

SAAMICOUNCIL

The following comments were received through a communication from the Saami Council.

Note from the Secretariat: The Saami Council's comments comprise a series of changes and comments made directly in Annex I to WIPO document WIPO/GRTKF/IC/7/5. Therefore, the Annex is reproduced below with the Saami Council's changes and comments, which are highlighted as received from the Saami Council.

[This informal paper reproduces Annex I of document WIPO/GRTKF/IC/7/5. These draft materials are put forward as one input only to facilitate continuing consideration and discussion of possible approaches to the Committee's work in preparing an overview of policy objectives and core principles. These are discussed and elaborated further in the full document.]

I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

[Recognize value]

(i) recognize the intrinsic value of traditional knowledge, including its social, cultural, spiritual, economic, intellectual, scientific, ecological, technological, commercial and educational value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that benefit all humanity;

Note: The amendment corresponds to the similar paragraph in the TCEDraft Policy. As TCEs, also TK has a cultural value, at least to indigenous peoples.

[Promote respect]

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual value of the traditional knowledge holders who conserve and maintain those systems; and for the contribution which traditional knowledge holders have made to the conservation of the environment, to food security and sustainable agriculture, and to the progress of science and technology;

[Meet the actual needs of holders of traditional knowledge]

(iii) be guided by the aspirations and expectations expressed directly by traditional knowledge holders, respect their rights under national and international law, and contribute to their welfare and economic, cultural and social benefit and reward the contribution made by them to the progress of science and the useful arts;

Note: The paragraph, as currently drafted, states that any policy should be guided by the aspirations and expectations expressed by TK holders. As WIPO has itself concluded, indigenous peoples are the holders of the vast majority of the world's collected TK. In more or less any discussion on protection of TK, indigenous peoples have underlined that at any TK protection system must respect their rights as holders and custodians of TK, including their human rights. Since the paragraph addresses the expectations of TK holders, this should be

explicitly stated in the paragraph. As a UN system organization, WIPO is bound by the UN Charter to respect human rights, as its member states.

[Empower holders of TK]

(iv) be undertaken in a manner inspired by the protection provided for intellectual creations and innovations, that is balanced and equitable but yet effectively empowers traditional knowledge holders to exercise due rights and authority over their own knowledge, including appropriate moral and economic rights;

Deleted: and

Deleted: that

Note: The paragraph has been amended to signify “rights” precedent over other interests.

[Support traditional knowledge systems]

(v) respect and facilitate the continuing customary use, development, exchange and transmission of traditional knowledge by and between traditional knowledge holders; and support and augment customary custodianship of knowledge and associated genetic resources, and promote the continued development of traditional knowledge systems;

[Contribute to safeguarding traditional knowledge]

(vi) contribute to the preservation and safeguarding of traditional cultural expressions and the customary means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with the customary laws of traditional knowledge holders for the ir direct benefit in particular, and for the benefit of humanity in general;

Deleted: of traditional knowledge holders

Note: The amendment underlines that TK should be safeguarded to the largest extent possible in accordance with the customary laws of the holders of the TK.

[Repress unfair and inequitable uses]

(vii) repress the misappropriation of traditional knowledge and other unfair activities;

Deleted: commercial

Note: As currently drafted, the paragraph seems to suggest that only commercial activities might misappropriate TK. This is not the case (compare also para. (xiv)). The paragraph has been amended accordingly.

[Concord with relevant international agreements and processes]

(viii) recognize, and operate consistently with, other international and regional instruments and processes, in particular human rights standards, regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge, that recognize farmers’ rights, and that mitigate the effects of drought in countries experiencing serious drought or desertification;

Note: Again, under e.g. the UN Charter, any policy on protection of TK must comply with human rights standards. Since this is also the main concern of the majority of TK holders, the paragraph becomes severely unbalanced without direct reference to human rights standards. That is particularly so since the paragraph mentions ABS -regimes, regimes that most TK holders have stated that they do not concur with.

[Promote innovation and creativity]

(ix) encourage, reward and protect tradition -based creativity and innovation, particularly when desired by traditional knowledge holders; and promote innovation and subject to the consent of traditional knowledge holders, transfer of technology to the mutual advantage of holders and users of traditional knowledge;

Deleted: the

Note: TK holders might refer from always interested in "transfer" of their TK.

[Promote intellectual and technological exchange]

(x) provided that consent have been obtained from traditional knowledge holders, promote access to and the wider application of traditional knowledge on fair and equitable terms, for the general public interest and as a means of sustainable development, in coordination with international and national law and regimes governing access to and use of genetic resources;

Deleted: existing

Note: ABS -regimes can only "kick -in" provided that consent has been given by TK holders. Any other arrangements violate their rights. The word "existing" has been deleted to underline that the Policy should reasonably also be coordinated with the emerging and future standards. Moreover, not all relevant national and international standards can be described as "regimes".

[Promote equitable benefit sharing]

(xi) promote the fair and equitable distribution of the monetary and non -monetary benefits arising from use of traditional knowledge, consistent with the principle of free, prior and informed consent of indigenous peoples and other TK holders and other applicable international regimes;

Note: Again, it should be underlined that access and benefit sharing regimes are subject to the principle of FPIC.

[Promote community development and legitimate trading activities]

(xii) if it is so desired by the holder of traditional knowledge, promote the use of traditional knowledge for community -based, recognizing traditional knowledge as an asset of its holders; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries;

Note: It is far from always indigenous peoples want to commercialize their TK.

[Preclude the grant of invalid IP rights]

(xiii) curtail the grant, as well as the continued exercise and enforcement of already granted, invalid intellectual property rights over traditional knowledge and associated genetic resources;

Deleted: or

Note: The amendment corresponds to the similar paragraph in the TCEDraft Policy and has also been slightly clarified.

[Enhance transparency and mutual confidence]

(xiv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, government and other users of traditional knowledge on the other;

Note: The provision has been clarified to highlight that many governments are substantial users of TK.

[Complement protection of traditional cultural expressions]

(xv) operate consistently with protection of traditional cultural expressions and expressions of folklore, respecting that for many traditional communities their knowledge and cultural expressions form an indivisible part of their holistic identity.

II. CORE PRINCIPLES

A. General guiding principles

[These principles should be respected to ensure that the specific principles concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection. Each principle is followed here by a brief description of the possible effect of the principle; a more complete description is provided in Annex II of document WIPO/GTRKF/IC/7/5]

A1: Principle of responsiveness to the needs and expectations of TK holders

Protection should reflect the aspirations and expectations of traditional knowledge holders; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by traditional knowledge holders; and recognize the inseparable quality of traditional knowledge and cultural expressions for many communities. Measures for the legal protection of traditional knowledge should also be recognized as voluntary from the viewpoint of indigenous peoples and other communities who would always be entitled to rely exclusively or in addition upon their own customary and traditional forms of protection against unwanted access and use of their traditional knowledge.

Note: The amendment corresponds to the similar paragraph in the TCEDraft Policy.

A2: Recognition of rights

The rights of traditional knowledge holders to their knowledge should be recognized and respected.

Deleted: Principle of r

Deleted: the effective protection of

Deleted: against misuse and misappropriation

Note: The heading has been amended to recognize that recognition of rights – at least human rights – can never be a principle. The text in the paragraph has been amended to reflect that TK holders could have other rights to their TK than just “effective protection against misuse and misappropriation”.

A3: Principle of effectiveness and accessibility of protection

Measures for protecting traditional knowledge should be effective in achieving the objectives of protection, and should be understandable, affordable, accessible and not burdensome for their intended beneficiaries, taking account of the cultural, social and economic context of TK holders. National authorities should make available appropriate enforcement procedures that permit effective action against misappropriation of traditional knowledge and violation of the principle of prior informed consent.

A4: Principle of flexibility and comprehensiveness

1. Protections should respect the diversity of traditional knowledge held by different peoples and communities in different sectors, should acknowledge differences in national circumstances and the legal context and heritage of national jurisdictions, and should allow sufficient flexibility for national authorities to determine the appropriate means of implementing these principles within existing and specific legislative mechanisms, adapting protection as necessary to take account of specific sectoral policy objectives , subject to international law.

2. Protection may combine proprietary and non-proprietary measures, and use existing IP rights (including measures to improve the application and practical accessibility of such rights), *sui generis* extensions or adaptations of IP rights, and specific *sui generis* laws. Protection could include defensive measures to curtail illegitimate acquisition of industrial property rights over traditional knowledge or associated genetic resources, and positive measures establishing legal entitlements for traditional knowledge holders.

Deleted: sh

Note: Means of protection must certainly be adapted depending on the local context. In order to safeguard against regimes that violate the rights of indigenous peoples, it is necessary to underline, however, that whatever measures taken must be in compliance with international law, including human rights.

A5: Principle of equity and benefit-sharing

1. Protections should respect the right of indigenous peoples and other holders of traditional knowledge to consent or not consent to access to their traditional knowledge, and should, provided that free, prior and informed consent has been obtained, reflect the need for an equitable balance between the rights and interests of those that develop, preserve and sustain TK, and of those who use and benefit from TK; the need to reconcile diverse policy concerns; and the need for specific protection measures to be proportionate to the objectives of protection and the maintenance of an equitable balance of interests.

Note: This paragraph needs to be reformulated so that it adequately distinguishes between different rights and interests. As currently drafted, the paragraph appears to presume that there is always a right to access that only needs to be balanced against other rights. As mentioned above, such is obviously not the case. If for example indigenous peoples hold property rights, other human rights etc. to TK, or if the TK falls within the scope of indigenous peoples' right to self-determination, there can be no sharing unless the relevant indigenous peoples agree, and only on that people's terms and conditions. There is then no room for any ABS regime. In other words, "those that use TK" have no right to that particular TK, and there can thus be no balancing between the users' interest and the rights of the holders.

2. **If traditional knowledge has been accessed,** holders of traditional knowledge should be entitled to fair and equitable sharing of benefits arising from the use of their traditional knowledge. **Where** traditional knowledge is associated with genetic resources, the distribution of benefits should be consistent with measures, established in accordance with the Convention on Biological Diversity, providing for sharing of benefits arising from the utilization of the genetic resources.

Deleted: H

Note: This paragraph needs to be reformulated in line with the above stated. It must be clarified that as a main rule, the holders have rights to their TK, and that sharing of benefits will only take place on their own terms and conditions. The provision formulated in subpara. 2 is then only applicable when the main rule for some reason does not apply. It should further be noted that the reference to the ABS regime being elaborated in the CBD ABS WG is not unproblematic, given that the CBD currently almost entirely focuses on the relationship between developed and developing countries, whereas the IGC Draft Policy, at least as currently worded, seems to focus more on the relationship between sub-groups within a country and who ever wants to access the TK, including governments. **It is probably better to delete this reference.**

Deleted:

A6: Principle of consistency with existing legal systems

Note: This paragraph, as currently drafted, is erroneous in facts. It is simply not true that the authority to determine access to GR rests with the national government alone, and is subject to national legislation. The issue is more complex than that. In line with the just stated, a Policy that claims to be relevant for protection of TK, and in conformity with international law, cannot just refer to the principle of state sovereignty over natural resources, without acknowledging that this principle is seriously curtailed by other subjects – such as indigenous peoples' right to natural resources. The proposed provision obviously originates from the CBD. The CBD is one of the instruments addressing these issues. There are, however, also other international instruments relevant to the question of who has the right to determine access to GR, many of them human rights instruments. As a covenant etc. underlining basic human rights, these instruments have precedence over the CBD. If there is a conflict, the CBD has to give way. (The same is of course true for any policy emerging out of the IGC process.) The principle of state sovereignty over natural resources, and the right in general for the state to determine over such, needs to be balanced against the right of all peoples – including indigenous peoples – to self-determination as well as the right of indigenous peoples to their lands, waters and natural resources. The Sami Council does not intend to embark on a lengthy exposé over these rights. It must be stressed, however, that numerous UN bodies, the American Court on Human Rights, the European Union, numerous national courts etc. today confirm that the right to self-determination applies also to

Deleted: 1. The authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation. The protection of traditional knowledge associated with genetic resources shall be consistent with the applicable law, if any, governing access to those resources and the sharing of benefits arising from their use. Nothing in these Principles shall be interpreted to limit the sovereign rights of States over their natural resources and the authority of governments to determine access to genetic resources, whether or not those resources are associated with protected traditional knowledge.

indigenous peoples. The same is true for all countries that participate in the Working Group on the Draft UN Declaration on the Rights of Indigenous Peoples. The right to self-determination includes, e.g., a right for all peoples to freely dispose over their natural resources, including genetic resources, and a right not to be deprived of their means of subsistence (see, e.g., CCPR and CESCR Art. 1.2). It is further well established under international law that indigenous peoples – due to their special attachment to their traditional lands – have particular rights to their traditional lands, waters and natural resources, again including genetic resources (see, e.g., CCPR, CESCR and the CERD Convention). Obviously, these rights must be balanced against the principle expressed in the CBD of states sovereignty over natural resources. Indeed, in case of a conflict, expressing fundamental human rights, these instruments normally have precedent over the principle of states sovereignty over natural resources. In other words, it might well be that one state can invoke the principle of state sovereignty over natural resources in a conflict with other states, but normally not in a conflict of interest with indigenous peoples within its state. Given this background, it would be dishonest to quote one instrument, outlining one principle, relevant to the right to genetic resources, without even mentioning other relevant international legal rights and principles. There are only two choices for any policy that claims to be relevant for the regulation of TK. One can certainly refer to the principle of states sovereignty over natural resources, but the policy must then also outline other parts of international law that balances, and often takes precedent over, that principle, such as all peoples' right to self-determination and indigenous peoples' right to their traditional lands, waters and natural resources. The alternative is obviously to delete any reference to states sovereignty over natural resources as well as any language that renders indigenous peoples' right to their GR and TK subject to national legislation. Perhaps the second alternative is simpler.

2. Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each under the Paris Convention and other international intellectual property agreements.

Deleted: Traditional knowledge protections should be consistent with, and supportive of, existing IP systems and should enhance the applicability of relevant intellectual property systems to traditional knowledge subject matter in the interests of holders of traditional knowledge and consistently with the broader public interest.

Note: Even though enhanced applicability of existing IPR mechanisms, in the Saami Council's opinion, sometimes can serve to protect indigenous knowledge, indigenous representatives have repeatedly stressed that the applicability to IPR mechanisms to indigenous knowledge is indeed often what constitutes the concern of indigenous peoples. The paragraph has currently drafted is very categorical on this issue. It is better to leave the issue open. In any event, should the paragraph remain, it needs to be much more nuanced.

A7: Principle of respect for and cooperation with other international and regional instruments and processes

1. Traditional knowledge shall be protected in a way that is consistent with the objectives of other relevant international and regional instruments and processes, and without prejudice to specific rights and obligations already codified in or established under binding legal instruments and international customary law.

2. Nothing in these Principles shall be interpreted to affect the interpretation of other instruments or the work of other processes which address the role of traditional knowledge in related policy areas, including the role of traditional knowledge in the conservation of biological diversity, the combating of drought and desertification, or the implementation of farmers' rights as recognized by relevant international instruments and subject to national legislation.

Note: Not all relevant international law has necessarily been codified in instruments. In line therewith, not all provisions contained in international instruments establish obligations. Equally often, they merely underline already binding principles.

A8: Principle of respect for customary use and transmission of traditional knowledge

Protection should promote the use, development, exchange, transmission and dissemination of traditional knowledge by the communities concerned in accordance with their customary laws and practices. No contemporary use of traditional knowledge within the community which has developed and maintained it should be regarded as disturbing if the community identifies itself with that use of the traditional knowledge and any modification entailed by that use. Customary use, practices and norms should guide the legal protection of traditional knowledge as far as possible, on such questions as ownership of rights, management of rights and communal decision-making, equitable sharing of benefits, exceptions and limitation to rights and remedies.

Deleted: Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, as far as possible and as appropriate and subject to national law and policy. Protection beyond the traditional context should not conflict with customary access to, and use and transmission of, traditional knowledge, and should respect and bolster this customary framework.

Note: The amendment corresponds to the similar paragraph in the TCEDraft Policy, which more adequately describes what role customary laws should have in the regulation of TK.

A9: Principle of recognition of the specific characteristics of traditional knowledge

Protection of traditional knowledge should respond to the traditional context, the collective or communal context and inter-generational character of its development, preservation and transmission, its relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the community.

B. Specific substantive principles

B1: Protection against misappropriation

[Suppression of misappropriation]

1. Traditional knowledge shall be protected against misappropriation.

[General nature of misappropriation]

2. Any acquisition or appropriation of traditional knowledge without the free, prior and informed consent of the holders of traditional knowledge or otherwise by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition or appropriation of traditional knowledge when the person using that knowledge knows, or is grossly negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.

Note: As outlined above, indigenous peoples hold rights to their TK that award them the right to determine who can access such, and under what terms and conditions. This must be reflected in any relevant Policy.

[Acts of misappropriation]

3. In particular, legal means should be available to suppress:

(i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means;

(ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge;

(iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter by a person who knew that the intellectual property rights were not validly held in the light of that traditional knowledge and any conditions relating to its access; and

(iv) if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge.

Deleted: such use has gainful intent and confers technological or commercial advantage on its user, and when

Note: The addition signifies that FPIC is the general rule. The deletion is motivated by that the Saami Council fails to see why compensations should be limited to that particular example. Rather, compensations should be paid in all circumstances when it is “fail”.

(v) use that is culturally offensive to the originator of the traditional knowledge

[General protection against unfair competition]

4. Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10 *bis* of the Paris Convention. This includes false or misleading representations that a product or service is produced or provided with the involvement or endorsement of traditional knowledge holders, or that the commercial exploitation of products or services benefits holders of traditional knowledge.

[Recognition of the customary context]

5. The application, interpretation and enforcement of protection against misappropriation of traditional knowledge, including determination of equitable sharing and distribution of benefits, should be guided, as far as possible and appropriate, by respect for the customary practices, norms, laws and understandings of the holder of the knowledge, including the spiritual, sacred or ceremonial characteristics of the traditional origin of the knowledge.

B2: *Legal Form of Protection*

1. Protection may be implemented through a special law on traditional knowledge; the law on intellectual property, including unfair competition law and the law of unjust enrichment; the law of torts, liability or civil obligations; criminal law; laws concerning the interests of indigenous peoples; regimes governing access and benefit-sharing; or any other law or a combination of any of those laws.

2. The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the holders of traditional knowledge, including through existing or adapted intellectual property rights systems, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.

B3: General scope of subject matter

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking to define the diverse and holistic conceptions of knowledge within the traditional context.

2. For the purpose of these principles only, the term “traditional knowledge” refers to the content or substance of knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge that is embodied in the traditional lifestyle of a community or people, or is contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.

B4: Eligibility for protection

Protections should be extended at least to that traditional knowledge which is:

(i) generated, preserved and transmitted in a traditional and intergenerational context;

(ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and

(iii) integral to the cultural identity of an indigenous or traditional community or people which holds the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility, such as a sense of obligation to preserve, use and transmit the knowledge appropriately, or a sense that to permit misappropriation or demeaning usage would be harmful or offensive; this relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.

Deleted: is recognized as

Deleted: ing

Note: Inclusion of the term “recognized” would render protection of indigenous knowledge completely subject to national legislation, which hardly can be the intent of an international policy.

B5: Beneficiaries of protection

Protection of traditional knowledge should be for the principal benefit of the holders of knowledge in accordance with the relationship described under ‘eligibility for protection.’ Protections should in particular benefit the indigenous and traditional communities and peoples that develop, maintain and identify culturally with traditional knowledge and seek to pass it on between generations, as well as recognized individuals within these communities and peoples. Entitlement to the benefits of protection should, as far as possible and appropriate, take account of the customary protocols, understandings, laws and practices of these

communities and peoples. Benefits from protection should be appropriate to the cultural and social context, and the needs and aspirations, of the beneficiaries of protection.

B6: Equitable compensation and recognition of knowledge holders

1. If traditional knowledge has been accessed, commercial or industrial use of traditional knowledge should be subject to just and appropriate compensation for the benefit of the traditional holder of the knowledge, when compensation would be consistent with fairness and equity in relation to holders of the knowledge, in view of the circumstances in which the user acquired the knowledge. Liability for compensation should, in particular, arise where the knowledge was accessed or acquired in a manner that creates a reasonable expectation that benefits from such use should be shared equitably, and where the user is aware of the distinctive association of the knowledge with a certain community or people. Compensation should be in a form that responds to the expressed needs of the TK holders and is culturally appropriate.
2. If traditional knowledge has been accessed for non-commercial purposes, such use need not incur an obligation for compensation, but suitable benefit-sharing from such uses should be encouraged, including access to research outcomes and involvement of the source community in research and educational activities.
3. Those using traditional knowledge beyond its traditional context should make every endeavor to identify the source and origin of the knowledge, to acknowledge its holders as the source of the traditional knowledge, and to use and refer to the knowledge in a manner that respects and acknowledges the cultural values of its holders.

Deleted: C

Deleted: such use has gainful intent and confers technological or commercial advantage, and when

Deleted: Use of traditional knowledge

Deleted: reasonable

Note: The proposed amendments to subpara. 1 and 2 are consistent with proposed amendments above.

B7: Principle of Prior Informed Consent

1. The principle of prior informed consent should govern any direct access or acquisition of traditional knowledge from indigenous peoples or other traditional holders, subject to these principles.
2. Legal systems or mechanisms for obtaining prior informed consent should ensure legal certainty and clarity; should not create burdens for traditional holders and legitimate users of traditional knowledge; should ensure that restrictions on access to traditional knowledge are transparent and based on legal grounds; and should provide for mutually agreed terms for the equitable sharing of benefits arising from the use of that knowledge.
3. The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent

Deleted: and relevant national laws

Deleted: by an appropriate national authority, as provided by applicable national legislation

Note: Again, rendering the principle of FPIC subject to national legislation and to the whim of national authorities would in effect make the provision meaningless. The Saami Council further reiterates that there appears to be little point in crafting an international policy if national legislation is to govern the most central issues that the policy addresses regardless. Subpara. 3 has been amended to signify that there is no reason why an authority should act on behalf of indigenous peoples. Indigenous peoples are self-determining entities, capable of administering their own affairs. If they need assistance administering these kinds of affairs, they can arrange with that themselves. The provision, as currently drafted, opens up for

misuse. We would also suggest that this paragraph is moved and placed above B6, in order to signify that FPIC is the general rule, and ABS the exception.

B8: Exceptions and limitations

1. The application and implementation of protection of traditional knowledge should not adversely affect:

(i) the continued availability of traditional knowledge for the customary practice, exchange, use and transmission of traditional knowledge by traditional knowledge holders;

(ii) the use of traditional medicine for household purposes, or for public health purposes, provided that such use is fair and equitable and provided just and fair compensation; and

(iii) other fair use or fair dealing with traditional knowledge, which could include use of traditional knowledge in good faith that commenced prior to the introduction of protection.

Deleted: , using government hospitals,

Deleted: other

Deleted: ing

2. As a general rule, the principle of prior informed consent applies also to traditional knowledge which is already readily available to the general public, but due considerations should be given to the interest of third parties that have acquired traditional knowledge in good faith. Use of traditional knowledge already available to the general public in a manner that does not fall within B13., above, and that is otherwise fair and equitable given the interests of those from which the traditional knowledge originates from, might be excluded from the principle of free, prior and informed consent, provided that users of that traditional knowledge provide equitable compensation for uses of that traditional knowledge. The users should further be encouraged to acknowledge the source of the traditional knowledge concerned.

Deleted: In particular national authorities may exclude

Deleted: from

Deleted: the fair use of

Deleted: ,

Deleted: industrial and commercial

Note: Provision 1.(ii), as currently formulated, would potentially render a substantial part of traditional knowledge unprotected, particularly since “traditional medicine” potentially could be broadly defined. The provision has therefore been narrowed.

Provisions 1.(ii) and (iii) and 2. address the fundamental issue of public domain. Indigenous representatives have repeatedly stressed that the notion of public domain, as understood by conventional IP law, is perhaps the most problematic issue when it comes to achieving a more adequate protection for TK. The Saami Council understands that it might not be practically feasible, or perhaps even beneficial, suddenly to prohibit all use of TK currently regarded to be in the public domain. On the other hand, as the provision is currently drafted, it offers more or less no protection at all for indigenous knowledge in the public domain. It is necessary to strike a better balance. The amendment strives to achieve that end. The sentence added is picked from provision B10.

B9: Duration of protection

Protection of traditional knowledge against misappropriations should last as long as the traditional knowledge fulfills the criteria of protection, in particular as long as it is maintained by traditional knowledge holders, remains distinctively associated with them and remains integral to their collective identity. Possible additional protection against other acts, which may be made available by relevant national or regional laws or measures, shall specify the duration of protection under those laws or measures.

Note: Certain elements of this provision have been incorporated into B8. The rest of the provision has been deleted, since the issue has already been covered in B8.

B11: Formalities

1. Eligibility for protection of traditional knowledge against acts of misappropriation and other acts of unfair competition should not require any formalities.

2. In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may maintain registers or other records of traditional knowledge, where appropriate and subject to relevant policies, laws and procedures, and the approval of the traditional knowledge holders. Such registers may be associated with specific forms of protection, and should not compromise the status of hitherto undisclosed traditional knowledge or the interests of traditional knowledge holders in relation to undisclosed elements of their knowledge.

Note: No TK should be registered against the will of the knowledge holders.

B12: Consistency with the general legal framework

Note: Again, indigenous peoples' rights to their TK must not be subject to national legislation. Moreover, what is the point with an international policy if national laws have precedent over a such any way?

2. Traditional knowledge protections should be supportive of the applicability of relevant international intellectual property standards to the benefit of holders of traditional knowledge.

Note: See comments under A62, above.

3. Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each under the Paris Convention and other international intellectual property agreements.

B13: Administration and enforcement of protection

1. An appropriate national or regional authority, or authorities, should be competent for:

(i) distributing information about traditional knowledge protection and conducting public awareness and advertising campaigns to inform traditional knowledge holders and other stakeholders about the availability, scope, use and enforcement of traditional knowledge protection;

(ii) determining whether an act pertaining to traditional knowledge constitutes an act of unfair competition in relation to that knowledge;

(iii) assisting, where possible and appropriate, holders of traditional knowledge to acquire, use, exercise and enforce their rights over their traditional knowledge.

Note: If the deleted language is allowed to remain in the Policy, this would render sub groups within a country, such as indigenous peoples, completely without protection.

Deleted: B10: Application in time
Protection of traditional knowledge newly introduced in accordance with these principles should be applied to new acts of acquisition, appropriation and use of traditional knowledge. Recent acquisition or uses of traditional knowledge should be regularized as far as possible within a certain period of that protection coming into force. Long-standing prior use in good faith may be permitted to continue, but the user should be encouraged to acknowledge the source of the traditional knowledge concerned and to share benefits with the original holders of the knowledge.

Deleted: needs and aspirations

Deleted: 1. In case of traditional knowledge which relates to components of biological diversity, access to, and use of, that traditional knowledge shall be consistent with national laws regulating access to those components of biological diversity. Permission to access traditional knowledge does not imply permission to use associated genetic resources and vice versa.

Deleted: consistent with existing intellectual property systems and

Deleted: misappropriation of, or another act of

Deleted: ,

Deleted: <#> determining whether prior informed consent for access to and use of traditional knowledge has been granted; ¶ <#> determining equitable compensation; determining whether a user of traditional knowledge is liable to pay equitable compensation; and ¶ if the user is liable, as appropriate, facilitate and administer the payment and use of equitable compensation; ¶ <#> determining whether a right in traditional knowledge has been acquired, maintained, or infringed, and for determining remedies; ¶

Formatted: Bullets and Numbering

2. Measures and procedures developed by national and regional authorities to give effect to protection in accordance with these Principles should be fair and equitable, should be accessible, appropriate and not burdensome for holders of traditional knowledge, and should provide safeguards for legitimate third party interests and the interests of the general public.

B14: International and Regional Protection

Legal and administrative mechanisms should be established to provide effective protection in national systems for the traditional knowledge of foreign rightsholders. Measures should be established to facilitate as far as possible the acquisition, management and enforcement of such protection for the benefit of traditional knowledge holders in foreign countries.