

## AUSTRALIA

*The following comments were received through a communication from IP Australia*

1. Australia strongly supports the work of the WIPO IGC as the pre-eminent international forum for the discussion of issues relating to intellectual property and genetic resources, traditional knowledge and folklore, and values this opportunity to comment on the draft objectives and core principles as set out in Annex I of document WIPO/GRTKF/IC/7/5. Australia acknowledges the work of the WIPO Secretariat in preparing document WIPO/GRTKF/IC/7/5 which we regard as a significant and substantial contribution to the debate surrounding the development of a common international approach to the protection of traditional knowledge.

2. Australia is a country of many different indigenous groups that possess a wide variety of scientific, technical and ecological knowledge. Our understanding is that the suggested policy objectives and principles aim to provide a common approach to the protection of traditional knowledge and hence are guidelines for encouraging such protection at a national level. We are encouraged by the statements made at paragraph 9 of document WIPO/GRTKF/IC/7/5 which state that the draft policy objectives and principles 'do not seek to place limits on the parameters of the debate concerning TK protection, to prescribe any particular outcomes or solutions, nor to define the form that they may take'. It is on this basis that Australia is supportive of the draft policy objectives which address the key goals of valuing and supporting traditional knowledge, traditional knowledge systems and traditional knowledge holders, and providing a framework for the protection and exploitation of traditional knowledge.

3. Australia understands the need for the Specific Substantive Principles to guide the manner in which protection for traditional knowledge can be afforded. However we believe that such principles can only be finalised once the draft policy objectives and the general guiding principles are carefully considered and agreed to.

4. Australia favours a flexible approach to the protection of traditional knowledge to ensure that appropriate mechanisms are available to suit the range of needs of indigenous people, and to ensure that an appropriate balance is achieved between those needs and the maintenance of a stable framework for investment, for example in biotechnology, both nationally and at a global level. Australia also believes that this flexibility should extend to respect for the diversity of legal systems amongst Member States.

5. In particular, Australia supports the comments at paragraph 12 in relation to Draft Principle A.4, that there exists a "need to respect that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection, conflict with existing laws to protect TK, and pre-empt necessary consultation with TK holders". The wording of Principle A.4 appears to address both the diversity of traditional knowledge in different countries and the diversity in national legal systems and potential approaches to the protection of that knowledge.

6. Australia supports consultation and cooperation with other international fora where traditional knowledge is discussed, such as the Convention on Biological Diversity, and the principle of consistency with relevant provisions of existing international instruments. This appears to be reflected in draft policy objective (viii) *Concord with relevant international agreements and processes* and draft general guiding principle A.7: *Principle of respect for and cooperation with other international and regional instruments and processes*. However Australia is of the view that WIPO and the World Trade Organization (WTO), should remain the principal fora for addressing intellectual property issues relating to the protection of traditional knowledge, and as such should play a lead role in debate on any future measures to protect traditional knowledge, including advising other fora where necessary.

7. The Australian government has concluded an intergovernmental agreement on genetic resource management with the governments of the Australian States and Territories, known as the *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources*. Some of these States and Territories have introduced or are in the process of considering legislation relating to access to biological resources for biodiversity and other purposes. This legislation does not address traditional knowledge and it is Australia's view that the two issues, although they are closely interconnected, should be treated separately, as there are genetic resources to which no traditional knowledge is applicable and vice versa. Accordingly, Australia supports the first paragraph in Draft Principle B.12 distinguishing between access to genetic resources and access to traditional knowledge. However Australia suggests a clarification of the wording in the second sentence of the first paragraph to "Permission to access *and/or use* traditional knowledge does not imply permission to *access and/or use* associated genetic resources and vice versa" to cover both access to and use of, traditional knowledge and genetic resources.

8. Australia has expressed its view in other fora<sup>1</sup> that existing legal and administrative mechanisms may provide effective protection for traditional knowledge, and maintains that the evolution of domestic policy and legislative responses should not be unduly constrained by any premature and binding *suigeneris* measures internationally. Thus we are encouraged by the presence of those principles which respect the effectiveness of existing systems.

9. We also note that there appears to be a word missing in the first sentence after "community-based" in draft policy objective (xii) and believe that it should be reviewed to prevent any misunderstanding about what the policy objective seeks to achieve.

10. Australia is committed to ongoing and constructive discussion of these draft policy objectives and core principles in order to assist its further analysis of the issues surrounding the protection of traditional knowledge.

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<sup>1</sup>WTO document IP/C/W/310 of 2 October 2001.

## BRAZIL

*The following comments were received through a communication from the Permanent Mission of Brazil in Geneva*

In addition to the comments and suggestions below, Brazil reserves the right to make additional comments and proposals in respect of any other aspect of future versions of the draft objectives and principles.

### COMMENTS AND SUGGESTIONS ON "POLICY OBJECTIVES":

Redraft objectives (i), (iv), (vii), (ix), (x), (xii) and (xiii)

#### I. Policy objectives

The protection of traditional knowledge should aim to:

Objective (i) – [Recognize value] – redraft final phrase as follows:

*(i)... and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are as important as scientific knowledge"*

Objective (iv) – (Empower holders of TK) – should be reformulated as follows:

*[Acknowledge the distinctive nature of traditional knowledge systems]*

*(iv) be undertaken in a manner that empowers TK holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and of the need to tailor solutions to meet the distinctive nature of such systems, bearing in mind the need to ensure that the conventional intellectual property regime operates in a manner supportive of and that does not run counter to the protection of TK;*

Comments on the proposed changes:

The current wording contained in Annex I of Document WIPO/GRTKF/IC/7/5 suggests that the protection of Traditional Knowledge should take inspiration from existing forms of protection provided for intellectual creations and innovations. This is inappropriate because, in many cases, existing forms of intellectual property protection, such as patents and copyright, cannot and do not provide an adequate model or framework for protecting traditional knowledge. Most traditional knowledge systems are, in effect, much older

than the modern intellectual property regime and international conventions such as the Paris and Berne Conventions. One could hardly expect the latter instruments, which are the product of an entirely different cultural mindframe, to do full justice to the holistic character of traditional knowledge systems. One should look instead at new solutions tailored to address and respect the distinctive nature of traditional knowledge, including the adoption of measures with a view to ensuring that the existing IP regime is supportive of and does not run counter to the goal of TK protection.

Objective(vii) –[Repressunfairandinequitableuses] –Redraftsoastoread as follows:

*(vii) repress the misappropriation of traditional knowledge and associated genetic resources;*

Objective(ix) –(Promoteinnovationandcreativity) –Redraftsoastoread as follows:

*[Promotetradition-basedinnovationandcreativity]*

*(ix) encourage, reward and protect tradition-based creativity and innovation [DELETE rest of paragraph];*

Comments on the proposed deletions:

The suggestion contained in the current draft objectives (Document 7/5) that one should reward and protect traditional knowledge “*particularly when desired by traditional knowledge holders*” does not seem appropriate and should be deleted, as it appears to suggest that a system for the protection of TK could place a burden on traditional and local communities as it would require them to actively and explicitly indicate an interest in the protection of their knowledge. The rights of indigenous peoples in Brazil over their traditional knowledge are considered to be inalienable, imprescriptible and unrenounceable prior rights. Protection of TK should not and cannot be made subject to formalities and other conditions, including registration and publication.

The reference to transfer of technology in the paragraph also seems to be misplaced, given the context of the problem –the misappropriation of TK –which the IGC is trying to address. The current wording of Doc 7/5 seems to suggest that, in exchange for the protection of their knowledge, TK custodians should commit to transfer their traditional know-how to the “users” of traditional knowledge. This formulation appears to ignore the fact that, through misappropriation, ample TK has already been disseminated and used inappropriately, often without the consent of TK holders. The draft objectives and principles should seek to rebalance this situation, by placing an emphasis on the protection of TK and on the need to ensure prior informed consent, and not on the transfer of knowledge from TK custodians to the private sector.

Objective(x) –(Pro mote intellectual and technological exchange) –Redraft as follows:

Objective(x) –[Ensure prior informed consent and exchanges based on mutually agreed terms]

*(x) ensure prior informed consent and exchanges based on mutually agreed terms, in coordination with existing international and national regimes governing access to genetic resources;*

Comments on proposed changes: the objective of protecting traditional knowledge from misappropriation can be effectively served only if enough emphasis is placed on the need to enforce prior informed consent. The current wording contained in Document 7/5, however, chooses to emphasize instead the continued promotion of access to TK and its widespread dissemination, which is not appropriate.

Objective(xii) –(Pro mote community development and legitimate trading activities) –Rephrase as follows:

*(xii) promote the use of traditional knowledge for community -based, recognizing the rights of traditional and local communities over their knowledge; and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries;*

Comments on proposed changes:

Characterizing TK as an “asset” of its holders, which could be “acquired” and alienated on the marketplace is inappropriate. Though TK holders may indeed wish to engage in the commercial exchange of products produced on the basis of their knowledge, treating TK rights as tradable assets goes too far. It is highly questionable whether such an approach would be compatible with traditional and indigenous worldviews. It would not, in any case, be compatible with the inalienable character of the prior rights of indigenous peoples over their knowledge.

Objective(xiii) –(Preclude the grant of invalid IP right) –Redraft as follows:

*[Preclude the grant of invalid IP rights]*

*(xiii) curtail the grant of invalid intellectual property rights over traditional knowledge and associated genetic resources, by requiring, in particular, as a condition for the granting of patent rights, that patent applicants for inventions involving traditional knowledge and associated genetic resources disclose the source and country of origin of*

*those resources, as well as evidence that prior informed consent and benefit sharing conditions have been complied with in the country of origin;*

COMMENTS AND SUGGESTIONS ON “GENERAL GUIDING PRINCIPLES”:

A5 – (Principle of equity and benefit sharing) – Redraft Paragraphs 1 and 2 as follows:

Para. 1: DELETE

Para. 2 should be a single paragraph and modified to read as follows:

*As a means of ensuring that the intellectual property regime is equitable and responsive to broader societal interests, the rights of TK holders over their knowledge should be fully recognized and safeguarded. Respect for prior informed consent should be ensured, and holders of TK should be entitled to the fair and equitable sharing of benefits 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 the sharing of benefits arising from the utilization of genetic resources.*

A6 – (Principle of consistency with existing legal systems) – Redraft Paragraph 2 as follows:

*Measures should be adopted with a view to ensuring that existing intellectual property systems operate in a manner that is consistent with and does not run counter to the objectives of traditional knowledge protection.*

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

DELETE the words “ as far as possible and as appropriate ” in line 2 of the paragraph.

COMMENTS AND SUGGESTIONS ON “SPECIFIC SUBSTANTIVE PRINCIPLES”:

B1 – (Protection against misappropriation) – Reword Para. 3(iii) as follows

3.

*(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 when those IP rights are not validly held in the light of that traditional knowledge and any conditions relating to its access;*

Comment on proposed changes: The current wording contained in Document t 7/5 suggests an overly subjective criterion for determining an act of misappropriation. The proposed changes seek to rectify this shortcoming.

B1.5 –[Recognition of the customary context] –change as follows:

DELETE the words “as far as possible and appropriate” in the third line of the paragraph.

B6 –(Equitable compensation and recognition of knowledge holders) –  
Redraft entire principle as follows:

*B6 –Fair and equitable benefit sharing and recognition of knowledge holders*

- 1. Traditional and local communities should be entitled to the fair and equitable sharing of benefits arising out of the commercial or industrial use of their traditional knowledge;*
- 2. Use of traditional knowledge for non-commercial purposes may give rise only to non-monetary benefit sharing, such as 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 identify the source and origin of the knowledge, acknowledge its holders as the source of the traditional knowledge, and use and refer to the knowledge in a manner that respects and acknowledges the cultural values of its holders.*

B7 –(Principle of prior informed consent) –Redraft as follows:

Paragraph 1: DELETE the word “acquisition” in line 1

Paragraph 2: DELETE in its entirety

B8 –(Exceptions and limitations) –DELETE Paragraph 1 roman (iii)  
[other fair use or fair dealing]

B10 –(Application in time) –DELETE the last sentence of the paragraph  
[“Longstanding prior use in good faith... with the holders of the knowledge”]

B12 –(Consistency with the general legal framework) –Redraft paragraphs  
2 and 3 as follows:

2. Measures should be adopted with a view to ensuring that existing intellectual property systems operate in a manner that is supportive of and does not run counter to the objectives of traditional knowledge protection.

Paragraph 3: DELETE

B13 – (Administration and enforcement of protection) – Redraft Para. 1 romanitos (iv), (v) and (vi), and Paragraph 2 as follows:

Para. 1:

(iv) determining fair and equitable benefit sharing;

(v) determining whether a right in traditional knowledge has been infringed, and for determining remedies;

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

Comment on proposed changes: The deletion of the words “acquired” and “acquire”, in romanitos (v) and (vi), respectively, are proposed. The rights of indigenous peoples over their traditional knowledge constitute inalienable prior rights, and cannot be simply “acquired” or alienated on the marketplace.

Para. 2. Redraft the last phrase of the paragraph as follows: (“... and should provide safeguards for legitimate third party interests and the public interest”).



## CHINA

*The following comments were received through a communication from SIPO*

### (A) General Comments

We appreciate very much the enormous work the WIPO Secretariat has done in summarizing the draft policy objectives and core principles put forward by the various member states. However, since there are 15 policy objectives and 23 core principles (including 9 general guiding principles and 14 specific substantive principles) in WIPO/GRTKF/IC/7/5, we think it is necessary for the IGC to make these principles in a way more brief and concentrate, so that these principles have more unity and coherence.

Summarizing from all the comments put forward by the various member states of the IGC, the protection of TK could be mainly broken down into two groups, active or negative. Being the case, put forward two sets of model clauses based on these comments and making a detailed analysis and comparison between them may be also something worth doing.

### (B) Comments on the draft objectives and core principles

#### I. POLICY OBJECTIVES

The title of point (vi) is “*Contribute to safeguarding traditional knowledge*”, but the contents also include TCEs. So there lacks consistency between the title and the contents.

#### II. CORE PRINCIPLES

##### A. General guiding principles

*i* We suggest to add in A “*Principle of providing help to what TK holders need*”, for example to help set up collective management or keep record of their TK prescriptions as long as they wish etc. It is also acceptable if these contents could be included in A1 “*Principle of responsiveness to the needs and expectations of TK holders*”.

*ii* In A2 “*Principle of recognition of rights*”, the term of “*misuse*” and “*misappropriation*” need to be clearly defined.

iii In A5.1, there is the term of “those that develop, preserve and sustain TK”, we want to know the difference between this term and “TK holders”.

iv In A6.2, the principle that “Nothing in these Principles shall be interpreted to derogate from existing obligations that national authorities have to each other under the Paris Convention and other international intellectual property agreements” need to be further considered. TK is not the same as IPR, so we can’t be sure that TK protections suit entirely the existing obligations that national authorities each have under the Paris Convention and other international intellectual property agreements.

## B. Specific substantive principles

i B.4 reads “Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10bis of the Paris Convention”. We think the relationship between misappropriation and acts of unfair competition should be further clarified.

ii B6 is about “Equitable compensation and recognition of knowledge holders”, it seems too broad. We wonder whether there could be added into it concrete principles for the determination of the damage and compensation.

iii In B8.2 “Exceptions and limitations”, we need further clarification on “use in government hospitals”.

iv In B8.3, we think “other fair use or fair dealing with traditional knowledge, including use of traditional knowledge in good faith that commenced prior to the introduction of protection” is key to strike a fair balance between the interests of the people at large and that of the TK holders. Whether “fair use” after the introduction of protection should be limited to the original scale or not needs further deliberation.

v The principle in B12. 2 “Traditional knowledge protection should be consistent with existing intellectual property systems and supportive of the applicability of relevant international intellectual property standards to the benefit of holders of traditional knowledge” needs further consideration. TK is not the same as IPR, so we can’t expect TK protection to be entirely under the umbrella of IPR laws and related international treaties.

These can be said to be envisaged in objectives (i), (ii), (iii) and (v) listed above.

As regards the core principles, special attention should be given to principle A6 (principle of consistency with existing legal systems), and A7 (principle of respect for and cooperation with other regional and international instruments and processes), in order to avoid possible conflicts with binding agreements and systems already in force in the intellectual property sphere.

Furthermore, the specific substantive principles contained in Section B are consistent with the objectives and core principles. The definition of the acts of misappropriation listed in B1.3 are sufficient to prevent such appropriation, taking into account acts of fraud, bribery, theft and commercial or industrial use without fair remuneration for the holders of TK.

Similarly, we believe that said document must be consolidated in a series of recommendations by WIPO for the establishment of a legal protection framework for TK, as suggested in the legal form of protection in paragraph B.2, wherein the establishment of legal provisions is recommended in the form of a *sui generis* law or *inter alia* in various civil, criminal or unfair competition laws. Likewise, paragraph B13 will be of great assistance in determining the administrative authority which will be responsible for protection and for enforcing the provisions on misappropriation of TK.

## TURKEY

*The following comments were received through a communication from the Intellectual Property Office of Turkey*

Relating to the document WIPO/GRTKF/IC/7/5 which contains an overview of policy objectives and core principles, Turkey is supporting an international *suigeneris* model for the legal protection of Traditional Knowledge, Genetic Resources and Folklore, taking into account the collective nature of the mentioned subject matter.

International minimum standards should be determined for the legal protection of Traditional Knowledge, Genetic Resources and Folklore, considering the differences in national circumstances and legal context and allowing sufficient flexibility at the national level. The protection of Genetic Resources and Traditional Knowledge would not be effective unless an international binding system is implemented.

For Principle A.5: equitable benefit sharing should be provided taking into account the CBD. Prior informed consent should be required before the grant of a patent. Turkey also supports paragraph 2 of Principle A.6, and believes that Traditional Knowledge should be taken into account as a community right and the sovereignty of the countries over their Genetic Resources and Traditional Knowledge should be acknowledged.

Where a patent application is based on Genetic Resources a binding disclosure requirement of the geographical origin and evidence of prior informed consent is necessary for benefit sharing and in order to achieve such a binding requirement, the Patent Law Treaty (PLT), the Patent Cooperation Treaty (PCT), the European Patent Convention (EPC) and TRIPS should be amended. The disclosure requirements should apply to all international, regional and national patent applications and should be at the earliest stage. Revision of the IPC should also be considered.

## MEXICO

*The following comments were received through a communication from IMPI*

It may be observed that the protection of Traditional Knowledge (TK), which is suggested in the document, is based on the prevention of the misappropriation of such knowledge, i.e.:

- (1) any acquisition or appropriation of TK by unfair or unlawful means;
- (2) obtaining commercial benefits from the acquisition or appropriation of TK which has been the subject of acquisition or appropriation by unfair means;
- (3) other commercial activities contrary to honest use and through which unfair benefits are obtained from TK.

From the above, the policy objectives, core principles and substantive principles of protection should aim to avoid the misappropriation and misuse of TK.

Taking into account the fact that a clearer definition exists between the sphere of intellectual property protection and the protection of TK from misappropriation, Mexico agrees with this type of protection, for which reason we can state that intellectual property parameters cannot cover the protection of TK in terms of its characteristics and nature, as widely discussed in the Committee.

In this connection, the list of policy objectives should, in our opinion, be clearly determined, since there are various policy objectives which are confused or are similar to each other; we therefore suggest that the objectives are limited to the following:

- (i) Recognizing the value of TK;
- (ii) Promoting respect for TK;
- (iii) Meeting the actual needs of holders of TK;
- (iv) Empowering holders of TK;
- (v) Contributing to the safeguarding of TK;
- (vi) Repressing unfair and inequitable use;
- (vii) Complying with the relevant international agreements and processes;
- (viii) Promoting equitable benefit sharing;
- (ix) Precluding the grant of invalid IP rights;
- (x) Complementing protection of traditional cultural expressions.

As regards the objectives:

- Supporting TK systems;
- Promoting innovation and creativity;
- Promoting the exchange of technology and knowledge;
- Promoting community development and lawful commercial activities;
- Guaranteeing transparency and mutual trust.

## THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

*The following comments were received through a communication from the European Community and its Member States*

At the Seventh Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, the Committee called for further comments on the draft objectives and core principles set out in document WIPO/GRTKF/IC/7/5, before 25 February 2005.

Document WIPO/GRTKF/IC/7/5 summarizes the existing legal mechanisms and experiences with the protection of Traditional Knowledge (TK), and makes an attempt to formulate specific objectives and core principles on TK protection based on existing practices, without considering the international dimension as a distinct issue.

The European Community and its Member States wish to reiterate their support for further work towards the development of international sui generis models for the legal protection of TK and for the flexible and consistent approach in the draft document. Measures to protect TK need to strike a fair balance between the rights and interests of TK holders and the interests of those who use and benefit from TK, and TK protection should also be consistent with existing intellectual property systems and international treaties, without prejudice to specific rights and obligations already established under binding legal instruments. The European Community and its Member States also wish to stress that the final decision on the protection of TK should be left to the individual Contracting party.

The draft document is a constructive and elaborate document which contains the right elements that should play a role in the discussion on the protection of TK.

However, at this stage we find the draft document still susceptible of further elaboration, particularly as regards determining the scope and consequences of the core term "traditional knowledge". Determining a clear and acceptable definition of TK is of paramount importance for any future work. In particular, further efforts should be made aiming at developing, defining and qualifying further the different prerequisites of B3 paragraph 2 such as "result of intellectual activity or insight", "traditional context", "form part of traditional knowledge systems", "embodied in the traditional lifestyle".

The draft text also needs to be improved in order to provide more legal certainty, as long as some terms need further and better definition and the consequences of the implementation of some principles has to be studied and measured. In particular, further discussion is needed on issues such as:

- the identification of the TK holders;
- the protection against misappropriation;
- the provisions regarding compensation for the TK holder;
- the principle of prior informed consent;
- the exceptions and limitations;
- the concept of "public domain"
- the duration of the protection and entitlement;
- the possible need of registration.

In this context, individual EU Member States may wish to make specific (and non-exhaustive) comments on the current text of the draft document.

## INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM (IPCB)

*The following comments were received through a communication from the Indigenous Peoples Council on Biocolonialism (IPCB)*

IPCB supports the submission by Call of the Earth LlamadodelaTierra, and makes these additional comments for your consideration.

### *Policy Objectives*

- (i) When referring to the specific intellectual traditions of Indigenous peoples, the term Indigenous knowledge (IK) should be utilized. Therefore, we will refer to IK throughout this submission, rather than TK. IK is holistic in nature, and cannot be separated into distinct categories. IK is intrinsic to specific Indigenous peoples, and is fundamental to sustaining this distinct knowledge for future generations. As such, IK does not exist to “benefit all humanity” but rather the Peoples to whom the knowledge belongs.
- (ii) Systems must be developed that promote respect for IK systems as valid systems of knowledge within their own right, and not for the extraction and use by non-Indigenous societies.
- (iii) This paragraph suggests that Indigenous peoples freely contribute their knowledge for use by others. In fact, the typical paradigm is that IK is misappropriated and misused by others for commercial and other exploitation. What IK holders need is protection from such misuse and misappropriation. This protection should be centered on prohibiting the granting of IPR over IK rather than trying to subsume IK into an IPR framework.
- (iv) IK has inherent value to the communities it serves and cannot be valued based on outside commercial use. IK systems are inherent and inalienable and last in perpetuity as dynamic and evolving knowledge systems as long as the Indigenous people exist. The IP protection provided for intellectual creations and innovations are time limited, individualistic, monopolistic and exist for economic exploitation. Therefore, any attempt to apply IP protection to IK is completely inappropriate because rights to IK must be inalienable, collective and last in perpetuity.
- (v) IK systems belong to the holders of such knowledge, as do the genetic resources originating from their territories. Therefore, it is not necessary to “augment customary custodianship and associated genetic resources.” IK systems can best be protected by insuring the right of self-determination of Indigenous peoples, including the right to territory and permanent sovereignty over natural resources.

- (vi) As stated previously, IK exist to benefit the People to whom the knowledge belongs. There is an inherent conflict of interest if benefits for humanity are prioritised over the rights and interests of Indigenous peoples.
- (vii) Repression, and prohibitions, must also be established over the unauthorized use of IK in non-commercial venues such as in academic and research institutions.
- (viii) Existing international agreements and processes such as WTO/TRIPs, WIPO treaties, and the CBD currently fail to protect the rights of Indigenous peoples. Protections for IK must be based upon and consistent with international human rights law including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. The Conference of the Parties of the CBD has mandated the Working Group on Access and Benefit Sharing to take these human rights instruments into consideration in the elaboration of an international regime on access and benefit sharing (ABS). Emerging international human rights standards such as contained in the UN Draft Declaration on the Rights of Indigenous Peoples should also be recognized.

As a similar process for developing sui generis protection of IK is underway in the CBD, and nothing should prejudice that body of work. We also recommend consistency with the significant work that has been done under the UN Working Group on Indigenous Populations on the Cultural Heritage of Indigenous Peoples which builds on the earlier report of the Special Rapporteur Erica Irene Daeon Principles and Guidelines on Indigenous Cultural Heritage (E/CN.4/Sub2/2000/26).

- (ix) This objective should focus on strengthening the development of sui generis IK systems for internal use, not external use. Efforts to enhance educational opportunities and the use of culturally appropriate technology, should be considered a human right, and not a requirement to facilitate the extraction of IK for use by outside interests. Considerable work has been achieved in Indigenous classrooms and communities using multi-media and digital technologies as a means of transmitting IK from elders to youth. These kinds of initiatives should be supported when requested by Indigenous peoples.
- (x) Indigenous peoples certainly have a right to fair and equitable terms when they freely consent to the access and use of their IK. By and large, however, Indigenous peoples are not seeking the facilitation or promotion of access to, and wider application of, IK and genetic resources originating in Indigenous territories. Without proper recognition of Indigenous peoples' right of permanent sovereignty over natural resources, any regime to facilitate access to IK and genetic resources originating in Indigenous territories is premature. Currently, Indigenous peoples do not support the international regime on ABS being elaborated and negotiated under the



CBD, therefore it is inappropriate to consider it as a standard for protection of IK, lands or peoples.

We reiterate our comment on Draft Policy Objective (i) and (vi) regarding “benefit for humanity” and apply the same perspective to access to IK and wider application “for the general public interest.”

- (xi) We note that existing regimes, such as the CBD’s voluntary Bonn Guidelines on ABS, have found little support among Indigenous peoples, especially as regards its promotion of national authorities as competent bodies to control access to IK associated with genetic resources (Article 26) and its limitation to “established legal rights” of Indigenous peoples, subject to domestic law (Article 31). As stated above, the current discussions on an international regime for ABS under the CBD are proceeding without Indigenous support because there has been no commitment for the regime to achieve consistency with human rights law.

It is difficult to see how benefit sharing agreements that allow for the monopolization and alienation of traditional knowledge and genetic resources under the veil of intellectual property protection can be of any meaningful benefit to Indigenous peoples. Certainly, there will be a promise of some potential income, an income that could make a difference in the lives of those terribly lacking in resources. In the end, however, the benefits that come to Indigenous peoples are likely to be quite insignificant compared to those reaped by the pharmaceutical, agricultural or chemical companies and academic institutions with which they are dealing.

- (xii) IPR protections are not consistent with sustainable development, rather they promote short-term gain and alienate knowledge and resources from Indigenous peoples. Community development models should be based on sustainable development practices and consistent with Indigenous peoples’ right of self-determination, including their right to freely pursue economic development.
- (xiii) Rather than curtailing the grant or exercise of invalid IPRs, this objective should focus on prohibiting the grant of IPRs over IK and promote strict enforcement of such prohibition. Ensuring that IPRs are not granted over existing IK and biological resources should be a priority objective in recognition of the principle within IPLaw itself that IPRs should be limited to true innovations and not extend to natural processes. This objective should also promote mechanisms for redress, including repatriation, restitution, damages and sanctions.
- (xiv) Principles of transparency must include evidence of strict adherence to ethical codes of conduct, free prior informed consent, and procedures for redress and liability.
- (xv) No comment.

## *Core Principles*

A.2 This principle should also include the recognition of Indigenous peoples' right of permanent sovereignty over natural resources.

A.4.1 The only appropriate authorities to determine the appropriate means for use of IK should be Indigenous peoples' authorities. National authorities should be required to uphold international human rights law. As long as Indigenous peoples' rights are subject to national legislation, the right of self-determination will not be appropriately protected. History clearly shows that states' interests directly conflict with Indigenous peoples' rights.

A.4.2 True protection for IK cannot be based on IPRs in their existing or adapted form (i.e., community copyright or community marks). New sui generis protections should be based on Indigenous peoples' customary laws, which are the true sui generis protections for IK.

A.5.1 Protection of Indigenous peoples' rights over their knowledge should be a priority, not trying to balance interests of users of IK at the expense of compromising the rights of IK holders.

A.6.1 States' sovereignty is not absolute and does not amount to absolute political or legal freedom. Sovereignty of states is limited by the Charter of the United Nations and by other principles of international law, such as human rights treaties. We recommend inclusion of the analysis and findings of the report of the Human Rights Special Rapporteur, Erica Irene Daes in her *Final Report on Indigenous Peoples' Permanent Sovereignty Over Natural Resources*<sup>1</sup> as a fundamental principle for WIPO's work.

A.6.2 Until existing IPR conventions, agreements, and national laws are adapted to recognize Indigenous peoples as rightsholders over their own knowledge and resources, consistent with international human rights law, true protection of IK will never be achieved.

A.7.1 Given the conflict of interest that WIPO has to promote IPRs and the inability of IPRs to adequately protect IK, WIPO is an inappropriate body to establish any kind of international standards for the protection of IK. This work, in the interests of Indigenous peoples, is best carried out in the human rights arena.

A.8 We reiterate our comment in A.4.1 regarding subjecting Indigenous peoples' rights to national law.

## **Specific Substantive Principles**

B3.2 This definition of traditional knowledge is narrow and limiting and therefore, fails to reflect the evolving and dynamic nature of IK in relation to specific peoples

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<sup>1</sup>E/CN.4/Sub.2/2004/30 Special Rapporteur, Erica Irene Daes, *Final Report on Indigenous Peoples' Permanent Sovereignty Over Natural Resources*

overtime and their territory. Furthermore, it is inappropriate for WIPO to define TK or IK.

B.8.2 This principle assumes that Indigenous knowledge already publicly released is within the "public domain." Indigenous peoples have asserted that with respect to Indigenous knowledge that is already documented in registers or databases, this knowledge is NOT in the public domain, and Indigenous peoples retain all rights over the ownership and use of this knowledge. Similarly, any Indigenous knowledge acquired without prior and informed consent is not in the public domain, and all rights remain with the affected Indigenous peoples. Mechanisms are necessary for the repatriation of Indigenous knowledge and genetic resources that have been illegally appropriated. Indigenous knowledge and genetic resources should be classified as inalienable cultural heritage, which is not subject to the laws relevant to public domain.

B9 IK in all forms must be protected in perpetuity.

## 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.

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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.

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**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.

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**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.**

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#### 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 that 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.

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**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.

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**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.

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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

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**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 time. 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; ¶

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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.