

I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

...

*Contribute to safeguarding traditional knowledge*

(vii) [UNITED STATES OF AMERICA: While recognizing the value of a vibrant public domain] contribute to the preservation and safeguarding of traditional knowledge and the appropriate balance of customary and other means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, in accordance with relevant customary practices, norms, laws and understandings of traditional knowledge holders, for the primary and direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general;

...

*Preclude the grant of improper IP rights to unauthorized parties*

(xiv) curtail the grant or exercise of improper intellectual property rights over traditional knowledge and associated genetic resources, by requiring [UNITED STATES OF AMERICA: the creation of digital libraries of publicly known traditional knowledge and associated genetic resources, 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 of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;] 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 of prior informed consent and benefit-sharing conditions have been complied with in the country of origin;

\*To be checked against the tapes for purposes of the official report of the session.

ARTICLE 1

PROTECTION AGAINST MISAPPROPRIATION [INDONESIA: and misuse]

1. *Traditional knowledge shall be protected against [MOROCCO: ~~misappropriation the following acts if these acts have a commercial goal or take place outside the context of the customary or traditional uses of this traditional knowledge~~] ~~misappropriation~~ [INDONESIA: and misuse].*

2. *Any acquisition, appropriation or utilization [PERU: revelation] of traditional knowledge by unfair or illicit means [INDIA: shall constitute constitutes] [VENEZUELA: that constitutes an act to derive constitutes an act of misappropriation. Misappropriation may also include deriving] constitutes an act of misappropriation [INDONESIA: and misuse]. Misappropriation [INDONESIA: and misuse] [CAMEROON: may also include -also includes] may [INDIA: may shall ] also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or [VENEZUELA: fails-is negligent in failing] is 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.*

3. *In particular, legal means should [INDIA: shall should] be provided to prevent:*

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

(iv) *[BRAZIL: if traditional knowledge has been accessed] if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge [INDIA: in violation of the recognized rights of the holders of the knowledge without just and appropriate compensation to the recognized holders of the knowledge] without just and appropriate [BRAZIL: ecompensation benefit-sharing] compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, [INDIA: and 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] [BRAZIL: and 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 and according to the national and international regimes] and when compensation would be consistent with fairness and equity*

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*in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge; and*

*(\*)~~[BRAZIL: willful]~~ willful offensive use of traditional knowledge of particular moral or spiritual value to its holders by third parties outside the customary context, when such use clearly constitutes a mutilation, distortion or derogatory modification of that knowledge ~~[MEXICO: and is contrary to ordre public or morality]~~ and is contrary to ordre public or morality.*

*[BRAZIL: (vi) the granting of patent rights for inventions involving traditional knowledge and associated genetic resources without the disclosure of the country of origin of the knowledge and/or resources, as well as evidence that prior informed consent and benefit-sharing conditions have been complied with in the country of origin.]*

4. *Traditional knowledge holders should also be effectively protected against other acts of unfair competition, including acts specified in Article 10bis 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. It also includes acts of such a nature as to create confusion with a product or service of traditional knowledge holders; and false allegations in the course of trade which discredit the products or services of traditional knowledge holders.*

5. *The application, interpretation and enforcement of protection against misappropriation ~~[INDONESIA: and misuse]~~ of traditional knowledge ~~[INDIA: and other recognized rights]~~, 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.*

COMMENTS and QUESTIONS

SOUTH AFRICA: Status of the document should be clarified. The objective of protection in this document is too limited. Protection against misappropriation should not be the only objective. The protection of traditional knowledge should expand to other areas, such as sustainable development, promotion of innovation and research, as well as moral rights.

SWEDEN ON BEHALF OF EUROPEAN UNION: (1) What is the relationship between the foreseen protection of TK and knowledge already in the public domain? Where is the relevant point of access to TK, which is not fixed locally in nature, to be determined? (2) How Member States foresee protection of TK contained in databases?

SWITZERLAND: Parts 1 and 2 of the Annex in WIPO/GRTKF/IC/9/5 should also be discussed. The protection against misappropriation of traditional knowledge should not be the only direction of protection of TK. Therefore, other additional policy objectives, as listed in part 1 of the annex, are important to the protection of TK and should be reflected in any provision of protection of TK.

CAMEROON: In relation to Article 1 paragraph 3, it is not clear who should make the legal means available and to whom.

BURUNDI: The concept of "compensation" should remain in Article 1 paragraph 3 (iv).

JAPAN: Agreed with the Delegation of Switzerland in the sense that in-depth examination of Parts 1 and 2 is the prerequisite for the discussion on Part 3 of the document. In relation to Article 1 Paragraph 1, the fundamental term, namely, "traditional knowledge" there is no clear understanding among members. The definition should be dealt with before entering substantive discussion on respective articles.

UNITED STATES OF AMERICA: If an international regime is created, how to enforce laws of another country when morals are involved, since the perspectives on the concept of ordre public or morality could be quite different? In relation to the proposal of Brazil on Article 1 paragraph 3 (iv) *deleting "if traditional knowledge has been accessed"*, the purpose of that phrase was to make clear that if someone created that same knowledge independently he would have the right to use his own independent creation. How to deal with the concept of TK evolving?

MOROCCO: The definition of misappropriation is not clear. The definition of TK should be addressed before protection against misappropriation. In relation to Article 1 paragraph 3 (v), the ordre public or morality is different from countries to countries. The definition of "the ordre public or morality" is not clear and a relative concept.

NORWAY: Article 1 contains many positive elements. However, there is need for more drafting work to achieve a more precise and coherent text. There is a need for greater clarification of what actually is the subject matter for protection, namely how TK should be defined for this purpose. It is also especially important to find the right balance between protectable TK and knowledge which has become part of the public domain. There is not a coherent approach to what the notion of public domain actually means. With regard to the question of limitations and exceptions, it is important that TK not hinders fair use, and in particular private use. Coherence with the CBD should be sought.

AUSTRALIA: This Article specifically relates to elements of a number of policy objectives and principles in the operative document, particularly Policy Objectives 5 and 8 and Principles (b) and (c). There are elements of these policy objectives and principles that are worthy of further discussion that will assist in a thorough analysis of the operation of any text of this nature. For example, what would the relationship or interface be with the existing IP system, to what extent does it accord with flexibility for national and local implementation, what impact would it have with respect to public domain knowledge, and what elements of such protection relate to the IP system specifically, and which elements do not. Also the text is very dense and it may be useful to distill the operative elements and consider each separately.

ITALY: The definition of TK is absolutely necessary. The kind of definition included in article 3 paragraph 2 is insufficient. The first thing to do would be to define the rights which are to be recognized to the holders, since misappropriation means breach of rights. The list of possible cases of misappropriation included in article 1 paragraph 3 is not necessary.

