

## 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: eompensation 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

~~(v) [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.



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SPAIN: Supports MAYA TO'ONIK ASSOCIATION which calls for a glossary.

NEW ZEALAND: Raises the issue of potentially differentiating commercial and non-commercial misappropriation. Article 1 sets a higher threshold for non-commercial misappropriation than for commercial misappropriation. However, the Policy Objective (viii) aims to "repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities". It should be sufficient that the effect of the use is offensive rather than the intended consequence. This also highlights the need to further discuss the policy objectives and principles in conjunction with the substantive provisions.

CAMEROON: In relation to Article 1, what misappropriation is should be defined. Another question is what body should be responsible for penalization.

SUGGESTIONS BY OBSERVERS

SAAMI COUNCIL: In relation to Article 1 paragraph 2, delete "by unfair or illicit means" and replace by "without the free, prior informed consent of the indigenous peoples or communities that have developed traditional knowledge". Replace "the acquisition, appropriation or utilization of traditional knowledge" by "the utilization of traditional knowledge that has entered the public domain without the consent of the indigenous peoples or communities that have developed the traditional knowledge".

TULALIP TRIBES OF WASHINGTON: In Article 1 paragraph 3 (v) add "of the indigenous peoples and local communities" after "ordre public or morality".

INBRAPI: You cannot apply the concept of public domain to TK. Publicly available TK should be distinguished from TK in the public domain. It is not clear in the text that the holders of rights on traditional knowledge are indigenous peoples and local communities. This should be reflected in the text. In Article 1 paragraph 3 (ii) it should be added after "prior informed consent" in line 2 "of the indigenous peoples and local communities, holders of traditional knowledge".

AFRICAN REGIONAL INTELLECTUAL PROPERTY ORGANIZATION (ARIPO): submitted the relevant provision of the ARIPO Protocol on Traditional Knowledge as follows:

"Rights conferred to holders of traditional knowledge

7.1 This Protocol shall confer on the owners of rights referred to in Section 6 the exclusive right to authorize the exploitation of their traditional knowledge.

7.2. In addition, owners shall have the right to prevent anyone from exploiting their protected traditional knowledge without their prior informed consent.

7.3. For the purposes of this Protocol, the term "exploitation" with reference to protected traditional knowledge shall refer to any of the following acts:

(a) Where the traditional knowledge is a product:

(i) manufacturing, importing, offering for sale, selling or using beyond the traditional context the product;

(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;

(b) Where the traditional knowledge is a process:

(i) making use of the process beyond the traditional context;

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(ii) carrying out the acts referred to under paragraph (a) of this subsection with respect to a product that is a direct result of the use of the process.”

TUPAJ AMARU: Indigenous peoples and local communities are the object of protection. “Shall” in Article 1 paragraph 1 should be replaced with “should”. In relation to Article 1 paragraph 2, replace “may include” with “also includes”. Then replace in its line 3 “from” by “through”. In line 4 of this paragraph replace “the person using that knowledge knows” with “the person or persons using that knowledge know or should have known”. In relation to Article 1 paragraph 3, add “and sanction” after the word “prevent”. In relation to Article 1 paragraph 3 (i), add “and illicit appropriation” after “acquisition” in line 1, as well as “including recourse to violence” after the word “theft”. In number (ii) add “possession” after “acquisition” and also “the legislation currently in place” after “in violation of”. In number (iii) change wording to “claims that have no legal foundation”. In number (v) has to be redrafted as the Spanish text is not clear. “Violation of customary rights of indigenous peoples” should replace the concept “morality”. Add in Article 1 paragraph 4 “indigenous peoples and local communities”. Add “customary laws of indigenous peoples and local communities” in paragraph 5.

INTERNATIONAL CHAMBER OF COMMERCE: Objectives also need to be discussed. The importance of balance should be emphasized: balance between right-holders and users, and indeed the general public. Clarity is also important. Business needs to know what they can do and what they cannot do. ICC strongly opposes the clause proposed by the delegation of Brazil, requiring the origin of biological materials to be disclosed in patents. However, a full discussion of this proposal between experts is welcomed.

IPCB: It is important that the legal form of protection should extend to commercial and non-commercial use of TK because misuse often results from non-commercial use of traditional knowledge, and traditional knowledge acquired under non-commercial auspices can easily move into commercial use. Add “or non-commercial” in line 5 of Article 1 paragraph 2 after the word “commercial”.



ARTICLE 2

LEGAL FORM OF PROTECTION

1. *The protection of traditional knowledge against misappropriation [INDONESIA: and misuse shall may] may be implemented through a range of legal measures, including: a special law on traditional knowledge; laws on intellectual property, including laws governing unfair competition and unjust enrichment; the law of contracts; the law of civil liability, including torts and liability for compensation; criminal law; laws concerning the interests of indigenous peoples; fisheries laws and environmental laws; regimes governing access and benefit-sharing; or any other law or any combination of those laws. This paragraph is subject to Article 11(1).*
2. *The form of protection need not be through exclusive property rights, although such rights may be made available, as appropriate, for the individual and collective 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.*

COMMENTS and QUESTIONS

ECUADOR, VENEZUELA: In relation to Article 2 paragraph 2 on the scope of the rights of holders of knowledge, the word "individual" should be reviewed due to the collective nature of traditional knowledge.

SUGGESTIONS BY OBSERVERS

ARIPO: Article 2 provides a range of legal forms or measures that can be used to protect traditional knowledge. However those measures indicated in Article 2.1, which relate principally to forms of existing intellectual property legal tools and are also based on the notion what the instrument seeks to, are to prevent misappropriation, an objective which has been referred to as inadequate or limiting. Furthermore, the paragraphs of the commentary on Article 2 suggest that holders of traditional knowledge do not require the creation of exclusive rights over their traditional knowledge. This understanding is not what we have gathered in our experiences with the traditional knowledge holders in Africa. Most of holders have rather called for collective rights over their traditional knowledge and not private or individual rights as has been referred to Article 2.2. ARIPO shares the views expressed by the delegation of Cameroun. It is therefore the view of ARIPO that without conferring rights, there cannot be consequential action taken. The Article should therefore be substantially amended to reflect the aspirations of the traditional knowledge holders who have called for new form of *sui generis* system to protect their traditional knowledge and not a conglomerate of legal options.

ARTICLE 3

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 externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving [SOUTH AFRICA: inter-generational] nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.*

2. *For the purpose of these principles only, the term "traditional knowledge" refers to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or 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 [MEXICO: any traditional] knowledge associated with genetic resources.*

COMMENTS and QUESTIONS

SWITZERLAND: The establishment of a working definition of traditional knowledge is considered to be one of the prerequisites of a substantial discussion. The definition of traditional knowledge as contained in Article 3 paragraph 2 constitutes a good working definition. The IGC can and should revisit this definition during the course of its negotiations to amend or modify the definition if necessary. The definition of traditional knowledge should encompass all traditional knowledge, that is, traditional knowledge from developing countries and developed countries. Also the term "indigenous and local communities" in Article 3 paragraph 2 shall be understood in the same broad and inclusive sense as the term "communities" as described in footnote 23 of the Annex of document IC/9/4.

VENEZUELA, EL SALVADOR, and MOROCCO: Article 3 should be merged with Article 1 or moved before Article 1.

NEPAL: Clarify the definition of "traditional knowledge" and "misappropriation" in this document.

OMAN: Add traditional arts and artisanal works in Article 3.

MOROCCO: Clarify the definition of "traditional knowledge" and "cultural identity".

SOUTH AFRICA: Article 3 should be clearer and sharper. The "inter-generational nature" should be accommodated in paragraph 1 line 4.

ITALY: The definition of traditional knowledge in Article 3 paragraph 2 is not adequate. Inconsistency between Article 4, in which "local communities" are not considered, and other provisions. Language used and Definitions should be the same throughout the document.



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SUGGESTIONS BY OBSERVERS

INBRAP: In Article 3 paragraph 2, lines 2 add after "activity" "developed".

ARIPO: Add the sentence "The specific choice of terms to denote the protected subject matter under Traditional Knowledge may be determined at the national level" after paragraph 2 of Article 3.

ARTICLE 4

ELIGIBILITY FOR PROTECTION

*Protection*~~[VENEZUELA, INDONESIA: should shall]~~ *should be extended*  
~~[VENEZUELA: at least]~~ *at least to that traditional knowledge which is:*

(i) *generated, preserved* ~~[SUDAN: constituted]~~ *and transmitted in a*  
*traditional and intergenerational context* ~~[INDIA: or];~~

(ii) ~~[INDIA, SUDAN: distinctively]~~ *distinctively associated with*~~[MOROCCO: distinctively associated with customarily recognized as belonging to]~~ *a traditional or indigenous community or people which preserves and transmits it between generations;*  
~~and [INDIA: and or]~~

(iii) ~~[INDIA: integral to the cultural identity of]~~ *integral to the cultural identity of an indigenous or traditional community or* ~~[URUGUAY: cultural identity of]~~ *people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or* ~~[INDONESIA: applicable national] laws.~~

COMMENTS and QUESTIONS

CHINA: Traditional knowledge sometimes is owned by national minorities in China. A reference to different nationalities should be added in Article 4 (ii).

ITALY: The words in the document should be the same. As the definition of "traditional knowledge" in Article 3.2, the words "indigenous and local communities" are used, so is Article 4. The scope of "local communities" is needed, such rural community, communities sharing the same agricultural knowledge.

EL SALVADOR: In relation with article 4, the protection should be broader.

AUSTRALIA: Further consideration needs to be given to the definitions, and to the flexibilities required for local circumstances. In particular, for example, how does the wording in Article 4 relate to possible protection for traditional knowledge produced by a contemporary generation.

INDIA: More legal text will be submitted in writing. Traditional Medical Knowledge is not always linked to communities.

BRAZIL: Endorsed statement of INBRAPI and would like the wording of Article 4 (i) to be included in Article 3 paragraph 2.

CAMEROON: The criteria included in Article 4 should not be cumulative. Article 4(iii) is the only necessary criterion of protection.

URUGUAY: Proposal made on Article 4 shall extend to other articles on TK and TCEs.

MOROCCO: A definition of cultural identity is needed.



SUGGESTIONS BY OBSERVERS

INDIGENOUS PEOPLES (BETHECHILOKONO) OF SAINT LUCIA GOVERNING COUNCIL: The term "traditional or indigenous community or people" in Article 4(ii) is confusing. The explanation should be given after consulting outside of the IGC for a study on the terms.

INBRAPI: The definition of holders of traditional knowledge is only clear in Article 4, this should be included in Article 1.

ARTS LAW CENTER OF AUSTRALIA: Delete "distinctively" in Article 4(ii). Use "indigenous" with a capital "I".