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# REVISED PROVISIONS
# FOR THE PROTECTION OF
# TRADITIONAL KNOWLEDGE
# POLICY OBJECTIVES AND CORE PRINCIPLES

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*N.B. These draft provisions are reproduced unaltered from the Annex of documents WIPO/GRTKF/IC/8/5 and WIPO/GRTKF/IC/9/5, considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources and Folklore ('the Committee') at its eighth and ninth sessions. Committee members have expressed diverse views on the acceptability of this material as a basis for future work, in particular regarding certain passages of Part III: Substantive Principles. WIPO/GRTKF/IC/8/15 and WIPO/GRTKF/IC/9/14 set out these diverse views of Committee participants in full.*

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# I. POLICY OBJECTIVES

The protection of traditional knowledge should aim to:

*Recognize value*

(i) recognize the holistic nature of traditional knowledge and its intrinsic value, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial, educational and cultural value, and acknowledge that traditional knowledge systems are frameworks of ongoing innovation and distinctive intellectual and creative life that are fundamentally important for indigenous and local communities and have equal scientific value as other knowledge systems;

*Promote respect*

(ii) promote respect for traditional knowledge systems; for the dignity, cultural integrity and intellectual and spiritual values of the traditional knowledge holders who conserve and maintain those systems; for the contribution which traditional knowledge has made in sustaining the livelihoods and identities of traditional knowledge holders; 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 as holders and custodians of traditional knowledge, contribute to their welfare and economic, cultural and social benefit and reward the contribution made by them to their communities and to the progress of science and socially beneficial technology;

*Promote conservation and preservation of traditional knowledge*

(iv) promote and support the conservation and preservation of traditional knowledge by respecting, preserving, protecting and maintaining traditional knowledge systems and providing incentives to the custodians of those knowledge systems to maintain and safeguard their knowledge systems;

*Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems*

(v) be undertaken in a manner that empowers traditional knowledge holders to protect their knowledge by fully acknowledging the distinctive nature of traditional knowledge systems and the need to tailor solutions that meet the distinctive nature of such systems, bearing in mind that such solutions should be balanced and equitable, should ensure that conventional intellectual property regimes operate in a manner supportive of the protection of traditional knowledge against misappropriation, and should effectively empower traditional knowledge holders to exercise due rights and authority over their own knowledge;

*Support traditional knowledge systems*

(vi) 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*

(vii) 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;

*Repress unfair and inequitable uses*

(viii) repress the misappropriation of traditional knowledge and other unfair commercial and non-commercial activities, recognizing the need to adapt approaches for the repression of misappropriation of traditional knowledge to national and local needs;

*Respect for and cooperation with relevant international agreements and processes*

(ix) take account of, and operate consistently with, other international and regional instruments and processes, in particular regimes that regulate access to and benefit-sharing from genetic resources which are associated with that traditional knowledge;

*Promote innovation and creativity*

(x) encourage, reward and protect tradition-based creativity and innovation and enhance the internal transmission of traditional knowledge within indigenous and traditional communities, including, subject to the consent of the traditional knowledge holders, by integrating such knowledge into educational initiatives among the communities, for the benefit of the holders and custodians of traditional knowledge;

*Ensure prior informed consent and exchanges based on mutually agreed terms*

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

*Promote equitable benefit-sharing*

(xii) promote the fair and equitable sharing and distribution of monetary and non-monetary benefits arising from the use of traditional knowledge, in consistency with other applicable international regimes, the principle of prior informed consent and including through fair and equitable compensation in special cases where the individual holder is not identifiable or the knowledge has been disclosed;

*Promote community development and legitimate trading activities*

(xiii) if so desired by the holders of traditional knowledge, promote the use of traditional knowledge for community-based development, 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, where traditional knowledge holders seek such development and opportunities consistent with their right to freely pursue economic development;

*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, 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;

*Enhance transparency and mutual confidence*

(xv) enhance certainty, transparency, mutual respect and understanding in relations between traditional knowledge holders on the one hand, and academic, commercial, educational, governmental and other users of traditional knowledge on the other, including by promoting adherence to ethical codes of conduct and the principles of free and prior informed consent;

*Complement protection of traditional cultural expressions*

(xvi) 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.

[Commentary on Objectives follows]

# COMMENTARY ON

# POLICY OBJECTIVES

## Background

Most existing measures, legal systems and policy debates concerning the protection of traditional knowledge have expressly stated the policy objectives which they seek to achieve by protecting TK, and often they share certain common objectives. These objectives are often articulated in preambular language in laws and legal instruments, clarifying the policy and legal context. The draft policy objectives draw on the common goals expressed within the Committee as the common objectives for international protection.

Part A sets out the policy objectives of traditional knowledge (TK) protection, as they have been articulated by the Committee. These objectives give a common direction to the protection established in the principles of Part B. Such objectives could typically form part of a preamble to a law or other instrument. The listed objectives are not mutually exclusive but rather complementary to each other. The list of objectives is non-exhaustive and, given the evolving nature of the provisions, the Committee members may supplement the current list with additional objectives or decide to combine existing objectives from the current list which are notionally related.

## Changes reflecting stakeholder comments and inputs received from Committee members regarding the policy objectives in WIPO/GRTKF/IC/7/5

Committee participants provided valuable and in-depth comments on the policy objectives contained in Annex I of WIPO/GRTKF/IC/7/5 including specific proposals for redrafting the wording of the objectives. In addition, comments had already been made on policy objectives at earlier sessions of the Committee and in related early exercises regarding TK protection, such as the WIPO Fact-finding missions on intellectual property and traditional knowledge in 1998-1999.

All the comments and inputs have been taken into account in the revised draft policy objectives. Committee participants' proposals for specific wording have been directly entered into the text wherever possible, so that the revised text is a direct reflection of the drafting proposals. In some cases, policy objectives have been significantly reworded or entirely replaced, such as the objective to "ensure prior informed consent and exchanges based on mutually agreed terms", which replaces the objective to "promote intellectual and technological exchange" at the request of Brazil. In some cases, changes have been introduced to respond to comments in the light of earlier inputs from TK holders, such the need to recognize that TK is as valuable as conventional scientific knowledge[1] while also recalling that TK itself is of scientific value and may be considered by some as a distinct but equally valid scientific system.[2] In other cases, new policy objectives or guiding principles have been added at the request of Committee members, such as the objective of conservation and preservation of TK at the request of the United States of America and the guiding principle of "providing assistance to address the needs of traditional knowledge holders" at the request of China.

*Comments and inputs reflected*: African Group,[3] GRULAC;[4] Brazil, Canada, China, New Zealand, United States of America; European Community; OAPI; Call of the Earth, Indigenous Peoples' Council on Biocolonialism, Inuit Circumpolar Conference, Saami Council, UNU-IAS.

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1 See, Objective (i) in the present document and WIPO/GRTKF/IC/8/INF/4, Comment of Brazil.

2 E.g., TK holders have pointed out that "... the implication [of certain assumptions about TK] is that TK is not "science" in the formal sense of a systematic body of knowledge that is continually subject to empirical challenges and revision. Rather the term implies something "cultural" and antique. [...] What the international community needs to protect is 'indigenous science'". See Statement by Dr. Russell Barsh, 21 July 2000, *IP Needs and Expectations of TK Holders. Report on Fact-finding Missions on IP and TK.* Geneva, 2001: page 116, footnote 3.

3 African Group (WIPO/GRTKF/IC/6/12, Annex, "Objectives")

4 GRULAC (WIPO/GRTKF/IC/1/5, Annex I, "II. Objectives")

## II. GENERAL GUIDING PRINCIPLES

*These principles should be respected to ensure that the specific substantive provisions concerning protection are equitable, balanced, effective and consistent, and appropriately promote the objectives of protection:*

(a) *Principle of responsiveness to the needs and expectations of traditional knowledge holders*

(b) *Principle of recognition of rights*

(c) *Principle of effectiveness and accessibility of protection*

(d) *Principle of flexibility and comprehensiveness*

(e) *Principle of equity and benefit-sharing*

(f) *Principle of consistency with existing legal systems governing access to associated genetic resources*

(g) *Principle of respect for and cooperation with other international and regional instruments and processes*

(h) *Principle of respect for customary use and transmission of traditional knowledge*

(i) *Principle of recognition of the specific characteristics of traditional knowledge*

(j) *Principle of providing assistance to address the needs of traditional knowledge holders*

[Commentary on General Guiding Principles follows]

COMMENTARY ON

GENERAL GUIDING PRINCIPLES

Background

The substantive provisions set out in the next section are guided by and seek to give legal expression to certain general guiding principles which have underpinned much of the discussion within the Committee since its inception and in international debate and consultations before the Committee's establishment.

Elaboration and discussion of such principles is a key step in establishing a firm foundation for development of consensus on the more detailed aspects of protection. Legal and policy evolution is still fast-moving in this area, at the national and regional level, but also internationally. Equally, strong emphasis has been laid on the need for community consultation and involvement. Broad agreement on core principles could put international cooperation on a clearer, more solid footing, but also clarify what details should remain the province of domestic law and policy, and leave suitable scope for evolution and further development. It could build common ground, and promote consistency and harmony between national laws, without imposing a single, detailed legislative template.

*(a) Principle of responsiveness to the needs and expectations of traditional knowledge holders*

Protection should reflect the actual aspirations, expectations and needs of traditional knowledge holders; and in particular should: recognize and apply indigenous and customary practices, protocols and laws as far as possible and appropriate; address cultural and economic aspects of development; address insulting, derogatory and offensive acts; enable full and effective participation by all 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 traditional 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.

*(b) Principle of recognition of rights*

The rights of traditional knowledge holders to the effective protection of their knowledge against misappropriation should be recognized and respected.

*(c) 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 traditional knowledge holders. Where measures for the protection of traditional knowledge are adopted, appropriate enforcement mechanisms should be developed permitting effective action against misappropriation of traditional knowledge and supporting the broader principle of prior informed consent.

*(d) Principle of flexibility and comprehensiveness*

Protection 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, and respecting that

effective and appropriate protection may be achieved by a wide variety of legal mechanisms and that too narrow or rigid an approach may preempt necessary consultation with traditional knowledge holders.

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 should 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.

*(e) Principle of equity and benefit-sharing*

Protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and maintain traditional knowledge, namely traditional knowledge holders, and of those who use and benefit from traditional knowledge; 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. In reflecting these needs, traditional knowledge protection should respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge and should take into account the principle of prior informed consent.

The rights of traditional knowledge holders over their knowledge should be recognized and safeguarded. Respect for prior informed consent should be ensured, and 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.

Protection which applies the principle of equity should not be limited to benefit-sharing, but should ensure that the rights of traditional knowledge holders are duly recognized and should, in particular, respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge.

*(f) Principle of consistency with existing legal systems governing access to associated genetic resources*

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 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.

*(g) Principle of respect for and cooperation with other international and regional instruments and processes*

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.

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.

*(h) Principle of respect for customary use and transmission of traditional knowledge*

Customary use, practices and norms shall be respected and given due account in the protection of traditional knowledge, 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. If so desired by the traditional knowledge holders, 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, taking into account the diversity of national experiences. No innovative or modified use of traditional knowledge within the community which has developed and maintained that knowledge should be regarded as offensive use if that community identifies itself with that use of the knowledge and any modifications entailed by that use.

*(i) 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.

*(j) Principle of providing assistance to address the needs of traditional knowledge holders*

Traditional knowledge holders should be assisted in building the legal-technical capacity and establishing the institutional infrastructure which they require in order to effectively utilize and enjoy the protection available under these Principles, including, for example, in the setting up

of collective management systems for their rights, the keeping of records of their traditional knowledge and other such needs.

[Substantive provisions follow]

## III. SUBSTANTIVE PROVISIONS

### ARTICLE 1

### PROTECTION AGAINST MISAPPROPRIATION

*1. Traditional knowledge shall be protected against misappropriation.*

*2. Any acquisition, appropriation or utilization of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition, appropriation or utilization of traditional knowledge when the person using that knowledge knows, or 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 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) 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 such use has gainful intent and confers a technological or commercial advantage on its user, 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*

*(v) 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 and is contrary to* ordre public *or morality.*

*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 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.*

COMMENTARY ON

ARTICLE 1

This provision builds on an international consensus that traditional knowledge should not be misappropriated, and that some form of protection is required to achieve this. Existing international and national laws already contain norms against misappropriation of related intangibles such as goodwill, reputation, know-how and trade secrets. These norms can be viewed as part of the broader law of unfair competition and civil liability rather than as necessarily requiring distinct exclusive rights as provided for in the chief branches of modern intellectual property law. This provision establishes a general principle against the misappropriation of TK as a common frame of reference for protection, drawing together existing approaches and building on existing legal frameworks. The provision thus reflects the African Group's proposal that the first objective of TK protection should be to "Prevent the misappropriation of ... traditional knowledge"[5] and other expressions of commitment to "preventing the misappropriation of TK".[6]

The general norm against misappropriation is elaborated in three, cumulative steps. The provision first articulates a basic norm against misappropriation as such; second, it develops the nature of "misappropriation" by providing a general, non-exclusive description of misappropriation; and finally it catalogues specific acts of misappropriation which should be suppressed. This drafting structure (but not its legal content) mirrors the structure of a provision in the Paris Convention which has proven to be widely adaptable (Article 10*bis*) and which has engendered several new forms of protection, such as the protection of geographical indications and the protection of undisclosed information. Importantly for traditional knowledge protection, this article does not create exclusive property rights over intangible objects. Rather, it represses unfair acts in certain spheres of human intellectual activity without creating distinct private

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5 See, Objective 1, African Group proposal, Annex, WIPO/GRTKF/IC/6/12

6 United States of America (WIPO/GRTKF/IC/6/14, paragraph 157)

property titles over the knowledge which is being protected against those illegitimate acts. Similarly, the first paragraph in this provision defines misappropriation as an unfair act which should be repressed, without creating monopolistic property rights over TK.

The second paragraph describes the nature of misappropriation in a general and non-exclusive manner. A link with unfair competition law is suggested by the focus on acquisition *by unfair means*. Akin to Article 10*bis*, the term "unfair means" may be defined differently, depending on the specific legal settings in national law. This allows countries to take into account various domestic and local factors when determining what constitutes misappropriation, in particular the views and concerns of indigenous and local communities. The non-exclusive nature of this description of "misappropriation" allows the term "misappropriation" to become the umbrella term and structure under which the various unfair, illicit and inequitable acts, which should be repressed, may be subsumed.[7]

Paragraph 3 provides an inclusive list of those specific acts which, when undertaken in relation to TK covered by these Principles, would, at a minimum, be considered acts of misappropriation. By allowing a wide range of measures as appropriate "legal means" within national law to suppress the listed acts, the chapeau of this paragraph applies the Guiding Principle of flexibility and comprehensiveness. The different subparagraphs of Article 1.3 distil specific acts of misappropriation, which include: (i) the illicit acquisition of TK, including by theft, bribery, deception, breach of contract, etc.; (ii) breach of the principle of prior informed consent for access to TK, when required under national or regional measures; (iii) breach of defensive protection measures of TK; (iv) commercial or industrial uses which misappropriate the value of TK where it is reasonable to expect the holders of TK to share the benefits from this

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[7] The approach taken under a misappropriation regime, as reflected in the present Principles, is thus to modulate the term "misappropriation", if and as required, rather than to subsume that term under another, broader term or structure, as suggested by one comment. This would appear to be more of a linguistic difference in the choice of terms, rather than a fundamental difference in structure of the protection provided (see WIPO/GRTKF/IC/8/INF/4, OAPI).

use; and (v) willful morally offensive uses of TK which is of particular moral or spiritual value to the TK holder. The provision gives wide flexibility for countries to use different legal means to suppress these listed acts. In countries which admit this possibility, judicial and administrative authorities may even draw upon these principles directly, without requiring specific legislation to be enacted. The words "in particular" leave the choice open to national policy makers to consider additional acts as forms of misappropriation and include these in the list nationally. This could include, for example, passing-off, misrepresentation of the source of TK, or failure to recognize the origin of TK.[8]

Paragraph 4 supplements the basic misappropriation norm by clarifying that the specific acts of unfair competition already listed in Article 10*bis* do have direct application to TK subject matter. As requested by commentators, the paragraph now been extended to clarify the relation between protection against misappropriation and protection under Article 10*bis* of the Paris Convention. It expressly states that TK holders are additionally protected against misleading representations, creating confusion and false allegations in relation to products or services produced or provided by them.

Since the notion of misappropriation would need to be more closely interpreted under national law, paragraph 5 suggests that concepts such as "unfair means", "equitable benefits" and "misappropriation" should in particular cases be guided by the traditional context and the customary understanding of TK holders themselves. The traditional context and customary understandings may be apparent in a community's traditional protocols or practices, or may be codified in customary legal systems.

Changes reflecting stakeholder comments and inputs received on this provision

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[8] For example, the conceptions of "unfair" in the Indian Arts and Crafts Act of the United States of America and Peruvian Law.

Several comments requested the addition of a further category of acts to the list of specific acts of misappropriation. Accordingly, sub-paragraph 3(v) was added, which would repress willful offensive use by third parties of TK which is of moral or spiritual value to the TK holders. In paragraph 4 the relationship between those acts of unfair competition which are repressed under Article 10*bis* of the Paris Convention and the protection against misappropriation have been further clarified through an additional sentence as requested by China. It expressly states that the acts of unfair competition listed in Article 10*bis*(3)2 and 10*bis*(3)3 Paris Convention should also be repressed, namely acts which create confusion with TK products or services and false allegations which discredit the TK products or services.

*Comments and inputs reflected*: Brazil, China, United States of America; European Community, OAPI, Saami Council, UNU/IAS;

## ARTICLE 2

## LEGAL FORM OF PROTECTION

*1. The protection of traditional knowledge against misappropriation 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.*

COMMENTARY ON

ARTICLE 2

Existing *sui generis* measures for TK protection at the level of domestic law already display a high diversity of legal forms and mechanisms. If the current provisions are not to pre-empt or supersede existing national and regional choices for TK protection, this diversity of legal mechanism would need to be accommodated in these international standards. Again, this approach is not new in the articulation of international standards. Provisions similar to this Article can be found in existing international instruments covering diverse fields of protection. Examples that have earlier been cited include the Washington Treaty,[9] the Paris Convention, and the Rome Convention.[10] This provision applies the guiding principle of flexibility, to ensure that sufficient space is available for national consultations with the full and effective participation of TK holders, and legal evolution as protection mechanisms are developed and applied in practice.

Accordingly, in order to accommodate existing approaches and ensure appropriate room for domestic policy development, paragraph 1 gives effect to the Guiding Principle of flexibility and comprehensiveness and reflects the actual practice of countries which have already implemented *sui generis* forms of TK protection. It allows the wide range of legal approaches which are currently being used to protect TK in various jurisdictions, particularly in the African Union, Brazil, China, India, Peru, Portugal and the United States of America. It leaves national authorities a maximum amount of flexibility in order to determine the appropriate legal mechanisms which best reflect the specific needs of local and indigenous communities in the domestic context and which match the national legal systems in which protection will operate. The paragraph is modeled on a provision from a binding international instrument, namely Article 4 of the Washington Treaty.

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9 *Treaty on Intellectual Property in Respect of Integrated Circuits* (1989) (hereinafter, "the Washington Treaty")

10 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961) (hereinafter, "the Rome Convention")

Paragraph 2 clarifies that these principles do not require the creation of exclusive property titles on TK, which are perceived by many TK holders as inappropriate (see commentary on Article 1). Many TK holders have expressed the concern that new forms of protection of TK against misappropriation should not impose private rights on their TK. On the contrary, these principles give effect to an underlying norm against misappropriation by third parties, and thus against the illegitimate privatisation or commodification of TK, including through the improper assertion of illegitimate private property rights. Instead they leave open the scope for using alternative legal doctrines in formulating policy on these issues as suggested by several Committee participants. However, since several countries have already established *sui generis* exclusive rights over TK, the paragraph gives scope for such exclusive rights, provided that they are in accordance with the needs and choices of TK holders, national laws and policies, and international obligations.

Changes reflecting stakeholder comments and inputs received on this provision

Comments by Committee participants informed that in some jurisdictions fisheries laws and environmental laws are also relevant to the protection of some forms of TK and therefore these references have been added to the possible means of implementation of the Principles. The listing of laws has also been amended to bring it into line with the civil law tradition in continental Europe and francophone African countries.

*Comments and inputs reflected*: OAPI, Australia, New Zealand, ICC, Saami Council, UNU-IAS.

## 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 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 knowledge associated with genetic resources.*

COMMENTARY ON

ARTICLE 3

This provision does two things: it clarifies the general nature of traditional knowledge for the purposes of these provisions, and it sets appropriate bounds to the scope of protectable subject matter. It therefore gives effect to concerns that international provisions on TK should reflect the distinctive qualities of TK, but also responds to concerns that provisions against misappropriation of TK should not intrude on the traditional context and should not place external constraints or impose external interpretations on how TK holders view, manage or define their knowledge in the customary or traditional context.

International IP standards typically defer to the national level for determining the precise scope of protected subject matter. The international level can range between a description in general terms of eligible subject matter, a set of criteria for eligible subject matter, or no definition at all. For example, the Paris Convention and the TRIPS Agreement do not define "invention". The Paris Convention defines 'industrial property' in broad and expansive terms. This provision takes a comparable approach which recognizes the diverse definitions and scope of TK that already apply in existing national laws on TK, and does not seek to apply one singular and exhaustive definition. Guided by existing national laws, however, this provision clarifies the scope of TK in a descriptive way. Its wording draws on a standard description that has been developed and consistently used by the Committee, which was based in turn on the Committee's analysis of existing national laws on the protection of TK. In essence, if intangible subject matter is to constitute traditional knowledge for the purposes of these provisions, it should be "traditional", in the sense of being related to traditions passed on from generation to generation, as well as being "knowledge" or a product of intellectual activity.

The second paragraph clarifies that these provisions cover traditional knowledge as such. This means that they would not apply to TCEs/EoF, which are treated in complementary and parallel provisions (document WIPO/GRTKF/IC/8/4). In its general structure, but not its content, the paragraph is modeled on Article 2(1) of the Berne Convention which delineates the scope of

subject matter covered by that Convention by first providing a general description and then an illustrative list of elements that would fall within its scope. In following a similar approach, this paragraph does not seek to define the term absolutely. A single, exhaustive definition might not be appropriate in light of the diverse and dynamic nature of TK, and the differences in existing national laws on TK.

Changes reflecting stakeholder comments and inputs received on this provision

Comments by Committee participants suggested that the evolving and dynamic nature of indigenous knowledge over time should be further emphasized and reflected in this provision. A sentence to this effect has been added. Other comments suggested to develop and qualify certain prerequisites and terms used in the provision, such as "resulting from intellectual activity", and thus the description of traditional knowledge has been further specified, drawing on well-known language in existing international IP and other instruments.[11]

*Comments reflected:* European Community, Indigenous Peoples' Committee on Biocolonialism, International Publishers' Association, UNU-IAS.

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[11] For example, the terms "resulting from intellectual activity" has a long established, clear usage in Article 2 of the WIPO Convention, and the term "embodying traditional lifestyles" has a similar long-established and clear usage in the context of Article 8(j) CBD. See comments of the European Community and its Member States.

ARTICLE 4

ELIGIBILITY FOR PROTECTION

*Protection 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 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 laws.*

COMMENTARY ON

ARTICLE 4

This provision clarifies what qualities TK should have at least to be eligible for protection against misappropriation in line with these provisions. Again without intruding on the traditional domain, this provision would help set out the criteria that TK should meet in order to be assured protection against misappropriation by third parties in the external environment, beyond the traditional context. It leaves open the possibility of wider eligibility for protection, where this is in line with particular national choices and needs.

This provision is guided by the criteria that are applied in existing national *sui generis* TK laws and by the extensive Committee discussions on the criteria that should apply for TK protection. These national laws and Committee discussions cover diverse criteria, but certain common elements have emerged. This provision articulates those common elements: in essence, providing that TK should have (i) a traditional, intergenerational character, (ii) a distinctive association with its traditional holders, and (iii) a sense of linkage with the identity of the TK holding community (which is broader than conventionally recognized forms of 'ownership' and embraces concepts such as custodianship). For example, TK might be integral to the identity of an indigenous or traditional community if there is a sense of obligation to preserve, use and transmit the knowledge appropriately among the members of the community or people, or a sense that to allow misappropriation or offensive uses of the TK would be harmful. Some guidance on these concepts may be found in existing national laws. For example, the Indian Arts and Crafts Act in the United States of America specifies that a product is a product of a particular tribe when "the origin of a product is identified as a named Indian tribe or named Indian arts and crafts organization[12]". This could be a form of 'distinctive association' as suggested in subparagraph (ii).

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[12] (Section 309.2(f), 25 CFR Chapter II 309 (Protection of Indian Arts and Crafts Products)).

This provision builds on the general description of TK in Article 3, and provides a conceptual link with the beneficiaries of protection, who are specified in Article 5. Together, these three articles clarify the minimal traditional linkage that would apply between TK and its holders, in order for protection against misappropriation to be assured under these provisions. They do not rule out broader scope of protection, since they define a minimum only (this is the intent of the term 'at least' in the chapeau). Yet the reference to "at least" in the chapeau of this provision clarifies that policymakers can choose more inclusive criteria to meet with national needs and circumstances.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on whether specific TK elements, which were of specific importance to the commentators, such as TK utilized by environmental impact assessment projects,[13] would fulfill the criteria of eligibility. Such a question would depend primarily on whether the knowledge was intergenerational, how it was associated with the community, and whether the community itself saw it as integral to its identity, as well as on national interpretation and existing national jurisprudence.

*Comments and inputs reflected*: IPA, ICC, OAPI, Saami Council, UNU-IAS.

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13 Inuit Circumpolar Conference (ICC).

## ARTICLE 5

## BENEFICIARIES OF PROTECTION

*Protection of traditional knowledge should benefit the communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context, who are associated with it and who identify with it in accordance with Article 4. Protection should accordingly benefit the indigenous and traditional communities themselves that hold traditional knowledge in this manner, 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.*

COMMENTARY ON

ARTICLE 5

Preceding principles have focussed on the subject matter of protection. This provision seeks to clarify who should principally benefit from protection of TK. It articulates the principle that the beneficiaries should be the traditional holders of TK. This draws on established practice in existing national systems and the consistent theme in international TK debates. The same approach is found in existing proposals for international protection frameworks. For example, the third objective of the international instrument or instruments proposed by the African Group is "to ensure that these benefits are harnessed for the benefit of traditional knowledge holders".[14]

Because TK is in general held by, associated with and related to the cultural identity of a community, the basic principle provides for that community collectively to benefit from its protection. Studies and actual cases have, nonetheless, shown that in some instances a particular individual member of a community may have a specific entitlement to benefits arising from the use of TK, such as certain traditional healers or individual farmers, working within the community. This provision therefore clarifies that beneficiaries may also include recognized individuals within the communities. Typically, the recognition will arise or be acknowledged through customary understandings, protocols or laws.

Entitlement to and distribution of benefits within a community (including the recognition of entitlements of individuals) may be governed by the customary law and practices that the community itself observes. This is a key area where external legal mechanisms for protection of TK may need to recognize and respect customary laws, protocols or practices. Case law suggests that financial penalties imposed for IP infringement can be distributed according to customary law. The mutually agreed terms for access and benefit-sharing agreements can also give effect to customary laws and protocols by allowing the communities to identify internal beneficiaries of

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[14] See Objective 3, page 1, Annex, WIPO/GRTKF/IC/6/12.

protection according to their own laws, practices and understandings. This option is recognized in the third sentence.

This provision reflects a balance between the diverse forms of custodianship of TK at national and community levels, and the need for guidance on the determination of the beneficiaries of protection, entailing a trade-off between flexibility and inclusiveness on the one hand, and precision and clarity on the other hand. Existing national and community laws may already define the communities who would be eligible for protection. (See further detailed discussion of this question in document WIPO/GRTKF/IC/8/6). In contrast to seeking to create a new body of law *ab initio* concerning the identity of indigenous and other local communities, this text currently allows scope for reference to the national laws of the country of origin to determine these matters. Relevant law at the national or local levels can define relevant communities and/or individuals.[15].

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15 For example, the Indian Arts and Crafts Act in the United States of America, at WIPO/GRTKF/IC/5/INF/6, specifies that an "Indian tribe" means "any Indian tribe, band, nation, Alaska Native village, or any organized group or community which is recognized as eligible ... by the United States ...; or (2) Any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority". (Section 309.2(e), 25 CFR Chapter II 309).

Comments and inputs received and changes regarding this provision

Comments received on this provision suggested that the beneficiaries should be defined with further precision even in the international layer of protection. This would apply both if the entitled TK holders are "indigenous or traditional communities or peoples" as such, and if they are "recognized individuals within these communities". More precise qualifiers have thus been incorporated by reference into the provision.

*Comments and inputs reflected*: OAPI, UNU-IAS

ARTICLE 6

FAIR AND EQUITABLE BENEFIT-SHARING
AND RECOGNITION OF KNOWLEDGE HOLDERS

*1. The benefits of protection of traditional knowledge to which its holders are entitled include the fair and equitable sharing of benefits arising out of the commercial or industrial use of that traditional knowledge.*

*2. Use of traditional knowledge for non-commercial purposes need only give rise to non-monetary benefits, 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 mention its source, acknowledge its holders, and use it in a manner that respects the cultural values of its holders.*

*4. Legal means should be available to provide remedies for traditional knowledge holders in cases where the fair and equitable sharing of benefits as provided for in paragraphs 1 and 2 has not occurred, or where knowledge holders were not recognized as provided for by paragraph 3.*

*5. Customary laws within local communities may play an important role in sharing benefits that may arise from the use of traditional knowledge.*

COMMENTARY ON

ARTICLE 6

The misappropriation of traditional knowledge may include gaining benefits, especially commercial benefits, from the use of the knowledge without equitable treatment of the holders of the knowledge. This is generally congruent with the concerns expressed that TK should not be the subject of unjust enrichment or should not give rise to inequitable benefits for third parties. Accordingly, the elaboration of a system of protection of TK against misappropriation may entail providing for positive standards for equitable sharing of benefits from the use of TK. Such equitable benefit-sharing is also a means of implementing such policy objectives as "recognition of the value of TK"; "ensuring respect for TK and TK holders"; and "promoting equitable benefit-sharing" (Objectives (i), (ii) and (xi), above).

This provision therefore supplements the broad reference to equitable benefit-sharing in the general description of misappropriation (Article 1 above), and covers commercial or non-commercial uses. Internationally agreed guidelines on biodiversity-related TK suggest that basic principles for benefit-sharing can include (i) covering both monetary and non-monetary benefits and (ii) developing different contractual arrangements for different uses.[16] Accordingly, this provision differentiates between commercial and non-commercial uses of TK and specifies different benefit-sharing principles for these uses.

Paragraph 1 establishes the general principle that TK holders are entitled to the sharing of benefits arising from commercial or industrial uses of their TK. The paragraph is worded in such a way that benefits would be shared directly with the TK holder, i.e. the traditional and local communities.

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[16] See Section IV.D.3 ( Benefit-sharing ), *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Decision VI/24A, Annex)

In contrast to the first paragraph, paragraph 2 concerns non-commercial uses of TK and concedes that such uses may give rise only to non-monetary benefit-sharing. The paragraph gives an illustration of non-monetary benefits that could be shared, namely access to research outcomes and involvement of the source community in research and educational activities. Other examples might include institutional capacity building; access to scientific information; and institutional and professional relationships that can arise from access and benefit-sharing agreements and subsequent collaborative activities.

The third paragraph concerns the recognition of TK holders and specifies that users should identify the source of the knowledge and acknowledge its holders. It also provides that TK should be used in a manner that respects the cultural values of its holders.

The final paragraph specifies that civil judicial procedures should be available to TK holders to receive equitable compensation when the provisions in paragraph 1 and 2 have not been complied with. It also specifies the possible role of customary laws and protocols in benefit-sharing since, as has been observed, "customary laws within local communities may play an important role ... in sharing any benefits that may arise" from access to TK.[17]

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on fair and equitable benefit-sharing rather than equitable compensation and the provision has been redrafted accordingly. Other comments highlighted the role of customary laws and protocols in benefit-sharing and an additional sentence has thus been added. As requested by some comments, concrete principles regarding the determination of compensation and damages have also been added to the provision.

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17 United States of America, WIPO/GRTKF/IC/6/14, paragraph 76.

*Comments and inputs reflected*: Australia, Brazil, China, IPA, Saami Council, United States of America, UNU-IAS

## ARTICLE 7

## PRINCIPLE OF PRIOR INFORMED CONSENT

*1. The principle of prior informed consent should govern any access of traditional knowledge from its traditional holders, subject to these principles and relevant national laws.*

*2. 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 by an appropriate national authority, as provided by applicable national legislation.*

*3. Measures and mechanisms for implementing the principle of prior informed consent should be understandable, appropriate, and not burdensome for all relevant stakeholders, in particular for traditional knowledge holders; should ensure clarity and legal certainty; and should provide for mutually agreed terms for the equitable sharing of benefits arising from any agreed use of that knowledge.*

COMMENTARY ON

ARTICLE 7

The application of the principle of prior informed consent is central to the policy debates and existing measures concerning TK protection. The expanded conception of misappropriation of TK in Article 1 includes violation of legal measures that require the obtaining of prior informed consent. Prior informed consent has been recognized by some Committee members as a key legal principle and by others as "a valuable practice".[18] The principle essentially requires that at the point of access, when an external party first gains access to traditional knowledge held within a community, formal consent is required on the part of the community that holds the knowledge. National laws stipulate a contract or permit, containing mutually agreed terms, is agreed between TK users and providers, based on which consent is granted for access to the TK. The principle has been widely implemented through permits, contract systems or specific statutes.

The general principle, as expressed in the first paragraph, provides that TK holders should be both informed about the potential use of TK and should consent to the proposed use, as a condition of fresh access to their TK. The second paragraph expresses the roles and responsibilities concerning the prior informed consent principle, but leaves flexibility to adapt the application of the principle to national legal systems, stakeholder needs and custodianship structures. The third paragraph sets out basic features of mechanisms to implement prior informed consent, applying the guiding principle 'effectiveness and accessibility of protection' to prior informed consent mechanisms, so as to ensure that such mechanisms provide for legal certainty and are appropriate. An explicit link with equitable benefit-sharing is made through the requirement that prior informed consent should also entail concluding mutually agreed terms on the use and sharing of benefits arising from the use.

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[18] United States of America (WIPO/GRTKF/IC/6/14, paragraph 76)

The provision recognizes and accommodates the diversity of existing approaches to prior informed consent and merely provides *that* the principle should be applied. In practice, prior informed consent systems might follow certain basic principles that have been developed and agreed internationally,[19] such as providing for legal certainty and clarity; minimizing transaction costs for access procedures; ensuring that restrictions on access are transparent and legally based. However, from the point of view of these principles, as long as the basic principle is applied, the provision leaves the precise modalities of application to the national law of the country where the TK is located, given the numerous and diverse existing TK laws and the diverse needs of TK holders and custodianship structures.

Changes reflecting stakeholder comments and inputs received on this provision

Some comments suggested that the application of prior informed consent principles should be limited to "access" to TK and should not apply to the "acquisition" of TK. Consequently, the term "acquisition" has been deleted. Following a range of comments on

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19 See Section IV.C.1 ('Basic Principles of a Prior Informed Consent System'), *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (Decision VI/24A, Annex)

the basic features of prior informed consent measures, which are described in the provision, the features have been adapted to directly implement Guiding Principle A.3 on "Effectiveness and accessibility of protection".

*Comments and inputs reflected*: Brazil, ICC, Saami Council, OAPI, United States of America

ARTICLE 8

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; use in government hospitals, especially by traditional knowledge holders attached to such hospitals; or use for other public health purposes.*

*2. In particular national authorities may exclude from the principle of prior informed consent the fair use of traditional knowledge which is already readily available to the general public, provided that users of that traditional knowledge provide equitable compensation for industrial and commercial uses of that traditional knowledge.*

COMMENTARY ON

ARTICLE 8

Like the rights and entitlements granted in other fields of legal protection, rights in traditional knowledge may be limited or qualified so as to avoid unreasonable prejudice to the interests of society as a whole, to the customary transmission of TK systems themselves, and other legitimate interests. This provision sets out such exceptions and limitations in relation to the entitlements and rights provided in the preceding provisions. It ensures that *sui generis* protection does not adversely affect the customary availability of TK to the TK holders themselves by interfering with their customary practices of using, exchanging, transmitting and practicing their TK. It also foresees that TK protection should not interfere with household uses and public health uses of traditional medicine. Besides the general exclusions in paragraph 1 which apply to misappropriation in general, a specific optional exclusion is foreseen for the prior informed consent requirement. It concerns knowledge that is already readily available to the general public and the exclusion is subject to the requirement that users provide equitable compensation for industrial and commercial uses.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on two aspects. First, a clarification was requested on subparagraph 8.1(ii) regarding use in government hospitals. This exception derives from the Thai law on traditional medicine and is focused on ensuring that TK protection does not restrain and hamper the public health benefits which derive from the use of traditional medicine in non-profit government hospitals, especially at the local and district level, to which traditional medicine practitioners may often be attached. Following the request for clarification, the language of subparagraph (ii) was specified accordingly. The second comment proposed that fair use should not be addressed in this provision and the first paragraph was modified accordingly.

*Comments and inputs reflected*: Brazil, China, OAPI.

## ARTICLE 9

## DURATION OF PROTECTION

*1. Protection of traditional knowledge against misappropriation should last as long as the traditional knowledge fulfills the criteria of eligibility for protection according to Article 4.*

*2. If competent authorities make available through national or regional measures additional or more extensive protection for traditional knowledge than is set out in these Principles, those laws or measures shall specify the duration of protection.*

COMMENTARY ON

ARTICLE 9

An important element of any protection measure is the duration of the rights or entitlements which are made available by that measure. In the field of TK protection this has been a particularly difficult element and most conventional IP rights have been considered inappropriate for this field because they foresee a limited term of protection. Existing *sui generis* systems for TK protection have utilized a range of options to define the duration of protection: a single, limited term of protection; successively renewable limited terms; or an unlimited term of protection. Given the inter-generational transmission and creation of traditional knowledge, TK holders have called for a long or unlimited term of protection.

This provision foresees a duration of protection which is not limited to a specific term. This is because TK protection under these Principles is not comparable to those IP titles which grant a time-limited exclusive property right (e.g., a patent or a trademark), but rather resembles those forms of protection which deal with a distinctive association between the beneficiaries of protection and the protected subject matter, and which last as long as that association exists (e.g., the protection of goodwill, personality, reputation, confidentiality, and unfair competition in general). Therefore, the entitlement of TK holders to be protected against misappropriation has been described by one delegation as "an inalienable, unrenouncable and imprescriptable right".[20] In analogy with other forms of unfair competition law based on this distinctive association and based on "support [for] the protection of TK through the suppression of unfair competition"[21], this provision stipulates that the duration of protection against misappropriation should last as long as the distinctive association remains intact and the knowledge therefore constitutes "traditional knowledge". The distinctive association exists as long as the knowledge is maintained by traditional knowledge holders, remains distinctively associated with them, and remains integral to

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20 Brazil (WIPO/GRTKF/IC/7/15 Prov, paragraph 110)

21 United States of America (WIPO/GRTKF/IC/6/14, paragraph 76)

their collective identity (see Articles 4 and 5). So long as these criteria of eligibility are fulfilled, the protection of TK under these Principles may be unlimited.

Since numerous countries already make available through their national or regional laws more extensive TK protection than is required in these Principles, the second paragraph specifies that the duration of this more extensive or additional protection should be specified in the relevant laws or measures. The provision is silent on the whether the duration of such additional rights should be for a limited term or not. It merely requires that the duration should be specified and thus leaves to national policy making the decision what the specified duration should be. This accommodates all existing national *sui generis* laws, whether or not they provide for a limited term of protection.

Changes reflecting stakeholder comments and inputs received on this provision

Comments on this provision focused on simplifying and streamlining the first paragraph of the provision and thus the latter part of the first paragraph has been deleted as compared to the version contained in document WIPO/GRTKF/IC/7/5. In order to address the question of duration of possible additional protection and in order to accommodate existing *sui generis* TK systems, the second paragraph has been added.

*Comments and inputs reflected*: Brazil, OAPI, Saami Council, IPCB.

## ARTICLE 10

## TRANSITIONAL MEASURES

*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. Acquisition, appropriation or use prior to the entry into force of the protection should be regularized within a reasonable period of that protection coming into force. There should however be equitable treatment of rights acquired by third parties in good faith.*

COMMENTARY ON

ARTICLE 10

The application of a new requirement for legal protection may have retrospective effect, may exclude retroactivity, or may adopt a range of intermediate approaches which apply varying degrees of retroactivity. Applying protection with retrospective effect can create difficulties because third parties may have already used the protected material in good faith, believing it not to be subject to legal protection. In some legal and policy contexts, the rights and interests of such good faith third parties are recognized and respected through measures such as a continuing entitlement to use the protected material, possibly subject to an equitable compensation, or a prescribed period within which to conclude any continuing good faith use (such as sales of existing goods that would otherwise infringe the new right). On the other hand, the traditional context of TK means that proponents of protection have sought some degree of retrospectivity.

Between the extreme positions of absolute retroactivity and non-retroactivity, this provision seeks to provide an intermediate solution, in terms of which recent utilizations, which become subject to authorization under the law or under any other protection measure, but were commenced without authorization before the entry into force, should be regularized as far as possible within a reasonable period. This requirement of regularization, however, is subject to equitable treatment of rights acquired by third parties in good faith. With this arrangement, the provision conforms broadly with the approach taken in other protection systems, and is consistent with the exceptions and limitations set out in Article 8, above.

<u>Changes reflecting stakeholder comments and inputs received on this provision</u>

Following comments by Committee Members, the provision has been renamed as "transitional measures". Member States comments also suggested that the reference to "a certain period" be replaced with "a reasonable period" and that use in good faith not be addressed in this provision. The changes are reflected accordingly.

*Comments and inputs reflected*: Brazil, OAPI

## ARTICLE 11

## FORMALITIES

*1. Eligibility for protection of traditional knowledge against acts of misappropriation 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 needs and aspirations of 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.*

COMMENTARY ON

ARTICLE 11

Existing TK protection systems take a variety of approaches towards formalities as a requirement of protection: they may expressly require registration of the knowledge as a condition of protection; they may establish registries or databases, but not link them as a requirement to the acquisition of rights; or they may provide that protection does not require formalities. In the legal protection of know-how and innovation, there are trade-offs between legal predictability and clarity on the one hand, and flexibility and simplicity on the other hand. A registration-based system provides greater predictability and makes it easier in practice to enforce the rights. But it can mean that the TK holders need to take specific legal steps, potentially within a defined time-frame, or risk losing the benefits of protection; this may impose burdens on communities who lack the resources or capacity to undertake the necessary legal procedures. A system without formalities has the benefit of automatic protection, and requires no additional resources or capacity for the right to be available.

This provision clarifies that the general safeguard against misappropriation would not be conditional on registration of TK in databases, registries or any other formalities. This reflects concerns and skepticism which certain countries and communities have expressed about the use of registry and database systems.

However, a number of countries have already established *sui generis* systems which provide for registration as a condition of acquiring exclusive rights over registered knowledge. Therefore, paragraph 2 clarifies that such additional protection, established subject to national law and policies, may require such formalities. It thereby recognizes the diversity of existing protection systems which include registration-based systems, but does not prescribe any approach which requires formalities. In addition, it clarifies that appropriate registration or recordal should not jeopardize or compromise the rights and interests of TK holders in relation to undisclosed elements of their knowledge.

*Comments and inputs reflected*: OAPI, UNU/IAS

## ARTICLE 12

## CONSISTENCY WITH THE GENERAL LEGAL FRAMEWORK

*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 and/or use traditional knowledge does not imply permission to access and/or use associated genetic resources and vice versa.*

COMMENTARY ON

ARTICLE 12

Traditional knowledge protection would inevitably interface with other legal systems, especially legal systems regulating access to genetic resources which are associated with the protected TK. This provision ensures consistency with those frameworks, while allowing for appropriate independence of the two regulatory systems. The first sentence of the provision is a direct counterpart to paragraph 37 of the Bonn Guidelines which establishes the independence of prior informed consent procedures for access to genetic resources from access to TK related to those resources. The sentence in this provision mirrors the same approach by establishing that independence from the direction of prior informed consent for TK related to biodiversity components.

Changes reflecting stakeholder comments and inputs received on this provision

The wording in the second sentence has been clarified to cover both access to, and use of, TK and associated genetic resources. Furthermore, the scope of this provision has been significantly narrowed to address only the interfaces between TK protection and legal frameworks regulating access to associated genetic resources, rather than addressing the general legal framework at large.

*Comments and inputs reflected*: Australia, Brazil, OAPI, Saami Council

ARTICLE 13

ADMINISTRATION AND ENFORCEMENT OF PROTECTION

*1 (a). 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 misappropriation of, or an other act of unfair competition in relation to, that knowledge;*

*(iii) determining whether prior informed consent for access to and use of traditional knowledge has been granted;*

*(iv) determining fair and equitable benefit-sharing;*

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

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

*(b) The identity of the competent national or regional authority or authorities should be communicated to an international body and published widely so as to facilitate cooperation and exchange of information in relation to protection of traditional knowledge and the equitable sharing of benefits.*

*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 public interest.*

COMMENTARY ON

ARTICLE 13

Traditional knowledge protection can be administered and enforced in diverse ways. Typically, TK protection measures identify certain procedures as well as national authorities which ensure effectiveness and clarity in the protection of TK. This provision sets out the key tasks and functions of such a "competent authority", without seeking to specify any particular form of institutional structure, since institutional and administrative arrangements may vary widely from country to country.

A general role of the competent authority may be to assist in awareness raising about and general administration of the protection of TK. This could entail, for example, providing information about TK protection to raise awareness of TK holders and the general public about TK protection; playing a role in determining misappropriation, prior informed consent and equitable benefit-sharing; and providing a national or regional focal point for TK protection matters.

A specific role may be envisaged for competent authorities in enforcing protection of TK. Most existing *sui generis* laws provide that acts that contravene the laws shall be punished with sanctions such as warnings, fines, confiscation of products derived from TK, cancellation/revocation of access to TK, etc. For example, the Indian Arts and Crafts Act of the United States of America contains extensive enforcement provisions, constituting some of the strongest enforcement provisions of all *sui generis* TK laws described to the Committee.[22] There may be practical difficulties for holders of TK to enforce their rights, which raises the possibility of a collective system of administration, or a specific role for government agencies in monitoring and pursuing infringements of rights. In the above-mentioned Indian Arts and Crafts Act, for

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[22] A person who sells a product falsely suggesting it is Indian produced can be subject to very heavy fines and imprisonment, with penalties escalating for repeat infringement.

example, the Indian Arts and Crafts Board has a specific role in monitoring violations of this law.[23]

The wording in the chapeau specifies that the "appropriate competent authority" could be national or regional. Indeed, several regional institutions and authorities have already decided to examine this possibility, such as ARIPO, OAPI, the South Asian Association for Regional Cooperation (SAARC) and the Pacific Community. This reflects the possibility of addressing the issue of regional TK through appropriate regional and sub-regional institutional arrangements and competent authorities *inter alia.*

Changes reflecting stakeholder comments and inputs received on this provision

Subparagraph 1(iv) has been brought into line with the amendment of Article 6 from an equitable compensation approach towards an equitable benefit-sharing model. The competencies of the national or regional authority have been accordingly revised. References to the "acquisition" and "maintenance" of rights have been deleted, since Committee members considered that the rights of indigenous peoples to their traditional knowledge constituted inalienable prior rights, and could not be "acquired" or alienated on the marketplace.

*Comments and inputs reflected*: Brazil, OAPI, Saami Council

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23 See WIPO/GRTKF/IC/5/INF/6, Annex.

## ARTICLE 14

## INTERNATIONAL AND REGIONAL PROTECTION

*The protection, benefits and advantages available to holders of TK under the national measures or laws that give effect to these international standards should be available to all eligible traditional knowledge holders, who nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign holders of TK should enjoy benefits of protection to at least the same level as traditional knowledge holders who are nationals of the country of protection. Exceptions to this principle should only be allowed for essentially administrative matters such as appointment of a legal representative or address for service, or to maintain reasonable compatibility with domestic programs which concern issues not directly related to the prevention of misappropriation of traditional knowledge.*

COMMENTARY ON

ARTICLE 14

The General Assembly has instructed the Committee "to focus its work on the international dimension". An essential element of addressing this dimension is to establish standards of treatment which apply to foreign nationals in respect of the protection of TK. Existing systems have utilized several standards which enable nationals of one country to enjoy legal protection in a foreign jurisdiction. These include national treatment, assimilation, fair and equitable treatment, the most-favored nation principle, reciprocity, and mutual recognition. A concise summary of each of these standards and their possible implications for international TK protection are contained in document WIPO/GRTKF/IC/8/6.

To date Committee members have provided limited guidance on how the international dimension should addressed on a technical level. However, one Member State proposal on 'Elements of an international instrument, or instruments', which was put forward by the African Group and widely supported by Committee members, foresees some form of application of the principle of national treatment.[24] This provision therefore sets out a flexible form of national treatment, which would ensure that eligible foreign TK holders should be entitled to protection against misappropriation and misuse of their TK, provided that they are located in a country which is prescribed as eligible. "National treatment" is a principle whereby a host country would extend to foreign TK holders treatment that is at least as favorable as the treatment it accords to national TK holders in similar circumstances. In this way national treatment standards seek to ensure a degree of legal equality between foreign and national TK holders. It is important to note that national treatment is a relative standard whose content depends on the underlying state of treatment for domestic TK holders.

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24 Proposal by the African Group, 'General Elements' (WIPO/GRTKF/IC/6/12, Annex)

The function of the illustrative language contained in this draft provision is not to prescribe any particular approach, but rather to help identify and highlight the important policy choices that must be made in the formulation of an international instrument or instruments in this area, and to invite further guidance from the Committee members.

While a national treatment approach would, in the light of precedent and past experience in the IP field, appear to be an appropriate starting point, the very nature of TK and the *sui generis* forms of protection being called for by many Committee participants, suggests that national treatment be supplemented by certain exceptions and limitations or other principles such as mutual recognition, reciprocity and assimilation, especially when this concerns the legal status and customary laws of beneficiaries of protection. Under one strict conception of national treatment, a foreign court in the country of protection would have recourse to its own laws, including its own customary laws, to determine whether a foreign community qualifies as a beneficiary. This may not satisfactorily address the situation from the community's viewpoint which would, reasonably, wish for its own customary laws to be referred to. Under mutual recognition and assimilation principles, a foreign court in the country of protection could accept that a community from the country of origin of the TK has legal standing to take action in country A as the beneficiary of protection because it has such legal standing in the country of origin. Thus, while national treatment might be appropriate as a general rule, it may be that mutual recognition, for example, would be the appropriate principle to address certain issues such as legal standing.

The protection of foreign holders of rights in TK is, however, a complex question as Committee participants have pointed out. Concerning TCEs/EoF, the Delegation of Egypt, for example, stated at the seventh session that "TCEs/EoF were often part of the shared cultural heritage of countries. Their regional and international protection was therefore a complex issue and it was necessary to be very careful. Countries would have to consult with each other before

adopting any legal measures in this regard".[25] Morocco noted the need for "wider consultation involving all interested parties before the establishment of legal protection mechanisms".[26] In view of this complexity, Committee discussions have thus far provided little specific guidance on this technical question and existing TK *sui generis* national laws either do not protect foreign rightsholders at all or show a mix of approaches.

25 WIPO/GRTKF/IC/7/15 Prov. Paragraph 69.
26 WIPO/GRTKF/IC/7/15 Prov. Paragraph 85.

# ภาคผนวก ข

**(เอกสารนี้อยู่ระหว่างการพิจารณา ไม่สามารถใช้อ้างอิง)**

# ร่างพระราชบัญญัติส่งเสริมและคุ้มครองภูมิปัญญา พ.ศ. .....

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มาตรา ๑ พระราชบัญญัตินี้เรียกว่า "พระราชบัญญัติส่งเสริมและคุ้มครองภูมิปัญญา พ.ศ. ....."

มาตรา ๒ พระราชบัญญัตินี้ให้ใช้บังคับตั้งแต่.....

มาตรา ๓ ในพระราชบัญญัตินี้

"ภูมิปัญญา" หมายความว่า องค์ความรู้ที่ได้รับการอนุรักษ์ ฟื้นฟู สืบทอด พัฒนา เผยแพร่ หรือใช้ประโยชน์ในวิถีชีวิต ในราชอาณาจักรไทย

"ชุมชนท้องถิ่น" หมายความว่า กลุ่มของประชาชนที่ตั้งถิ่นฐานและสืบทอดระบบวัฒนธรรมร่วมกันมาโดยต่อเนื่อง และได้อนุรักษ์ ฟื้นฟู สืบทอด พัฒนา เผยแพร่ หรือใช้ประโยชน์ภูมิปัญญา

"พนักงานเจ้าหน้าที่" หมายความว่า ผู้ซึ่งรัฐมนตรีประกาศแต่งตั้งให้ปฏิบัติการตามพระราชบัญญัตินี้

"เลขาธิการ" หมายความว่า เลขาธิการสำนักงานคณะกรรมการส่งเสริมและคุ้มครองภูมิปัญญา

"รัฐมนตรี" หมายความว่า รัฐมนตรีผู้รักษาการตามพระราชบัญญัตินี้

มาตรา ๔ ให้รัฐมนตรีประจำสำนักนายกรัฐมนตรีรักษาการตามพระราชบัญญัตินี้และให้มีอำนาจแต่งตั้งพนักงานเจ้าหน้าที่ ออกกฎกระทรวงและประกาศเพื่อปฏิบัติการตามพระราชบัญญัตินี้

กฎกระทรวงและประกาศนั้น เมื่อได้ประกาศในราชกิจจานุเบกษาแล้วให้ใช้บังคับได้

## หมวด ๑
## คณะกรรมการ

มาตรา ๕ ให้มีคณะกรรมการนโยบายการส่งเสริมและคุ้มครองภูมิปัญญา ประกอบด้วยนายกรัฐมนตรีหรือรองนายกรัฐมนตรีที่ได้รับมอบหมายเป็นประธานกรรมการ รัฐมนตรีว่าการกระทรวงวัฒนธรรม รัฐมนตรีว่าการกระทรวงศึกษาธิการ รัฐมนตรีว่าการกระทรวงพาณิชย์ รัฐมนตรีว่าการกระทรวงเกษตรและสหกรณ์ รัฐมนตรีว่าการกระทรวงทรัพยากรธรรมชาติและสิ่งแวดล้อม รัฐมนตรีว่าการกระทรวงสาธารณสุข รัฐมนตรีว่าการกระทรวงมหาดไทย รัฐมนตรีว่าการกระทรวงการต่างประเทศ รัฐมนตรีประจำสำนักนายกรัฐมนตรี และกรรมการผู้ทรงคุณวุฒิซึ่งคณะรัฐมนตรีแต่งตั้งหกคน ซึ่งจะต้องแต่งตั้งจากผู้เชี่ยวชาญด้านภูมิปัญญาระดับภูมิภาคหกคน

ให้คณะกรรมการนโยบายการส่งเสริมและคุ้มครองภูมิปัญญามีอำนาจหน้าที่ในการพิจารณานโยบายและแผนการส่งเสริมและคุ้มครองภูมิปัญญา และนำเสนอคณะรัฐมนตรีเพื่อพิจารณาอนุมัติ

มาตรา ๖ ให้มีคณะกรรมการบริหารการส่งเสริมและคุ้มครองภูมิปัญญา ประกอบด้วยปลัดสำนักนายกรัฐมนตรีเป็นประธานกรรมการ เลขาธิการสำนักงานคณะกรรมการวัฒนธรรมแห่งชาติ เลขาธิการสำนักงานนโยบายและแผนทรัพยากรธรรมชาติ และสิ่งแวดล้อม เลขาธิการสำนักงานคณะกรรมการการศึกษาแห่งชาติ อธิบดีกรมทรัพย์สินทางปัญญา อธิบดีกรมศิลปากร อธิบดีกรมวิชาการเกษตร อธิบดีกรมส่งเสริมการเกษตร อธิบดีกรมการแพทย์แผนไทยและการแพทย์ทางเลือก อธิบดีกรมการพัฒนาชุมชน และกรรมการผู้ทรงคุณวุฒิซึ่งคณะรัฐมนตรีแต่งตั้งสิบสองคน ในจำนวนนี้จะต้องแต่งตั้งจากผู้เชี่ยวชาญด้านภูมิปัญญาระดับภูมิภาคหกคน ผู้เชี่ยวชาญด้านภูมิปัญญาจากสถาบันการศึกษาสองคน ผู้เชี่ยวชาญด้านกฎหมายคุ้มครองภูมิปัญญาสองคน ผู้แทนองค์การพัฒนาเอกชนที่ไม่แสวงหากำไรที่มีกิจกรรมเกี่ยวกับการส่งเสริมและคุ้มครองภูมิปัญญาหนึ่งคน ผู้แทนสมาคมที่มีวัตถุประสงค์เกี่ยวกับการใช้ประโยชน์ภูมิปัญญาหนึ่งคนเป็นกรรมการ โดยมีเลขาธิการสำนักงานคณะกรรมการส่งเสริมและคุ้มครองภูมิปัญญาเป็นกรรมการและเลขานุการ

กรรมการผู้ทรงคุณวุฒิซึ่งเป็นผู้เชี่ยวชาญด้านภูมิปัญญาระดับภูมิภาค ต้องเป็นผู้ที่มีประสบการณ์ด้านการส่งเสริมและคุ้มครองภูมิปัญญา โดยให้คัดเลือกจากการเสนอชื่อของกลุ่ม ชมรม สมาคม กลุ่มภูมิปัญญาหรือวัฒนธรรมของทุกภูมิภาค โดยต้องมีกรรมการจากภูมิภาคละอย่างน้อยหนึ่งคน

กรรมการผู้ทรงคุณวุฒิจากองค์การพัฒนาเอกชนที่ไม่แสวงหากำไรที่มีกิจกรรมเกี่ยวกับการส่งเสริมและคุ้มครองภูมิปัญญาตามวรรคหนึ่ง ให้คัดเลือกจากรายชื่อที่เสนอโดยองค์การพัฒนาเอกชนดังกล่าว

วิธีการคัดเลือกกรรมการผู้ทรงคุณวุฒิ ให้เป็นไปตามหลักเกณฑ์และวิธีการที่กำหนดในกฎกระทรวง

มาตรา ๗ ให้คณะกรรมการบริหารการส่งเสริมและคุ้มครองภูมิปัญญามีอำนาจหน้าที่ดังต่อไปนี้

(๑) จัดทำนโยบายและแผนการส่งเสริมและคุ้มครองภูมิปัญญาและนำเสนอคณะกรรมการนโยบายการส่งเสริมและคุ้มครองภูมิปัญญา

(๒) สนับสนุนและส่งเสริมการอนุรักษ์ ฟื้นฟู สืบทอด และการใช้ประโยชน์ภูมิปัญญา

(๓) สนับสนุนและส่งเสริมการจัดทำและจัดการฐานข้อมูลภูมิปัญญา

(๔) กำหนดมาตรการเพื่อเสริมสร้างความมั่นคงและประสานงานระหว่างส่วนราชการ รัฐวิสาหกิจ ชุมชน และองค์กรเอกชนที่ดำเนินงานเกี่ยวกับการส่งเสริมและคุ้มครองภูมิปัญญา

(๕) เสนอแนะรัฐมนตรีในการออกกฎกระทรวงและประกาศตามพระราชบัญญัตินี้

(๖) ให้ความเห็นหรือคำแนะนำแก่รัฐมนตรีเกี่ยวกับการปฏิบัติการตามพระราชบัญญัตินี้

(๗) วางระเบียบเกี่ยวกับข้อยกเว้นในการใช้ประโยชน์ภูมิปัญญา

(๘) วางระเบียบเกี่ยวกับการบริหารกองทุนส่งเสริมและคุ้มครองภูมิปัญญา

(๙) ปฏิบัติการอื่นตามที่กฎหมายบัญญัติให้เป็นหน้าที่ของคณะกรรมการ

มาตรา ๘ กรรมการผู้ทรงคุณวุฒิตามมาตรา ๕ และ ๖ มีวาระการดำรงตำแหน่งคราวละสี่ปี

กรรมการซึ่งพ้นจากตำแหน่งอาจได้รับการแต่งตั้งอีกได้ แต่จะดำรงตำแหน่งเกินสองวาระติดต่อกันไม่ได้

มาตรา ๙ นอกจากการพ้นจากตำแหน่งตามวาระตามมาตรา ๘ กรรมการผู้ทรงคุณวุฒิตามมาตรา ๕ และ ๖ พ้นจากตำแหน่ง เมื่อ

(๑) ตาย

(๒) ลาออก

(๓) เป็นบุคคลล้มละลาย

(๔) เป็นคนไร้ความสามารถหรือคนเสมือนไร้ความสามารถ

(๕) ได้รับโทษจำคุกโดยคำพิพากษาถึงที่สุดให้จำคุก เว้นแต่เป็นโทษสำหรับความผิดที่กระทำโดยประมาท หรือความผิดลหุโทษ

ในกรณีที่กรรมการผู้ทรงคุณวุฒิพ้นจากตำแหน่งก่อนวาระ ให้คณะรัฐมนตรีแต่งตั้งบุคคลซึ่งได้รับการคัดเลือกตามมาตรา ๕ และ ๖ เป็นกรรมการแทน เว้นแต่วาระการดำรงตำแหน่งของกรรมการผู้ทรงคุณวุฒิเหลือไม่ถึงเก้าสิบวันจะไม่แต่งตั้งก็ได้ และให้ผู้ได้รับแต่งตั้งให้ดำรงตำแหน่งแทนอยู่ในตำแหน่งเท่ากับวาระที่เหลืออยู่ของผู้ซึ่งตนแทน

มาตรา ๑๐ การประชุมของคณะกรรมการต้องมีกรรมการมาประชุมไม่น้อยกว่ากึ่งหนึ่งของจำนวนกรรมการทั้งหมดจึงจะเป็นองค์ประชุม

ถ้าประธานกรรมการไม่อยู่ในที่ประชุม หรือไม่สามารถปฏิบัติหน้าที่ได้ให้กรรมการซึ่งมาประชุมเลือกกรรมการคนหนึ่งขึ้นทำหน้าที่แทน

การวินิจฉัยชี้ขาดของที่ประชุมให้ถือเสียงข้างมาก กรรมการคนหนึ่งมีเสียงหนึ่งในการลงคะแนน ถ้าคะแนนเสียงเท่ากัน ให้ประธานในที่ประชุมออกเสียงเพิ่มขึ้นอีกเสียงหนึ่งเป็นเสียงชี้ขาด

ในกรณีที่กรรมการเป็นผู้มีส่วนได้เสียไม่ว่าโดยตรงหรือโดยอ้อมในเรื่องใดห้ามมิให้กรรมการผู้นั้นเข้าร่วมประชุม

มาตรา ๑๑ ในการปฏิบัติหน้าที่ตามพระราชบัญญัตินี้ คณะกรรมการมีอำนาจแต่งตั้งคณะอนุกรรมการ เพื่อปฏิบัติการตามที่คณะกรรมการมอบหมายได้

คณะอนุกรรมการตามวรรคหนึ่งมีอำนาจหน้าที่ตามที่คณะกรรมการมอบหมาย

ให้นำความตามมาตรา ๑๐ มาใช้บังคับแก่การประชุมของคณะอนุกรรมการโดยอนุโลม

## หมวด ๒
## ภูมิปัญญาชาติ

มาตรา ๑๒ ภูมิปัญญาชาติ หมายความว่า ภูมิปัญญาที่กำเนิดภายในราชอาณาจักรไทยหรือมีอยู่ในราชอาณาจักรไทย ซึ่งได้ประกาศขึ้นทะเบียนตามพระราชบัญญัตินี้ และต้องประกอบด้วยลักษณะ ดังต่อไปนี้

(๑) มีการสั่งสม เรียนรู้ กลั่นกรอง พัฒนาและสืบทอดจากรุ่นสู่รุ่น

(๒) มีคุณค่าเป็นที่ประจักษ์โดยทั่วไป

ภูมิปัญญาชาติตามวรรคหนึ่ง ได้แก่ภูมิปัญญาด้านต่างๆ ดังต่อไปนี้ เกษตรกรรม ภาษาและวรรณกรรม ความเชื่อ ประเพณี พิธีกรรม ศิลปกรรม นันทนาการ อาหารและโภชนาการ หัตถกรรม การจัดการทรัพยากรธรรมชาติ สิ่งแวดล้อมและการจัดระบบความสัมพันธ์ในสังคม หรือภูมิปัญญาอื่นใดในด้านวิทยาศาสตร์ ด้านสังคมศาสตร์ หรือด้านมนุษยศาสตร์ ทั้งนี้ไม่รวมถึงภูมิปัญญาการแพทย์แผนไทยตามกฎหมายคุ้มครองและส่งเสริมภูมิปัญญาการแพทย์แผนไทยและพันธุ์พืชตามกฎหมายคุ้มครองพันธุ์พืช

มาตรา ๑๓ เพื่อประโยชน์ในการคุ้มครองภูมิปัญญาชาติ ให้รัฐมนตรีโดยคำแนะนำของคณะกรรมการบริหารการส่งเสริมและคุ้มครองภูมิปัญญามีอำนาจประกาศขึ้นทะเบียนโดยการกำหนดประเภท ชนิด ชื่อ ลักษณะและชุมชนท้องถิ่นซึ่งเป็นแหล่งที่มาของภูมิปัญญาชาติที่มีความสำคัญให้เป็นภูมิปัญญาชาติที่ได้รับการคุ้มครอง

การประกาศขึ้นทะเบียนภูมิปัญญาชาติตามวรรคหนึ่งให้เป็นไปตามหลักเกณฑ์และวิธีการที่กำหนดในกฎกระทรวง

## หมวด ๓
## การคุ้มครองภูมิปัญญาชาติ

มาตรา ๑๔ ผู้ใดใช้ภูมิปัญญาชาติตามมาตรา ๑๓ เพื่อประโยชน์ในทางการค้า ละต้องได้รับอนุญาตจากพนักงานเจ้าหน้าที่ และทำข้อตกลงแบ่งปันผลประโยชน์ โดยให้นำเงินรายได้ตามข้อตกลงแบ่งปันผลประโยชน์ส่งเข้ากองทุนส่งเสริมและคุ้มครองภูมิปัญญา ทั้งนี้ ให้เป็นไปตามหลักเกณฑ์ วิธีการ และเงื่อนไขที่กำหนดในกฎกระทรวง

ข้อตกลงแบ่งปันผลประโยชน์อย่างน้อยต้องมีรายการดังต่อไปนี้

(๑) วัตถุประสงค์ของการใช้ประโยชน์ภูมิปัญญาชาติ

(๒) การบรรยายลักษณะของภูมิปัญญาชาติ

(๓) ข้อผูกพันของผู้ได้รับอนุญาต

(๔) การกำหนดความเป็นเจ้าของทรัพย์สินทางปัญญาในผลงานที่ได้มาจากการใช้ประโยชน์ภูมิปัญญาชาติในข้อตกลง

(๕) การกำหนดจำนวน อัตรา และระยะเวลาการแบ่งปันผลประโยชน์ตามข้อตกลงแบ่งปันผลประโยชน์ในผลงานที่ได้มาจากการใช้ภูมิปัญญาชาติในข้อตกลง

(๖) อายุของข้อตกลง

(๗) การยกเลิกข้อตกลง

(๘) การกำหนดวิธีการระงับข้อพิพาท

(๙) รายการอื่นตามที่กำหนดในกฎกระทรวง

มาตรา ๑๕ ในกรณีที่ผู้ได้รับอนุญาตให้ใช้สิทธิในภูมิปัญญาชาติได้ใช้สิทธินั้นโดยขัดต่อความสงบเรียบร้อยหรือศีลธรรมอันดีของประชาชน หรือฝ่าฝืน หรือมิได้ปฏิบัติตามเงื่อนไขที่กำหนดตามความในมาตรา ๑๔ หรือใช้สิทธิอันก่อให้เกิดความเสื่อมเสียต่อภูมิปัญญาชาติ พนักงานเจ้าหน้าที่มีอำนาจสั่งเพิกถอนการอนุญาตให้ใช้สิทธิในภูมิปัญญาชาตินั้นได้

การเพิกถอนการอนุญาตให้ใช้สิทธิในภูมิปัญญาชาติตามมาตรานี้ ให้เป็นไปตามหลักเกณฑ์และวิธีการที่กำหนดในกฎกระทรวง

มาตรา ๑๖ ก่อนที่จะสั่งเพิกถอนการอนุญาตให้ใช้สิทธิในภูมิปัญญาชาติตามมาตรา ๑๕ ให้พนักงานเจ้าหน้าที่มีหนังสือแจ้งให้ผู้ได้รับอนุญาตให้ใช้สิทธิในภูมิปัญญาชาตินั้นทราบเพื่อยื่นคำชี้แจงภายในสิบห้าวันนับแต่วันที่ได้รับหนังสือแจ้งจากพนักงานเจ้าหน้าที่

ในการสอบสวนข้อเท็จจริงตามวรรคหนึ่ง พนักงานเจ้าหน้าที่จะให้บุคคลที่เกี่ยวข้องชี้แจงและนำพยานหลักฐานมาแสดงเพื่อประกอบการพิจารณาก็ได้

เมื่อพนักงานเจ้าหน้าที่มีคำสั่งเพิกถอนการอนุญาตให้ใช้สิทธิในภูมิปัญญาชาติแล้ว ให้มีหนังสือแจ้งคำสั่งพร้อมด้วยเหตุผลให้ผู้ได้รับอนุญาตให้ใช้สิทธิในภูมิปัญญาชาติทราบภายในสามสิบวันนับแต่วันที่มีคำสั่งเพิกถอนการอนุญาตดังกล่าว

มาตรา ๑๗ ความในมาตรา ๑๔ ไม่ใช้บังคับแก่กรณีดังต่อไปนี้

(๑) การใช้ภูมิปัญญาชาติ โดยชุมชนท้องถิ่นซึ่งเป็นแหล่งที่มาของภูมิปัญญาชาติ

(๒) การใช้ภูมิปัญญาชาติโดยไม่มีวัตถุประสงค์เพื่อประโยชน์ในทางการค้า

(๓) การใช้ภูมิปัญญาชาติโดยภาครัฐหรือที่ได้รับการสนับสนุนจากหน่วยงานภาครัฐ

(๔) การศึกษา ทดลอง หรือวิจัยภูมิปัญญาชาติที่มิได้มีวัตถุประสงค์เพื่อประโยชน์ในทางการค้า

ทั้งนี้ ให้ปฏิบัติตามระเบียบที่คณะกรรมการบริหารการส่งเสริมและคุ้มครองภูมิปัญญากำหนด

## หมวด ๔
## กองทุนส่งเสริมและคุ้มครองภูมิปัญญา

มาตรา ๑๘ ให้จัดตั้งกองทุนขึ้นกองทุนหนึ่งเรียกว่า "กองทุนส่งเสริมและคุ้มครองภูมิปัญญา" ในสำนักนายกรัฐมนตรี เพื่อเป็นทุนใช้จ่ายในการช่วยเหลือและอุดหนุนกิจการที่เกี่ยวกับการส่งเสริมและคุ้มครองภูมิปัญญา ประกอบด้วยเงินและทรัพย์สินดังต่อไปนี้

(๑) เงินรายได้จากข้อตกลงแบ่งปันผลประโยชน์จากการใช้ภูมิปัญญาชาติตามมาตรา ๑๔

(๒) เงินอุดหนุนจากรัฐบาล

(๓) เงินหรือทรัพย์สินที่มีผู้อุทิศให้

(๔) ดอกผลและผลประโยชน์อื่นใดที่เกิดจากกองทุน

เงินและทรัพย์สินอื่นตามวรรคหนึ่ง ให้ส่งเข้ากองทุนโดยไม่ต้องนำส่งคลังเป็นรายได้แผ่นดิน

มาตรา ๑๙ เงินกองทุนให้ใช้จ่ายเพื่อกิจการดังต่อไปนี้

(๑) ส่งเสริมและสนับสนุนกิจการใดๆ ของชุมชนท้องถิ่นซึ่งเป็นแหล่งที่มาของภูมิปัญญาชาติที่เกี่ยวกับการอนุรักษ์ ฟื้นฟู สืบทอดหรือใช้ประโยชน์ภูมิปัญญา

(๒) ส่งเสริมและสนับสนุนกิจการใดๆ ที่เกี่ยวกับการศึกษาวิจัยและพัฒนาภูมิปัญญา (ตัดคำว่าของทิ้ง)

(๓) เป็นค่าใช้จ่ายในการบริหารกองทุน

การบริหารกองทุนและการควบคุมการใช้จ่ายเงินกองทุน ให้เป็นไปตามระเบียบที่คณะกรรมการบริหารการส่งเสริมและคุ้มครองภูมิปัญญากำหนดโดยความเห็นชอบของกระทรวงการคลัง

มาตรา ๒๐ ให้มีคณะกรรมการกองทุนคณะหนึ่ง ประกอบด้วยปลัดสำนักนายกรัฐมนตรี เป็นประธานกรรมการ และบุคคลอื่นซึ่งคณะกรรมการแต่งตั้งไม่เกินเจ็ดคนเป็นกรรมการ โดยมีเลขาธิการสำนักคณะกรรมการส่งเสริมและคุ้มครองภูมิปัญญาเป็นกรรมการและเลขานุการ

มาตรา ๒๑ ให้คณะกรรมการกองทุนมีอำนาจหน้าที่ดังต่อไปนี้

(๑) เสนอแนวทาง หลักเกณฑ์ เงื่อนไข และลำดับความสำคัญของการใช้จ่ายเงินกองทุนตามวัตถุประสงค์ที่กำหนดไว้ในมาตรา ๑๙ ต่อคณะกรรมการ

(๒) กำหนดระเบียบเกี่ยวกับหลักเกณฑ์และวิธีการขอจัดสรร ขอเงินช่วยเหลือหรือขอเงินอุดหนุนจากกองทุน

(๓) พิจารณาจัดสรรเงินกองทุนเพื่อใช้ตามวัตถุประสงค์ที่กำหนดไว้ในมาตรา ๑๕ ทั้งนี้ตามแนวทาง หลักเกณฑ์ เงื่อนไข และลำดับความสำคัญที่คณะกรรมการกำหนด

(๔) พิจารณาอนุมัติคำขอรับการส่งเสริมและสนับสนุนตามมาตรา ๑๕

(๕) ปฏิบัติการอื่นใดตามที่คณะกรรมการบริหารการส่งเสริมและคุ้มครองภูมิปัญญามอบหมาย

มาตรา ๒๒ ให้นำความในมาตรา ๘ และมาตรา ๙ มาใช้บังคับแก่วาระการดำรงตำแหน่งและการพ้นจากตำแหน่งของคณะกรรมการกองทุนโดยอนุโลม

ให้นำความในมาตรา ๑๐ มาใช้บังคับแก่การประชุมของคณะกรรมการกองทุนโดยอนุโลม

มาตรา ๒๓ ภายในหนึ่งร้อยยี่สิบวันนับแต่วันสิ้นปีปฏิทิน ให้คณะกรรมการกองทุนเสนองบดุลและรายงานการรับจ่ายเงินกองทุนในปีที่ล่วงมาแล้วต่อสำนักงานการตรวจเงินแผ่นดินเพื่อตรวจสอบรับรองและเสนอต่อคณะกรรมการ

งบดุลและรายงานการรับจ่ายเงินดังกล่าว ให้คณะกรรมการเสนอต่อรัฐมนตรีและให้รัฐมนตรีเสนอต่อคณะรัฐมนตรีเพื่อทราบและจัดให้มีการประกาศในราชกิจจานุเบกษา

## หมวด ๕
## การคุ้มครองสิทธิในภูมิปัญญา

มาตรา ๒๔ ในกรณีที่มีการฝ่าฝืนสิทธิในภูมิปัญญาชาติตามมาตรา ๑๔ ศาลมีอำนาจสั่งให้ผู้ฝ่าฝืนชดใช้ค่าเสียหายตามจำนวนที่ศาลเห็นสมควร โดยคำนึงถึงความร้ายแรงของความเสียหาย รวมทั้งการสูญเสียผลประโยชน์และค่าใช้จ่ายอันจำเป็นในการบังคับสิทธิ

มาตรา ๒๕ บรรดาสิ่งที่อยู่ในความครอบครองของผู้กระทำการอันเป็นการฝ่าฝืนสิทธิในภูมิปัญญาชาติตามมาตรา ๑๔ ให้ศาลสั่งริบเสียทั้งสิ้น

บรรดาสิ่งที่ศาลสั่งริบ ให้ตกเป็นของแผ่นดิน และให้สำนักงานคณะกรรมการส่งเสริมและคุ้มครองภูมิปัญญาไทยนำไปดำเนินการตามระเบียบที่เลขาธิการกำหนด โดยความเห็นชอบของคณะกรรมการ

## หมวด ๖
## บทกำหนดโทษ

มาตรา ๒๖ ผู้ใดไม่ปฏิบัติตามมาตรา ๑๔ ต้องระวางโทษจำคุกไม่เกินสองปี หรือปรับไม่เกินสี่แสนบาท หรือทั้งจำทั้งปรับ

มาตรา ๒๗ ผู้ใดใช้หรือกระทำการใดๆ เกี่ยวกับภูมิปัญญาชาติในทางที่เสื่อมเสีย ต้องระวางโทษจำคุกไม่เกินหนึ่งปี หรือปรับไม่เกินสองแสนบาท หรือทั้งจำทั้งปรับ

มาตรา ๒๘ ในกรณีที่ผู้กระทำความผิดซึ่งต้องรับโทษตามพระราชบัญญัตินี้ เป็นนิติบุคคลผู้แทนของนิติบุคคลนั้น ต้องรับโทษตามที่กฎหมายกำหนดไว้สำหรับความผิดนั้นๆ ด้วย เว้นแต่จะพิสูจน์ได้ว่าการกระทำของนิติบุคคลนั้นได้กระทำโดยตนมิได้รู้เห็นหรือยินยอมด้วย

ผู้รับสนองพระบรมราชโองการ

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นายกรัฐมนตรี