

**KEY ISSUES DISCUSSED AT THE THIRD NATIONAL CONSULTATION  
ON TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL  
EXPRESSIONS, December 15, 2012**

An overview of the discussions at the WIPO-IGC was presented. The discussions at the National Consultation then focused on a few key issues under the provisions on ‘Exceptions and Limitations’ under the TK and TCE texts. The Facilitator’s Text was used as the basis for the discussions.

A summary of the discussions is presented below.

**I. LIMITATIONS AND EXCEPTIONS**

*Text on Traditional Knowledge*

**Article 6: Limitations and Exceptions-Text contained in the Facilitators’ text**

6.1 Member States understand that [m]easures for the protection of traditional knowledge should not restrict the generation, customary use, transmission, exchange and development of traditional knowledge by the beneficiaries, within and among communities in the traditional and customary context, [in accordance with national law].

6.2 [Limitations on protection [should]/[shall] extend only to the utilization of traditional knowledge taking place outside the membership of the beneficiary community or outside traditional or cultural context.]

6.3 Member States may adopt appropriate limitations or exceptions under national law[, with the prior and informed consent of the beneficiaries], provided that the use of traditional knowledge:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

*Alternative*

(a) does not conflict with the normal utilization of the traditional knowledge by the beneficiaries; and (b) does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.

*Alternative*

6.3 Contracting Parties may adopt appropriate limitations or exceptions under national law for the following purposes:

- (a) teaching, learning, but does not include research resulting in profit-marking or commercial purposes;
- (b) for preservation, display and presentation in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes,

6.4 Contracting Parties may permit the use of traditional knowledge for epidemics and natural disaster response, provided that the beneficiaries are adequately compensated.  
[End of alternative]

6.4 [Secret and sacred traditional knowledge shall not be subjected to exceptions and limitations.]

6.5 [Regardless of whether such acts are already permitted under Article 6.2 or not, the following shall be permitted: (a) the use of traditional knowledge in cultural institutions recognized under the appropriate national law, archives, libraries, museums for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted; and (b) the creation of an original work of authorship inspired by traditional knowledge.]

6.6 [There shall be no right to [exclude others] from using knowledge that:

*Alternative*

6.6 The provisions of Article 3 shall not apply to any use of knowledge that:  
[End of alternative]

- (a) has been independently created;
- (b) derived from sources other than the beneficiary; or
- (c) is known outside of the beneficiaries' community.]

6.7 [Protected traditional knowledge shall not be deemed to have been misappropriated or misused if the protected traditional knowledge was:  
(a) obtained from a printed publication; (b) obtained from one or more holders of the protected traditional knowledge with their prior informed consent; or  
(c) mutually agreed terms for access and benefit sharing apply to the protected traditional knowledge that was obtained, and were agreed upon by the national contact point.]

6.8 [Except for the protection of secret traditional knowledge against disclosure, to the extent that any act would be permissible for this parties under the national law for knowledge protected by patent or trade secrecy laws, such act shall not be prohibited by the protection of traditional knowledge.]

6.9 [National authorities shall exclude from protection traditional knowledge that is already available without restriction to the general public.]

6.10 [National authorities may exclude from protection diagnostic, therapeutic and surgical methods for the treatment of humans or animals.]

6.11 [National authorities, in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use, authorize the use of protected traditional knowledge, without the consent of the protected traditional knowledge holder.]

## **Discussion on TK (Article 6: Limitations and Exceptions)**

As seen in the Facilitator's Text for Limitations and Exceptions above, there are several options and bracketed texts in Article 6. Discussions and feedback of the participants on each of the elements of Article 6 is presented below.

6.1: The participants deliberated on use of the phrase "*traditional and customary context*" in Clause 6.1. The views that were presented are summarized below.

- *One view was that both terms can be used since there is no fundamental distinction between the two. A suggestion was made that the phrase could read as: "traditional and/or customary" context.*
- *Another view was that customary need not always be 'traditional', and hence the phrase should read as "traditional and customary".*
- *The participants agreed that reference to 'national law' in the clause is important, and traditional/customary context has to be examined in the context of national law.*
- *A fundamental issue on which most participants agreed was that non-codified generally known uses of herbs and other material, cannot be considered as being freely available. It is for this purpose that it is important to ensure that the nation as a whole is the 'beneficiary' in respect of what is considered as 'widely spread' knowledge.*
- *Similarly, codified systems of knowledge – such as Ayurveda, Unani and Siddha are also not to be considered as being freely available.*
- *There was a fair amount of discussion of the impact of the treaty's obligations on 'Indian industry'. Ownership and control of Indian citizens, and incorporation in India were stated to be the primary factors for identification of 'Indian industry'. One view was that any law implementing the treaty would need to treat Indian industry more favourably. There was no consensus on this issue; however it was generally agreed that this issue could be considered by the implementing legislation and need not be addressed under the treaty.*
- *The general view expressed was that any industry's use of TK for manufacture of any product cannot be considered to be "traditional and customary context".*
- *There was some discussion on the interface with the Nagoya Protocol on Access and Benefit Sharing under the Convention on Biological Diversity, and its applicability to TK associated with Genetic Resources. The view expressed was that the TK treaty emerging from the WIPO IGC should not dilute the Nagoya Protocol.*
- *It was generally agreed by the participants that the WIPO IGC would have a wider scope and application to TK- both stand-alone and when*

*associated with genetic resources, and that it would in no way compromise on any of the provisions of the Nagoya Protocol. It was also highlighted that the CBD's focus was conservation and use of biological resources, whereas the purpose and focus of a TK Treaty would be on 'property rights' over TK.*

- *Several participants also highlighted the need for domestic legislation on protection of TK, which could provide a clear basis for the international position that can be taken. However the practical approach suggested by others was that India should continue negotiating at the international level for a strong treaty and that the national legislation should be developed in parallel.*

6.3: The discussions on the alternatives focused on the need to include exceptions such as:

- *Teaching, learning, but not research resulting in profit-making or commercial purposes.* In this regard, an issue discussed was that the obligations under the treaty would be triggered at the time of application of research results for commercial purposes.
- *For preservation, display and presentation in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes.*
- There was some discussion on whether publications of research results permissible. It was agreed that the key test would be whether the research would result in commercialization- at which point the obligations would trigger under the treaty.

6.5: With regard to sub-clause (b), it was agreed that there should be no exception for creation of an original work of authorship inspired by traditional knowledge.

6.6: The participants were of the view that none of the following can be accepted:

- (a) has been independently created;
- (b) derived from sources other than the beneficiary; or
- (c) is known outside of the beneficiaries' community.

6.7 None of the terms set forth under this clause can be acceptable.

6.8 This clause cannot be accepted either.

6.9 In this clause, the participants were of the view that the following cannot be accepted: *"traditional knowledge that is already available without restriction to the general public"*.

## 6.4 & 6.11:

With regard to these clauses, some participants were of the view that the provision needs to be developed so as to include clear conditions/safeguards regarding ‘other authorization’/ ‘Govt use’ as under TRIPS Art. 31. This would include elements such as remuneration and use for the limited purpose of the emergency, with clear limitations.

### *Text on Traditional Cultural Exceptions*

#### **Article 5: Limitations and Exceptions-Text contained in the Facilitators’ text**

1. Measures for the protection of traditional cultural expressions shall/should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context [consistent with national laws of the contracting parties/member States/members where applicable].
2. Limitations on protection shall/should extend only to the utilization of traditional cultural expressions taking place outside the membership of the beneficiary community or outside traditional or cultural context.
3. Contracting parties/Member States/Members may adopt appropriate limitations or exceptions under national law, provided that the use of traditional cultural expressions:

#### Alternative 1:

- (a) acknowledges the beneficiaries, where possible;
- (b) is not offensive or derogatory to the beneficiaries; and
- (c) is compatible with fair practice.

#### Alternative 2:

- (a) is limited to certain special cases;
- (b) does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and
- (c) does not unreasonably prejudice the legitimate interests of the beneficiaries.

4. Regardless of whether such acts are already permitted under Article 5(3) or not, the following shall/should be permitted [only with the free prior and informed consent of the beneficiaries]:

- (a) the use of traditional cultural expressions in archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education;

(b) [the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions].

5. [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law for works protected by copyright or signs and symbols protected by trademark law, such act shall/should not be prohibited by the protection of traditional cultural expressions].

### **Discussion on TCE (Article 5: Limitations and Exceptions)**

5.1: The discussions mirrored the views as under Clause 6.1 of the TK text.

5.3 The participants were of the view that Alternative 1 is acceptable, but not Alternative 2.

5.4 With reference to this clause, the discussions highlighted the following points:

- *PIC is something national law can provide. Need not be mentioned here.*
- *The Africa Group may insist on PIC. If so required, this may be accepted. (In such a case, domestic law may need to work out a generic deeming provision for acceptance.)*
- *As in the TK text, the participants agreed that we cannot accept “the creation of an original work of authorship inspired by or borrowed from traditional cultural expressions”.*

5.5 With reference to Clause 5.5, the discussions focused on the need to limit the exception in a manner that would build in concepts such as fair use and fair practice.

## **II. TK- OTHER ISSUES**

### **Article 3bis: Text on Scope of Protection and Sanctions**

3 BIS.1 Access to and use of traditional knowledge requires prior informed consent from the indigenous people or local community that is the beneficiary of protection according to Article 2. The use of such knowledge [should]/[shall] be in accordance with the terms the beneficiary may have set out as a condition for the consent. Such terms can, *inter alia*, determine that benefits arising from the use of the knowledge [should]/[shall] be shared with the beneficiary.

3 BIS.2 In addition to the protection provided for in paragraph 1, users of traditional knowledge which fulfills the criterion in Article 1, Subparagraph 2(a) [should]/[shall]:

(a) acknowledge the source of traditional knowledge and attribute the beneficiary, unless the beneficiary decides otherwise; and

(b) use the knowledge in a manner that respects the cultures and practices of the beneficiary.

3 BIS.3 When traditional knowledge is accessed or used in a manner that contravenes any of the provisions in paragraphs 1 and 2, the beneficiary [should]/[shall] have the right to:

- (a) request that the judicial authorities order the infringer to desist from further infringements; and
- (b) a fair compensation from an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

3 BIS.4 The Parties [should]/[shall] provide adequate and effective legal measures to ensure the application and enforcement of the provisions set out in paragraphs 1 to 3.

3 BIS.5 Protection of traditional knowledge under this instrument [should]/[shall] not affect:

- (a) access to or use of knowledge which is invented independently of traditional knowledge of indigenous peoples or local communities or is discovered from other sources than an indigenous people or local community; and
- (b) generation, sharing, preservation and transmission and customary use of traditional knowledge by the beneficiaries in the traditional and customary context.

### **Discussion on TK (Other issues) (Article 3bis: Text on Scope of Protection and Sanctions)**

*With regard to Article 3bis, the following points were highlighted:*

- (i) The need to assert positive rights in a clear manner was emphasized.*
- (ii) A suggestion was made that elements of Option 2 of Article 3, could be added to Article 3bis.1, to arrive at a compromise text.*
- (iii) Sub-clause 3.1(b)(iii) from Option 1 can also be added to Article 3bis1.*
- (iv) The modification would require deletion of the second and third sentences of Article 3bis.1.*
- (v) Sub-clauses 2 and 3 of Article 3bis can be agreed to.*
- (vi) Instead of specifying ‘local and indigenous communities’, reference should be limited to ‘beneficiaries’ under Art. 2.*
- (vii) Sub-clauses 3, 4 and 5 of Article 3bis cannot be accepted.*