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**International Vilm Workshop on Matters related to
Traditional Knowledge associated with Genetic
resources and the ABS Regime**

July 6-10, 2009



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on Matters related to
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with Genetic resources
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Results and documentation

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Cover photo: Midwives of lowland Quichua of Ecuador are holders of traditional knowledge.
(Cornelia Paulsch)

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**Proceedings of the
International Vilm Workshop on Matters related to Traditional Knowledge
associated with Genetic resources and the ABS Regime
6.-10. July 2009**

Introduction

CBD COP Decision IX/12 para. 18 encourages Parties to provide the ways and means to allow for sufficient preparation and to facilitate effective participation of indigenous and local communities in the process of the negotiation and elaboration of the international ABS regime. Accordingly, the Federal Agency for Nature Conservation on behalf of the German Federal Ministry of Environment, Nature Conservation and Nuclear Safety has organized an International Workshop on matters related to Traditional Knowledge associated with Genetic Resources and the International ABS-Regime.

The goal of the expert meeting was to exchange information and discuss practical implications of different views and options of draft text within the parameters of the Annex (UNEP/CBD/COP/DEC/IX/12 Annex 1) in order to support indigenous and local communities in the negotiations of the International ABS Regime.

The discussions took into account the results of the Vienna Workshop (Dec. 2008) as well as the results of the Seventh Ad hoc Open ended Working Group on ABS (ABS 7) and the Ad hoc technical Expert Group on Traditional Knowledge associated with Genetic Resources, held in Hyderabad, India., in June 2009.

In particular, the Workshop was meant to facilitate the preparation for, and progress at, the 8th meeting of the Ad Hoc Working Group on ABS (ABS 8), due to be held in Montreal, Canada on 9-15 November 2009.

The workshop took place at the Isle of Vilm, Germany from 06.-10. July 2009 and was attended by 25 participants.

In order to facilitate open discussions it was agreed that the meeting was held under Chatham House Rule. This means, participants are free to use the information received but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed. All participants attended in his/her personal capacity. In the sense of open discussions the aim of the workshop was not to reach a consensus on individual positions but rather to have an exchange of technical options and ideas.

As a starting point for discussions participants had been asked to submit ideas, views or options for operational text on the basis of a questionnaire that was circulated to participants

before the meeting. The discussions were based on but in no way restricted to these submissions. Furthermore, participants were given the possibility to address the meeting with presentations of information and views on specific topics.

Comments

As an outcome of the meeting some proposals for operational text are annexed to this document. They are available for free distribution, future use and reference and are intended to provide an informal input to the ABS negotiating process under the Convention on Biological Diversity.

The text proposals do not constitute negotiated text but try to capture main ideas that were discussed during the meeting.

There are a few considerations to be kept in mind with respect to these text proposals:

Participants were aware that the CBD uses the term 'Prior Informed Consent' (PIC), whereas the UN Declaration on the Rights of Indigenous Peoples (DECRIPS) uses the term 'Free Prior Informed Consent' (FPIC). How these terms will be used in the IR is subject to further negotiation. The text proposals use the term 'FPIC'.

Participants were aware that the CBD has used the term 'Indigenous and Local Communities' (ILC) which has become increasingly uncertain since the adoption of the UN Declaration of the Rights of Indigenous Peoples. More recent CBD papers like e.g. the report of the AHTEG (UNEP/CBD/WG-ABS/8/2) use the term 'Indigenous Peoples and Local Communities'. How these terms will be used in the IR is subject to further negotiation. The text proposals use the term 'Indigenous Peoples and Local Communities'.

Participants felt that term 'misappropriation' needs a definition, that the concept needs further clarification (e.g. versus misuse). Also, participants felt that there is a difference between misappropriation and breaches of contract. Misappropriation would e.g. be the failure to comply with national access rules and legislation or the failure to meet FPIC requirements of indigenous peoples and local communities. Some experts pointed to the close link between the current discussions in the negotiations of an international ABS-regime under the CBD and the work on protection of TK associated with GR that has been done within the framework of WIPO. A reference was made to the definition of the term "misappropriation" in WIPO Document WIPO/GRTKF/IC/9/5, Draft Provisions for the Protection of Traditional Knowledge: "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.”

Participants felt that the relationship between national competent authorities and legitimate representatives of ILC’s needs to be further clarified, inter alia with respect to granting of access, distribution of benefits or issuing of certificates, particularly concerning traditional knowledge.

Participants agreed not to discuss the use of the terms ‘shall’ or ‘should’ with respect to the text proposals, because the use of these terms will depend on the negotiations on the nature of IR. The text proposals use the term ‘shall’.

Participants agreed not to discuss the use of the terms ‘GR and associated TK’ or ‘TK associated to GR’ with respect to the text proposals, because the use of these terms will depend on the negotiations on the scope of IR.

It was discussed that benefit sharing should not be used so broadly as to be used by States to avoid their responsibility to supply basic community services and infrastructure such as roads, water, sewages, schools or hospitals to the same level as provided to the rest of the population (refer International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 3 January 1976, in accordance with article 27 and International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with article 49).

Participants felt that paragraph 64 of the report of the AHTEG (UNEP/CBD/WG-ABS/8/2) contains useful language with respect to access and FPIC and referred to that paragraph in the discussion under of item 2 of the Annex to these proceedings.

With respect to certificates it was discussed that countries that provide free access to GR and therefore require no PIC may not want/need to issue a certificate of compliance. Participants decided not to address the question of the type of certificates (compliance/ origin/legal provenance).

Annex

Proposals for operational text

Item 1: Benefit Sharing

Fair and Equitable Benefit Sharing: Ensuring TK holders obtain benefits arising out of the utilisations of TK

Relevant bricks and bullets:

- Measures to ensure the fair and equitable sharing with TK holders of benefits arising out of the utilization of TK in accordance with Art. 8(j) of the CBD (brick D/1/1)
- Measures to address the use of TK in the context of benefit-sharing arrangement (brick D/1/3)

Proposal for operative text:

Each contracting party shall take legislative, administrative or policy measures ensuring the sharing with indigenous peoples and local communities in a fair and equitable way the benefits arising from the commercial and other utilization of

i) genetic resources, when the indigenous peoples and local community has collective rights to such genetic resources under national and/or international law, and

ii) traditional knowledge, when the indigenous peoples and local community has built such traditional knowledge.

These benefits shall be based on MAT's with the indigenous peoples and local communities concerned.

Equitable sharing and distribution of benefits shall be guided, as far as possible and appropriate, by respect for the holders of the traditional knowledge, including their cultural, spiritual, ecological and economic values, customary norms, laws, community protocols and understandings of the holders of such knowledge.

Comment: Terms as 'customary norms' or 'community protocols' need further explanation with respect to their definition and scope. (See Alexander, M and Hardison, P & Åhrén, M (2009) Study on Compliance in Relation to Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law. UNEP/CBD/WG-ABS/7/INF/5.)

When the state, under national and international law, is the owner/holder of a genetic resource, indigenous peoples and local communities are still entitled to benefit-sharing with regard to traditional knowledge, when the indigenous people or local community has created such.

Traditional knowledge of indigenous peoples and local communities accessed prior to the entering into force of the CBD, shall be subject to the International Regime on ABS with:

- a) All continuing benefits arising from the pre CBD use of such traditional knowledge to be fairly and equitably shared with the relevant indigenous peoples and local communities.*
- b) All new uses of such traditional knowledge arising post the entry into force of the CBD to be subject to FPIC and MAT negotiated with the relevant indigenous peoples and local community concerned in accordance with their community level procedures, customary laws or community protocols.*
- c) In cases where the origin of the traditional knowledge is unclear, regional traditional knowledge funds shall be established and administered by the representatives of indigenous peoples and local communities and a fair and equitable share of the benefits arising from the use of such TK shall flow into such funds.*

Comment: concerning the paragraph a) above, some experts considered that such measures can only be voluntary because it addresses the question of preCBD access to GR associated with TK.

Parties shall take measures to address transboundary and shared traditional knowledge. In instances when more than one indigenous people and local community share traditional knowledge, and an ABS agreement is reached with one indigenous people or local community, Parties shall take measures to ensure that benefits are shared also with other indigenous peoples and local communities holding the same traditional knowledge, when applicable through the Indigenous Peoples Competent Authorities (IPCA). This however does not preclude indigenous peoples and local communities that are the holders the transboundary and shared traditional knowledge to enter into separate ABS agreements with the users of such TK on the condition that such agreements are non-exclusive and do not adversely affect the rights and customary laws of other indigenous peoples and local communities that share such traditional knowledge.

Comment: concerning the paragraph above, some experts considered that such measures can only be realised through bilateral/multilateral cooperation agreements between parties.

Parties, in agreement with indigenous peoples and local communities, shall develop minimum conditions and standards for MAT relating to transboundary and shared traditional knowledge that would have to be complied with by users of such traditional knowledge when negotiating MAT with any of the communities sharing such knowledge.

Parties shall establish mechanisms to provide information to potential users of traditional knowledge concerning their obligations regarding access to and benefit sharing arising from the use of such traditional knowledge.

Fair and Equitable Benefit Sharing: Community-level distribution

Relevant bricks and bullets:

- Community-level distribution of benefits arising out of TK (bullet D/2/4)

Proposal for operative text:

Where benefits arise from the use of traditional knowledge, Parties shall support ILC's to facilitate the fair and equitable sharing of such benefits at the community level in accordance with the customary laws, values or community protocols of the holders of such knowledge.

Fair and Equitable Benefit Sharing: Development of Model Clauses

Relevant bricks and bullets:

Incorporation of TK in development of model clauses for material transfer agreements (brick D/1/5)

Proposal for operative text:

Parties shall incorporate TK in the development of sectoral model clauses for material transfer agreements, based on best practices, after the adoption of the Regime.

Item 2: Access

Access: Free Prior Informed Consent

Relevant bricks and bullets:

- Access with approval of traditional knowledge holders (brick D/1/7)
- No engineered or coerced access to traditional knowledge (brick D/2/8)
- PIC of, and MAT with, holders of TK. Including ILC's, when TK is accessed (Bullet D/2/1)

Proposal for operative text:

Parties shall respect, recognize and protect the collective rights of indigenous peoples and local communities to their genetic resources and associated traditional knowledge, and shall establish an appropriate national regulatory framework to effectively protect and implement such rights. Until, and to the extent such policies and measures have not been put in place, the state shall nonetheless uphold obligations with respect to indigenous peoples and local communities' collective rights to genetic resources and traditional knowledge.

Each contracting party shall take legislative, administrative or policy measures ensuring FPIC by indigenous peoples and local communities before access is granted to:

- i) genetic resources, when the indigenous peoples or local communities have rights to such under national and/or international law, and*
- ii) traditional knowledge, when the indigenous people or local communities has built such.*

If FPIC is granted, this shall be documented in MAT's with the indigenous people or local community concerned.

Also when IP and LC don't have rights to FPIC with regard to GR, States shall take measures to ensure appropriate participation by relevant indigenous peoples and local communities when the GR is being accessed and used, and when access to and use of genetic resources affects their knowledge, innovations and practices.

When seeking to access indigenous peoples' or local communities' genetic resources and traditional knowledge, FPIC shall be obtained from their authorities pursuant to their customary laws, or otherwise appointed by them.

Upon request by the indigenous people or local community concerned, the national competent authority can assist them in FPIC/MAT procedures.

Contracting Parties shall:

- (a) Ensure that any access to and use of traditional knowledge shall be based on the free prior informed consent of indigenous peoples and local communities who are the holders of such knowledge*
- (b) Ensure that the commercialization and any other use of genetic resources and traditional knowledge should not prevent traditional use of such genetic resources and traditional knowledge*
- (c) Make available all relevant information in order to facilitate the effective participation and informed consent of indigenous peoples and local communities in any ABS agreement relating to their traditional knowledge*
- (d) Ensure that any documentation of traditional knowledge of indigenous peoples and local communities should be subject to the free prior informed consent of the indigenous peoples and local communities;*
- (e) Ensure that decisions regarding access to traditional knowledge made by competent indigenous peoples or local communities authorities established by IP or LC are made available to relevant indigenous peoples and local communities and other relevant stakeholders;*
- (f) Require that MAT address scope of use of TK and GR, and that substantially new or changed uses of traditional knowledge and GR beyond the intended use of what has been consented by FPIC and agreed to under MAT, shall be subject to new prior informed consent and mutually agreed terms from the indigenous peoples and local communities who are the holders of such knowledge.*
- (g) Provide support for capacity-building, in order for indigenous peoples and local communities to be actively engaged in various stages of access and benefit-sharing arrangements, such as in the development and implementation of mutually agreed terms and contractual arrangements.*

Access: Identification of appropriate authority

Relevant bricks and bullets:

- Identification of individual or authority to grant access in accordance with community level procedures (brick D/1/6)

Proposal for operative text:

Parties shall designate an ABS national focal point and/or competent national authority who shall direct users of traditional knowledge to the legitimate indigenous or local community authorities for the purposes of FPIC and MAT.

Parties shall support ILC's to establish their own legitimate authorities and recognize them.

Comment: Some experts have explained their concern on the question of legitimate authorities and the recognition in a second step.

Access: Community level procedures

Relevant bricks and bullets:

- Measures to ensure that access to TK takes place in accordance with community level procedures (brick D/1/2)

Proposal for operative text:

The legitimate indigenous or local authorities shall provide potential users of traditional knowledge with clear information on how to obtain FPIC and negotiate MAT to traditional knowledge based on community level procedures, customary laws and/or community protocols.

Parties shall, with the full and effective participation of the indigenous peoples and local communities concerned, support and facilitate local, national and/or regional community protocols regulating access to genetic resources and associated traditional knowledge, taking into consideration the relevant customary laws and ecological values of indigenous peoples and local communities in order to prevent the misappropriation of their associated TK.

If an agreement on access to genetic resources and/or traditional knowledge has been reached between an indigenous people or a local community and a user, when applicably through an Indigenous Peoples Competent Authority and/or the use of community protocols, the existence of the agreement shall be registered with the competent national authority.

Access: Transboundary TK or GR

Relevant bricks and bullets:

No brick or bullet in TK section but important issue raised in discussions.

Proposal for operative text:

States shall take measures to address transboundary and shared genetic resources and associated traditional knowledge. In instances when more than one indigenous people or local community share genetic resources and/or traditional knowledge, States shall prevent potential users from gaining access from an indigenous people/local community with no or limited access regulation, if this causes harm to other indigenous peoples/local communities holding the same genetic resources/traditional knowledge.

Parties shall take measures to address transboundary and shared traditional knowledge. In instances when more than one indigenous people and local community share traditional knowledge, and an ABS agreement is reached with one indigenous people/local community, Parties shall take measures to ensure that FPIC is obtained from other indigenous peoples/local communities holding the same traditional knowledge, when applicable through the Indigenous Peoples Competent Authorities. This however does not preclude indigenous peoples and local communities that are the holders the transboundary and shared traditional knowledge to give FPIC and to enter into separate ABS agreements with the users of such TK on the condition that such FPIC and agreements are non-exclusive and do not adversely affect the rights and customary laws of other indigenous peoples/local communities that share such traditional knowledge.

Comment: concerning the two paragraphs above, some experts considered that such measures can only be realised through bilateral/multilateral cooperation agreements between parties.

Parties shall encourage and support the development of community protocols that will provide potential users of traditional knowledge with clear and transparent rules for access to genetic resources and traditional knowledge where such is shared between:

- (i) indigenous peoples and local communities spread across national boundaries and*
- (ii) between indigenous peoples and local communities with different values, customary norms, laws and understandings.*

Item 3: Compliance

Compliance: International Certificates

Relevant bricks and bullets:

Declaration to be made on the international recognized certificate as to whether there is any associated TK and who owners of TK are (bullet D/2/3)

Proposal for operative text:

The international regime shall establish a system of an internationally recognized certificate of compliance, which shall establish that genetic resources and associated traditional knowledge has been duly acquired. Each party, upon request, shall issue a certificate of compliance with international legal effectiveness and applicability that certifies that genetic resources and traditional knowledge have been acquired in accordance with the laws of the provider country and the FPIC of relevant indigenous peoples or local communities. The certificate shall denote whether there is traditional knowledge associated with a genetic resource and who are the holders of relevant genetic resources and traditional knowledge, documented in MAT's.

The international regime shall establish a system of an internationally recognized certificate of compliance. For tracking access to TK associated with genetic resources, the certificate shall include the following minimum information:

- a) Licensing terms, including permitted uses and restrictions of use, for:*
 - Research not aiming at commercialization*
 - Research and development aiming at commercialization; and*
 - Commercialization;*
- b) Conditions of transfer to third parties including licensing terms.*

Alternative or complement to certificate.

A Contracting Party shall provide a FPIC decision for access to genetic resources in writing and make this available through the ABS Clearing House Mechanism. This written FPIC decision could serve as a certificate of compliance with national legislation in order to support monitoring and tracking of access to genetic resources. In cases where TK is associated with this genetic resource, the written FPIC decision shall also state whether the appropriate procedures for obtaining the free, prior and informed consent from the relevant TK holders where observed and complied with, and who the relevant TK holders are.

Compliance: Misappropriation

Relevant bricks and bullets:

No specific brick or bullet in TK section, but issued raised in Part C on Compliance, section 3 (Annex to report of ABS 7)

Proposal for operative text:

For the purposes of the international regime, it constitutes an act of misappropriation/ unauthorized access to:

- 1) access and/or use genetic resources and/or associated traditional knowledge without obtaining the relevant indigenous peoples or local community's FPIC, or*
- 2) when an indigenous people or local community has rights to a genetic resource and this genetic resource is found ex situ, and/or the traditional knowledge is already in the public domain, and when no FPIC requirements apply, use the genetic resource and/or traditional knowledge without providing fair and equitable benefit sharing with the relevant indigenous people or local community.*

Comment: In addition to acts of misappropriation as defined above there may be other situations that constitute inappropriate use that cannot be addressed by contractual remedies and therefore should be addressed by IR, e.g transfer of GR and associated TK to 3rd Parties without FPIC.

Concerning the paragraph 2) above, some participants considered that when accessing GR found in ex situ conditions prior to the entry into force of the CBD, and/or traditional knowledge which is already in the public domain, the use of the genetic resource and/or traditional knowledge without providing fair and equitable benefit sharing with the relevant indigenous people or local community is not a situation of misappropriation.

Compliance: Non-commercial research

Relevant bricks and bullets:

- Identification of best practices to ensure respect for TK in ABS related research (brick D/1/4)

Proposal for operative text:

Parties shall encourage the application of measures and best practices to respect the rights of the holders of TK also in non-commercial research.

A community protocol can provide special rules for access to traditional knowledge for non-commercial purposes.

Contracting Parties shall encourage users to observe international guidelines and/or codes of conduct relating to indigenous peoples and local communities and TK, when requesting for access to TK for non-commercial purposes.

The effectiveness of the system shall be monitored and reviewed at a regular basis. The international certificate of compliance shall be monitored through an independent review.

States shall respect indigenous peoples' and local communities' customary laws, norms and protocols pertaining to genetic resources and associated traditional knowledge.

Further points under compliance

Proposal for operative text:

The Governing Body of the International Regime should recommend that rules and measures should be introduced aiming at ensuring that users disclose the country providing the resources/country of origin, the identity of the TK holders and evidence of FPIC, where available in applications for intellectual property rights.

Lack of PIC, where required by national legislation or community level procedures, shall be ground for disqualification in patent applications and applications for plant variety protection.

Parties shall ensure that any benefits arising out of the inappropriate use of GR and/or associated TK are directed towards the holders/owners of such TK and/or GR.

Comment: Further consideration of the term 'inappropriate use' would be useful.

Further points of discussion

In the discussions following presentations or held in smaller working groups issues were raised which in the understanding of participants need further reflection.

It was mentioned that the disclosure of origin of the genetic resource may be checked case by case for the consequences in different IPR systems. It was also noted that the Eighth Session United Nations Permanent Forum on Indigenous Issues adopted a recommendation for the disclosure of the origins of knowledge and resources of indigenous peoples in patent applications (Recommendation 21, E/2009/43E/C.19/2009/14).

It was discussed that TK could be treated as special chapter in the IR or be addressed throughout all chapters. There may be inherent dangers of restricting TK to a separate/single chapter.

It was mentioned that there should be made a distinction between public availability and public domain. It might happen that e.g. a certain TK is publicly available but still is not in public domain, because it still belongs to its original holders.

With respect to certificates it was mentioned that the objective of such certificates should be further discussed by Parties, e.g. to what extent do certificates provide legal certainty.

Another issue mentioned in connection with compliance was the role that voluntary self declarations could play.

With respect to Prior Informed Consent questions were raised including inter alia:

- what means prior? (only 'Prior to access application'?)
- What about access between 1992 and 2010?
- What about access prior to 1992?
- What to do if TK and GR are encountered at different points in time?

Which information should be included in an informed consent?

- Information about the user?
- Information about possible effects of commercialisation (e.g. disclosure via scientific publication)?
- Information about possible benefits (maybe hard to predict)?
- Information about possible effects of benefits on ILC's?
- Inclusion of milestones, checkpoints?

It was discussed that the relationship between Article 8j and Article 15 needs further reflection e.g. the question was raised whether Article 8j refers to TK on ecosystems in a broader sense while 15 refers to utilisable TK only. The AHTEG in India provided some light on this.

It was also discussed if license models could be a complement or in part a substitute for certificates. The models of 'creative commons' and 'science commons' were mentioned as examples. A detailed discussion paper and operational text proposals relating to commons/open source models were provided to accompany the workshop presentation on this issue and have been submitted to the CBD Secretariat for inclusion in the compilation for ABS 8. (Oldham, P (2009) An Access and Benefit-Sharing Commons? The Role of Commons/Open Source Licenses in the International Regime on Access to Genetic Resources and Benefit-Sharing. *Initiative for the Prevention of Biopiracy*, Research Documents, Year IV, No. 11. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1438027)

It was also mentioned that ILC's shall be included in the technology transfer section of the IR, inter alia with respect to sharing of results of research and development and with respect to collaboration in research activities.

Programme

INTERNATIONAL VILM WORKSHOP ON MATTERS RELATED TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH GENETIC RESOURCES AND THE ABS-REGIME

Isle of Vilm, Germany

July 6-10, 2009

As called for in the CBD COP Decision IX/12 the Federal Agency for Nature Conservation on behalf of the German Federal Ministry of Environment, Nature Conservation and Nuclear Safety has organized an International Workshop on matters related to Traditional Knowledge associated with Genetic Resources and the International ABS-Regime. The goal of the expert meeting is to exchange information and discuss practical implications of different views and options of drafted text along the parameter of the Annex (UNEP/CBD/COP/DEC/IX/12 Annex 1) in order to support the rights of indigenous and local communities in the negotiations of the International ABS Regime. The discussions will take into account the results of the Vienna Workshop (Dec. 2008) as well as the results of the Sevenths Ad hoc Open ended Working Group on ABS and the Ad hoc technical Expert Group on Traditional Knowledge associated with Genetic Resources. The output of the meeting will be a report containing abstracts of contributions of the experts as well as workshop proceedings including the collected views and text options on different subjects to support the rights of ILC's in the International ABS Regime.

Monday, 06.07.2009

ARRIVAL OF THE PARTICIPANTS.

18.30 *DINNER*

20.00 WELCOME AND SHORT INTRODUCTION TO THE MEETING

Marc Auer, GERMAN FEDERAL MINISTRY OF ENVIRONMENT, NATURE CONSERVATION
AND NUCLEAR SAFETY;

Ute Feit, FEDERAL AGENCY FOR NATURE CONSERVATION

Tuesday, 07.07.2009

08.00 *BREAKFAST*

MORNING SESSION

I. State of play

09.00 – 10.00 **RESULTS OF THE TECHNICAL EXPERT GROUP ON TK**

John Scott, SECRETARIAT of the CBD

10.00 – 10.15 *COFFEE BREAK*

II. BENEFIT SHARING

ANNEX:

- *MEASURES TO ENSURE THE FAIR AND EQUITABLE SHARING WITH TK HOLDERS OF BENEFITS ARISING OUT OF THE UTILIZATION OF TK IN ACCORDANCE WITH ART. 8(J) OF THE CBD (BRICK D/1/1)*
- *MEASURES TO ADDRESS THE USE OF TK IN THE CONTEXT OF BENEFIT-SHARING ARRANGEMENT (BRICK D/1/3)*
- *INCORPORATION OF TK IN DEVELOPMENT OF MODEL CLAUSES FOR MATERIAL TRANSFER AGREEMENTS (BRICK D/1/5)*
- *COMMUNITY-LEVEL DISTRIBUTION OF BENEFITS ARISING OUT OF TK (BULLET D/2/4)*

10.15 – 10.45 **TK AND MAT: OPTIONS FOR INCORPORATING TK IN EFFORTS TO DEVELOP MENUS OF MODEL CLAUSES FOR POTENTIAL INCLUSION IN MAT'S. WHAT MODEL CLAUSES WOULD BE HELPFUL TO INCLUDE?**

Preston D. Hardison, Policy Advisor Tulalip Tribes

- 10.45 – 11.15 **PRESENTATION OF COLLECTED OPTIONS AND VIEWS ON THE ISSUE PRE-PREPARED BY THE PARTICIPANTS (QUESTIONNAIRE)**
Jane Bulmer, IUCN
- 11.15 – 12.30 **DISCUSSION OF OPTIONS ON THE ISSUE**
PRESTON D. HARDISON, POLICY ADVISOR TULALIP TRIBES, Axel Paulsch, IBN
- 12.30 *LUNCH*
- AFTERNOON SESSION*
- 13.30 – 15.00 GUIDED TOUR AROUND THE ISLE OF VILM

III. ACCESS

ANNEX:

- *MEASURES TO ENSURE THAT ACCESS TO TK TAKES PLACE IN ACCORDANCE WITH COMMUNITY LEVEL PROCEDURES (BRICK D/1/2)*
 - *IDENTIFICATION OF INDIVIDUAL OR AUTHORITY TO GRANT ACCESS IN ACCORDANCE WITH COMMUNITY LEVEL PROCEDURES (BRICK D/1/6)*
 - *ACCESS WITH APPROVAL OF TRADITIONAL KNOWLEDGE HOLDERS (BRICK D/1/7)*
 - *NO ENGINEERED OR COERCED ACCESS TO TRADITIONAL KNOWLEDGE (BRICK D/2/8)*
 - *PIC OF, AND MAT WITH, HOLDERS OF TK. INCLUDING ILC'S, WHEN TK IS ACCESSED (BULLET D/2/1)*
- 15.00 – 15.30 **BIOCULTURAL PROTOCOLS AND THEIR RELEVANCE FOR THE INT. ABS-REGIME – LESSONS LEARNED: SOME PROPOSALS FOR DRAFTED TEXT OPTIONS**
Kabir Sanjay Bavikatte, Natural Justice
- 15.30 – 16.00 *COFFEE BREAK*
- 16.00– 16.30 **CONSULTATION PROCESS OF SAAMI PEOPLE AND ITS RELEVANCE FOR THE INT. ABS-REGIME – LESSONS LEARNED: SOME PROPOSALS FOR DRAFTED TEXT OPTIONS**
JON PETTER GINTAL, SAAMI PARLIAMENT OF NORWAY
- 16.30 – 17.00 **CUSTOMARY LAWS OF ILC'S REGULATING ACCESS TO GENETIC RESOURCES AND ASSOCIATED TK AND ITS RELEVANCE TO THE INT. ABS-REGIME – SOME VIEWS AND/OR POSSIBLE TEXT OPTIONS**
Isabel Lapeña, Peru
- 17.00 – 17.30 **PRESENTATION OF COLLECTED OPTIONS AND VIEWS ON THE ISSUE PRE-PREPARED BY THE PARTICIPANTS (QUESTIONNAIRE)**
Jane Bulmer, IUCN

17.30 – 18.30 **DISCUSSION OF OPTIONS ON THE ISSUE**
Kabir Sanjay Bavikatte, Axel Paulsch, IBN

18.30 *DINNER*

20.00 – 22.00 **DISCUSSION**

Wednesday, 08.07.2009

08.00 *BREAKFAST*

MORNING SESSION

III. ACCESS (CONTINUED)

ANNEX:

- *ACCESS WITH APPROVAL OF TRADITIONAL KNOWLEDGE HOLDERS (BRICK D/1/7)*
- *NO ENGINEERED OR COERCED ACCESS TO TRADITIONAL KNOWLEDGE (BRICK D/2/8)*
- *PIC OF, AND MAT WITH, HOLDERS OF TK. INCLUDING ILC'S, WHEN TK IS ACCESSED (BULLET D/2/1)*

09.45 – 10.30 **TK AND PIC: WAYS TO INCORPORATE TK IN PIC DECISIONS. WHAT ARE THE OPTIONS TO ADDRESS THE BALANCE BETWEEN DOMESTIC FLEXIBILITY AND INTERNATIONAL STANDARDS ON ACCESS? - SOME VIEWS AND/OR POTENTIAL TEXT OPTIONS**
Beatriz Zapata Ferrufino, Bolivia,

10.30 – 11.00 *COFFEE BREAK*

11.00 – 11.30 **PRESENTATION OF COLLECTED OPTIONS AND VIEWS ON THE ISSUE PRE-PREPARED BY THE PARTICIPANTS (QUESTIONNAIRE)**
Jane Bulmer, IUCN

11.30– 12.30 **DISCUSSION OF OPTIONS ON THE ISSUE**
Axel Paulsch

12.30 *LUNCH*

13.35 **Departing for National Park Centre Königsstuhl**

14.45 Welcome by the Königsstuhl National Park Centre
C. REESE, KÖNIGSSTUHL NATIONAL PARK CENTRE

15.00 **Tour in the visitor centre with English audio guides**

16.15 **Guided tour to Königsstuhl and Viktoriasicht**

17.30	<i>Dinner in Jasmund National Park</i>
20.30	<i>Return by bus to Lauterbach</i>
22.00	<i>Departure by boat</i>

Thursday, 09.07.2009

08.00 *BREAKFAST*

MORNING SESSION

IV. COMPLIANCE

POTENTIAL PROTECTION AGAINST MISAPPROPRIATION OR MISUSE OF TK ASSOCIATED TO GR

ANNEX:

- *IDENTIFICATION OF BEST PRACTICES TO ENSURE RESPECT FOR TK IN ABS RELATED RESEARCH (BRICK D/1/4)*
- *DECLARATION TO BE MADE ON THE INTERNATIONAL RECOGNIZED CERTIFICATE AS TO WHETHER THERE IS ANY ASSOCIATED TK AND WHO OWNERS OF TK ARE (BULLET D/2/3)*

09.00 – 09.30	TK AND ABS RELATED RESEARCH: BEST PRACTICE TO ENSURE THAT ABS RELATED RESEARCH RESPECTS EXISTING TK - LESSONS LEARNED: SOME PROPOSALS FOR DRAFTED TEXT OPTIONS Monica Ribadeneira Sarmiento, German Research Foundation
09.30 – 10.00	INTERNATIONALLY CERTIFICATE OF COMPLIANCE: IF AND HOW COULD THE SCOPE OF SUCH CERTIFICATE ALSO INCLUDE TK ASSOCIATED WITH GR? SOME PROPOSALS FOR DRAFTED TEXT OPTIONS? Tack Daniel, Mātauranga Māori and International Issues
10.00 – 10.30	<i>Coffee break</i>
10.30 – 11.00	Draft Objectives and Principles according to misappropriation and misuse of TK – some proposals for drafted text options BEGONA VENERO, WIPO
11.00 – 11.30	Intellectual property rights policies and the rights of ILC's: Development of 'commons' licensing models to provide choice and enhanced use of intellectual property classification and coding schemas for monitoring compliance – some proposals for drafted text options PAUL OLDHAM, ESCR CENTER FOR ECONOMIC AND SOCIAL ASPECTS OF GENOMICS

11.30 – 12.00 **An “unfair-competition” – approach: Creating a legal standard modelled on the basis of Art. 10bis of the Paris Convention – some proposals for drafted text options**
JOSTEIN SANDVIK, NORWAY

12.30 Lunch

AFTERNOON SESSION

14.00 – 15.30 **PRESENTATION OF COLLECTED OPTIONS/VIEWS ON THE ISSUE PRE-PREPARED BY THE PARTICIPANTS (QUESTIONNAIRE)**
JANE BULMER, IUCN

15.30 – 16.00 Coffee break

16.0 – 17.30 **DISCUSSION OF OPTIONS ON THE ISSUE**
Paul Oldham, Axel Paulsch, IBN

18.00 – 18.30 **Sum up, end of meeting**
UTE FEIT

18.30 Dinner

Free time for a farewell party!

Friday, 10.07.2009

08.00 Breakfast

Departure (for all participants from the isle of Vilm)

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Annex: Presentations

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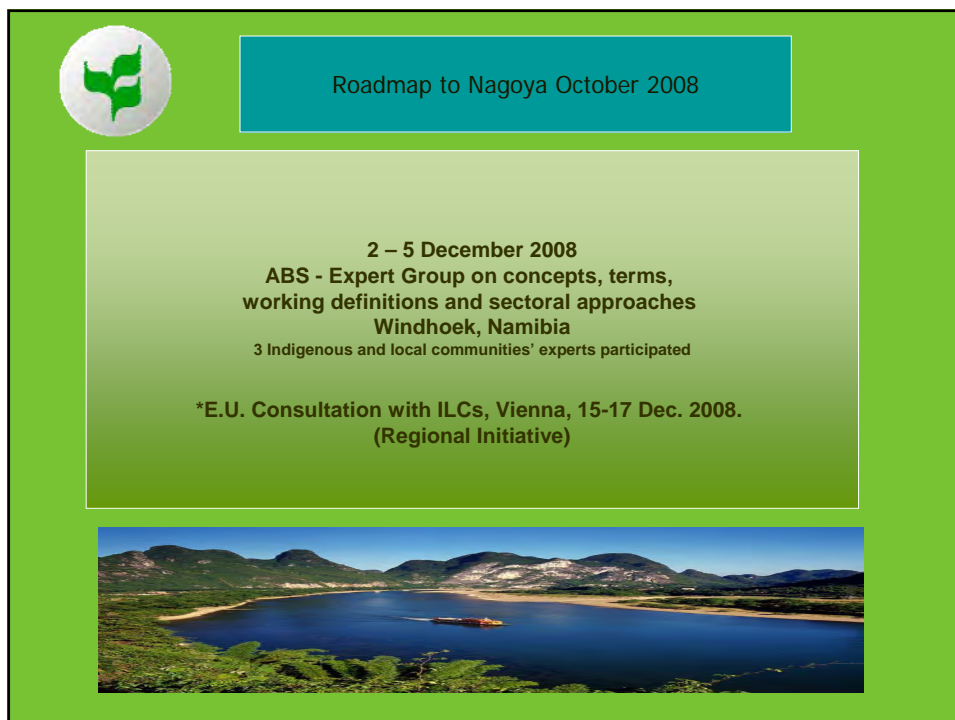
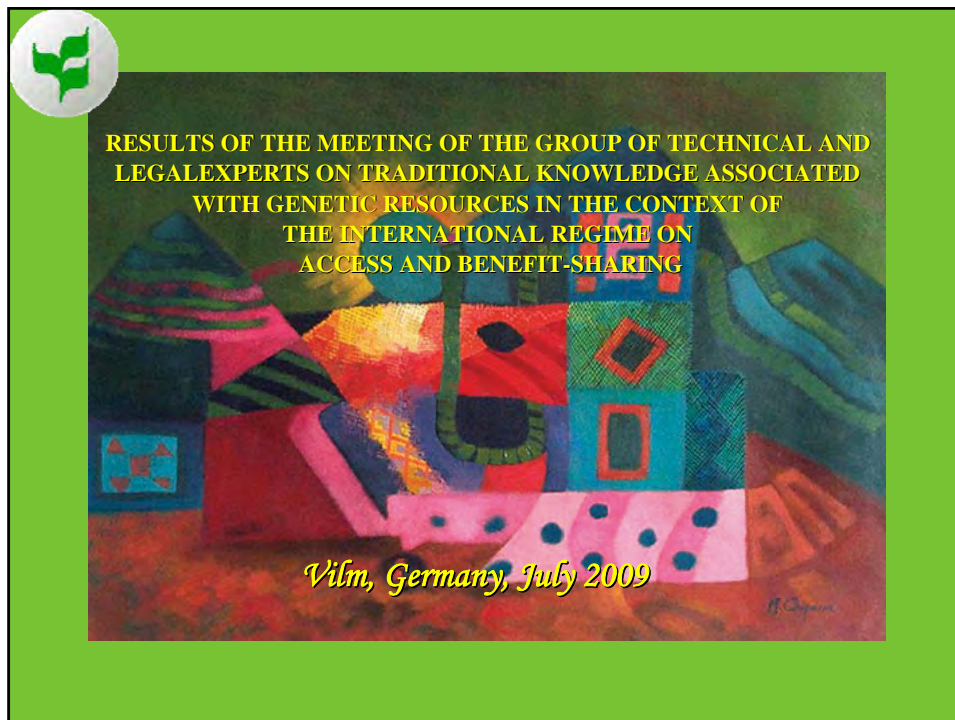
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Road Map to Nagoya 2009




27-30 January 2009
ABS - Expert Group on Compliance
Tokyo, Japan
ILCs experts will participate including in expert
Papers being prepared including on customary law





2 – 8 April 2009
WG-ABS 7 Paris, France
(at UNESCO)




Roadmap to Nagoya 2009







16 – 19 June 2009
ABS Expert Group on TK associated with GR
Hyderabad, India
7 ILCs mandated to participate
(To feed into the WG ABS 8)



The Meetings of the WG ABS

- (a) *Seventh meeting*. Negotiation of operational text on the objective, scope, compliance, fair and equitable benefit-sharing, access (April 2009);
- (b) *Eighth meeting*. Negotiation of operational text on nature, traditional knowledge associated with genetic resources, capacity-building, compliance, fair and equitable benefit-sharing, access (November 2009);
- (c) *Ninth meeting*. Consolidation of all operational text developed at the seventh and eighth meetings of the Working Group; (see decision IX/12 par. 7) (March 2010)



Road Map to Nagoya 2009



WG 8(j) 6
Montreal, Canada
2 – 6 November 2009

(back to back with 8 WG ABS)

WG-ABS 8
Montreal Canada
9-15 November 2009




Road Map to Nagoya 2010



18 – 24 March 2010
WG-ABS 9

Venue to be determined
(possibly Colombia)


****Parties should agree on an operational text for adoption 6 months before the meeting of the Governing Body***



Road Map to Nagoya 2010

18 - 29 October 2010
Tenth Conference of the Parties to the
Convention on Biological Diversity
(COP 10)

Adoption of an International Regime on ABS
Nagoya, Japan



Background

In paragraph 11 of its decision XI/12, the Conference of the Parties to the Convention on Biological Diversity decided:

"[...] to establish three distinct groups of technical and legal experts on: (i) compliance; (ii) concepts, terms, working definitions and sectoral approaches; and (iii) **traditional knowledge associated with genetic resources**. The terms of reference of the groups, including the criteria for the selection of experts, are laid out in annex II to the present decision;"



Section C of annex II to decision XI/12 reads:

"1. A group of technical and legal experts on traditional knowledge associated with genetic resources is established to further examine the issue of traditional knowledge associated with genetic resources in order to assist the Working Group on Access and Benefit-sharing. The expert group shall provide legal and technical advice, including, where appropriate, options and/or scenarios. The expert group will address the following questions:



The eight questions were clustered as follows: (a) and (h),
(c) and (b); (d) and (f), and (e) and (g).

- (a) What is the relationship between access and use of genetic resources and associated traditional knowledge?
- (h) How to define traditional knowledge associated to genetic resources in the context of access and benefit-sharing?
- (c) Identify the range of community level procedures and determine to what extent customary laws of indigenous and local communities regulate access to genetic resources and associated traditional knowledge at the community level and its relevance to the international regime;
- (b) What practical impacts should the negotiations of the international regime take into account based on the range of community level procedures and customary systems of indigenous and local communities for regulating access to traditional knowledge associated with genetic resources at the community level?



(d) To what extent measures to ensure compliance with prior informed consent and mutually agreed terms under Article 15 also support the prior informed consent of indigenous and local communities for the use of their associated traditional knowledge?



(f) Is there a basis for prior informed consent for indigenous and local communities relative to traditional knowledge associated to genetic resources in international law? If so, how can it be reflected in the international regime?



- (e) Identify elements and procedural aspects for the prior informed consent of holders of associated traditional knowledge when traditional knowledge associated with genetic resources is accessed also taking into account potential transboundary contexts of such associated traditional knowledge and identifying best practice examples;



- (g) Assess options, considering the practical difficulties and distinct implementation challenges, for including traditional knowledge associated with genetic resources in a potential internationally recognized certificate issued by the competent domestic authority also by considering the possibility of a declaration on such certificate as to whether there is any associated traditional knowledge and who the relevant holders of traditional knowledge are;



Results of the Meeting

The following reflects the outcome of discussions in that order.

- (a) What is the relationship between access and use of genetic resources and associated traditional knowledge?

SOME MAIN POINTS

The Relationship between access and use of genetic resources and associated traditional knowledge

Not all but in most cases, GR and TK are linked either directly or indirectly – and “associated” may be applicable. The discussions reinforced that that where genetic resources have associated traditional knowledge – they are inseparable.

The IR should address the protection of TK – in fact is has an obligation to address the effective implementation of both Article 15 and 8(j),



How should traditional knowledge be addressed in the International Regime?

Some were of the opinion that traditional knowledge should be reflected across the International Regime, others were of the opinion that a special chapter should be devoted to traditional knowledge.

It was pointed out that the development of a chapter on traditional knowledge which did not take into account the relationship between indigenous and local communities and genetic resources would not be desirable.



Some suggested that the International Regime should contain specific language that speaks to the rights of indigenous and local communities over their traditional knowledge and associated genetic resources.

Some experts felt that if the International Regime is legally binding concerning genetic resources, it should also be legally binding concerning associated traditional knowledge and in particular in its requirement for respective prior informed consent of Governments for genetic resources and prior informed consent of indigenous peoples and local communities concerning traditional knowledge.



The development, adoption and implementation of the International Regime should not restrict the exchange of genetic resources and traditional knowledge among indigenous and local communities for traditional purposes.

Some Parties do not require prior informed consent for access to genetic resources. Under these circumstances, there is a need to consider how to deal with access to associated traditional knowledge if genetic resources do not require the prior informed consent of the State in order to ensure that benefits will be shared with indigenous and local communities as holders of the traditional knowledge accessed.



There is also a need to address not only traditional knowledge associated with genetic resources that is accessed *in situ* but also traditional knowledge and genetic resources accessed *ex situ*, including in databases, or libraries and the potential sharing of benefits

In such cases, it was suggested that national regulations should reflect the possibility for national governments to preserve this traditional knowledge and have a right over traditional knowledge and more specifically for governments or communities to be able to reclaim and restore traditional knowledge through repatriation [refer 8(j) task 15].



(h) How to define traditional knowledge associated with genetic resources in the context of access and benefit-sharing?

SOME MAIN POINTS

The experts agreed that a common understanding of traditional knowledge associated with genetic resources would assist the expert group in its work. Opinions varied almost equally among the experts on the value and practicability of the expert group developing a precise or working definition, or simply enumerating a list of indicative characteristics of traditional knowledge associated with genetic resources that could provide a working understanding of what was meant and could be passed on to the Ad Hoc Open-ended Working Group on Access and Benefit-sharing (Working Group on ABS).



By consensus the experts developed and agreed on some common characteristics of traditional knowledge associated with genetic resources which included (but not limited to):

- A link to a particular culture or people – knowledge is created in a cultural context;
- unspecified creators;
- A dynamic and evolving nature;
- Existence in codified or uncoded (oral) forms;
- Passed on from generation to generation – intergenerational in nature;
- Local in nature and often imbedded in local languages;
- Unique manner of creation – (innovations and practices);
- It may be difficult to identify original creators.



(c) Identify the range of community level procedures and determine to what extent customary laws of indigenous and local communities regulate access to genetic resources and associated traditional knowledge at the community level and its relevance to the international regime

SOME MAIN POINTS

There exists a wide diversity of community level procedures, which address access to natural, biological and genetic resources. It was generally agreed, that indigenous peoples and local communities hold rights to traditional knowledge associated with genetic resources.



Decisions as well as terms for granting access will often be guided by the indigenous peoples or local communities' customary laws and community level procedures. Consequently, when indigenous peoples and local communities have customary laws and community level procedures pertaining to traditional knowledge, these laws and procedures are relevant to the International Regime. Procedures for prior informed consent and mutually agreed terms, when they have not been established, can draw on existing practices. In many cases there are collective decision-making procedures at community level. It was suggested that community protocols may provide a useful approach



When indigenous and local communities have well defined structures and have established indigenous authorities, national regulations can directly rely on these.

In cases where such indigenous infrastructure/organizations does not exist, their establishment, in general, would be desirable.

Customary laws and practices may not currently provide specific procedures for access to genetic resources at this time.

However, these may evolve in response to the development of the International Regime and national legislations. It was also stressed that due to the diversity of community level procedures there is no one-size-fits-all approach to address access to genetic resources and associated traditional knowledge at the community level.



Common themes relating to customary law and community level procedures were identified during the discussion, including but not limited to the following:

- Generally indigenous and local communities conceive genetic resources more broadly. They have a more holistic approach and refer generally to natural or biological resources. The concept of genetic resources has only started to be considered more recently.
- Indigenous and local communities also perceive traditional knowledge and genetic resources/biological resources in a holistic manner. Traditional knowledge is hence generally considered as cohesive and integral to genetic resources.
- Traditional knowledge is collective in nature.



- Capacity building is needed at the community level to raise awareness on genetic resources and access and benefit-sharing and the International Regime should address this.
- A number of different approaches have been adopted at the regional and national levels to deal with the ownership of genetic resources. For example, while in some cases genetic resources are the ownership of the State, in others they may be the property of the land owner (including indigenous and/or local communities).
- With respect to traditional knowledge, it was generally suggested, except by one expert, that the International Regime needs to address the issue of the ownership of traditional knowledge which is already documented in databases and scientific publications.

(b) What practical measures should the negotiations of an international regime take into account based on the range of community level procedures and customary systems of indigenous and local communities for regulating access to traditional knowledge associated with genetic resources at the community level?

SOME MAIN POINTS

The International Regime should provide basic principles to ensure respect for customary laws and community level procedures. Respect could be interpreted as respect for obligations arising from customary law – without a need to reveal what the actual customary laws are.

Competent national authorities and focal points for access and benefit-sharing would have the responsibility to inform applicants on access granting procedures and rights of indigenous and local communities. They should also direct applicants to relevant indigenous authorities when access to traditional knowledge associated with genetic resources was concerned. These indigenous authorities could ensure respect for customary laws and procedures.



- It was hence submitted that providing for prior informed consent by the relevant indigenous or local community authority contributes to respect for customary laws and community level procedures (and respect for traditional knowledge). With such an approach, the user need not necessarily be aware of the actual content of the customary law, enhancing efficiency and legal certainty. It was mentioned that the task of identifying relevant indigenous authorities could be difficult in countries with many different indigenous and local communities.
- Capacity-building at the community level would be required to address this challenge in order to develop clear procedures for access to traditional knowledge associated with genetic resources, such as community protocols

- It was suggested that the International Regime should call on state legislation to recognize rights of indigenous peoples and local communities.
- It was noted that there may be different levels of law relevant to the development of the International Regime incorporating international, regional, national, sub-national and customary laws and the relationship between and obligations arising from these different levels of laws may need to be clarified in the International Regime.
- It was recognized that a regional approach may be a helpful approach to deal with many of these transboundary issues.

- In order to address situations of conflicts arising from transboundary traditional knowledge, it was suggested that an international and/or regional mediation or alternative dispute resolution mechanism could be established by the International Regime exclusively or among others to address issues regarding the authority to grant prior informed consent.
- **Establishment of an Ombudsperson and Office of Legal Aid would be desirable.**
- It was also suggested that the International Regime should address the situation of traditional knowledge found in the public domain. In this respect, it was stated that intellectual property rights can not be granted on traditional knowledge found in the public domain. **Some suggested that traditional knowledge found in the public domain remains the property of indigenous and local communities and therefore should require prior informed consent before being used. The distinction between public availability and the public domain was stressed.**

(d) To what extent measures to ensure compliance with prior informed consent and mutually agreed terms under Article 15 also support the prior informed consent of indigenous and local communities for the use of their traditional knowledge?

SOME MAIN POINTS

- The experts concluded, (with the exception of one expert), that **article 8(j) provides a basis for a requirement that prior informed consent be obtained.** National laws would therefore prescribe compliance conditions for the granting of access to genetic resources with associated traditional knowledge which ensure that prior informed consent is properly and appropriately obtained from indigenous peoples and local communities.
- At minimum, a Competent National Authority (CNA) is needed to promote certainty over the domestic process governing prior informed consent of indigenous peoples and local communities when access to associated traditional knowledge is sought. In this regard, the CNA will be guided by the customary laws, community procedures or community protocols where they exist.

- The Bonn Guidelines recommend that prior informed consent should be obtained from indigenous and local communities where traditional knowledge associated with genetic resources is to be accessed.
- What kinds of compliance measures could be prescribed for ensuring the prior informed consent of indigenous peoples and local communities for the use of their traditional knowledge. National law should not arbitrarily prescribe the process for obtaining prior informed consent. The process should be a flexible one recognizing that customary laws and local practices will vary between different groups and locations. No one size will fit all.
- Protocols and **codes of conduct** should fully reflect the rights/decisions of indigenous peoples and local communities concerned.

Compliance measures that also support the prior informed consent of indigenous peoples and local communities for the use of their associated traditional knowledge could include:

- Capacity-building, awareness raising and information sharing within indigenous and local communities;
- **Codes of conduct** and best practice codes of users;
- Sectoral model clauses for material transfer agreements to promote equity between the negotiating positions of the parties;
- Minimum standards for access and benefit-sharing agreements
- Disclosure requirements concerning the origin or source of genetic resources and associated traditional knowledge to which access is granted.

- To enhance legal certainty, clarity and transparency, the International Regime could suggest the inclusion of clear provisions for obtaining prior informed consent of indigenous peoples and local communities when accessing traditional knowledge associated with genetic resources in national access and benefit-sharing frameworks.
- In this regard, **a procedure for simplified access for research with non-commercial purposes must be considered.**

(f) Is there a basis for prior informed consent for indigenous and local communities relative to traditional knowledge associated to genetic resources in international law? If so, how can it be reflected in the international regime?

SOME MAIN POINTS

- The experts discussed the value of existing international instruments and processes particularly within the human rights area with respect to indigenous peoples in providing a source of law with varying degree of applicability to establish a basis for prior informed consent of indigenous peoples and local communities for traditional knowledge associated with genetic resources.

The instruments discussed demonstrate a progressive trend towards international law mandating a requirement for the prior informed consent of indigenous peoples and local communities for traditional knowledge associated with genetic resources, there is hence a clear trend that provides a basis in international law for the International Regime to require prior informed consent. Moreover, a growing body of individual State and regional practice requires prior informed consent of indigenous peoples and local communities in relation to traditional knowledge associated with genetic resources. It was also noted that there is a growing practice in developed countries for commercial users to seek prior informed consent from indigenous peoples and local communities as a matter of best practice.

- The interpretation of the Convention by the Conference of the Parties through its **decisions must be guided by the developments in international law and processes particularly with regard to prior informed consent.**
- **It was concluded that there is a clear basis in international law for prior informed consent of indigenous peoples and local communities when traditional knowledge associated with genetic resources is accessed and this should be considered in the International Regime.**

(e) Identify elements and procedural aspects for the prior informed consent of holders of associated traditional knowledge when traditional knowledge associated with genetic resources is accessed also taking into account potential transboundary contexts of such associated traditional knowledge and identifying best practice examples;

SOME MAIN POINTS

Prior and Informed Consent

- The experts identified the following as desirable elements for the prior informed consent of holders of associated traditional knowledge:
- Competent national authority
- Competent authority at the level of indigenous and local communities with a statutory authorization/mandate as competent authorities of indigenous and local communities. It was pointed out that there is a need for legal recognition of indigenous and local communities competent authorities and recognition of customary law. Without such recognition there is an inherent risk that customary law is being replaced by local government regulations.

Elements of process including:

- Written application
- Wide notification of applications sought
- Applications to be widely accessible
- Legitimate process
- Adequate timing and deadlines
- Specification of use with clause to address change of use and transfer to third parties
- Prior informed consent granted on the basis of mutually agreed terms
- Consultation process with indigenous and local communities
- Procedures consistent with customary practices
- It was mentioned that the Bonn Guidelines provide useful elements and procedural aspects for prior informed consent, such as competent national authorities, appropriate timing of procedures and deadlines, stating the specificity of use, mechanisms for stakeholder consultations and a process for prior informed consent.

- In cases where associated traditional knowledge is accessed *ex situ*, benefit-sharing arrangements should be negotiated. Regarding access to gene banks and resulting benefit-sharing, it was highlighted by a number of experts that prior informed consent should be applied if associated traditional knowledge is accessed, subject to national legislation, and that benefit-sharing should apply. The International Regime could suggest that gene banks record such information where and as appropriate.
- With reference to the opposition of many indigenous and local communities, particularly in Latin America, to the compulsory documentation of associated traditional knowledge in databases or registers, there was broad agreement that adequate safeguards and protective mechanisms were needed regarding the use of associated traditional knowledge accessed through such databases or registers.

- **The interpretation of the Convention by the Conference of the Parties through its decisions must be guided by the developments in international law and processes particularly with regard to prior informed consent.** (refer GA resolution)
- **It was concluded that there is a clear basis in international law for prior informed consent of indigenous peoples and local communities when traditional knowledge associated with genetic resources is accessed and this should be considered in the International Regime.**

- There was broad agreement that the International Regime could provide incentives or even require Parties to establish such institutions and to develop relevant procedures. Some experts suggested that building a tandem of prior informed consent and mutually agreed terms at the level of indigenous and local communities and providing legitimacy at both levels should be an obligation under the Regime.
- It was also highlighted that the International Regime must safeguard against “ABS shopping” to obtain access to genetic resources and associated traditional knowledge from providers which have unduly lax provisions or requirements, by providing clear guidelines on how to ensure the notification of access applications sought, the publication of applications, transparency, timing and deadlines and by using the Clearing-House Mechanism under the Convention on Biological Diversity.
- It was suggested that at the national level, the establishment of authorities and procedures should build on existing structures of local governance and constitutional requirements where they exist.
- There was broad agreement that dispute settlement through alternative dispute resolution mechanisms, as well as appropriate compliance mechanisms could be defined by the International Regime.
- There was general agreement that legal certainty and consultative mechanisms were both desirable.

TRANSBOUNDARY ISSUES

- In situations where associated traditional knowledge is shared between indigenous and local communities, spread across national boundaries or indigenous and local communities with different values, customary norms, laws and understandings, countries should encourage and support the development of community protocols that will provide potential users of such associated traditional knowledge with clear and transparent rules for acquiring prior informed consent.
- In transboundary situations, to the extent possible, the prior informed consent procedures of both countries should be required from all entitled communities. The same applies to benefit-sharing. Dispute resolution mechanisms, if established, should be used in case of conflict. Benefit-sharing trust funds may be appropriate if common traditional knowledge is accessed and used.

- In cases where genetic resources are spread across a broad international scale, transboundary issues need to be addressed at the international level.
- It was highlighted that indigenous authorities and procedures do not seem to exist to address prior informed consent and mutually agreed terms for access to *ex situ* transboundary traditional knowledge.
- When traditional knowledge is found in more than one community and prior informed consent and mutually agreed terms are negotiated with only one or few of these communities, it was suggested that trust funds could be established for the sharing of benefits with the other communities who did not take part in prior informed consent and mutually agreed terms.
- The need for an ombudsperson under the International Regime for mediation of transboundary conflict was highlighted.

(g) Assess options, considering the practical difficulties and distinct implementation challenges, for including traditional knowledge associated with genetic resources in a potential internationally recognized certificate issued by the competent domestic authority also by considering the possibility of a declaration on such certificate as to whether there is any associated traditional knowledge and who the relevant holders of traditional knowledge are

SOME MAIN POINTS

A series of sub-questions were identified as a means to analyse the question:

- (a) Should there be certificates?
- (b) Are these certificates of compliance/origin/provenance?
- (c) Who would issue the certificates?
- (d) For whom is the certificate issued?
- (e) What would be the content of a certificate?
- The group also discussed some of the practical difficulties and distinct implementation challenges in relation to an internationally recognised certificate.

Should there be certificates?

- Some experts raised the basic question as to whether it is necessary to have certificates in the first place. **The experts generally agreed that certificates could be useful as evidence that prior informed consent from indigenous peoples and local communities had been achieved in relation to traditional knowledge associated with genetic resources.**
- A number of opinions were expressed that a certificate would be a necessary, concrete and credible tool within the access and benefit-sharing toolkit. Some experts noted that a certificate would provide assurance that misappropriation did not occur, while emphasising that good faith is a fundamental attribute of granting prior informed consent.
- Reluctance was expressed by some regarding the possible administrative complexity of issuing a certificate in relation to traditional knowledge associated with genetic resources. **It was agreed that any certificate would need to be simple, straightforward, efficient, and workable.** It was further noted that it should be possible to create an efficient system, as long as the certificate itself is easy to verify. Furthermore, having as simple a document as possible would be consistent with article 8(j), give flexibility to States, and minimize the administrative burden.
- There was also some discussion regarding the issuance of different types of certificates for different uses (i.e., academic, scientific research and commercial uses). The comprehensiveness or complexity of the certificate could depend on the use proposed.

Are these certificates of compliance/origin/provenance?

- **The general opinion of the group was that it does not matter what the certificate would eventually be called, as long as it contains certain essential information.** Essential components of a certificate would include whether or not there is traditional knowledge associated with genetic resources involved, who the traditional knowledge holders are, and whether or not the user has complied with indigenous customary law, community protocols and other consent or decision-making processes. Customary law per se would not need to be reflected in a certificate.
- The experts recalled the Lima Expert Group Meeting report which **"found it practical to refer to the certificate as a certificate of compliance with national law, in accordance with the Convention"** (paragraph 7). One expert expressed a view that a certificate of origin indicating country, as well as the region or indigenous peoples' territory from which the traditional knowledge associated with the genetic resources originated could be preferable.

Who would issue the certificate?

- The experts noted early in the discussion that question (g) assumes a **competent domestic authority would issue a certificate**. The law establishing a country's access and benefit-sharing framework would identify who acts as the domestic competent authority.
- Some experts stated there would necessarily be a role for including a competent local authority in the process since there is a trend within many countries toward devolving authority to local levels. **The main requirement however was foreseen to be assigning a due diligence responsibility to the competent domestic authority to ensure that prior informed consent had been obtained from the relevant indigenous peoples or local communities in relation to traditional knowledge associated with genetic resources.**
- In effect the competent domestic authority could be envisioned to act as a kind of clearing house, with the responsibility to verify compliance with the requirements of national law, indigenous or customary law, as well as the International Regime. A further comment made noted the competent domestic authority could have a meaningful role facilitating the development of community protocols that, among other things, could identify the indigenous or local community authority that has the power to give consent.

For whom is the certificate issued?

- **It was generally acknowledged that certificates could have multiple possible objectives and uses.** This would necessarily mean that there would be multiple users of certificates.
- A discussion ensued on the role of the intellectual property system, particularly the patent system and patent offices. Some strong concerns were expressed by some experts regarding the applicability of the intellectual property system as a means to protect traditional knowledge.
- The work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/IGC) was noted and **its general conclusion that *sui generis* solutions may be required to truly and substantively protect traditional knowledge.** That is, the WIPO/IGC has developed *sui generis* draft provisions for the protection of traditional knowledge in light of the increasing recognition that existing intellectual property tools are not fully adequate in protecting traditional knowledge.

What could be the content of a certificate?

- It was agreed that certificates could also include information on whether or not traditional knowledge associated with genetic resources has been accessed and whether prior informed consent and mutually agreed terms obligations have been fulfilled.
- There was general agreement that the content of a certificate in relation to traditional knowledge associated with genetic resource **must be simple and not overly detailed**.
- The group discussed the utility of a certificate including a declaration as a substantive component. The declaration would include an affirmative statement by the prospective user that the prior informed consent of an indigenous peoples or local community had been obtained in the process to gain access. A number of experts commented that a declaration could be a useful, straightforward and constructive tool to ensure full disclosure had been provided by the prospective user.
- There was some reference to the repercussion of non-disclosure, as well as the voiding of the certificate if the declaration proved to be false.

Practical difficulties and implementation challenges

- In its discussions the experts acknowledged there could be practical difficulties and distinct implementation challenges in relation to an internationally recognised certificate.
- An important issue included identifying who could legitimately provide prior informed consent at indigenous or local community level, particularly where there are different holders of traditional knowledge associated with genetic resources.
- In the context of a certificate system this will likely present some challenges for a domestic competent authority in determining who the relevant traditional knowledge holder would be. One expert explained that traditional knowledge associated with genetic resources shared by multiple communities should not necessarily preclude any of the individual communities at issue from providing prior informed consent and entering into agreements, provided any agreement would not limit the subsequent ability of any of the other communities from entering into similar agreements.

- On *ex-situ* sources, some experts noted that traditional knowledge associated with genetic resources in the public domain does not necessarily have the prior informed consent of the relevant indigenous peoples or local communities from which it was sourced. It was proposed by some that use should trigger some benefit-sharing.
- Two categories could be discerned: those where ownership is definable and those where it is not. If the holders are known they should be entitled to benefit-sharing based on principles of equity. If a holder is unknown or not identifiable, one option could be for the State to act as a trustee on behalf of its citizenry to claim benefits.

Public Domain V Publicly Available

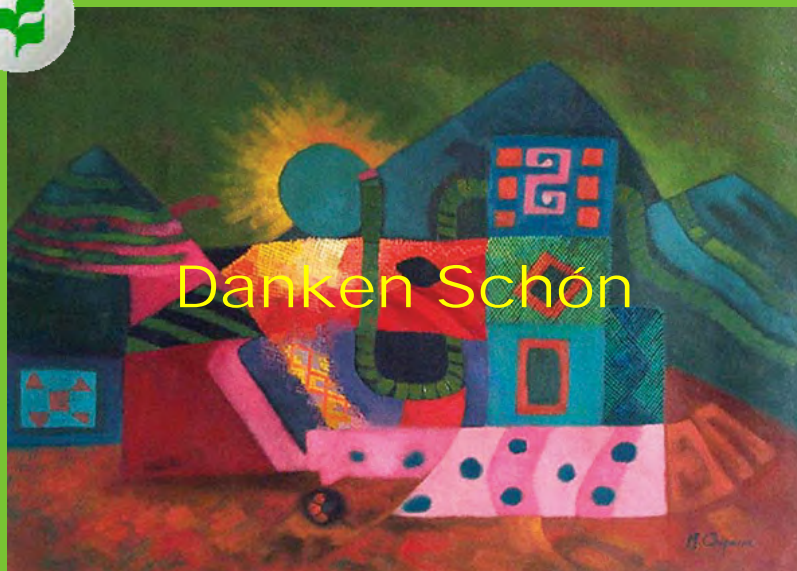
- The experts recognized a critical distinction between traditional knowledge associated with genetic resources being in the “public domain” versus being “publicly available”. It was pointed out that the term public domain, which is used to indicate free availability, has been taken out of context and applied to traditional knowledge associated with genetic resources that is publicly available. The common understanding of publicly available does not mean available for free. The common understanding of public availability could mean that there is a condition to impose mutually agreed terms such as paying for access.
- It cannot be assumed that traditional knowledge associated with genetic resources that has been made available publicly does not belong to somebody. Within the concept of public availability, prior informed consent from a traditional knowledge holder that is identifiable, could still be required, as well as provisions of benefit-sharing made applicable including when a change in use is discernible from any earlier prior informed consent provided. When a holder is not identifiable, beneficiaries could still be decided for example by the State. The experts also felt that the phrase public domain in the context of traditional knowledge needs to be more correctly re-phrased as publicly available.

Some Final Points of Interest

Annex

Negotiating Text

- The objective of the International Regime on Access and Benefit-sharing is to effectively implement the provisions in Articles [1,] [3,] 8(j), 15, [16 and 19.2] of the Convention on Biological Diversity and pursue its three objectives.
- Where PIC is used throughout the report the experts agreed to use the term "**indigenous peoples**" and local communities.








***Options for
Incorporating TK and
Customary Law into
MAT***

**Preston Hardison
Vilm Workshop
Tulalip Tribes of Washington
July 6, 2009**





page 1




Five General Approaches


- 1. Use existing IPR (trade secrets)**
- 2. Accomodation into National Systems:
constitutional law, policies, executive orders**
- 3. Sui generis: Law of itself**
- 4. Direct recognition of customary law/indigenous
regulatory authority**
- 5. Contract law**







page 2


 ***Use existing IPR***




- **Existing forms of IP inadequate in incorporating TK and customary law into MAT.**
- **Public domain**
- **Trade secrets**
 - **Positive: Mechanisms in place for in camera review**
 - **Negative: Restricted use, non-disclosed TK, and problem of leakage**





page 3


 ***Accomodation into National Systems***


- **Many Nations have not developed their systems**
- **National/state conflicts**
- **National systems may not adequately recognize IPs, PIC, or customary law**
- **Extraterritorial application**







page 4


**Sui generis**




- **Law in and of itself: “without precedence”**
- **Some equivocation: Without precedence relative to legal system**
- **Parties tend to use it to refer to new laws within modern legal systems**
- **Indigenous peoples use it to refer to customary law: sui generis recognition**
- **Basis for recognition: Inalienable rights vs. stakeholders**





page 5

***Direct recognition***



- **United Nations DECRIPS**
- **Article 11: right to practice and revitalize cultural traditions and customs**
- **States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.**



page 6

Direct recognition

- **Article 31: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge . . . including . . . genetic resources, seeds, medicines, knowledge of the properties of fauna and flora . . . They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.**



page 7



Direct recognition

- **Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.**



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Accomodation into National Systems

- **Many Nations have not developed their systems**
- **National/state conflicts**
- **National systems may not adequately recognize IPs, PIC, or customary law**
- **Extraterritorial application**



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Direct recognition: Tulalip Tribes

- **Treaty tribes: Treaties negotiated under Law of Nations**
- **Treaties not enumerated rights: reserved rights doctrine**
- **Treaties did not surrender right to customary law, TK or genetic resources**
- **Retained sovereign rights and fiduciary obligations**
- **Tulalip Cultural Resources Heritage Act**



page 10

Direct recognition: Problems

- **Tulalip code based on treaty system**
 - But, consistent with DECRIPS
- **“Oren Ishi-i! We have unfinished business!”**
Longstanding debate over indigenous rights versus stakeholder interests.
- **Extraterritorial application**



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Contracts

- **Contract law presumed by the terms of reference: “MAT”**
- **Not an endpoint**
- **Contracts can override existing IPR and impose stricter restrictions (e.g.: covenants, 3rd party)**
- **Contracts can be used to “contract into customary law”: procedural and substantive**
- **Doesn’t require codification of customary law**




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Contracts

- **Problem of shared knowledge, mixed property**
 - Indigenous institutions and limits
 - Ownership clarity
 - Conflict resolution
- **Good faith safeguards**
- **Capacity for F&E negotiation**
- **Bargaining power imbalances**
- **Negotiating authority**
- **PIC standards**





page 13




Contracts

- **MAT: Potential conflicts between inalienable rights and negotiation of terms**
- **Financing PIC/MAT process**
- **Access to justice/legal representation for conflict resolution**
- **Transparency/contract privacy**
- **Does no mean no? Responses to rejections**
- **Monitoring, oversight (trust, fiduciary, ombudsman)**





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Competent Authorities

- **National competent authorities**
 - Decisions, fiduciary obligations, transmittal role
 - Certification of IPs as parties
- **Indigenous competent authorities**
 - Indigenous-defined institutions
 - Multi-level institutions
 - Transboundary: Subnational and international
 - Transmittal of ABS decisions
- **Conflicts when:**
 - NCA says yes, ICAs say no; or ICAs say yes, NCA says no





page 15




Elements of FPIC/PIC

- **FPIC/PIC Debate: FPIC the language of ILO and DECRIPS**
- **“Free” is an emphasis word, but worth having**
- **Dilemmas of “prior”**
 - Prior to access or use
 - Access between 1992-2010 (?)
 - Access prior to 1992
 - Access where TK and GRs encountered separately (e.g. markets, ex situ collections, academic publications)






page 16




Elements of FPIC/PIC

- **“Informed”: Standards for what information must be provided about:**
 - **Intended uses of TK/GRs**
 - **Potential effects of commercialization**
 - Release of TK into the public domain
 - Disclosure of TK in patent applications
 - Crowding out and spillover effects
 - Non-monopolistic uses/competition






page 17



Elements of FPIC/PIC




- **Realistic assessments of potential benefits**
- **Reversability**
- **Conscientization/Options**
- **Remedies**
- **Mechanisms to withdraw consent**
- **Milestone points for reauthorization**
- **Third party controls**
- **Compensation**
- **Enforcement measures**



page 18

Consent




- **Indigenous identification of authorities**
- **Indigenous authority**
 - Certification
 - Review
- **Indigenous certificates of compliance**
- **Locus of consent: vested in communities, institutions, or representative organizations**
- **Rules of contact and engagement, do not call lists**
- **Parameters/scope of consent**



page 19

Fiddly Bits

- **Responsibility for monitoring costs and activities**
- **Responsibility for enforcement costs and activities**
- **Reasonable due diligence**

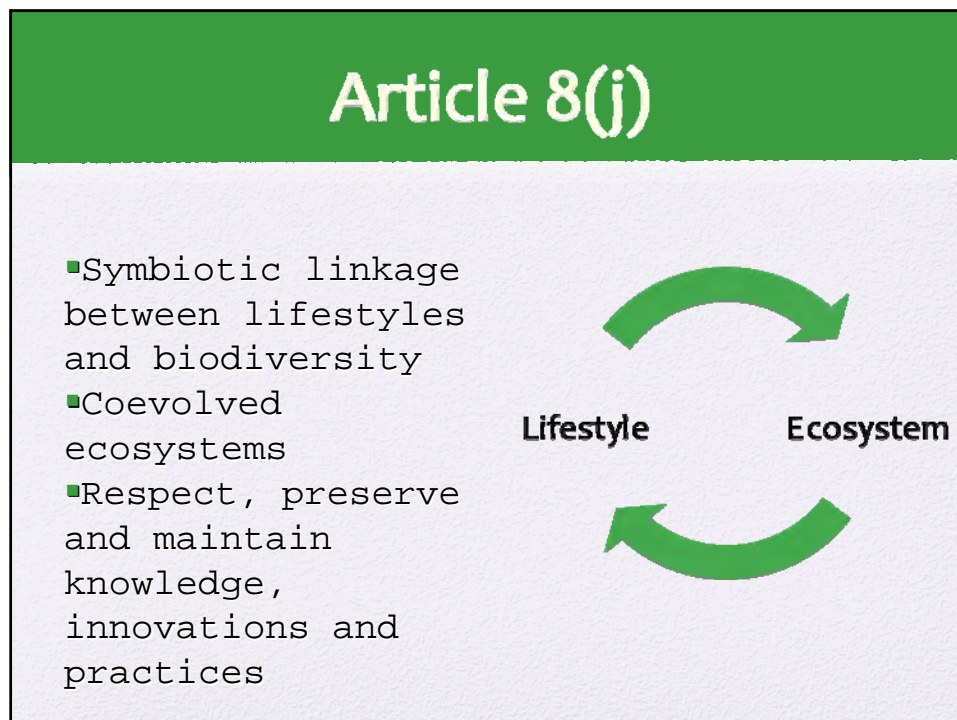
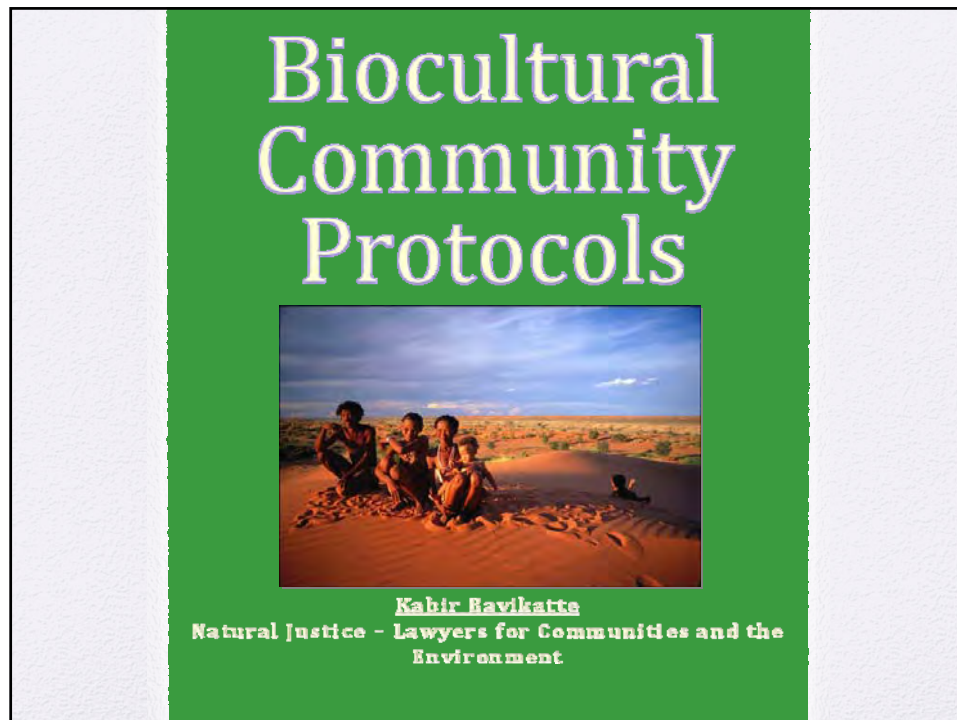


page 20

Fiddly Bits

	Conditions of Encounter of TK and GRs	
	GR On Territory	GR Off Territory
TK On Territory	TK On/GR On	TK On/GR Off
TK Off Territory	TK On /GR Off	TK Off/GR Off

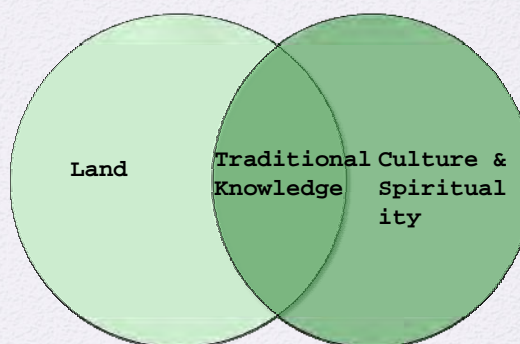




Traditional Knowledge: A Biocultural Relationship

- TK is a manifestation of a dynamic relationship between land and culture

- To protect TK is to protect a way of life

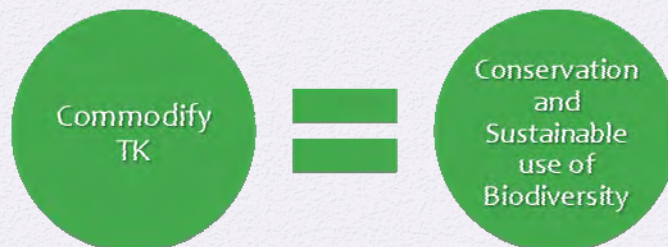


The Grand Bargain of Article 8(j)



- To safeguard the right to TK implies
- Safeguarding the right to a lifestyle that is rooted in rights to land and culture
- Which will lead to conservation and sustainable use of biodiversity

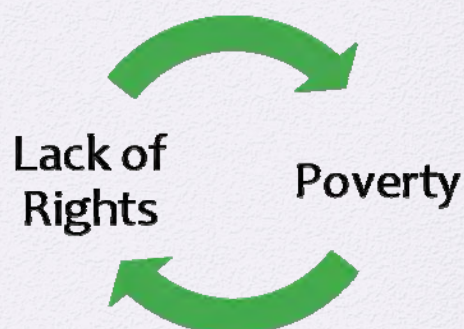
Dominant Interpretations of Article 8(j)



- Misconception that protecting TK as a commodity will lead to conservation and sustainable use of biodiversity
- Analogous to assuming that we can protect critical thinking by documenting knowledge while closing schools and universities

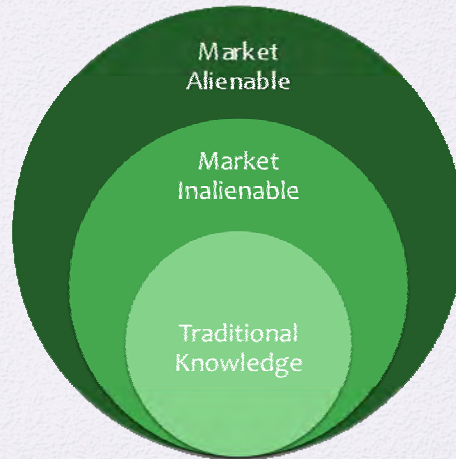
The Reality: Desperate Exchanges

- Some communities are forced to trade in TK due to desperate conditions
- They need the market related benefits that trade in TK will bring
- At the same time there are concerns about the impact of trade in TK on inter and intra community relationships

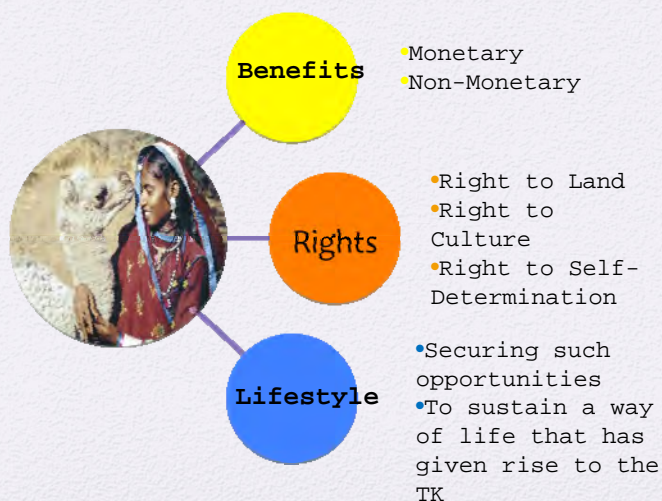


Incomplete Commodification: Addressing the Problem of the Double Bind

- TK has both market alienable and inalienable aspects
- Rights to land, culture, notions of the sacred etc. are market inalienable
- How can ABS secure the market inalienable aspects of TK?



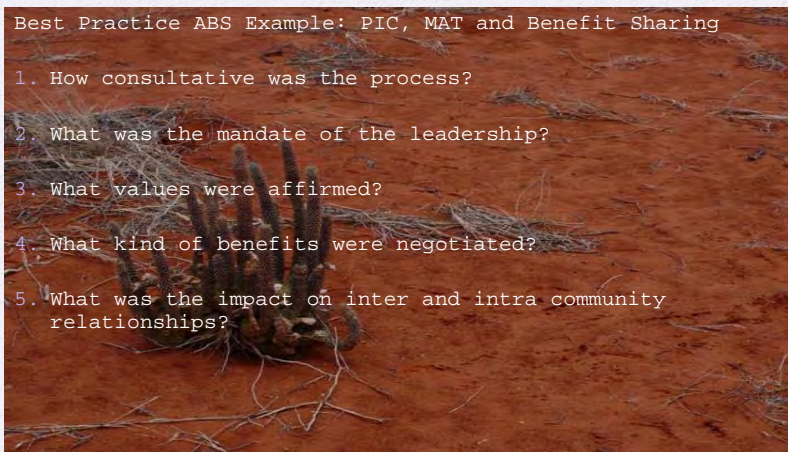
ABS: Affirming Market Inalienable Rights Through Market Alienability



Lessons from Past ABS Agreements: Hoodia

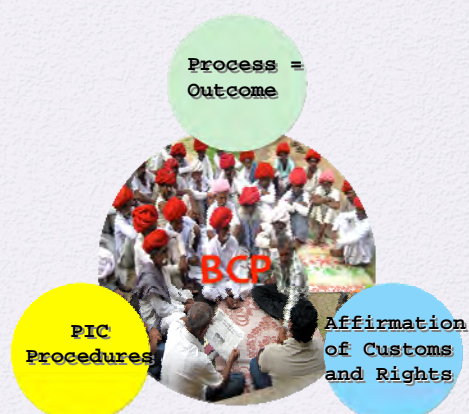
Best Practice ABS Example: PIC, MAT and Benefit Sharing

1. How consultative was the process?
2. What was the mandate of the leadership?
3. What values were affirmed?
4. What kind of benefits were negotiated?
5. What was the impact on inter and intra community relationships?



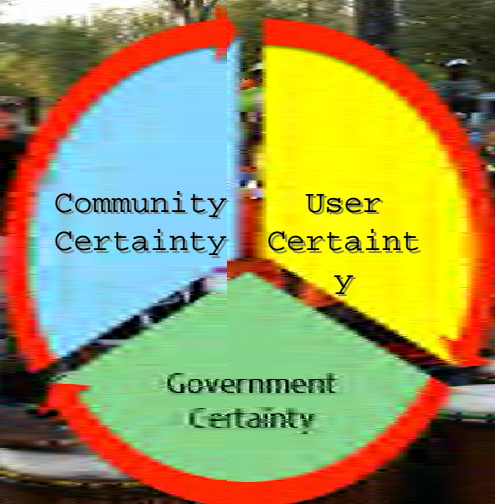
Biocultural Community Protocols

- A process of affirming lifestyle, customs and rights
- A process of reflection within and between communities about the implications of an ABS agreement
- Providing a clear mandate to the leadership



Outcomes: Certainty for Stakeholders

- Consultative process within the community
- Clarity of access procedures for potential users
- Clarity for government decision makers about community laws

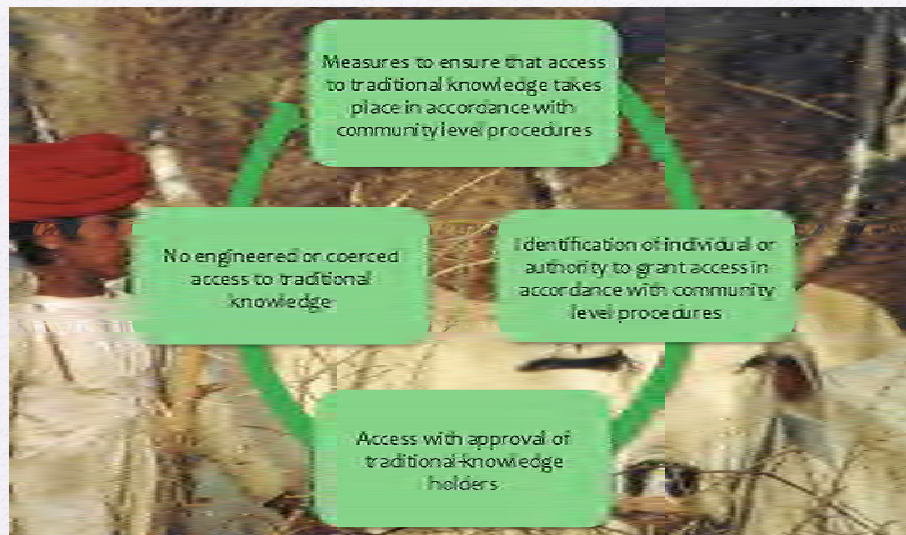


Relevance for the IRABS*

* International Regime on Access and Benefit Sharing

- Annex to the Paris report of ABSWG 7: Measures to Ensure Compliance with Customary Laws and Local Systems of Protection
- Clarity as to what constitutes 'misappropriation and misuse'
- Provides clear access standards for users
- Addresses issues of shared TK

Towards ABSWG8: Relevant Issues for Negotiation



Thank You

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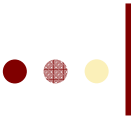
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**CUSTOMARY LAWS OF ILCs REGULATING ACCESS TO
GENETIC RESOURCES AND ASSOCIATED TK AND ITS
RELEVANCE TO THE INTERNATIONAL ABS REGIME-
SOME VIEWS AND POSSIBLE OPTIONS**


Isabel Lapeña
SOCIEDAD PERUANA DE DERECHO AMBIENTAL
ISLE OF VILM, GERMANY
July 2009

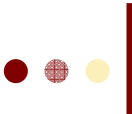


**CUSTOMARY LAWS OF ILCs REGULATING
ACCESS TO GENETIC RESOURCES AND TK
AND ITS RELEVANCE TO THE INTERNATIONAL
ABS REGIME-**




- Previous Considerations
- Concept and Nature of ILCs Customary Laws
- Relevance of Customary Laws of ILCs Regulating Access to Genetic Resources and Associated TK
- Possible Contents in the International Regime regarding ILCs Customary Law
- Inclusion of Customary Law in Contracts
- Role of National Frameworks




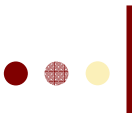


PREVIOUS CONSIDERATIONS




- “Art.8j CBD “knowledge, innovations and practices of ILCs embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity”
- What makes TK “traditional” is the fact that are developed and customarily disseminated within communities
- TK protection may require recognition to the legal, cultural and social context that applies within the original community







PREVIOUS CONSIDERATIONS




- ILCs perspectives:
 - Guarantee that mechanisms of access to GGRR and TK are based on respect to their customary laws and cultural practices
 - Trust in their own laws for the better protection of TK
- Andean Community “Elements for a Sui Generis Protection of Ancestral, Collective and Integral Knowledge” (2005)
“due to the characteristics of the collective and integral traditional knowledge of ILCs, it is recommended that their own ancestral systems based on their customary law and own cultural practices are the best option for the protection of their TK, allowing to consolidate their traditional structures”
- Bonn Guidelines
Call upon Parties to the CBD to respect the customs, traditions, values and customary practices of indigenous and local communities, as well as to secure customary use of genetic resources and related knowledge







CONCEPT AND NATURE OF ILCs CUSTOMARY LAW




- Nature of TK- Nature of Customary Laws
- "Customary Law is a framework of norms, uses and customs that are transmitted among generations and exercised by ILCs' own institutions and authorities on their territories and constitute legal systems acknowledged, accepted and respected by a collectivity and integrate the legal pluralism of countries with ILCs" (Quito 2006)
- Elements: define the very identity of the community; how traditional cultural heritage is shared and developed; Locality: local generation/local implementation







RELEVANCE OF CUSTOMARY LAWS OF ILCs REGULATING ACCESS TO GENETIC RESOURCES AND ASSOCIATED TK




SUBSTANTIVE

- Define user rights and exceptions (content of PIC)
- Determine who should benefit from protection
- Determine how benefits should be shared equitably within a community
- Assessment of cultural/spiritual offence or damage caused by misappropriation
- Determine possible forms of remedies and sanctions or restitutions following the breach of rights over TK
- Conflicts Resolution
- Guidance on the transmission of rights over TK from one generation to the following.
- Ensuring Compliance






RELEVANCE OF CUSTOMARY LAWS OF ILCs REGULATING ACCESS TO GENETIC RESOURCES AND ASSOCIATED TK



PROCEDURAL

- Appropriate forms of consultation and community decision making and consent
- Guide procedures to be followed in PIC



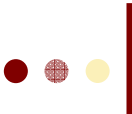


POSSIBLE CONTENTS IN THE INTERNATIONAL REGIME REGARDING ILCs CUSTOMARY LAW




- ILCs decision making incorporated in the Intl. Regime
 - Recognition of pre-existing customary laws as defining TK rights
 - Allow room for ILCs legal space in management of TK and GRR
 - Respect communal scenarios: avoid creating legal impediments to continuing use of customary law at the local level within the traditional context
- Focus on restraining illicit use beyond traditional context
 - Recognize ILCs PIC prior to access to GRR and TK is conceded
 - Previous stages to access according to Customary Law
 - Biocultural Protocols
 - Compliance measures




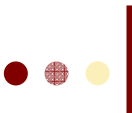


INCLUSION OF CUSTOMARY LAWS IN CONTRACTS




- Can deal with the sui generis matters of TK
- Include substantive contents to customary law and protection of TK (i.e. benefit sharing)
- Relies on the good faith of negotiating parties and equal bargaining; ILCs Negotiation Capacity
- Compliance: Alternative Resolution of Conflicts (according to customary laws)







ROLE OF NATIONAL FRAMEWORKS



- Precondition: indigenous rights recognition/legal pluralism at the national level
- Measures to deal with equity: set minimum standards
- Measures to ensure compliance with customary law and local systems of protection: Disclosure requirements + Check points
- Definition of misappropriation
- Dispute settlement mechanisms
- Information provider








Thank you!

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SPDA

**INTERNATIONAL VILM WORKSHOP ON MATTERS RELATED
TO TRADITIONAL KNOWLEDGE ASSOCIATED WITH
GENETIC RESOURCES AND THE ABS-REGIME**



**TK and PIC: Ways to incorporate TK in PIC decisions.
What are the options to address the balance between
domestic flexibility and international standards on
access? – Some views and/or potential text options**



BEATRIZ ZAPATA FERRUFINO – BOLIVIA

Isle of Vilm, Germany

WAYS TO INCORPORATE TK IN PIC DECISIONS

□ The international rules (International Regime on ABS)

- Must be minimal and standardized
- Should establish the general/key parameters that allow the fair and equitable sharing of benefits arising from the use of TK associated to GGRR and from the access to GGRR existing in their territories, recognizing the collective rights of them.
 - Access to GGRR existing in indigenous territories, with or without associated TK -issue not discussed- Also ABS parameters must be establish in this case
 - In Bolivia: The Political Constitution of the State establishes that benefits must be provided by the use of natural resources existing in indigenous peoples territories, taking into account their internal rules.

WAYS TO INCORPORATE TK IN PIC DECISIONS

□ The general parameters that International Regime on ABS could be include are:

- Recognition of the collective rights of indigenous peoples over their TK and the NNRR existing in their territories.
- Mechanisms and tools to give PIC by the origin Parties countries of GGRR (providers) – Divulcation of the origin country
- Mechanisms and tools to give the PIC by the indigenous peoples holders of TK associated to the GGRR, through their authorities:
 - Participatory decision-making processes
 - PIC provided in written documents (agreements, minutes, certificated, etc.) – Divulcation of the TK source

WAYS TO INCORPORATE TK IN PIC DECISIONS

□ The general parameters that the International Regime on ABS could include are: (Cont.)

- Mutually agreed terms between the country of origin of the GGRR, the holders of associated TK and the users.
- Mechanisms for sharing monetary benefits among stakeholders within the country, including the indigenous peoples involved (50% in Bolivia).
- Inclusion of aspects to monitor the compliance



WAYS TO INCORPORATE TK IN PIC DECISIONS

- ❑ **The role of the competent authorities of indigenous peoples in the ABS processes are important.** The national and regional authorities of indigenous peoples (in case of Bolivia for e.g.) have the role of:
 - Give the PIC with prior approval of the indigenous peoples that they represent, according to the regions and the agreed procedures,
 - Negotiate the "mutually agreed terms" on behalf of indigenous peoples
 - Request and submit to the NCA on ABS, the demands of communities.
 - Coordinate with the NCA on ABS, to agree the mechanisms for benefit sharing within the communities, for monitoring and supervision, .

WAYS TO INCORPORATE TK IN PIC DECISIONS

- ❑ Indigenous people make decisions about the use of their natural resources of their territories and associated TK, according to their internal protocols, procedures and rules according to customary law.
- ❑ The ABS International Regime should not establish rules on Intellectual Property Rights of indigenous peoples, these issues are being discussed by the WIPO Intergovernmental Committee.
- ❑ What happened if WIPO don't have results?



WHAT ARE THE OPTIONS TO ADDRESS THE BALANCE BETWEEN DOMESTIC FLEXIBILITY AND INTERNATIONAL STANDARDS ON ACCES?

❑ **A balanced option could be ensured if the ABS Regime:**

- Recognizes the collective rights of indigenous peoples on their traditional knowledge including at least:
 - The rights on the natural resources existing in the indigenous peoples territories/lands - need more discussion-
- Establishes the obligation to demonstrate the country of origin of the GGRR and the source of the traditional knowledge (write PIC)



WHAT ARE THE OPTIONS TO ADDRESS THE BALANCE BETWEEN DOMESTIC FLEXIBILITY AND INTERNATIONAL STANDARDS ON ACCES?

❑ **A balanced option could be ensured if the ABS Regime:**

- Establishes the system for benefit sharing (multilateral or bilateral)
- Determines percentages for monetary benefit sharing arising from the use of GGRR and TK
- Establishes the instrument through which the countries of origin will authorize the ABS, including associated TK (Access contract, Material Transfer Agreement)

POTENTIAL TEXT OPTIONS

- ❑ Countries Parties to the CBD recognize the collective rights of indigenous peoples on their TK associated to the genetic resources
- ❑ Countries Parties to the CBD must ensure the obligation to demonstrate the origin country of the GGRR and the source of the traditional knowledge by the GGRR and TK users.



POTENTIAL TEXT OPTIONS

- ❑ Countries Parties to the CBD should establish national legislation to include measures to ensure that the use of the TK associated to genetic resources should be in accordance with the internal rules and procedures of indigenous peoples and respecting their collective rights and organizations structures.
- ❑ The PIC for the use of TK should be given by national and regional authorities of indigenous peoples with the approval of them (may be one or more communities) and endorsement by the national competent authority on ABS.

THANK YOU VERY MUCH



Monica Ribadeneira Sarmiento TK and ABS-related research

Deutsche
Forschungsgemeinschaft

**Traditional Knowledge and
ABS-related research: best
practice to ensure that ABS
related research respects
existing TK- Options of
Operational Text**

Mónica Ribadeneira Sarmiento
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1. General Information

DFG: the essentials of funding philosophy

- funding of investigator-initiated research only (bottom-up approach);
- funding is granted solely on the basis of proposals;
- no restrictions concerning the subject of the proposal;
- assessment of all proposals by honorary peer reviewers;
- decisions are based on solely scientific criteria.

DFG Mission

- to serve all branches of science and the humanities by:
 - funding projects devoted to basic research
 - facilitating cooperation among researchers on a national and an international scale
- to advise parliaments and public authorities on scientific issues
- to devote particular attention to young researchers.

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DFG activities on CBD and ABS

1. DFG ABS Group
2. DFG Senate Commission on Biodiversity Research
3. Office for ABS Issues
4. DFG monitoring ABS at international level
5. Other activities
6. Guidelines for DFG projects with CBD-context

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Guidelines for DFG projects with CBD-context

- They were established by the ABS DFG Working Group
- Printed and online version available via DFG webpage in English and in German
- Delivery in printed version at workshops, seminars, meetings, etc.
- They are part of the DFG general information for grants (Research Grants)

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Guidelines

for Funding Proposals Concerning Research Projects
within the Scope of the Convention on Biological Diversity (CBD)



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System of Funding of projects

- Only scientists working at German research institutions can apply
- The counterparts in the host country are cooperation partners
- Aim: to promote international cooperation

For developing countries

- A special type of funding exists for the counterpart
 - monetary resources for project specific equipment for the host institution
- There are special grants to initiate or prepare cooperation projects.

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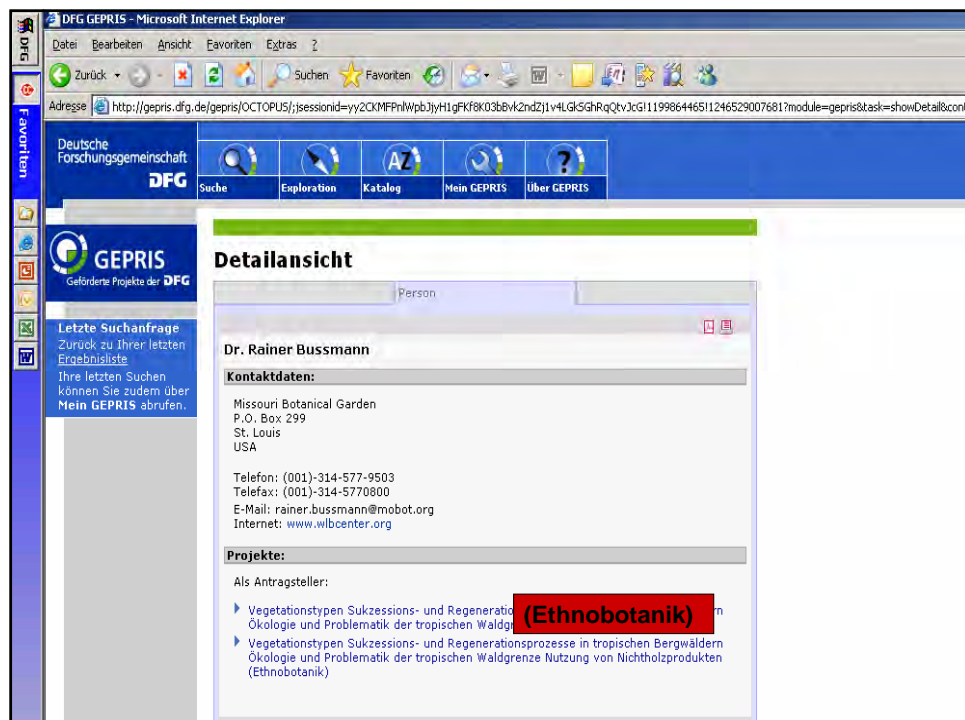
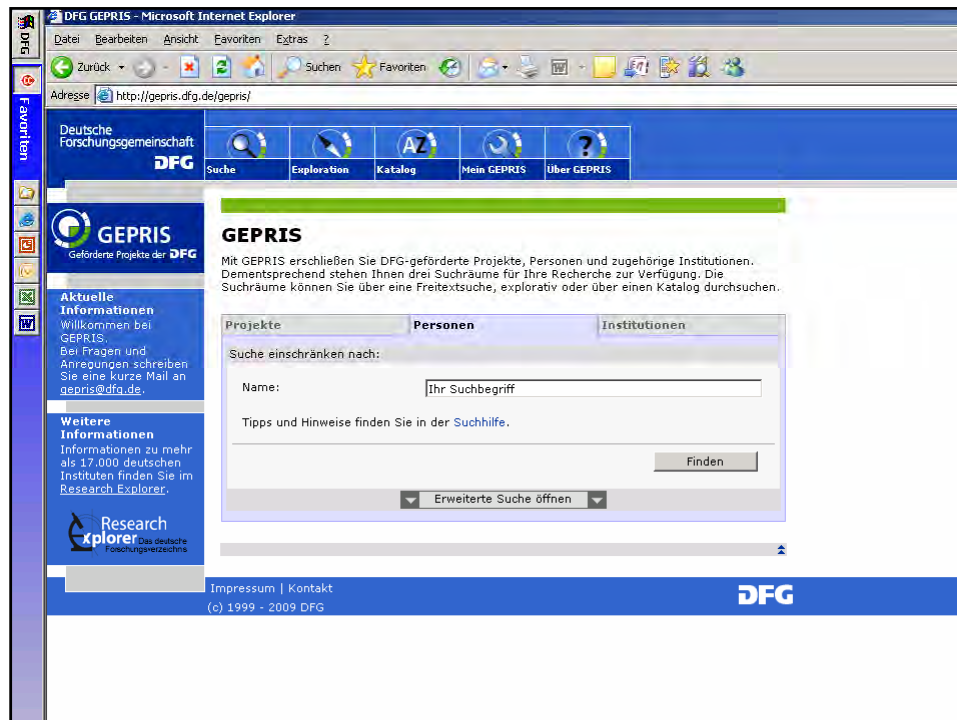
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2. Research including Traditional Knowledge at DFG, the case of Ethnobotany

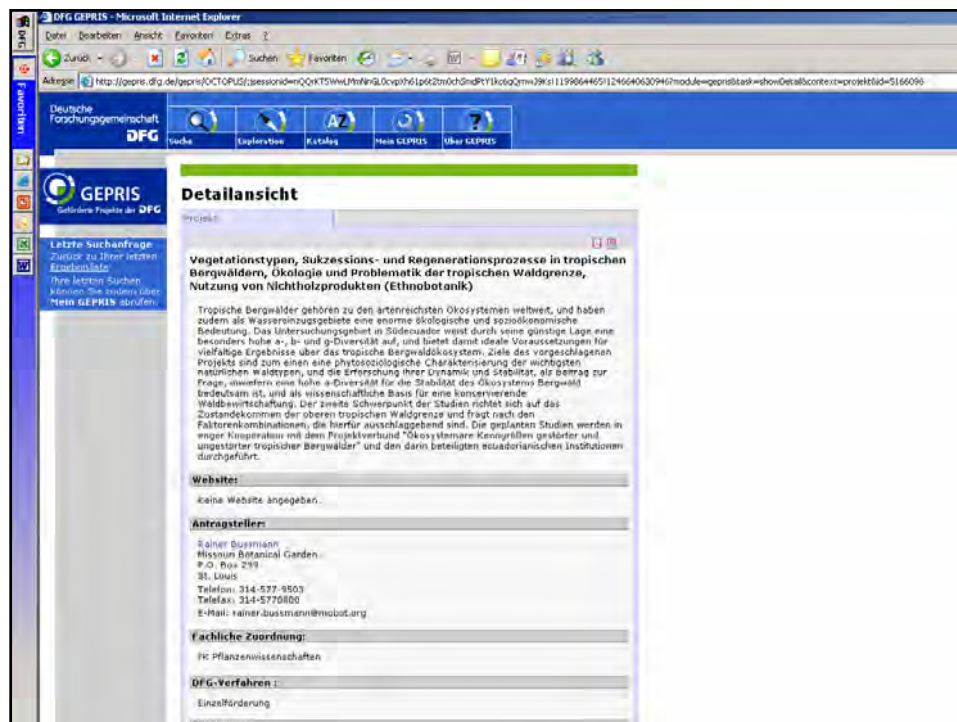
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Remaining questions and ideas

- Are "research + TK" not interesting for granting purposes?
- Grants for Research including TK
 - who is providing grants?
 - only industry?
- Method of working
- Monitoring system at national level:
 - feasibility
 - roles
 - local level
 - national level
 - international level

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3. Best practices according CBD

- Condition
- During the project is running
 1. PIC
 2. publications
 3. ABS
 4. results
 5. TK protection efforts
 - personal warning

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1. PIC

- country of origin
- formal
 - national legislation
- limit of PIC
 - conditions for transfer of genetic material

2. Publications

- to publishing or not to publishing, that is the question!
- to negotiate what is going to be published
- public disclosure of TK (?):
 - benefits / authorship
 - reachable material

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3. BS

- equitable share of benefits
 - tangible
 - expectations / benefits
 - useful benefits
 - sustainable benefits
- efforts and steps to avoid misuse and misappropriation

4. Results

- integral part of the project
- passing back the result
 - appropriate way to present
 - accessible way to use

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5. TK protection efforts

- efforts but real efforts to protect TK from misappropriation
- measures
 - agreed PIC
 - national authorities

do not mix “*misappropriation*” with other offences, misdemeanours, felonies or crimes regarding research, maybe you are missing legal chances

and ...

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Personal Warning

English

2. Right on special protection to enable him to develop physical, psychological and social.

(Mafalda: and mainly protection against old protection systems)
(Orphanage and Protection House)

German

2. Recht auf speziellen Schutz aufgrund ihrer physischen, psychischen und sozialen Entwicklung

(Mafalda) - und vorallem Schutz vor gewissen alten Schutzmethoden
(Heim zum Schutze der Jugend)

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Draft Objectives and Principles - Misappropriation of Traditional Knowledge

Begoña VENERO AGUIRRE

Head of the Genetic Resources, Traditional Knowledge and
Biotechnology Section / Traditional Knowledge Division /
WIPO

Vilm, July 9, 2009 *Encouraging creativity and innovation*



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IGC

- 2000: Creation of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) by WIPO General Assembly (to constitute a forum in which discussions could proceed among Member States on IP issues that arise in the context of: (i) access to genetic resources and benefit sharing; (ii) protection of TK; and (iii) protection of expressions of folklore)



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- 14 Sessions of the IGC so far
- WIPO's work on these issues has already come a great distance
- No consensus among all WIPO's Member States on the next steps to take ... in particular on international outcomes



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Some outputs

- Review of existing IP protection of TK
- Comparative summary of *sui generis* legislation for the protection of TK
- Policy options and legal mechanisms for the protection of TK
- Elements of a *sui generis* system for the protection of TK
- Survey of patent office practice in examining TK-related patent documents



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- Objectives and principles for the protection of TK (“Draft provisions”)
- Recommendations for taking account of TK in patent examination
- Toolkit for managing IP when documenting TK and GR
- Technical study on disclosure requirements related to GR and TK



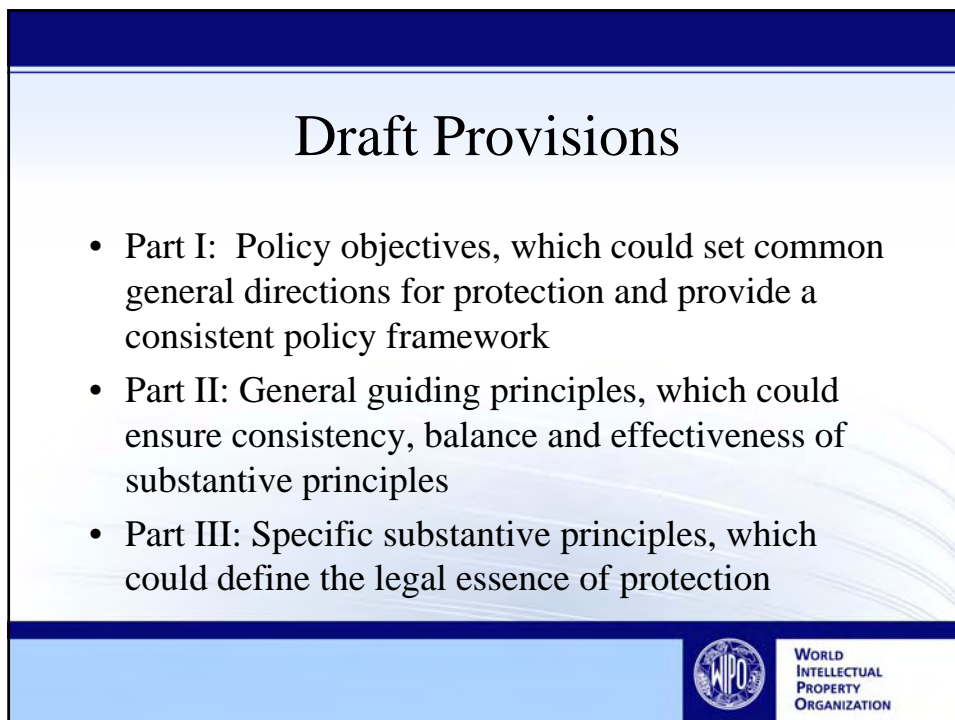
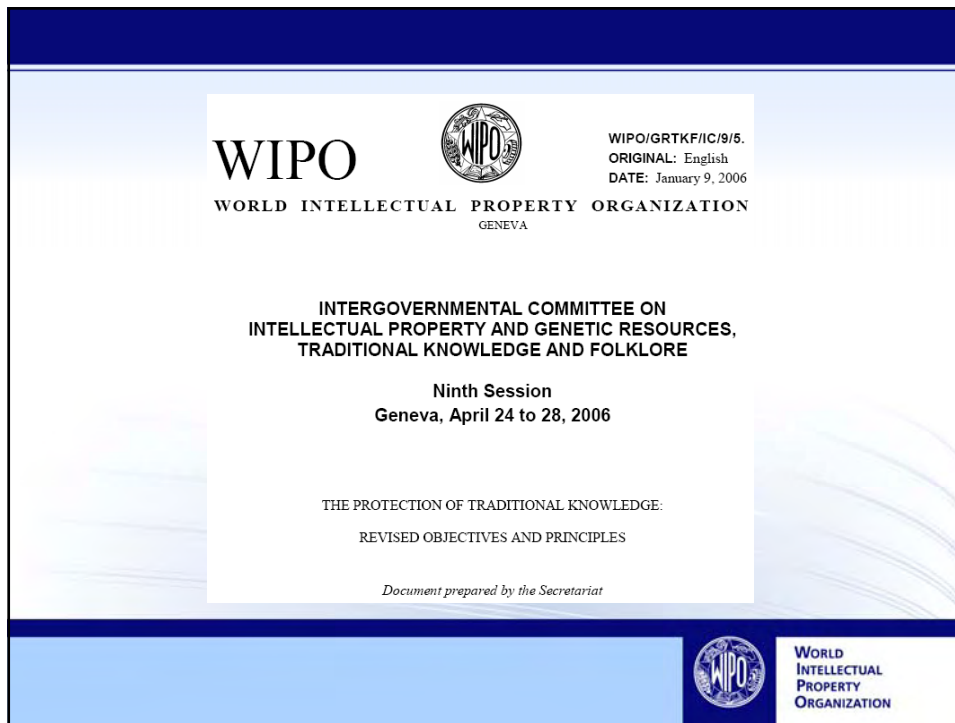
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These outputs ...

- Have been built through consultation and broad-based inputs
- Could provide content for international instruments, if WIPO Member States choose to take that step.




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I. POLICY OBJECTIVES


- (i) Recognize value
- (ii) Promote respect
- (iii) Meet the actual needs of traditional knowledge holders
- (iv) Promote conservation and preservation of traditional knowledge
- (v) Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems
- (vi) Support traditional knowledge systems
- (vii) Contribute to safeguarding traditional knowledge
- (viii) Repress unfair and inequitable uses
- (ix) Concord with relevant international agreements and processes
- (x) Promote innovation and creativity
- (xi) Ensure prior informed consent and exchanges based on mutually agreed terms
- (xii) Promote equitable benefit-sharing
- (xiii) Promote community development and legitimate trading activities
- (xiv) Preclude the grant of improper intellectual property rights to unauthorized parties
- (xv) Enhance transparency and mutual confidence
- (xvi) Complement protection of traditional cultural expressions



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II. GENERAL GUIDING PRINCIPLES

- (a) Responsiveness to the needs and expectations of traditional knowledge holders
- (b) Recognition of rights
- (c) Effectiveness and accessibility of protection
- (d) Flexibility and comprehensiveness
- (e) Equity and benefit-sharing
- (f) Consistency with existing legal systems governing access to associated genetic resources
- (g) Respect for and cooperation with other international and regional instruments and processes
- (h) Respect for customary use and transmission of traditional knowledge
- (i) Recognition of the specific characteristics of traditional knowledge
- (j) Providing assistance to address the needs of traditional knowledge holders



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III. SUBSTANTIVE PRINCIPLES

1. Protection Against Misappropriation
2. Legal Form of Protection
3. General Scope of Subject Matter
4. Eligibility for Protection
5. Beneficiaries of Protection
6. Fair and Equitable Benefit-sharing and Recognition of Knowledge Holders
7. Principle of Prior Informed Consent
8. Exceptions and Limitations
9. Duration of Protection
10. Transitional Measures
11. Formalities
12. Consistency with the General Legal Framework
13. Administration and Enforcement of Protection
14. International and Regional Protection



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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.*



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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.



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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.



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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.*



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ARTICLE 2

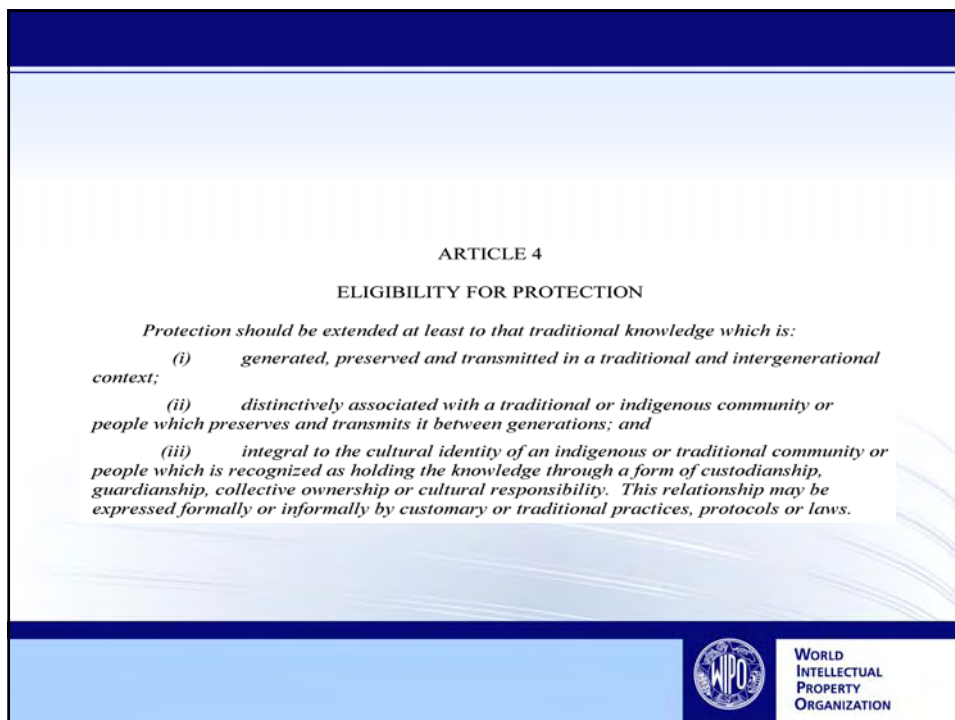
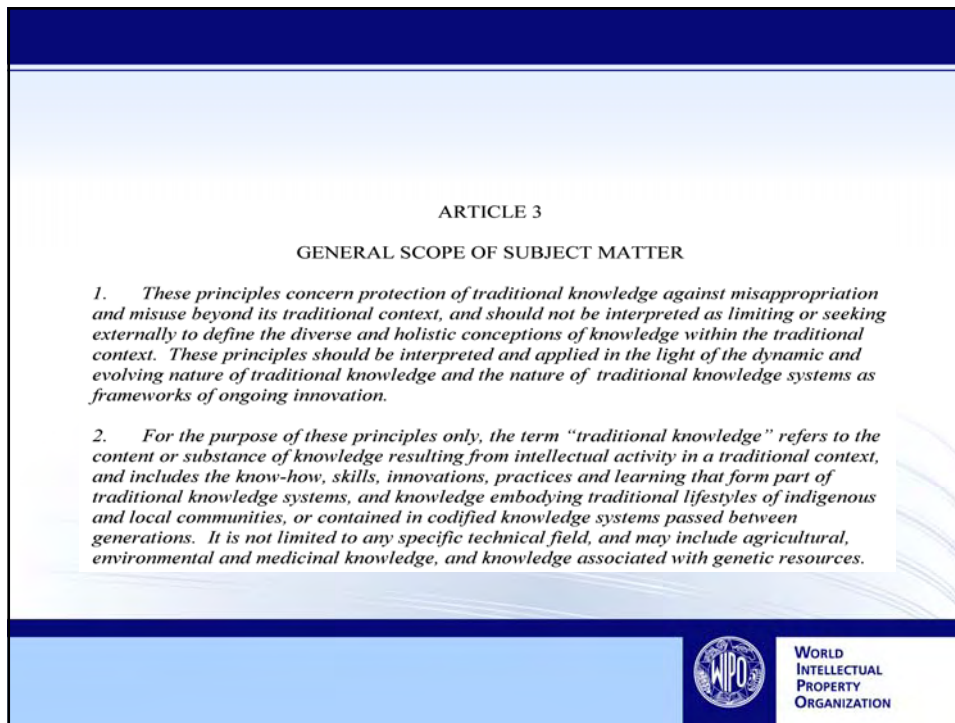
LEGAL FORM OF PROTECTION

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.*



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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.

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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.

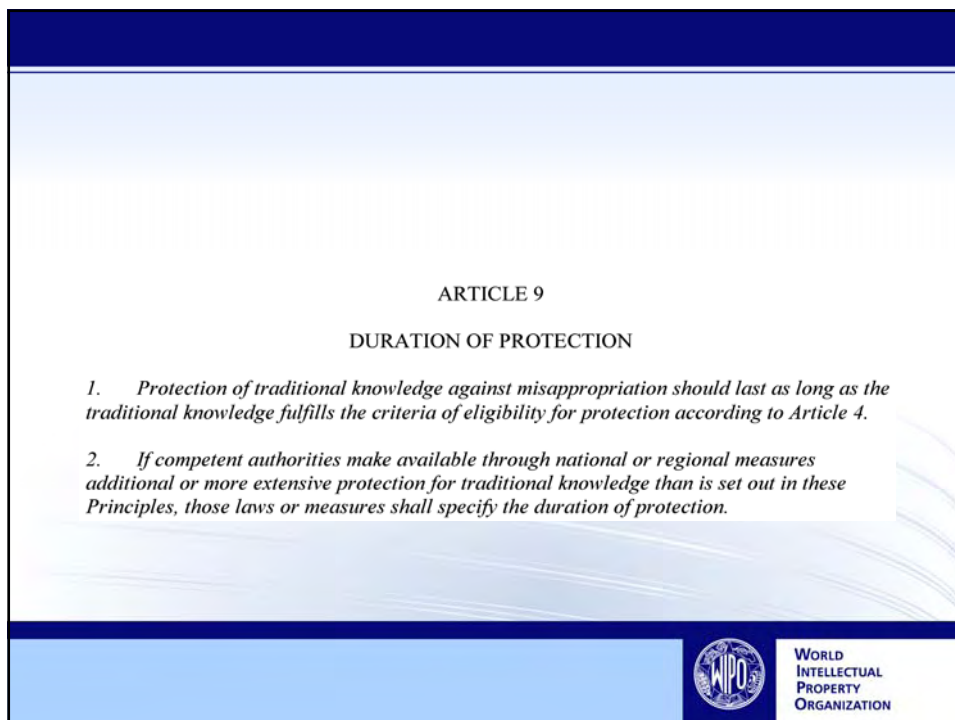
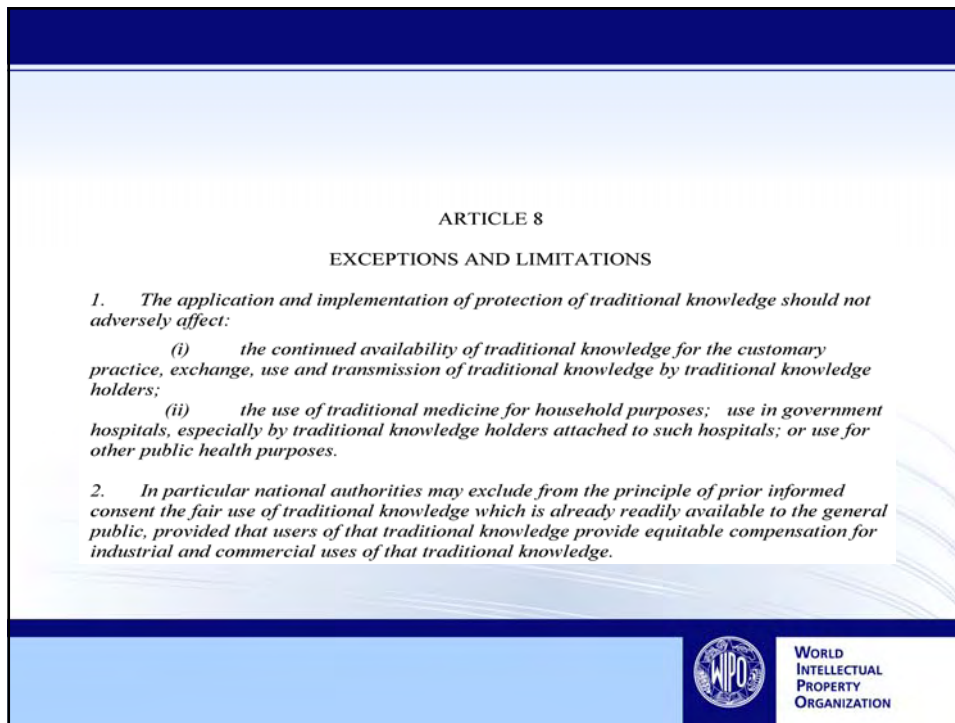
2.

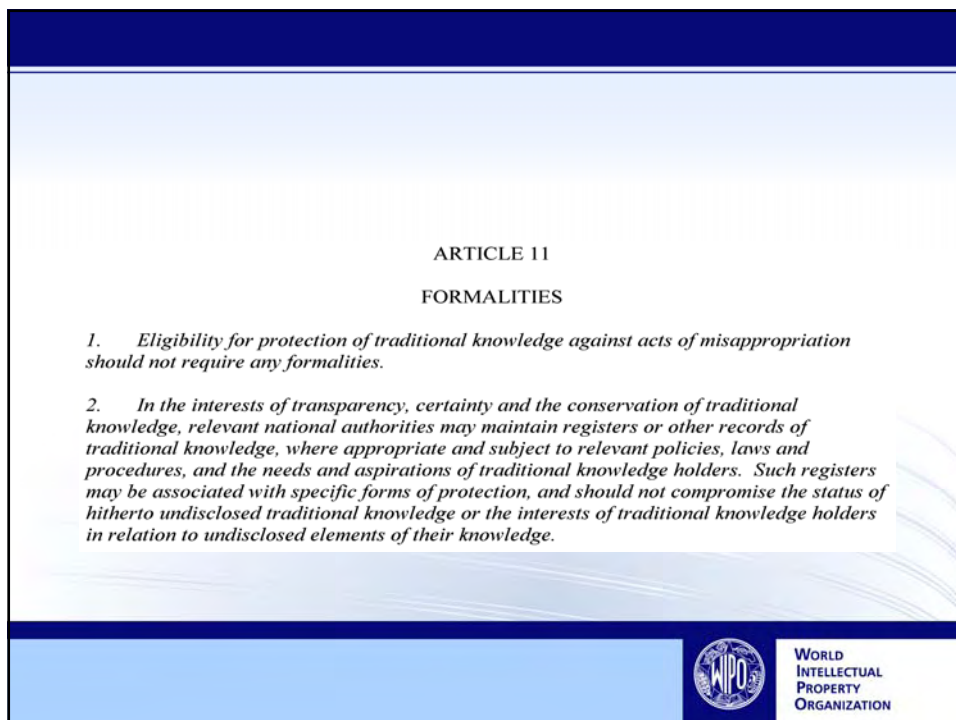
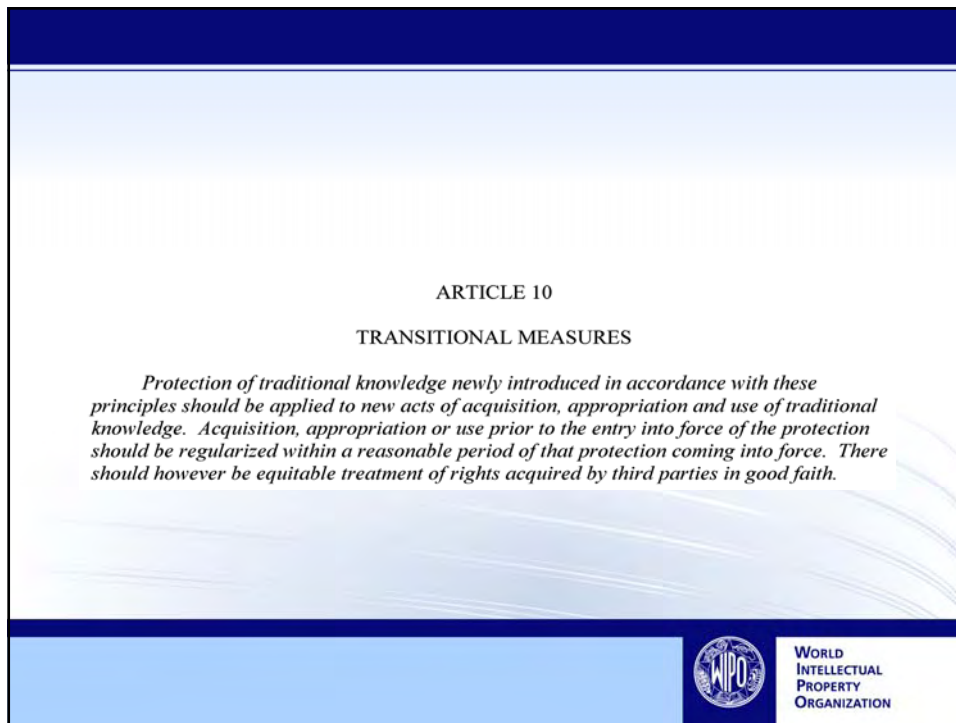
The holder of traditional knowledge shall be entitled to grant prior informed consent for access to traditional knowledge, or to approve the grant of such consent by an appropriate national authority, as provided by applicable national legislation.

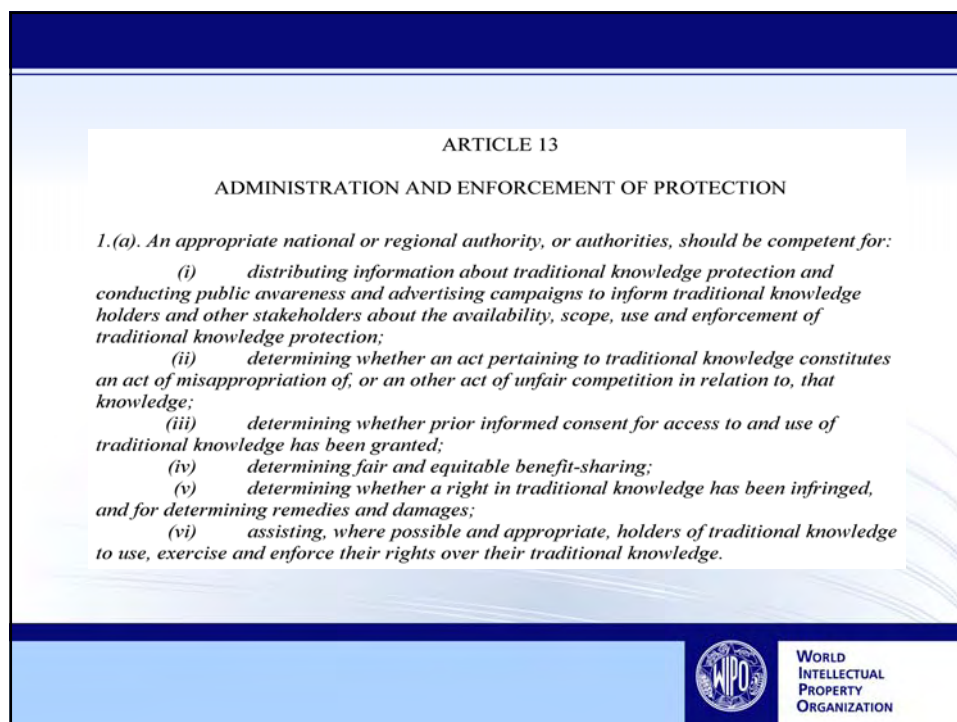
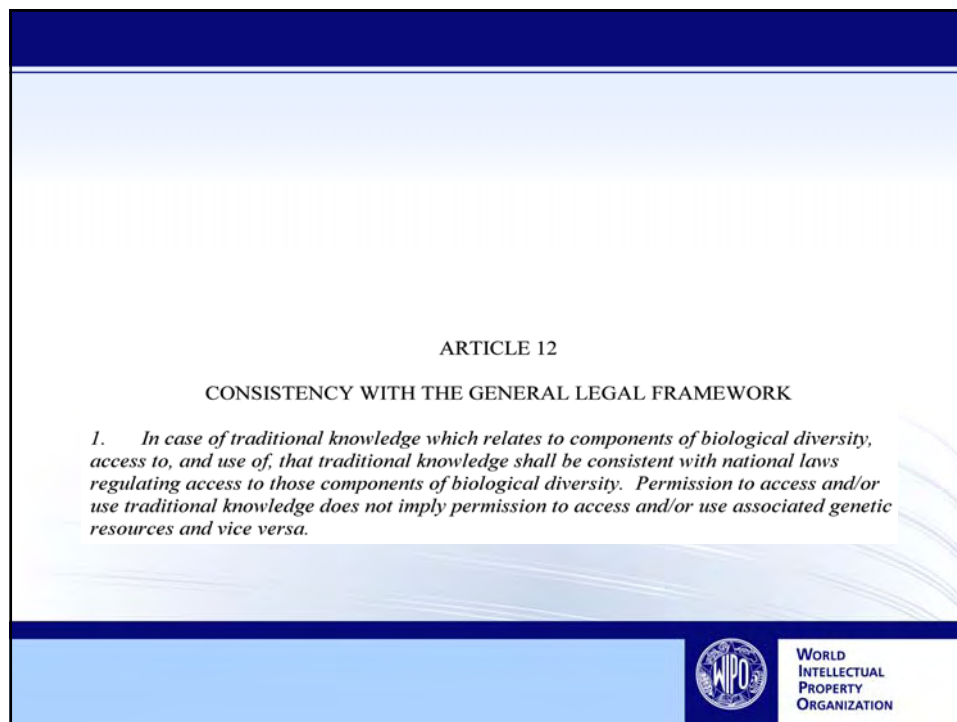
3.

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.

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(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.



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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.



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ABS Commons/Open Source Licenses

Paul Oldham
ESRC Centre for Economic and Social
Aspects of Genomics (Cesagen), UK

The ABS Labyrinth

- ▶ ABS debates over-emphasise *potential* value of genetic resources and TK at the expense of *actual* values;
- ▶ There is a need to find a way through the middle ground - I am proposing ABS licenses as a possible solution;
- ▶ The key to this is *reciprocity* and *enabling choices* for providers in conditions of sufficient certainty for their rights;



Customary Laws & Reciprocity

- ▶ Customary law study highlights the principle of reciprocity - that is the obligation to reciprocate in an exchange relationships;
- ▶ Three main types focusing on types of relationships:
 - ▶ Generalized (i.e. close family - delayed, non-equivalent);
 - ▶ Balanced (direct/time limited and equivalent);
 - ▶ Negative (attempt to get something for nothing);
 - ▶ Reciprocity is a spectrum - customary law elaborates on possibilities across that spectrum in multiple ways (*hau* example).
 - ▶ How might obligations to reciprocate be promoted in ABS and for what constructive purposes?

Commons/Open Source Licenses

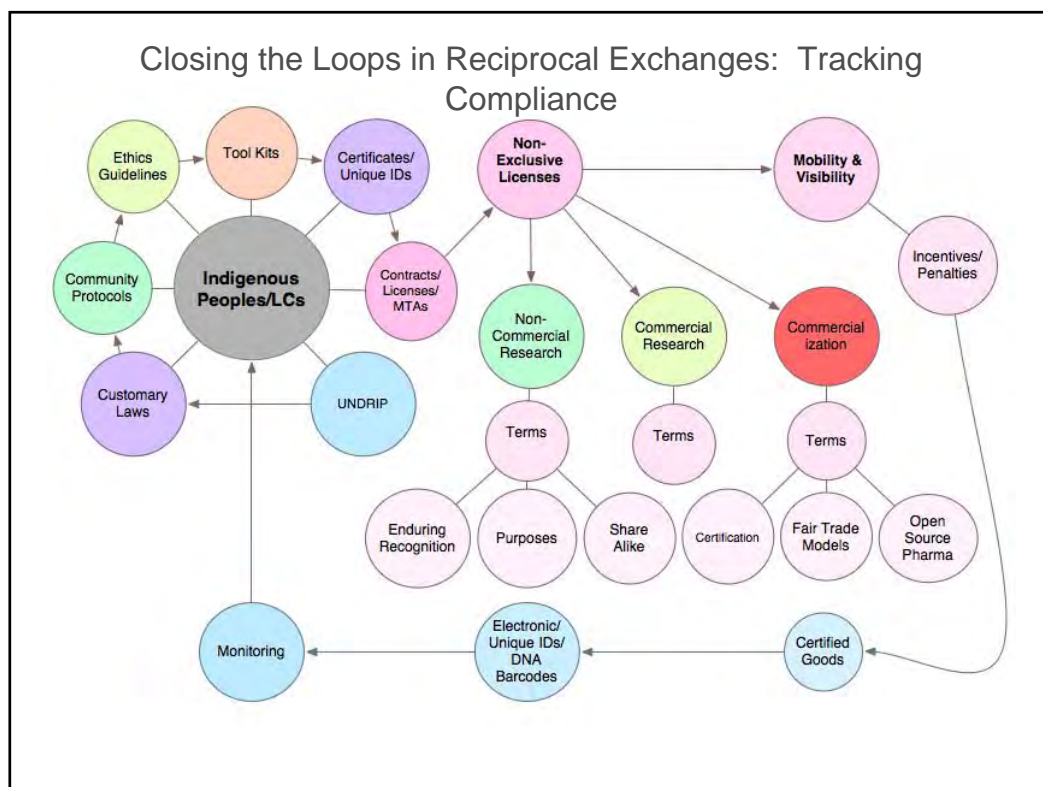
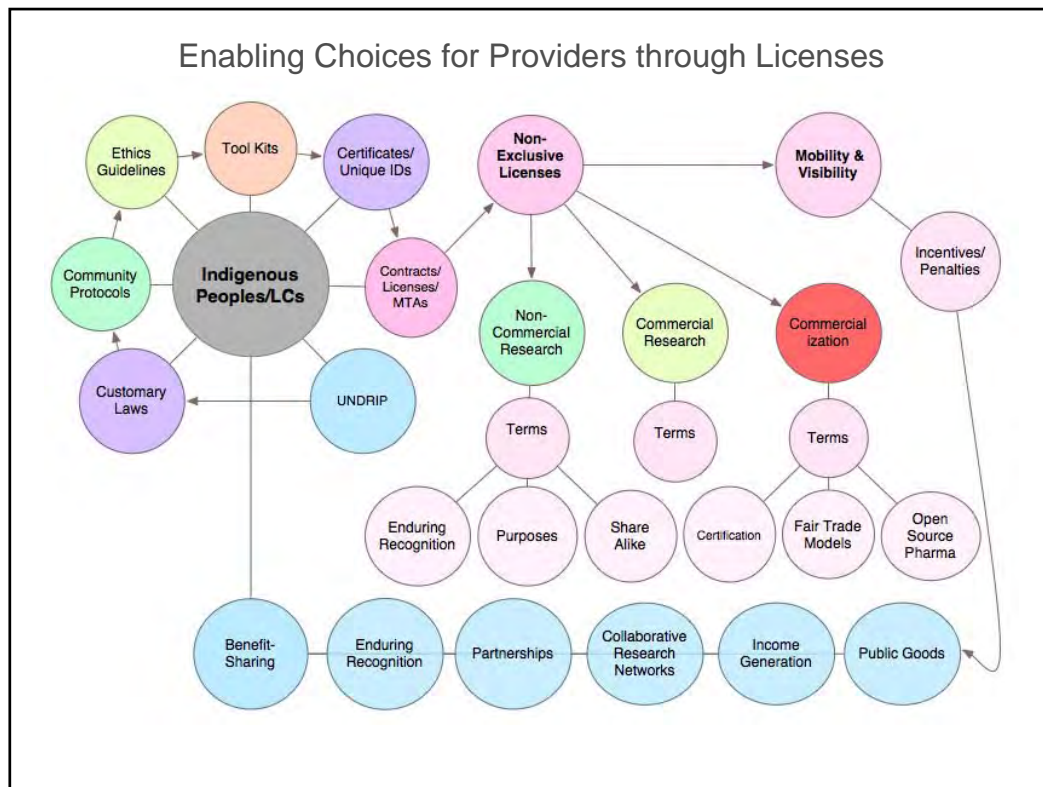
- ▶ Derive from the Free Open Source Software Movement (FOSS) and the creation of the General Public Licence in the 1980s;
- ▶ Objective of GPL was to create a protected commons for source code through the exploitation of copyright as “copyleft” *to prevent* source code entering into public domain and privatization (appropriation);
- ▶ Copyleft a “reciprocal” license because requires users to make derivatives/software available on exactly the same terms;
- ▶ Open source focuses on choices for providers and pragmatic business models (various licenses under open source definition);

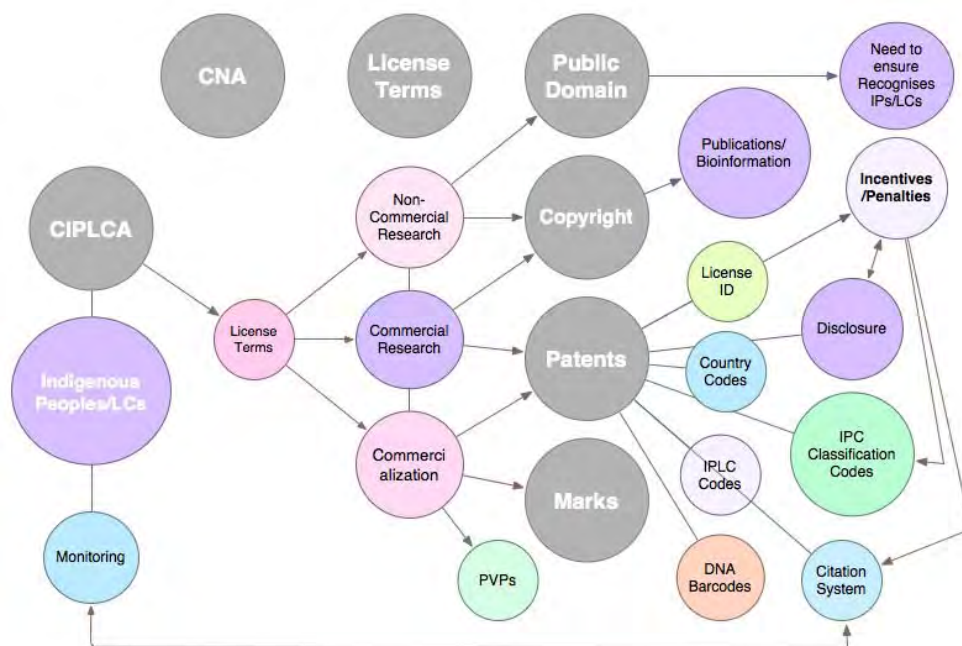
ABS License Options










- ▶ Three categories of utilization of genetic resources and knowledge, innovations and practices of indigenous peoples & LCs (Section: III.C.1.c option 2)
 - ▶ Research and development not aiming at commercialization (non-commercial research);
 - ▶ Research and development aiming at commercialization (commercial research);
 - ▶ Commercialization;
- ▶ Basis for 'access and benefit-sharing commons' licenses (import into III.A.5 and re-elaborate to cross link with compliance III.C.1.c option 2).

Components

- ▶ What happens when knowledge and resources **go mobile**?
- ▶ 1. Requirement for enduring recognition of contributions over time;
- ▶ 2. Modular license choices setting terms and conditions under which knowledge and resources made available (non-commercial, reciprocal 'share-alike' terms, requirement for new PIC and MAT for commercial research in an additional agreement etc.);
- ▶ 3. Visibility to the wider intellectual property regime (i.e. patents);
- ▶ 4. Linked to compliance and monitoring measures;
- **Giving providers choices that are transparent to users and can be tracked and monitored.**

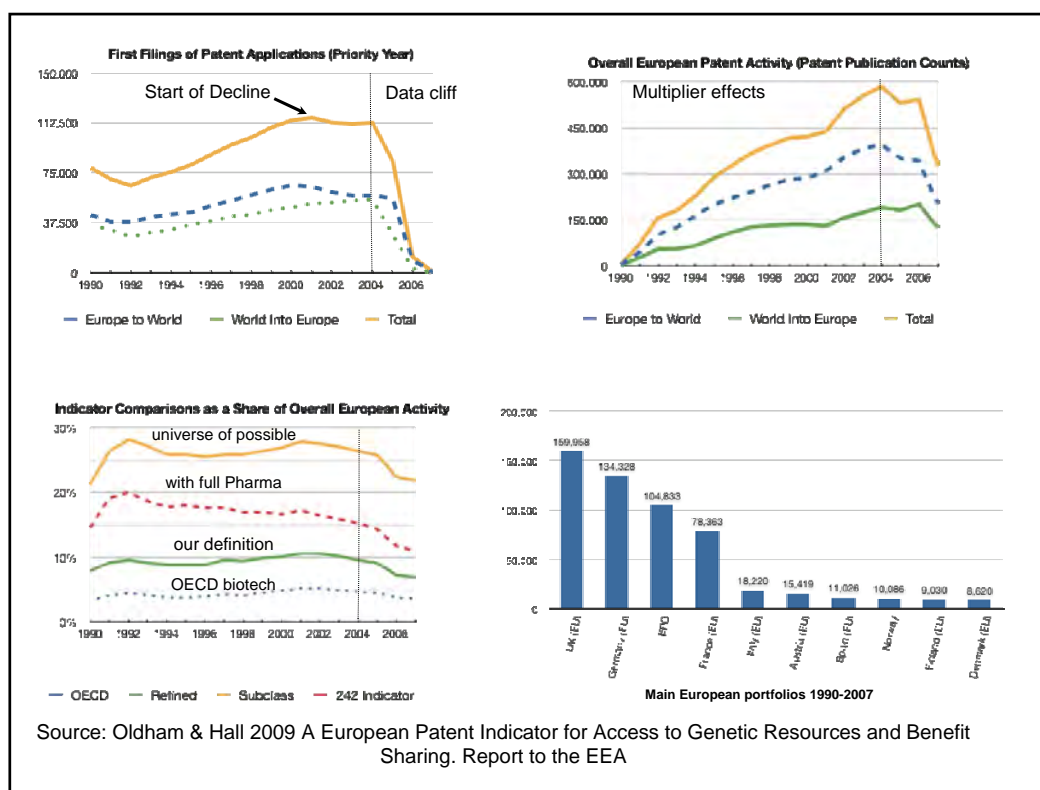




In my patents list Print Return to result list Previous in result list 32/79 Next in result list	
<h2>AGENT IMPROVING PERIPHERAL BLOOD FLOW</h2>	
Bibliographic data	Mosaics Original document INPADOC legal status
Publication number: WO2005094860	Also published as:  JP2005281272 (A)
Publication date: 2005-10-13	
Inventor: YOSHIDA YUJI (JP); KISO YOSHINOBU (JP); MATSUMOTO YUTA (JP)	
Applicant: SUNTORY LTD (JP); YOSHIDA YUJI (JP); KISO YOSHINOBU (JP); MATSUMOTO YUTA (JP)	Cited documents:  BR9900721  BR9901909  JP2004000171  JP2002515401  JP2002020246  JP2000334044  WO0051548  XP002998116 less <<
Classification: - International: A61K36/18; A23G3/00; A23L1/30; A23L2/02; A61P9/00; C12G3/04; A61K36/18; A23G3/00; A23L1/30; A23L2/02; A61P9/00; C12G3/00; (IPC1-7): A61K35/78; A23G3/00; A23L1/30; A23L2/02; A61K7/00; A61P9/00; C12G3/04 - european: A23L1/30B; A61K36/31; C12G3/04	
Application number: WO2005JP06325 20050331 Priority number(s): JP20040101735 20040331	
View INPADOC patent family	
Report a data error here	
Abstract of WO2005094860 <p>It is intended to provide an efficacious agent for improving peripheral blood flow which can improve symptoms caused by peripheral blood flow disorders (chill, palsy, pain, skin troubles, etc.) or skin disorders accompanying peripheral blood flow disorders (cold injury, frostbite, raw with cold, chap, etc.) and has no side effect. More specifically speaking, an agent for improving peripheral blood flow which contains, as the active ingredient, an extract of a plant belonging to the family Cruciferae and the genus Lepidium, still specifically, an agent for improving peripheral blood flow which contains, as the active ingredient, an extract of maca (<i>Lepidium myenii</i> Walp); and foods, drinks, cosmetics or drugs containing the agent for improving peripheral blood flow.</p>	
Data supplied from the esp@cenet database - Worldwide	

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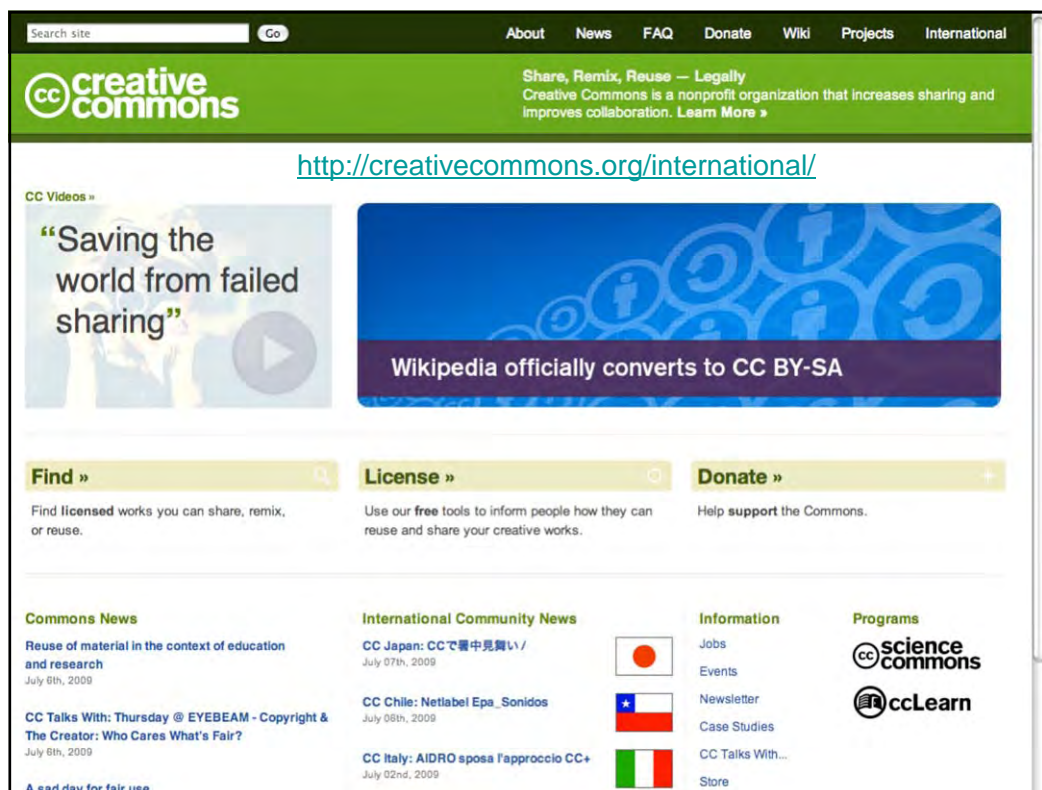
Sub-set Top Applicants for plant based traditional medicines (A61K36)

1st Applicant/Assignee	Japan	USA	PCT	EPO	Germany	France	UK
SHISEIDO CO LTD	403	23	31	53	8		
COUNCIL SCIENT IND RES (India)	11	168	109	89	30	1	13
L'OREAL	48	64	32	108	38	76	
KAO CORP	227	50	15	51	13		
NOEVIR KK	323		12				
INDENA SPA	16	61	65	120	58	1	1
POLA CHEM IND INC	262		1				
PROCTER & GAMBLE	4	69	67	64	21		1
MARUZEN PHARMA	209						
TOYO SHINYAKU KK	146	11	28	18			
TSUMURA & CO	160	4	6	11	1		
LION CORP	167	1	3	4	1		
TAISHO PHARMA CO LTD	164	2	6	3	1		
LVMH RECH	4	34	32	48	18	31	1
ICHIMARU PHARCOS INC	165						
SUNTORY LTD	83	11	29	38	3		
SCHWABE WILLMAR GMBH & CO	5	14	36	61	40		
Sub-Total	2,397	512	472	668	232	109	16
Total	13,907	9,863	7,598	6,881	2,257	949	278

Note: patent publication counts A61K36 only. Source: Micropatent Aureka

Components

- ▶ References to licences could be inserted in relevant parts of the text (i.e. customary laws, community protocols and licenses);
- ▶ Elaboration of technology transfer and research sections to reflect three categories of utilization and include IPLCs;
- ▶ Links to compliance (elements of the certificate and monitoring);
- ▶ Links to access (facilitated through advanced acceptance of a non-commercial licence);
- ▶ Radically reduced transaction costs and access through online tools;
- ▶ Need to adapt existing tools for ABS purposes.



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- ☒ Yes, as long as others share alike ¹
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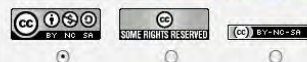


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Contents

[hide]

- 1 Simple Explanation
- 2 Summary
- 3 Solvable Problems
 - 3.1 Legal
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- 5 Use Cases
- 6 Media
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 - 7.3 BeatPick
 - 7.4 Mockups
 - 7.5 Actual

Simple Explanation

The basic concept is to have a Creative Commons license + some other agreement which provides morePermissions.

 + 

NOTE: Above, the CC license should link to the human deed and the generic commercial license would link to a place to get a commercial license for a work. The COMMERCIAL LICENSE is generic and should be tailored for specific uses with specific names of copyright holders.

Here is the SVG (vector graphic) to the generic button if you would like to construct a commercial licensing button for your usage. The button is released into the public domain.

Summary

CC+ is a protocol providing a simple way for users to get rights beyond the rights granted by a CC license. For example, a work's Creative Commons license might offer noncommercial rights. With CC+, the license can also provide a link by which a user might secure rights beyond noncommercial rights -- most obviously commercial rights, but also additional permissions or services such as warranty, permission to use without attribution, or even access to performance or physical media.

Work Useful (603) ▾

Stuff ▾

SCF related ▾


Lancaster Un...sity Library

SCF Share

Synthetic Biology ▾

http://mta.sciencecommons.org/chooser

Q Creative Commons Public



science commons

Materials Transfer Agreement

Science Commons Materials Transfer Agreements (MTAs) are contracts that govern the transfer of tangible research materials from one research institution (the provider) to another (the recipient). They are most commonly employed in the transfer of "unique research resources" such as cell lines, monoclonal antibodies, reagents, animal models, growth factors, combinatorial chemistry and DNA libraries, clones and cloning tools (such as PCR), methods, laboratory equipment and machines. Non-biological and synthetic materials, such as certain nano-materials, chemical reagents, and chemical substrates may be shared under MTAs as well.

Provider Information

Provider:

Provider URL:

Provider Address:

Material Information

Description:

Material URL:

Transfer Offers

An offer provides a material under a specific legal agreement. You can create multiple offers for your material.

You can include information about the offers on your web page; just copy and paste the HTML below into your page. The HTML includes machine-readable metadata which software can discover and aggregate.

Preview:

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The screenshot shows the Science Commons website with the "Materials Transfer Agreement" section. A modal window titled "Add Offer" is open, displaying a welcome message and a question: "What type of agreement are you offering?". The options are:
- ☐ UBMTA
- ☐ Simple Letter Agreement
- ☒ Science Commons MTA
- ☐ Custom Agreement
The modal has "Cancel", "Back", and "Next" buttons. In the background, the "Provider Information" section is visible, including fields for "Provider Name", "Provider Address", and "Material Information". The "Transfer Offers" section at the bottom states: "An offer provides a material under a specific legal agreement. You can create multiple offers for your material." and includes an "Add an offer" button.

The screenshot shows the same Science Commons website, but the modal window is now at the second step, titled "Whom is this offer made to?". It asks for the "Recipient class" with the following options:
- ☐ All types of recipients
- ☒ Offer to non-profits only
- ☐ Offer to for-profits only
The modal has "Cancel", "Back", and "Next" buttons. The background content remains the same as the previous screenshot, showing the "Provider Information" and "Transfer Offers" sections.

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The screenshot shows the Science Commons Materials Transfer Agreement (MTA) form. The form is titled "Materials Transfer Agreement" and includes a description of MTA. The form is divided into sections: "Provider Information", "Material Information", and "Transfer Offers". The "Add Offer" dialog box is open, showing the following fields:

- Field of use: ☐ All research uses, ☒ Restrict to disease, ☐ All uses except disease, ☐ Restrict to protocol
- Disease or protocol:
- Is scaling up allowed?: ☒
- Is retention of material allowed?: ☒

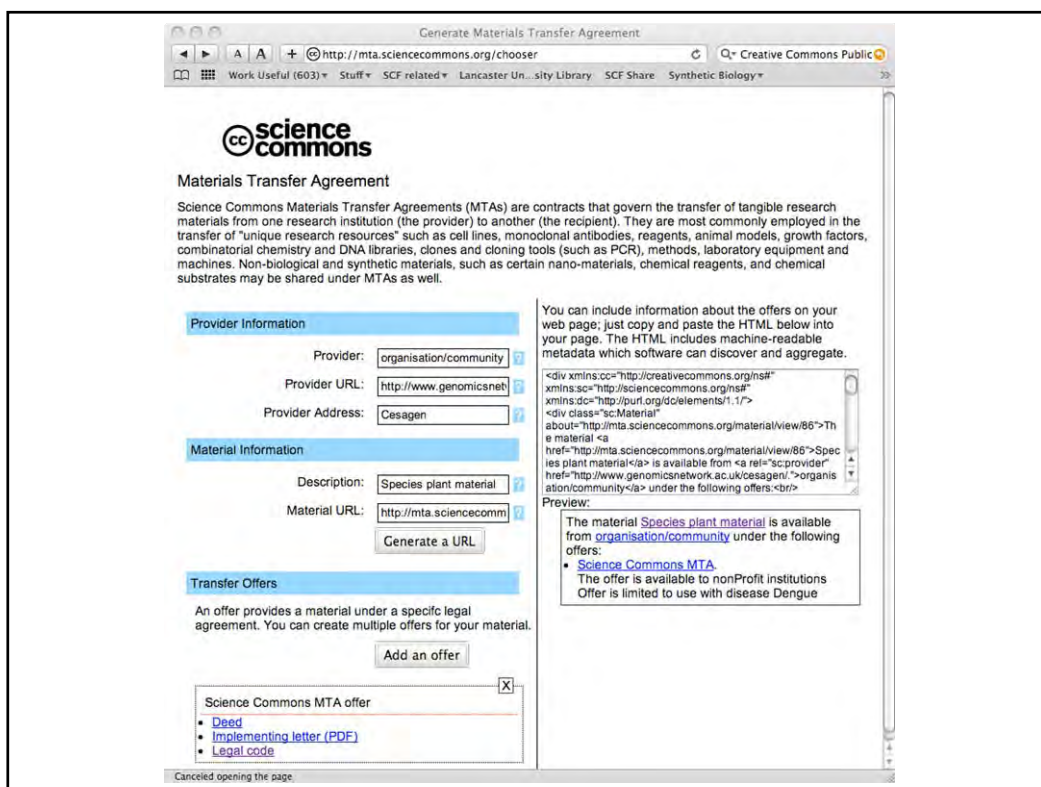
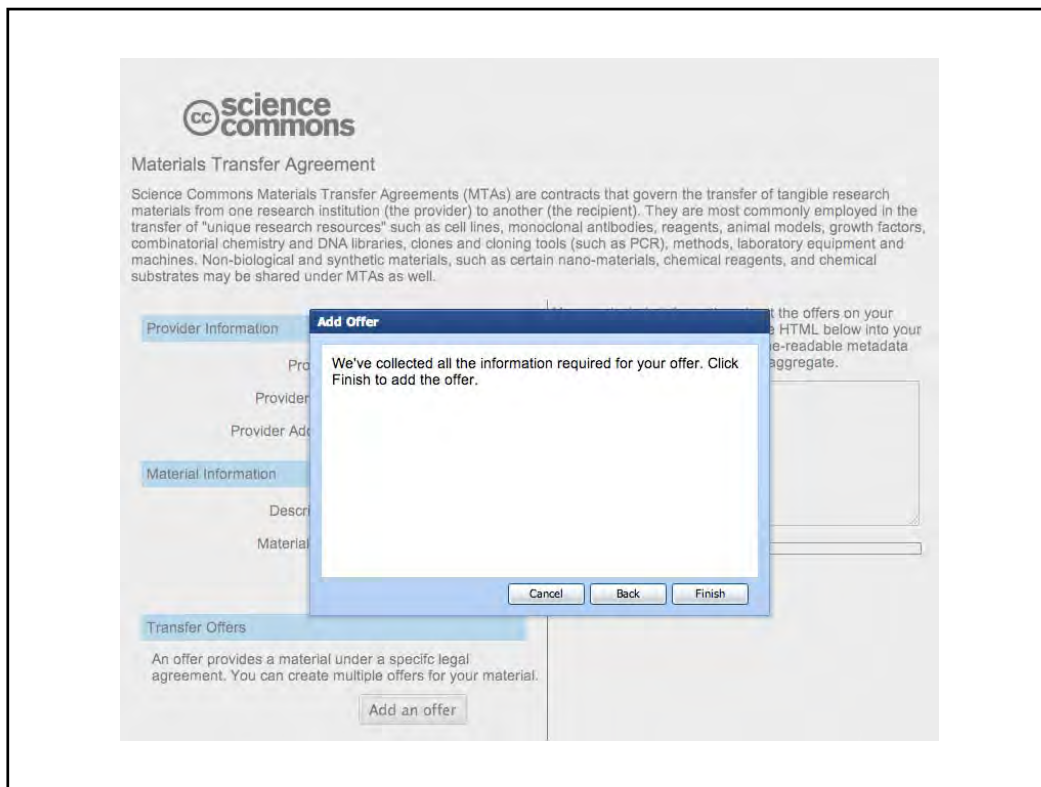
The dialog box has "Cancel", "Back", and "Next" buttons.

The screenshot shows the Science Commons Materials Transfer Agreement (MTA) form. The form is titled "Materials Transfer Agreement" and includes a description of MTA. The form is divided into sections: "Provider Information", "Material Information", and "Transfer Offers". The "Add Offer" dialog box is open, showing the following fields:


- Additional information about this offer (these fields are optional):
- Termination date:
- Transmittal Fee:

The dialog box has "Cancel", "Back", and "Next" buttons.

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Science Commons Material Transfer Agreement

sc-df 1.0


You are free to:

- Use the materials for research that you supervise
- Allow others under your supervision to use the materials
- Publish the results of your research

Under the following conditions:

-  Your use of the materials is restricted by fields of use.
Limited to Dengue
-  You may not use the materials for clinical purposes.
-  You may not use the materials in connection with the sale of a product or service.
-  You may not transfer or distribute the materials.

This is a human readable version of the full [MTA](#). [Disclaimer](#)



Science Commons Material Transfer Agreement

Legal code for sc-df agreement.

Science Commons Material Transfer Agreement
(SC DF 1.0)

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1. Introduction

This Science Commons Material Transfer Agreement and any attachment that references it (collectively, the "Agreement") is .
This Agreement may be released in multiple versions. Only the version expressly referenced by the parties shall apply, ev

2. Definitions

Capitalized terms used in this Agreement have the meaning defined below. Plural and singular forms may be used interchange.

"Clinical Use" means use in humans to treat or diagnose any disease or condition, including, but not limited to, use in cl.

"Commercial Use" means selling or offering for sale: (i) a product that contains the Materials, (ii) a service that invol

"Investigator" means the principal investigator employed by Recipient who is responsible for controlling and supervising r

"Materials" means tangible materials that are transferred subject to the Agreement, as may be more specifically described .

"Modification" means a change to the Materials resulting in novel properties or a combination of the Materials with other ,

"Provider" means the Party that provided the Materials.

"Recipient" means the Party that received the Materials.

"Research Use" means experimental activities directed to discovery or development, but excluding any Commercial Use or Cli

"Scale Up" means to produce substantial additional quantities of the Materials.

"Specified Field of Use" means the field of use as defined in the attachment to this Agreement.

"Unmodified Product" means: i) the progeny (if an organism, including a virus) or subclone of the Materials, ii) a product

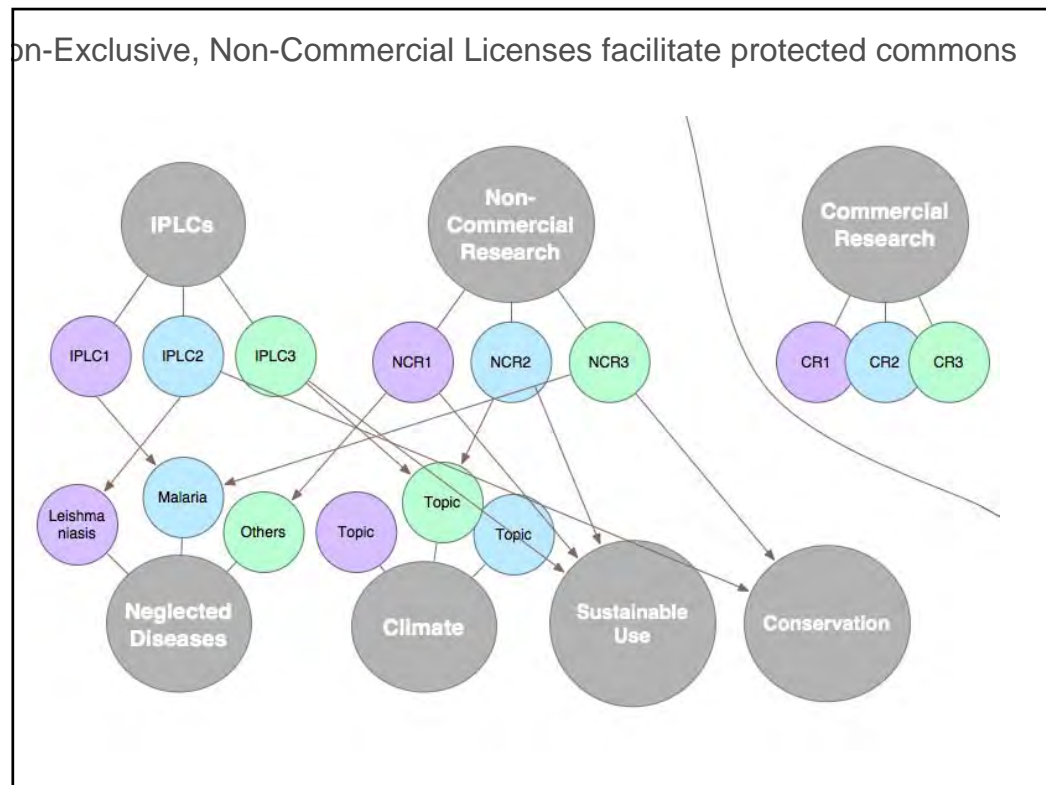
3. Authorized Uses and Limitations

Commons Licenses & ABS

- Additional work and adaptation would be needed to rework this type of approach under an international regime – post 2010;
- Significant opportunities to insert text notably following references to community protocols (“and licenses”)
- Re-elaboration of the research sections in A to link to provisions under C (in relation to model clauses);
- Would serve to operationalise and simplify the complex provisions of emerging regime and give indigenous peoples and local communities *choices*.

Background

- Oldham, P (2009) An Access and Benefit-Sharing Commons? The role of commons/open source licenses in the international regime. Being submitted for the compilation of views.
- On patents, indicators, disclosure and certificates:
- Oldham & Hall (2009) A European Patent Indicator for Access to Genetic Resources and Benefit-Sharing. Report to European Environment Agency EEA/BSS/08/012
- Oldham (2007) Biodiversity and the Patent System: Towards International Indicators. UNEP/CBD/WG-ABS/5/INF/6



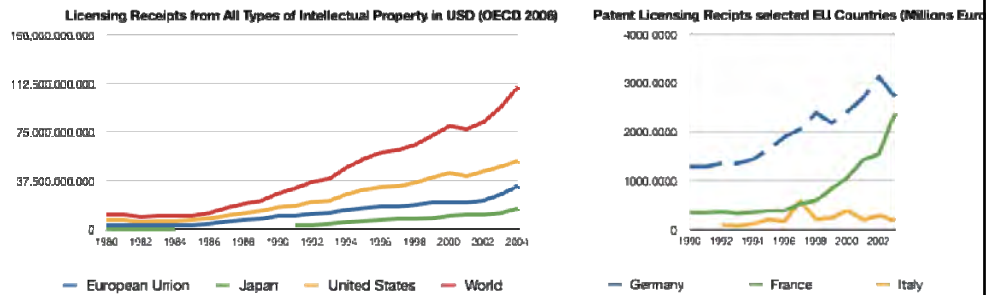
UNDRIP Art. 31

- Article 31: Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge . . . including . . . genetic resources, seeds, medicines, knowledge of the properties of fauna and flora They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Paul Oldham

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The economic stakes and the political economy of rents



Intellectual Asset Management = Leveraging Intellectual Property through Licensing (millions USD)

Millions of USD Firm (industry)	2000	2001	2002	2003	2004	% of net income (latest available)
DuPont (chemicals)	160	155	128	141	151	8
Merck (pharmaceuticals)	153	126	75	87	114	2
Amgen (biotechnology)	181	253	332	383	n.a.	17
IBM (computing)	528	465	351	338	393	5

Source: Corporate reports. Reproduced from OECD Science, Technology and Industry Outlook 2006

Science Commons Material Transfer Agreement Implementing Letter

Reference URL: <http://mta.sciencecommons.org/agreements/sc-df/1.0/legalcode>

This Implementing Letter incorporates by reference the Science Commons Material Transfer Agreement indicated above.

1. PROVIDER: Organization providing the MATERIAL:

Organization: organisation/community
 Address: Cesagen

2. RECIPIENT: Organization receiving the MATERIAL:

Organization: _____
 Address: _____

3. MATERIAL (Enter description, URL, or add attachment):

Description: Species plant material

4. SPECIFIED FIELD OF USE OR PROJECT (only if required by the MTA)

Dengue

5. Termination date for this letter (optional)

Date: _____

6. Transmittal Fee to reimburse the PROVIDER for preparation and distribution costs (optional)

Amount: _____

Traditional knowledge and Paris Convention art 10bis protection

Jostein Sandvik
Senior legal advisor

Legal and international affairs

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www.patentstyret.no

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Norwegian Industrial Property Office

Intellectual property law

- Creativity should be encouraged and stimulated
- Imitation, copying and passing off should be discouraged
- Create a level playing field
- Different forms of IP-law
 - Patents
 - Trademarks
 - Industrial design
 - Copyright and related rights
 - Can be supplemented by unfair competition law
- Territoriality
- Exceptions and limitations

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page 2

Intellectual property law

- Paris Convention of 1883
 - Revised last in 1967
- TRIPS Agreement 1994
 - WTO single undertaking
- IGC on GRTKF in WIPO from 2001 to 2009
 - Possible renewal of mandate for another two years

page 3

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Working definition of TK

- “traditional knowledge” is taken to referring in general 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.

page 4

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Working definition TK

- (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.

page 5

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The idea for a new model

- Create a legal instrument in order to protect the respect for and the recognition of TK, involving
 - Prior Informed Consent
 - Benefit sharing
- Modelled on the principle in Article 10bis of the Paris Convention
 - "Good business practices"
 - Presupposes a commercial effect in a given country
- This provision has also been the model for various new models of IP-protection
 - *Geographical indications (e.g. wines and spirits)*
 - *Undisclosed test data for pharmaceuticals*
 - *Integrated circuits*

page 6

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Recommendation regarding protection against misappropriation and unfair use of Traditional Knowledge

WIPO/GRTKF/IC/9/12 at § 38

- 1. The members of the Paris Union for the Protection of Industrial Property and the World Intellectual Property Organization should assure nationals of member countries adequate and effective protection against misappropriation and unfair use of Traditional Knowledge (TK)
- 2. Any use of TK against honest practices in cultural, industrial or commercial matters should be considered as actions in breach of paragraph one.
- 3. TK holders should in particular be provided with effective means to ensure that:
 - the principle of prior informed consent applies to access to TK,
 - benefits arising from certain uses of TK are fair and equitable shared,
 - all acts of such a nature as to create confusion by any means whatever with the origin of the TK are repressed, and
 - all acts of such a nature that would be offensive for the holder of the TK are repressed."

page 7

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Elements to be considered

- Legal certainty
 - Predictability
- International dimension
 - National treatment
 - Most favoured country
- Enforcement
 - Collecting societies
- National implementation
 - Different legal traditions
 - Trust in its own Government and/or Parliament

page 8

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Elements to be considered

- Legally binding
 - In what sense, in which context

 - Norway has proposed a disclosure obligation in the TRIPS Agreement a new article 29*bis*
 - WT/GC/W/566 (General Council)
 - TN/C/W/42 (Trade Negotiations Committee)
 - IP/C/W/473 (Council for TRIPS)
- 14 June 2006

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page 9



SÁMEDIGGI SAMETINGET

Sámi Parliament, Norway



Jon Petter Gintal

senior adviser, Dep. of rights, industry and environment

Introduction

- Sámi cooperation
- Procedures for consultations between State Authorities and the Sámi Parliament
- FPIC - Traditional knowledge
- Proposals for drafted text options; Saami Council submission



SÁMEDIGGI SAMETINGET

6. september 2009 / Informasjonssystem / Side 2

Sápmi



- One people in four countries
- Saami Council
- The Sámi Parliamentary Council
- Joint meeting of ministers and Sámi Parliaments presidents
- Sami Parliaments

The high north



The Sámi rights struggle



- Alta – Kautokeino conflict started in 1970
- Máze protected in 1973
- Stortinget decide to build the dam in 1978
- Demonstrations started in June 1979
- Conflict ends in 1982



Scanpix | Rolf Chr. Ulrichsen

Sámi rights issue

- Sámi Rights Council's was appointed in 1980 and the first part recommendation finished in 1984
- Stortinget resolution 1987 on separate Sámi Act
- The Constitutional act, § 110a of 1988
- Sámediggi, Sámi Parliament opened 9 October 1989
- The ILO Convention no. 169 ratified 1990



SÁMEDIGGI SAMETINGET

Agreement on consultation procedures

- Signed on 11 May 2005 by Erna Solberg, former Minister of Local Government and Regional Development, and Sven-Roald Nystø, former President of the Sami Parliament.



6. september 2009 / Side 7

What is the consultation agreement ?

- The consultation agreement is largely a specification of the obligations that have been incumbent since 1990 on central government authorities in respect of the Sami as an indigenous people.
- The first time there was agreement that actual consultations were taking place was during the process leading to the Finnmark Act in 2005



6. september 2009 / Side 8

Legal basis

- International law contains several different sources of law that govern indigenous peoples' participation, self-determination and consultations.
- It is first and foremost the consultation rules in the ILO Convention that lay the foundation for the consultation agreement.
- From a legal point of view, the rules and co- and self-determination will nonetheless be relevant supplementary interpretive factors.



6. september 2009 / Side 9

The purpose of the consultation agreement

- Ensure practical implementation of the ILO-169 convention
- Achieve agreement
- Facilitate the development of a partnership perspective
- Develop a joint understanding of the needs of the Sami community



6. september 2009 / Side 10

Scope

- The procedures apply in cases that may directly affect the Sami.
- It is enough that it is reasonably likely that an act or an initiative will have a direct effect.
- In cases of a general nature that must be expected to impact society as a whole, the consultation obligation will generally not apply.



6. september 2009 / Side 11

Information

- Information shall be furnished as early as possible in connection with cases that can affect the Sami directly
- The Sami Parliament shall give feedback as soon as possible on whether it is desirable that further consultations be held, and point out any other problems for discussion the case might raise



6. september 2009 / Side 12

Relevant and complete information

- Relevant and complete information must be provided at all stages of the case.
- The authorities are responsible for ensuring that the information is presented so that substance of the case is understood.



6. september 2009 / Side 13

The agreement requirement

- Consultations are to take place in good faith and for the explicit purpose of achieving agreement
- The Sami Parliament is to have an opportunity to exert genuine influence on the process and the result.
- Consultations are more than a hearing
- The parties are required to try to reach agreement.



6. september 2009 / Side 14

The agreement requirement cont.

- Several consultation meetings can be held, if so required. Cases shall not be concluded as long as the Sami Parliament and the State agree that it might be possible to reach agreement.
- Where it is not possible to reach agreement, distinct reasons must be cited for the parties' different assessments and points of view.



6. september 2009 / Side 15

Subordinate agencies

- In cases prepared by subordinate agencies, the consultations that have taken place with different agencies must be viewed in context.
- Information about the Sami Parliament's opinions and what the parties have agreed shall always accompany a case.
- The Sami Parliament will often need to know how local Sami communities and organisations feel about an issue before further consultations can be held.



6. september 2009 / Side 16

Minutes

- Minutes shall be kept of all consultation meetings between central government authorities and the Sami Parliament.
- The minutes shall include a brief statement on what the case refers to, the parties' assessments and points of view, and the conclusion.



6. september 2009 / Side 17

Consultations with other Sami interest groups

- Pursuant to the ILO Convention-169, there may be an obligation to consult with other parties in addition to the Sami Parliament.
- Coordination of the consultations must be discussed with the Sami Parliament



6. september 2009 / Side 18

Reindeer husbandry is an example



- Reindeer husbandry has a separate representative agency and a tradition of representing itself



6. september 2009 / Informasjonssystem / Side 19

Reindeer husbandry

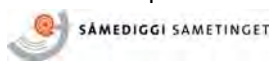
- When it comes to legislation and regulations, it would be natural to consult the Saami Reindeer Herders' Association in Norway (NRL).
- As regards specific encroachment cases, the individual rightsholder should be consulted, usually through a representative of the individual reindeer grazing district.



6. september 2009 / Side 20

Other Sami interests

- Point of departure: The Sami Parliament safeguards the interests of different local Sami groups
- In certain cases, it might be relevant to consult the Sami community through representative spokespersons.
- This is most appropriate when the group in question has a strong desire to speak for themselves
- BUT: The authorities can not choose solely to consult parties that agree with them



6. september 2009 / Side 21

United Nations Declaration on the Rights of Indigenous Peoples

- **Article 19**
States shall **consult** and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.



6. september 2009 / Informasjonssystem / Side 22

New nature management act in Norway





- Sámi Parliament decision on item 44/08
- The act states that genetic material produced by nature is a common resource that belongs to the community in Norway, including also the Sámi people
- Follow up the act through consultations
- Use of traditional Sami knowledge

Traditional knowledge - *árbediehtu*




- It is associated with a cultural and a social context
- It is local and usually transferred in the oral tradition
- It is a consequence of and at the same time reinforced by experience and actions



TK


- Traditional knowledge is of a highly collective nature
- It is repetitive, adaptable and shared
- It is related not only to past, but also to the present



SÁMEDIGGI SAMETINGET

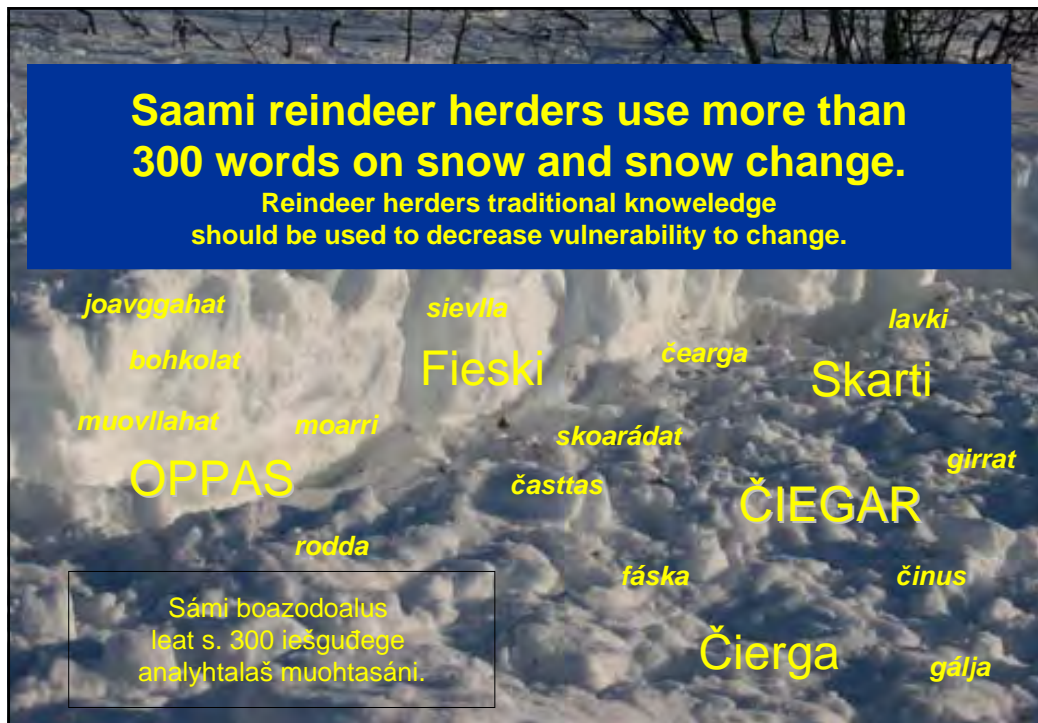
Main topics

- Reindeer husbandry - Agriculture and animal husbandry
- Fishing, sea and freshwater - Hunting and trapping
- Harvesting the outlying areas
- Weather and conditions
- Place and landscape
- *Duodji* and handicrafts



SÁMEDIGGI SAMETINGET

6. september 2009 / Side 26



IR - ABS



- Balázs Kicsiny: An Experiment in Navigation

Steps toward a declaration

Steps toward a declaration

- Informational needs
- Market or Government failure
- Market need
- Science need
- ILC need

process

- Scope
- Initial research
- Access
- R n D
- Followed by
 - Commercialisation, or other outcomes

Scope

- Literature search
- Identification – IF – Traditional knowledge is used or activated under the premise of the research focus

Ascertaining if TK might be engaged- used

- Step 1: TK is apparent – Declare
- Step 2: TK uncertain, hidden, or not apparent
 - Research and Consultation (through competent Authority perhaps)
 - Search of public records, GIS silent files, local historical-religious-archaeological records...
 - Time taken for consultation and relationship building
 - Remember the relationship between people and their resource (s) can be complex and subject to their own provenance, let alone the drive of an external party.
- Step 3: If TK apparent - Declare

Review;

- | | | |
|----------------|---|--|
| ■ therefore if | - | TK not apparent |
| ■ Then | - | Consult-search |
| ■ therefore if | - | Yes - Declare
No - poss other steps |