行政院原住民族委員會

「原住民族傳統生物多樣性知識保護法」草案

期末報告

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目錄

第一篇、國際規範與各國立法例之研究

一、立法目的

1. 保護傳統知識所有人、保護原住民（針對人的保護）
2. 保護傳統知識（針對資訊的保護）
3. 能力建設、教育和培訓，促進原住民和地方社區的適當參加和參與（針對技術移轉的保護）

（以 CBD 為主，並參考 WIPO 之規定）

項目 法規	立法目的
CBD	1. 防止傳統知識、創新和做法的衰退 2. 能力建設、教育和培訓 3. 原住民和地方社區的適當參加和參與 4. 需兼顧文化、環境和社會三方面的維護
WIPO	1. 保護傳統知識、保護遺傳資源（生物多樣性） 2. 保護傳統知識所有人、保護原住民 3. 永續發展與能力建立、促進創新
WTO	1. 開發中國家：為避免生物剽竊、傳統知識被盜用問題，應新增專利申請揭露的要求 2. 美國：專利申請揭露的要求將增加行政負擔，且無助於生物剽竊問題的解決
巴拿馬	透過一特別註冊登記制度，來保護原住民部落（Indigenous communities）基於其創作所生之智慧財產集體權利與傳統知識，並促進及商業化他們的權利
秘魯	1. 促進對原住民族集體知識的尊敬及保護、保存、和更廣泛的應用及發展 2. 為了原住民族及人類的利益而促進集體知識的使用
巴西	1. 使用遺傳遺產 2. 使用與遺傳遺產相關之傳統知識 3. 取得及移轉保存和使用生物多樣性之技術 4. 保存原住民或地方部落對於相關傳統知識之交換或散佈
菲律賓	透過部落智慧財產權保護體系的建立，保護、促進原住民文化部落（local and indigenous cultural communities）發展遺傳資源及維護國家生物多樣性
太平洋模範法	避免傳統知識、創新與實施方法之未經授權利用

二、定義

1. 傳統知識：指採用與生物多樣性保護和可持續地利用相關的傳統生活方式的原住民和地方社區的知識、創新和作法。（參照 CBD 之定義，並考量台灣傳統知識包含中醫藥與原住民藥用植物兩部分，及參考葡萄牙立法（Article 3(1) of Portugal's Decree-Law No. 118/2002）及 WIPO/GRTKF/IC/7/9、WIPO/GRTKF/IC/8/8 之附件對傳統知識特徵的描述。）
2. 生物多樣性：是指所有來源的形形色色生物體，這些來源除其他外包括陸地、海洋和其他水生生態系統及其所構成的生態綜合體；這包括物種內部、物種之間和生態系統的多樣性。（參照生物多樣性公約第 2 條第 1 款）
3. 公開：已見於公開文獻或已公開使用者。（參照專利法第 20 條第 1 項第 1 款）

項目 法規	**對傳統知識的定義**
WIPO	IGC 秘書處描述傳統知識之特徵 1. **2004 年 11 月，WIPO/GRTKF/IC/7/9：** 傳統知識尚無被認可的國際定義，對其特性一般的描述為： (1) 在傳統環境下產生、保存與傳播 (2) 分別隸屬於傳統或原住民的文化或社區，世代保存並傳播 (3) 透過一種保管、保護或文化責任感（如保存知識的義務感、不當使用或貶低性使用將被認為是有害的或侵犯性的如此的認識）而與當地或原住民社區相聯繫，此種關係可能藉由習慣法或實務上正式、非正式地表達出來 (4) 在廣泛的社會、文化、環境與技術背景下，源自於智力活動之「知識」 (5) 基於來源的社區而被認定是傳統知識 2. **2005 年 6 月，WIPO/GRTKF/IC/8/8 之附件：** (1) 傳統知識藉著依循當地社區的規則與文化而發展並維持 (2) 傳統知識系統是動態的，並非靜止不動或古老的 (3) 傳統知識強調以社區作為發展基礎，其使用方法與傳承方式應遵循其長時間流傳下來的習慣法則 ◎WIPO 文件認為關於傳統知識的意義，以葡萄牙之立法最為詳盡： →Article 3(1) of Portugal's Decree-Law No. 118/2002 「所謂傳統知識，係指所有商業或工業使用在地物種的無形成份，以及其他由在地部落發展的原生物質，由集體或個人以非系統的方式所發展，且附屬部落的文化及精神傳統，包括但不限於：各種有關農耕、實務及工業活動的方法、過程、產品的知識，及使用與保

	存在地物種、其他原生自然物質的工藝、交易與服務。」
巴拿馬	1. 集體原住民權利（Collective indigenous rights）--意指「與藝術、音樂、文學、生物、醫學、生態知識和其他構成整個原住民遺產而作者或所有者不明、來源日期不明的物和表達相關的原住民文化和智慧財產權。」（行政命令第二條） 2. 傳統知識（Traditional knowledge）--意指「原住民基於好幾世紀甚至幾千年來之集體知識，包括在科學、技術、及文化上有形（tangible）及無形（intangible）的表達，包含了遺傳資源、醫藥和種子、動植物特性的知識、口語傳說（oral tradition）、設計和視覺可感知及具有代表性的藝術」。（行政命令第二條）
祕魯	集體知識（collective knowledge）--意指與生物多樣性的所有權、使用（uses）及特性有關而由原住民族和其部落所逐漸發展累積、世代傳遞之知識（第二條 b 項）。
巴西	相關之傳統知識：原住民或地方部落所有之具有事實上或潛在上價值而且與遺傳遺產有關的資訊、個人的或集體的實施方法
菲律賓	「傳統方法」（Traditional method）係指「由原住民及當地部落所為之發明、創新及技術，通常並非以書面形式加以記錄，而是藉由代代口耳相傳來加以流傳。」
太平洋模範法	傳統生態知識（traditional ecological knowledge）：意指世代相傳之知識，不論有形或無形。

三、權利歸屬與權利主體

原住民族或其部落、家族。

項目 / 法規	**權利歸屬與權利主體**
WIPO	WIPO 過去對於傳統知識的所有人採取較寬的認定，即亦包括相關的社區居民，而在委員會第六次會議曾提到，除了原住民之外，還需考量非原住民所有人，例如農民團體。
CBD	未討論
巴拿馬	一個或兩個以上之原住民部落均得集體註冊登記成為權利人（行政命令第五條）。
祕魯	1. 權利歸屬 承認集體知識之權利屬於原住民族及其部落（第一條）。 2. 權利主體 (1) 集體知識之權利主體為原住民族及其部落，受保護之知識應屬於某原住民族，而非該族中之特定個人或數人，其亦可能屬於兩個以上的原住民族（第十條）。

	(2) 原住民族應由代表機構（representative organization）為代表（第十四條）。
巴西	1. 權利歸屬 國家承認土著和地方部落有權決定對其與遺傳資源有關之傳統知識的利用。（暫行條例第八條一項） 2. 權利主體 任何相關之傳統知識得為創造、發展、持有或保存與遺傳遺產相關傳統知識之原住民或地方部落所擁有，或為部落中之個人所擁有（第九條獨立條款）。
菲律賓	1. 權利歸屬 國家承認原住民與當地部落對於其所發現、發展之植物、遺傳資源、傳統醫藥、農業方法與當地科技有原始權利（the original rights）。（第二條） 2. 權利主體 原住民或當地部落為法律上永遠合法之所有權人（第四條）。本法中所指之部落，可以是任何具有歷史居住於特定地理範圍的一群人，由得代表其利益之部落會議、基金會、企業、人民組織或其他形式之組織，向適當的政府機關加以登記。
太平洋模範法	1. 權利歸屬 所有的傳統知識、創新及實施方法永久歸屬於個人或群體（本法第五條）。 2. 權利主體 個人（individual）或群體（group）（本法第五條）。

四、保護客體

與生物多樣性有關之傳統知識。

項目／法規	**保護客體**
WIPO	2004 年 11 月，WIPO/GRTKF/IC/7/6 將民俗（Traditional Cultural Expressions / Expression of Folklore）與傳統知識區分開來，特定傳統知識的概念：「傳統秘訣（know-how）、創新、資訊、習慣、技巧或是學習之實質內容，而非表現的形式所呈現」。
巴拿馬	原住民之智慧財產集體權利、傳統知識
祕魯	與生物資源有關之原住民族集體知識
巴西	與遺傳遺產有關的原住民和地方部落的傳統知識

菲律賓	部落知識財產
太平洋模範法	本法所保護之客體不僅包含知識（knowledge），亦包括以該知識為基礎所發展之產品（例如創新 innovations）及實施方法

五、保護要件

1. 基於原住民族的
2. 傳統的
3. 與生物多樣性有關的

◎非保護要件：集體、公開、登記。

項目 / 法規	**保護要件**
WIPO	基於傳統的。 （係指某種知識體系、創作、創新及文化表達方式，其通常皆為代代相傳，且被認為係某個特定民族或其居住地域所固有的，並會隨著環境變遷而不斷演進者。）
巴拿馬	1. 須得為商業上使用 2. 基於原住民部落的傳統 3. 集體的
祕魯	1. 與生物多樣性有關的 2. 由原住民族或部落所發展出來的 3. 集體的 4. 尚未公開的
巴西	1. 需與遺傳遺產相關 2. 需屬於某原住民或地方部落 3. 需具有事實上或潛在上之價值
菲律賓	1. 需為集體的 2. 需經登記
太平洋模範法	世代相傳之知識，或以之為基礎之產品或創新

六、登記制度

1. 主管機關：行政院原住民委員會。
2. 主管機關之任務：
   (1) 建立資料庫
      i. 中央建立公開資料庫。
      ii. 地方建立未公開資料庫。
   (2) 從事能力建設

i. 鼓勵地方整理傳統知識。
ii. 編列預算給予地方補助。

3. 申請人：權利歸屬人。
4. 登記機關：中央（原住民委員會或原住民委員會設立之研究中心）。

項目 法規	**登記制度**
CBD	兩級辦法 1. 已公開的傳統知識（建立登記冊或資料庫）→在處理專利申請過程中承認其為在先技術，從而避免不當授予權利。 2. 傳統知識如屬秘密, 將其收入登記冊和資料庫而又未採取充分措施加以保護，則有可能助長不當授權。於是解決方式如下： (1) 在**當地一級**，社區本位登記冊可以用來存儲各種文化資訊，甚至包括相關的禮儀或慶典資訊（如驅病儀式）等可能具有神秘性/神聖性的資料。除文字記錄外，還可以採用錄音/像帶、照片和光碟等形式錄製這類資料。 (2) 在**國家一級**，國家登記冊可以只收藏這類資訊的技術成分，從而保全信息其他成分的**神秘性，留給社區直接控制**。國家登記冊中收藏的資料可以通過專門立法等辦法加以保護，確保資訊一旦進入登記冊便自動成為受保護的資訊。以杜絕商業性利用，或防止他人對其主張智慧財產權。 3. 建立專門制度，必先**建立兩級運行的傳統知識登記制度**。仍有以下兩種作法： (1) 原則上，兩級登記冊**可置於一個單一的專門制度下進行保護**。 (2) 也可以對**國家**登記冊→實行立法保護，而在**當地一級**→原住民/地方社區可以設立自己的保護制度，或者通過援用普通措施(如規範保密資料的法律等)實現保護。
巴拿馬	登記庫（分為集體權利與傳統知識的登記庫；以及授權契約的登記庫） 1. 集體權利之註冊制度 2. 主管機關：工業財產登記總局下之工業財產登記總理事會（DIGERPI）或教育部的國家著作權局。（第四條） 3. 申請人：一般代表大會或傳統當地代表（第四條） 4. 申請程序： (1) 註冊申請應由一般代表大會或傳統當地代表向工商部的工業財產登記總局下之工業財產登記總理事會（DIGERPI）或教育部的國家著作權局申請。（第四條第二項） (2) 工業財產登記總理事會（DIGERPI）應設立「集體權利及民俗表達部門」負責核准註冊登記之申請。（第七條第一項） (3) 集體權利的註冊登記結果應公開（行政命令第十二條）
祕魯	登記庫（包括集體權利的登記庫；以及授權契約的登記庫）

	1. 原住民族集體知識之登記制度, 分為三種國立原住民族集體知識登記庫： (1) 公開的（Public National Register） (2) 保密的（Confidential National Register） (3) 地方的（Local Register） 2. 主管機關：國立競爭及智慧財產協會的發明及新技術局（INDECOPI）為公開及保密的國立原住民族集體知識登記庫的主管機關（第十五條）。 3. 申請人：任何人透過其原住民族代表機構（第十九條） 4. 申請程序： (1) 任何人得透過其代表機構向主管機關申請登記於國立公開或保密的集體知識登記庫（第十九條）。 (2) 相關內容具備後，INDECOPI 應將該集體知識登記於資料庫（第二十一條）。 (3) INDECOPI 應將已公開的集體知識登記於公開的國立登記庫中（第十七條）。 (4) INDECOPI 應將已登記於國立公開登記庫之資料寄發給世界各國的專利主管機關，以作為審核新穎性及進步性的既有技術（prior art）（第二十三條）。
巴西	登記機制（包括建立資料庫與地籍記錄） 1. **資料庫**：由主管機關遺傳資源管理委員會建立一個記錄相關傳統知識的資料庫（暫行條例第十一條第二項 d 款） 2. **地籍記錄**（cadastral record）：相關之傳統知識，包括巴西之文化遺產者，得經由管理委員會之指示或特別法之規定，納入地籍記錄中（暫行條例第八條第二項）。
菲律賓	**1. 將傳統知識文件化** 在諮詢相關當地部落、專家學者與非政府組織後，政府應提供技術上及其他形式上之協助以使部落智慧財產權得以文件化。政府亦應制訂規則以使非政府組織得以提供協助予當地部落。（本法第六條） **2. 分門別類登記** 所有的特定並文件化後之部落智慧財產權皆需經相關政府機關加以分門別類登記： (1) **植物品種及其他生殖材料**（Plant Varieties, and Other Plant Reproductive Materials）：由不同植物品種地區登記所組成的植物遺傳資源國家委員會應維護並更新植物品種國家記錄庫； (2) **文化產品與遺產**（Cultural Products and Heritage）：國家博物館應維護原住民文化遺產國家登記庫； (3) **發明、新型、新式樣**：所謂之原住民之發明、新型、新式樣，其包括衍生自原住民材料、慣習或知識之農業實施方法及設備，並包括經原住民與當地部落挑選、培育、儲存、利用藥草所發展出之醫療產品及程序。

太平洋模範法	1. 個人或群體得將其傳統知識、創新及實施方法登記於國家登記簿（national register），若該傳統知識、創新及實施方法係由兩個或兩個以上之國家、太平洋區域所擁有則登記於區域登記簿（regional register）； 2. 每一國家之政府代表國家登記簿，而區域協調者（Regional Coordinator）則代表區域登記簿，必須以適當之規則建立並維持該登記簿； 3. 未登記者，並不妨礙個人或群體對於傳統知識、創新及實施方法之所有權。（本法第九條）

七、權利內容

項目 / 法規	**權利內容**
WIPO	1. **權利範圍**（傳統知識所有人所得行使之權利） (1) 禁止傳統知識被未授權地記錄或揭露 (2) 禁止傳統知識非授權的商業化使用 (3) 禁止第三人主張該傳統知識為其權利 (4) 禁止傳統知識資料的誤用或老化所造成的文化侵害 (5) 禁止不正競爭 (6) 禁止成為一種道德權利，諸如傳統知識來源的歸屬與保持原樣之權利 **2. 決定傳統知識所有人權利範圍應考量下列原則** (1) 對習慣上使用、研究與保存行為的排除 (2) 提供對決定權利範圍前諮詢協商的機會 (3) 對於不同知識性質與所有人提供不同保護範圍之規則明確化 (4) 由第三人之行為類型決定保護範圍 **3. 事前告知同意原則（PIC）與惠益分享（BS）** 即於使用、複製傳統知識或對傳統知識進行商業化利用前，應得所有人同意並進行惠益分享之程序，IGC 第 6 次大會已將此原則列為保護傳統知識之主要立法原則。
CBD	1. 專門制度授予權利，應具體說明誰可以享受權利；享受那些權利；怎樣獲得這些權利；有無豁免；以及行使這些權利的期限。包括對傳統知識資料庫中商業性、工業性的內容進行轉移、讓與和租賃的權利 2. 惠益分享。
巴拿馬	1. **使用及商業化**（第十五條） 依原住民部落傳統使用及商業化其藝術、手工藝及其他文化表達之權利，必須受各原住民團體之規範（regulation）拘束，及依個案須向工

	業財產登記總理事會（DIGERPI）及著作權部註冊（register）及經其同意（approve）（第十五條）。 2. **工業上重製**（第二十條） 傳統服飾或其他依本法所承認集體權利之工業上重製（industrial reproduction），必須事先具備一般大表大會或原住民委員會之**事先明示同意**與工商部之授權（authorize）。（第二十條） 3. **文化表達證明之同意權**（第十條） 國家技術理事會或工商部地方理事會，經當地原住民團體之同意（awareness）及其他第三人之請求，得在美術作品、服裝、手工藝品上及其他工業財產或著作權保護客體以印章（seal）、印記（print）、圖章（stamp）證明其係依傳統原住民程序或由原住民手工所精心製作的。（第十條） 4. 傳統知識不能成為未經授權第三人在智慧財產體系下之任何排他權的客體。（第二條）
祕魯	1. **一般原則**（已公開、未公開）： 針對工業或商業目的申請使用集體知識者，有授權之權利，以確保利益之公平分配。（第七條） 2. **未公開集體知識**： (1) 有權對抗未經其同意及以不正當方式**揭露**（disclosure）、**獲取**（acquisition）、**利用**（use）之行為。 (2) 有權對抗具有合法集體知識使用權限之第三人未經其授權之**揭露**（第四十二條）。 (3) 對以科學、商業或工業上目的之使用集體知識者，享有受**事先告知同意權**。（第六條）
巴西	1. 透過管理委員會或其受託機關，以防止非法使用及開發該傳統知識和其他有害或未經本暫行條例授權之行為（第八條）。 2. 對於所有提及使用傳統知識之出版品、使用、開發及揭露，有**主張來源之權利**（第九條第一項）。 3. 有權禁止非經授權之第三人： (1) 對相關傳統知識為**使用**或**實施測試**、**研究**或**調查**（第九條第二項 a 款） (2) 對相關傳統知識之資料或訊息為**揭露**、**散布**或**再散布**（第九條第二項 b 款） 4. 事前告知同意 對於相關傳統知識的使用，應取得所有人之事先同意（第十一條第四項 b 款）。

	5. 惠益分享 有權向第三人收取因相關傳統知識為經濟上之使用所生之利益(第九條第三項)。
菲律賓	1. 事前告知同意 任何對於該等知識與創新之商業性利用, 應獲得所有人或管理人之事前同意。 2. 惠益分享 自原住民與當地部落之知識及創新所衍生之所有利益應公平地分享並用來促進其發展與提供福利。
太平洋模範法	1. 事前告知同意 對欲就傳統知識、創新或實施方法為商業使用或非商業使用之人，有事先知情同意權。(第十條、第十一條) 2. 惠益分享 與欲就傳統知識、創新或實施方法為商業使用之人，簽訂利益分享契約。(第十條) 3. 他人申請智財權時之權利 (1) 他人提出申請時 i. 他人提出專利、地理標示、原產地名稱、商標、新型(design)申請時，如未提出「所有人之書面事先知情同意及簽訂利益分享契約」之證明者，應拒絕其申請。 ii. 允許受到文化侵害之個人或群體對商標申請**提出異議**。(第十六條) (2) 他人已註冊之情形 i. 專利--未提出「所有人之書面事先知情同意及簽訂利益分享契約及所有人對申請專利之允許」者，該專利應撤銷。(第十四條) ii. 商標--允許受到文化侵害之個人或群體對已註冊之商標**申請撤銷**。(本法第十六條)。

權利內容詳細比較表

	防止未經授權揭露	**防止未經授權之使用**	**防止第三人主張權利**	**事前告知同意**	**惠益分享**	**其他**
WIPO	V	V 商業化	V 防止第三人主張該	V	V	➢ 防止文化侵害 ➢ 防止不正競爭 ➢ 防止成為一種道

			傳統知識為其權利			德權利
CBD						➢ 商業性、工業性的內容進行轉移、讓與和租賃的權利
巴拿馬		V 使用及商業化	V 傳統知識不能成為未經授權第三人在智慧財產體系下之任何排他權的客體	V	V	➢ 工業上重製 ➢ 文化表達證明同意權
秘魯	V 未公開	V 工商目的		V 未公開	V	
巴西	V	V 使用、研究、調查, 相關資料之散布		V	V	➢ 主張來源之權利。
菲律賓		V 商業性		V	V	
太平洋模範法		V		V	V	➢ 對商標申請案之異議權及已註冊商標之申請撤銷權。

八、權利行使之例外

項目 法規	**權利行使之例外**
WIPO	傳統知識權利不及之範圍： 1. 傳統知識在社團間的傳統交換機制 2. 研究與個人其他非商業化使用 3. 為保存、發展傳統知識或以傳統方式之創新知識 4. 個人使用或為公眾利益生產傳統藥品

	5. 第三者基於誠信之先使用且連續之行為 6. 不對其他智慧財產權造成侵害或限制 7. 習慣上的使用
CBD	應保證權利的集體性質不致侵蝕任何個人權利。
巴拿馬	1． **民俗舞蹈表演團體**免除第十五條之義務。（第十六條） 2． 特殊情形下（特定地區或向國家手工藝理事會登記之原住民手工藝品）之**小型非原住民工匠**，得製造、生產、販賣屬於原住民的手工藝重製品，但不得主張具有本法所承認之集體權利。（第二十三、二十四條、行政命令第二十六、二十七條） 3． 物或傳統知識註冊登記的集體權利不得影響原住民間對於該物或該知識所為之**傳統交換**。（行政命令第十一條） 4. 先前立法所承認之權利應被尊重，不受影響。(**他人已取得之智財權不受影響**)（第二條但書）
祕魯	本法不適用於原住民族集體知識之**傳統交換**（traditional exchange）（第四條）。
巴西	1. 不應阻礙原產地或當地社區對傳統知識的保護、獲取和發展。（第八條第三項） 2. 不得影響、損害或限制已取得之智慧財產權（第八條第四項）。 3. 為了自身利益 按照習慣使用進行的遺傳資源和相關傳統知識的交換和傳播受到保護。（第四條）
菲律賓	未規定。
太平洋模範法	未規定。

權利行使例外詳細比較表

	傳統交換	**不得影響已取得之智財權**	**習慣法上之使用**	**其他**
WIPO	V	V 不對其他智慧財產權造成侵害或限制	V	➢研究與個人非商業使用 ➢為保存、發展傳統知識或以傳統方式之創新知識 ➢個人使用或為公眾利益生產傳統藥品 ➢第三者基於誠信之先使用且連續之行為
CBD				➢應保證權利的集體性質不致侵蝕任何個人權利。
巴拿馬	V	V		➢民俗舞蹈表演團體。

		他人已取得之智財權不受影響		➢特殊情形下之小型非原住民工匠。
秘魯	V			
巴西	V	V 不得影響、損害或限制已取得之智慧財產權	V	➢不應阻礙原產地或當地社區對傳統知識的保護、獲取和發展。
菲律賓	未規定			
太平洋模範法	未規定			

九、權利期間

項目 法規	**權利期間**
WIPO	1. 永久保護。 2. 固定期限。 3. 終止保護。 4. 將已商業化的產品免除其權利。
CBD	1. 無限期。 2. 有限期。
巴拿馬	永久
祕魯	未規定
巴西	未規定
菲律賓	未規定
太平洋模範法	永久

十、事前告知同意

項目 法規	**事前告知同意（PIC）**
WIPO	1. 於使用、複製傳統知識或對傳統知識進行商業化利用前，應得所有人同意並進行利益分享之程序。 2. 負責單位 (1) 由政府專責機關 (2) 由民間組織或所有人

	3. 依用途決定 PIC 授予者 4. 因公眾連續使用得免除 PIC 5. 引入 PIC 原則於傳統知識標的應考量： (1) 與 CBD 及利益分享相一致 (2) 與取得遺傳資源之機制一致 (3) 排除傳統知識原來的習慣使用在 PIC 申請的適用之外 (4) 考量政府組織、原住民、社區或其他可能所有人在 PIC 的責任
WTO	1. 申請專利時，是否應揭露事前告知同意的證據（美、瑞士、歐盟認為否；印巴 11 國、非洲聯盟認為需要） 2. 美堅持以契約模式作為保護途徑之提案 3. 印巴 11 國認為，應明文在 TRIPS 協定中增加規範，提出事先同意及利益分享之證明要件一併提出，作為專利核准的要件
CBD	以下皆須經過原住民及地方社區事前告知同意 1. 工作資料的收集 2. 實地調查的研究 3. 文化影響評估的進行（揭露秘密和/或神聖知識） 4. 開發活動影響評估的進行 5. 開發計畫的改變或修改 6. 資料庫和登記冊的建立 7. 有權准予或拒絕他方獲取傳統知識，也有權決定獲取傳統知識的程度。
巴拿馬	1. 他人使用之條件, 須經事先明示同意及簽訂使用註冊登記集體權利之授權契約，並經許可（authorization） 2. 授權契約之簽訂： (1) 「授權契約」乃指由原住民族有權書面賦予第三人使用該註冊集體權利所簽訂之契約。（行政命令第二條） (2) 使用註冊登記集體權利之授權契約，應向工業財產登記總理事會（DIGERPI）為登記。 (3) 再授權亦須經許可與註冊集體權利擁有者的事先明示同意。
祕魯	1. 他人使用之條件，以科學、商業、工業目的而為使用（access）集體權利之申請者，應先獲得事先知情同意。 2. 授權契約之簽訂： (1) 明示協議，應包含使用該知識的期限與條件。 (2) 授權契約之強制登記須向 INDECOPI 為之。 (3) 簽訂授權，須以書面為之，期間為一年至三年。
巴西	1. 立法以政府專責機關處理事前同意與許可 2. 他人使用的要件： 為了工業或其他方面應用的科學研究、技術發展或生物探勘，對於相關傳統知識的使用，應取得所有人之事先同意

菲律賓	1. 需獲得社區之事前同意 2. 部落之傳統知識所有權：…任何對於該等知識與創新之商業性利用，應獲得所有人或管理人之事前同意。國家應致力於保護及鼓勵生物資源之慣常上使用。（本法第二條）
太平洋模範法	所有的傳統知識、創新及實施方法永久歸屬於個人或群體，（本法第五條）商業使用和非商業使用皆須獲得事先同意 1. 商業使用： 並不禁止同一段時間有兩人以上對傳統知識、創新及實施方法作商業使用。 2. 非商業使用： (1) 所有人得依照其慣習或其他適當之條件，允許某一群體或個人對傳統知識作非商業性之使用。 (2) 若未先取得所有人之事前知情同意，受領者不得將該傳統知識轉讓給其他人。

十一、利益分享

項目 / 法規	**利益分享（BS）**
WIPO	1. 使用傳統知識或對傳統知識進行商業化利用前，應得所有人同意並進行利益分享之程序。 2. 是否利用地理標示制度做為利益分享之基礎。
WTO	1. 涉及以傳統知識為基礎而申請專利時，是否應揭露有無利益分享（美、瑞士、歐盟認為否；印巴 11 國、非洲聯盟認為需要） 2. 美堅持以契約模式作為保護途徑之提案
CBD	1. 在國家和地方一級成立機構，評估涉及原住民和地方社區利益的擬議開發專案。 2. 開發活動的利益分享 (1) 評估應結合開發活動為所在社區帶來的具體利益。 (2) 原住民和地方社區應參與他們參加的開發專案的財政審計過程，以確保所投資的資源得到有效的使用。
巴拿馬	授權金：授權契約中應規定，原住民所能獲得之授權金（royalty），包括前付費用（initial payment）或對原住民族之補償（compensation）及由集體權利衍生之商品之獲利百分比（行政命令第十八條）。
祕魯	1. 以商業或工業目的為而使用（access）集體權利之申請者，須簽訂授權契約以確保利益之公平分配（第七條）。 2. 授權金：授權契約中規定，前付之授權金（initial monetary or other equivalent payment），該授權金比例須至少有相當於直接或間接從該傳統知識而來商品的淨額銷售的百分之五（未含稅）；（第二十七條）
巴西	1. 使用相關傳統知識發展而來的產品或方法為經濟上使用所得之利

	益，應與立約方公平平等的分享（暫行條例第二十四條）； 2. 若作為商業上使用者，應於簽訂利益分享契約後方可使用（暫行條例第十六條）。
菲律賓	部落之傳統知識所有權：自原住民與當地部落之知識及創新所衍生之所有利益應公平地分享並用來促進其發展與提供福利。（本法第二條）
太平洋模範法	1. 商業使用（本法第十條） 任何使用或打算使用傳統知識、創新或實施方法之人，必須取得所有人之事前知情同意，以及與所有人簽訂利益分享契約（an access and benefit sharing agreement）。 2. 非商業使用（本法第十一條）：無利益分享之相關規定。

十二、罰則

項目 / 法規	**罰則**
CBD	未討論
WIPO	未討論
WTO	開發中國家認為若未符合專利申請揭露要件，將產生的法律效果為： 1. 專利審查前或專利核准前：可能有適當刑罰及限定於期限內提供必要的宣誓書或證據，否則視為撤回申請案 2. 專利核准後：撤銷專利權、將發明權利的全部或一部移轉以做為利益分享或刑事與行政上的制裁
巴拿馬	1. 禁止進口或走私本法所保護之工業重製品或其他違反本法之行為, 得對於該違反行為處以罰鍰 2. 依據其行為輕重處 1000 至 5000 元之罰鍰（fine），累犯者加倍處罰，除罰鍰外並得加以沒收或銷毀違法本法之產品
秘魯	1. 違反原住民族權利者，原住民得對其主張權利；對於違反本法直接或間接使用該集體知識之第三人，代表機構得主張所有權及賠償 2. 亦可採取暫時性措施，如扣押、沒收或查封使用集體知識而生產的商品等 3. 違反擁有集體知識原住民族之權利應該處以罰鍰
巴西	1. 違反本暫行條例或其他相關法令之行為或不履行者，應受到行政處罰，可採取的行政罰包括警告、罰鍰、沒收、禁止命令 2. 違反使用規定者, 則應給予相當於商品淨銷售金額或從第三人處透過授予商品、方法或使用技術權利而獲得之授權金最低百分之二十的賠償金
菲律賓	未規定
太平洋模範法	任何使用傳統知識、創新及實施方法之人，若違反本法對於商業使用之規定（PIC 與 BS），將處以三個月以下有期徒刑 任何使用傳統知識、創新及實施方法之人，若違反本法對於非商業使用之規定（PIC），將處以三個月以下有期徒刑

十三、與其他法律之關係

項目 法規	與其他之關係		
	與智財權之關係	**與習慣法之關係**	**與國際條約之關係**
CBD	以資料庫（登記冊）提供作為先前技術證據，避免智慧財產權之不當授與	評估開發計畫對習慣法可能的影響 應商定減少違反地方法規的辦法	得考慮以雙邊或多邊協議訂立各國保護的最低標準 各國得自行決定依國民待遇或對等原則保護外國之表現形式
WIPO	未討論	得將習慣法納入作為保護傳統知識的方法	未討論
WTO	涉及專利權申請時的揭露要件問題，如達成共識，將影響專利申請、審查等要件	未討論	涉及 CBD 與 TRIPS 衝突與否的爭執
巴拿馬	他人已取得之智財權不受影響	傳統知識註冊登記的集體權利不得影響原住民間對於該物或該知識所為之傳統交換	與巴拿馬有相互承認之國際條約之國家，該國之美術及傳統表達方式在巴拿馬與本國人具有相同之效力
秘魯	未規定	1. 本法不適用於原住民族集體知識之傳統交換 2. 原住民族集體知識之權利獨立於原住民族依其傳統制度為利益分配之權利	未規定
巴西	1. 因本暫行條例所取得之保護不得影響、損害或限制已取得之智慧財產權 2. 使用遺傳遺產及利益分享契約應不得損害智慧財產權	未規定	未規定
菲律賓	未規定	未規定	未規定
太平洋模範法	對專利法、著作權法、商標法及設計權法之修正	未規定	未規定

第二篇、「原住民族傳統生物多樣性知識保護法」草案

草案總說明

公佈施行於二ＯＯ五年之原住民族基本法第十三條明文規定：「政府對原住民族傳統之生物多樣性知識及智慧創作，應予保護，並促進其發展；其相關事項另以法律定之」，據此，特制訂本法，並暫訂名稱為「原住民族傳統生物多樣性知識保護法」。

原住民廣義之「傳統知識」，係指基於傳統而產生之文學的、藝術的或科學的作品、表演、發明、科學發現、外觀設計、標記；名稱或符號、未公開之資訊，以及其他一切基於傳統在工業、科學、文學或藝術領域內智能活動所生之發明與創作之統稱。基於原住民知識整體性的特質，上述各類知識原本不宜強制切割分類，但由於外觀設計、標記、名稱或符號等文學的、藝術的創作，已規範在「原住民族傳統智慧創作保護法」草案之內，因此本草案暫時專就生物多樣性相關原住民傳統知識〈以下簡稱傳統知識〉之保護予以研擬。

傳統知識乃原住民歷代在其傳統領域內，與環境互動下的長期生活過程所產生、累積，對於環境之認識、保育與利用的相關知識。原住民因傳統知識而能永續地與環境共存，因此一般認為原住民族乃生物多樣性保育最重要之關係者。由於過去與外界的接觸、交流、雖然引入主流社會大量的知識與工具，然而經由調查與研究，原住民傳統知識亦不斷地為外界瞭解，更進一步經由科學研發而獲得商業利益，卻未能適當地回饋原住民，甚至於遭受直接剽竊傳統知識，申請專利，將之轉化為其私有財產，不僅有害於傳統知識之保存及維護，亦有損原住民之權益。

除了損及原住民傳統知識權益外，外來文明之衝擊亦導致原住民族傳統生活習慣以及既有社會體制之變遷，而傳統知識維持與創新所仰賴之機制，已經受到相當大之戮傷，對於原住民族之衝擊，更非傳統知識權受到侵害之能比擬。因此原住民傳統知識之保護，應兼顧知識權益之保障，以及知識創新與傳承機制之維持，兩者不可偏廢。

本「原住民族傳統生物多樣性知識保護法」草案，主要乃基於「生物多樣性公約」第八條ｊ項，尊重、保存及促進永續利用原住民族傳統生物多樣性知識之精神、事先告知同意與利益分享等原則，以及締約方大會針對第八條ｊ項所所採納的 Akwé：Kon 準則而擬定。本草案共分七章三十五條，除規定政府應成立專責機關外，並分別就權利之歸屬與內容、原住民族傳統知識資料庫、未公開傳統知識之調查與使用、傳統知識與智慧財產權之關係、傳統知識之延續與創新，以及侵害之救濟等加以規定。

第一章「總則」首先陳述本法之立法目的〈第一條〉，其次針對傳統生物多樣性知識、已公開知識、部落會議等加以定義〈第三條〉，並且明定行政院原住民族委員會為本法之主管機關〈第二條〉；再者要求主管機關設立專責機構或委

託專業機構〈第四條〉，並且成立傳統知識審議及調解會〈第五條〉，以期有效協助原住民族各部落進行傳統知識保護之諸項工作。

第二章「權利之歸屬及內容」規定傳統知識權利之歸屬於產生或發展該傳統知識之原住民族或其部落，而權利行使之決定權在原住民族或部落會議〈第六條〉；第十條則規定傳統知識權利所不及之五種情形。至於權利內容，第七條旨在防止他人非經同意取得或主張權利，或者以不正當方式使用傳統知識。而第八與第九條則將傳統知識區分為已公開與未公開兩大類，兩類知識之權利內容有所不同。已公開之傳統知識依照智慧財產產權之原則，允許他人使用，然而若因商業之需要需用到之原住民族或部落之名稱者，原住民有權要求給付權利金〈第八條〉。對於未公開之傳統知識，任何他人須先經同意並簽訂契約，方得使用或揭露〈第九條〉。

第四章「未公開傳統知識之調查與使用」進一步針對原住民族或部落如何受理與同意外人調查與使用未公開之傳統知識，加以規定；本章分為調查與使用之同意、監督機制等兩小節。第十三條為申請使用未公開傳統知識之基本原則；第十四至第十六條規定外人提出申請之程序、文件；第十七、十八條則設定契約內容以及如何達成契約協定；第十九、二十條進一步規範契約內容之影響評估以及利益公平分享之原則。達成契約協定後如何確保申請者遵行之監督機制則包括按期提交調查報告與報告之內容〈第二十、二十一條〉、使用許可之如何轉移至第三者〈第二十二條〉，以及如何防止未公開知識之擁有者或管理者對之加以外洩〈第二十三條〉。

已公開之傳統知識，由於他人得使用，一般建議採用「消極性之保護」，以防止他人惡意逕行申請專利權，竊為己有；因此需要製作資料庫，以方便各國專利局之篩檢，避免誤予以通過他人之專利申請。第三章第十一、十二條乃針對原住民族傳統知識資料庫加以規範。第十一條責成傳統知識專責機關成立國家資料庫，用以整理已公開或擬可公開之知識；而未公開知識經同意後，或原住民仍不擬公開者，則可以存放於部落自行管理之資料庫中加以保密。第十一條要求主管機關針對資料庫之運作等事宜訂定辦法。至於未公開傳統知識之智財權課題，由於傳統知識能否申請專利，其權責在專利法主管機關，因此本草案不予以處理；但本法案處理傳統知識或其衍生知識申請專利時之來源揭露事宜〈第五章第二十六條〉。

相對於第二至第四章之處理傳統知識權利課題，第五章「延續及創新傳統知識之方法」旨在建立法制，以期維持知識創新與傳承之機制。第二十四條明訂主管機關應提供適當之教育與培訓，提供「身教」課程與適當之「言教」教材，以提供學習傳統知識之機會。基於尊重各民族或部落之基本人權，因此本法不擬要求原住民族恢復傳統生活慣俗，但於第二十五條要求政府鼓勵之。

第六章「民事救濟及罰則」乃為貫徹本法所賦予原住民族或部落對其傳統知識之權利，對於違反本法規定，侵害原住民族或部落之權益者，設置侵害排除、救濟方法與請求損害賠償等民事救濟之規定〈第二十七條〉；而於第二十八條至第三十三條設置各項罰則，用以處分違反本法各項規定之行為者。

草案內容

草 案 條 文	立法說明
第一章　總則	
第一條　（立法目的） 為保護原住民族之傳統生物多樣性知識，及維護原住民族對該知識之權益，以促進傳統生物多樣性知識之永續利用及創新，特制定本法。本法未規定者，適用其他法律之規定。	本法目的乃是根據憲法增修條文第十條第十一項：「國家肯定多元文化，並積極維護發展原住民族語言及文化」及原住民族基本法第十三條，並參考生物多樣性公約（Convention on Biological Diversity）第八條 j 款之規定及世界智慧財產權組織（World Intellectual Property Organization，WIPO）之討論，以保護傳統生物多樣性知識為出發點，並維護原住民族對其傳統知識之權益，進而達成傳統生物多樣性知識永續利用與開發之目的，而加以制定。
第二條　（本法之主管機關） 本法所稱主管機關為行政院原住民族委員會。	本會主管全國原住民族事務，且綜合管理原住民族或部落之傳統生物多樣性知識，爰明定本會為本法之主管機關。
第三條　（用詞定義） 本法用詞定義如下： 一、 傳統生物多樣性知識（以下簡稱傳統知識）：係指原住民族為永續生存所產生，與下列各項有關之知識、創作及操作方法，而經世代相傳者： （一） 生物，包括其組成部分、生活過程、行為及特性。 （二） 生物以外之自然環境。 （三） 人類與環境之互動。 （四） 人類對於生物或非生物之取得及利用。 二、 已公開：係指於所屬原住民族或部落	一、 由於本法之用詞有其特殊內涵及用法，故先行定義以求解釋上之一致。 二、 第一項第一款有關傳統生物多樣性知識之定義，係參考太平洋區域保護傳統生態知識、創新及實施模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and Practices）中對於傳統生態知識之規定，並參考 WIPO 文件 WIPO/GRTKF/IC/7/9 及巴拿馬第 20 號法律

外，已公開發表、已公開使用或已為公眾所知悉者。 三、 原住民族會議：為原住民族集體意思之形成機關。 四、 部落會議：為部落集體意思之形成機關。 前項原住民族會議及部落會議之組成與議事規則，由主管機關另以辦法訂之。	(Regimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indigenas)等立法例。以狩獵為例，傳統知識包括(一)原住民對動物生理與生態行為之認識，(二)對動物出沒環境之認識，(三)決定獵區、獵季以及獵捕方法，以及(四)對陷阱製作所用植物及方法之認識等。 三、 第一項第二款有關已公開之定義，係參考專利法第二十二條第一項之規定。 四、 為凝聚原住民族之集體意思，以確保原住民族或部落之權益，爰於第一項第三款與第四款規定原住民族會議與部落會議為原住民族或部落之集體意思之形成機關。 五、 至於本法中原住民族或部落之定義參見原住民族基本法第二條之規定。
第四條　（專責機關之設置） 主管機關應成立專責機關或委託專業機構，並編列預算，協助原住民族或部落調查、整理、保存及開發利用傳統知識。 前項專責機關或受委託之專業機構，於原住民族或部落依本法所保障之權益受侵害時，應協助原住民族或部落維護之。	一、 有鑑於原住民族或部落之傳統知識逐漸流失與散佚，故明訂主管機關應成立專責機關或委託專業機構，並編列預算，以協助調查、整理、保存及開發利用相關傳統知識。 二、 為避免原住民族或部落於依本法所賦予之權益受侵害時，無法負擔龐大訴訟費用，致使相關權益無法主張，形同虛設，特規定專責機關或受委託之專業機構之協力義務。
第五條　（審議及調解會之設置）	傳統知識歸屬之認定、權利金及涉及原住民族或部落間關於傳統

主管機關應成立傳統知識審議及調解會，辦理下列事項： 一、 傳統知識歸屬之審議與爭議之調解。 二、 第八條規定權利金爭議之調解。 三、 其他涉及原住民族或部落間關於傳統知識爭議事項之審議與調解。 前項審議及調解會之組織、設置、審議、調解程序及其他應遵行事項之辦法，由主管機關定之。	知識等爭議事項，宜由獨立客觀之委員會進行審議或調解。
第二章　權利之歸屬及內容	
第六條　(傳統知識之權利歸屬) 與傳統知識有關之權利，歸屬於產生或發展該傳統知識之原住民族或部落。 依本法之規定，應經原住民族或部落同意者，由原住民族會議或部落會議行使之。	一、 傳統知識之權利，屬於產生或發展該傳統知識之原住民族或其部落所有，爰參考秘魯第 27811 號法律第一條、第十條，巴西第 2186-16 暫行條例第八條、第九條規定之。 二、 原住民族或部落之同意權，應由代表原住民族或部落集體意思形成機關之原住民會議或部落會議行使之。
第七條　(防止他人取得或主張權利及以不正當方式使用傳統知識) 傳統知識所屬之原住民族或部落以外之人，非經原住民族或部落同意，不得就該傳統知識取得智慧財產權或主張其他權利，或以不正當方式使用該傳統知識。 前項所稱之不正當方式使用，係指以扭曲、污衊或其他方式使用，致有損害原住民族或部落之聲譽或尊嚴之虞者。	為賦予傳統知識所屬之原住民族或部落權利，以防止他人未經原住民族或部落之同意，對傳統知識主張權利或以不正當方式利用傳統知識，爰參考 WIPO/GRTKF/IC/7/6 文件、秘魯第 27811 號法律第四十二條規定之。
第八條　(已公開傳統知識之來源表彰權及權利金請求權) 就已公開之傳統知識，為商業上之使用，且欲表彰該傳統知識所屬之原住民族或部	一、 本法將傳統知識區分為已公開及未公開之傳統知識，並分別賦予不同程度之保護。 二、 已公開之傳統知識屬公共領域之知識，原則上任何人均

落之名稱者，應事先徵得原住民族或部落之同意，並給付適當之權利金。 前項權利金，由原住民族或部落會議與使用人協議之，協議不成，由傳統知識審議及調解會調解之。	得使用，惟使用之際若表彰該知識所屬之原住民族或部落之名稱，以獲取商業上之利益者，應事先徵得該原住民族或部落之同意，並給付適當之權利金，以示尊重。 三、 權利金之金額，原則上由原住民族或部落與傳統知識之使用人自行協議，如有協議不成之情事，則由審議及調解會調解之。
第九條 (未公開傳統知識之揭露、取得與使用) 未公開之傳統知識，非事先徵得所屬原住民族或部落之同意並簽訂契約，他人不得揭露、取得或使用之。 未公開傳統知識所屬之原住民族或部落，對於相關傳統知識之揭露或使用行為，有主張表彰來源之權利。	一、 傳統知識屬於原住民族或其部落所有，為保障原住民族之傳統知識及促進其永續發展，故參考 WIPO/GRTKF/IC/7/6 文件、秘魯第 27811 號法律第四十二條、巴西第 2186-16 暫行條例第九條之規定，欲揭露、取得、使用未公開之傳統知識，必須經由該傳統知識所屬原住民族或部落之同意及簽訂契約始得為之。 二、 針對未公開之傳統知識，賦予其得請求表彰來源之權利。參考巴西第 2186-16 暫行條例第九條之規定予以定之。
第十條 (權利內容之例外) 原住民族或部落對其傳統知識之權利，不及於下列各款情事： 一、各原住民族或部落間之傳統交換行為。 二、研究或個人之非營利之使用。 三、他人善意使用未公開傳統知識之行為。	傳統知識之權利範圍，應考量相關因素予以限縮。 一、為尊重原住民族或部落間關於傳統知識之傳統交換行為，參酌 WIPO/GRTKF/IC/7/6 文件、巴拿馬第十二號行政命令第十一條、秘魯第 27811 號法律第四條、巴西第 2186-16 暫行條例第四條等規定，將其排除於權利範圍之外。

四、為保存、發展傳統知識及促進傳統創新之必要措施。 五、國家為因應緊急情況或增進公共利益之非營利使用行為。	之外。 二、為促進傳統知識之相關研究及發展，參酌 WIPO/GRTKF/IC/7/6 文件之規定，將研究行為及個人非營利上之使用行為排除於權利範圍之外。 三、他人善意使用未公開傳統知識之行為，應非本法所賦予之權利效力所及，故參酌 WIPO/GRTKF/IC/7/6 文件，予以排除於權利範圍之外。 四、為促進傳統知識之永續利用及創新，故為保存、發展傳統知識及促進傳統創新所採取之必要措施，參酌 WIPO/GRTKF/IC/7/6 文件之規定，予以排除於權利範圍之外。 五、將涉及公共利益之非營利使用行為排除於權利範圍之外，參酌 WIPO/GRTKF/IC/7/6 文件之規定予以定之。
第三章　原住民族傳統知識資料庫	
第十一條　（登記機關及登記申請人） 傳統知識所屬之原住民族或部落，得將其傳統知識中欲公開之部分，登記於原住民族傳統知識國家資料庫；其不欲公開之部分，得登記於原住民族傳統知識部落資料庫。 前項之原住民族傳統知識國家資料庫，由本法第四條所稱之專責機關成立之。原住民族傳統知識部落資料庫由主管機關協助部落會議成立之。 第一項未公開之傳統知識內容應予以保密。	為維護及保存傳統知識，故參考生物多樣性公約（Convention on Biological Diversity）及太平洋區域傳統生態知識、創新及實施之保護模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and Practices） 之規定，建立國家與地方部落兩級制資料庫，由傳統知識所屬之原住民族或部落主動登記。 原住民族傳統知識國家資料庫由第四條之專責機關加以成立，原住民族傳統知識國家資料庫屬公開資料庫，而部落資料庫由主管機關協助部落會議成立，登記於部落資料庫之傳統知識並不公

	開，並應予以保密。
第十二條　（資料庫之設置） 原住民族傳統知識資料庫之建置、運作、管理、取得及保密辦法，由主管機關另訂之。	授權主管機關另以辦法規範原住民族傳統知識資料庫之建置及運作、管理、取得及保密原則。
第四章　未公開傳統知識之調查與使用	
第一節　調查與使用之同意	
第十三條　(使用未公開傳統知識之基本原則) 就未公開之傳統知識之調查或使用，應符合原住民族權益、公共利益及永續發展等原則。	調查或使用應符合原住民權益，公共利益及永續發展，為傳統知識調查或使用之最高原則。參酌生物多樣性公約第十四條。
第十四條（申請調查或使用) 調查或使用未公開之傳統知識者，應事先向原住民族會議或部落會議提出申請，徵得其同意，並簽訂調查或使用契約後，始得為之。	為徵得原住民族或部落的事先同意，應提出申請並訂定契約，參照生物多樣性公約 UNEP/CBD/WG8J/3/6 與原住民族和部落參與決策的過程以及交流機制的能力建設。
第十五條　(調查申請文件) 申請調查傳統知識，應備具申請書及調查計畫書。 申請書之格式與應記載事項，由主管機關定之。 第一項之調查計畫書應記載下列事項： 一、　調查目的。 二、　調查地、調查之對象、調查進行之期間與方式。 三、　擬蒐集之生物或非生物材料。 四、　預期調查成果及其用途。 五、　定期報告及結案報告之日期。	一、　關於申請調查所需要之文件，參考安地斯組織第 391 號決議、哥斯大黎加「生物多樣性法」等立法例。本法參照上述規定，僅明文要求申請人出具申請書表明申請之意願，並以調查計畫書說明其所欲從事之調查活動相關內容細節，以做為原住民族或部落審核之依據。 二、　申請書之格式與應記載事項，純屬主管機關作業上考量，故於第二項明文授權由主管機關定之。 三、　調查計畫書乃原住民族或部落審核之重要依據，應揭露關於調查活動之各種細節。

	關於調查活動之各種細節。本法列舉四款較為重要之項目作為調查計畫書之應記載事項。爰規定於第三項。
第十六條　(使用申請文件) 申請使用傳統知識，應備具申請書及使用計畫書。 申請書之格式與應記載事項，由主管機關定之。 第一項之使用計畫書應記載下列事項： 一、 使用之傳統知識。 二、 使用目的。 三、 使用地、使用進行之期間與方式。 四、 預期使用成果及其用途。 五、 定期報告及結案報告之日期。 具商業目的之使用計畫，除提出第一項之文件外，並應備具商業利用說明書及利益分享方式。	關於申請使用所需要之文件，本法明文要求申請人出具申請書表明申請之意願，並以使用計畫書說明其所欲從事之使用傳統知識相關內容細節，以做為原住民族或部落審核之依據。 一、 申請書之格式與應記載事項，純屬主管機關作業上考量，故於第二項明文授權由主管機關定之。 二、 使用計畫書乃原住民族或部落審核之重要依據，應揭露關於使用活動之各種細節。本法列舉五款較為重要之項目作為調查計畫書之應記載事項。爰規定於第三項。 三、 於具商業目的之使用計畫，配合利益分享之原則，宜於申請時提出商業利用說明書以及利益分享方式。爰規定於第四項。參考祕魯 27811 號法律第七條。
第十七條　(調查或使用契約內容之協議) 調查或使用契約之內容，由原住民族會議或部落會議與申請人協議決定之。 主管機關應協助原住民族或部落進行前項之協議。 具商業目的之使用，其契約內容應包含利益分享條款。 原住民族或部落得遴選代表協商契約之內容。	一、 根據契約自由原則，原住民族會議與申請人應經由充分協議以達成契約內容之共識。爰規定第一項。 二、 原住民族或部落會議與申請人協議之進行，於訂立契約之技術事項主管機關應主動協助進行。參考生物多樣性公約，文件 UNEP/CBD/WG8J/3/7。參照巴拿馬第二十條及行政命令第二條第十三項、行政命令第十七條；菲律賓 Community

	十七條；菲律賓 Community Intellectual Rights Protection Act 第六條。爰規定第二項。 三、 具有商業目的之使用，在相關契約內容應包含利益分享條款，以期能保障原住民族或部落的權益。參考祕魯 27811 號法律第七條。爰規定於第三項。 四、 原住民族或部落得自治，經由部落會議遴選適任代表參與協商契約之內容，原住民族或部落之最後決定權，仍歸於原住民族會議或部落會議。爰規定第四項。
第十八條 （訂約時應考慮之原則） 原住民族會議或部落會議於訂立契約時，應評估所申請之調查或使用計畫對原住民傳統生活、文化、社會、環境，以及其他對部落權益可能之影響。 主管機關應協助原住民族或部落進行前項之影響評估。	一、 原住民生活相關開發活動進行時應該評估文化、環境和社會影響。參考生物多樣性公約中 UNEP/CBD/WG8J/3/5，2004 年生物多樣性公約第七次會員大會所訂定之「Akwe：Kon 自願性準則」。 二、 主管機關具有較充裕的資源，應主動提供協助以進行前項評估。
第十九條 （利益分享之原則） 未公開之傳統知識經商業使用所得之直接或間接利益，應以合理公平之方式，由相關部落共同分享之。 前項利益之分享，得約定以金錢或非金錢之方式給付之。 以金錢方式給付利益者，得一次或分次給付之。 以非金錢方式給付利益者，得以提供資訊、技術、培訓或其他方式為之。	一、 參考生物多樣性公約第十五條第八款，開發所獲得的利益，應與提供遺傳資源的締約國公平分享，爰作本條之規定。 二、 利益分享可以包括：分享利潤、給付使用費、技術移轉、提供產品，以及進行人力資源能力建設等。參考巴西 2001 年 8 月 23 日第 N.2186-16 號臨時措施第 25 條。

訊、技術、培訓或其他方式為之。	三、 從生物資源和相關傳統知識的獲得中預期可得利益的性質，大致可以分為兩類：金錢利益和非金錢利益。《波恩準則》附錄 II 中載有這兩者的提示性清單。由於在某些情況下直接向原住民族/部落給付金錢利益可能有所不便或不妥，因此可以考慮其他形式的利益。CBD 8(j) 第 3-7 會議中提到：獲得與利益分享安排應該考慮非金錢利益。這一類利益可以採取能力建設的形式，包括提供資訊、技術和培訓等，以扶植當地新行業的發展，並進而實現可持續經濟增長。
第二節　監督機制	
第二十條（傳統知識調查者之義務） 依本法申請調查傳統知識者，應依計畫內容按期向部落會議提交調查報告。 前項調查報告應包含調查過程，與所調查結果之完整書面及影音記錄資料。	一、 為使原住民族或部落得定期知悉調查之進度，申請調查者應定期提交報告，爰規定本條。 二、 調查結果應記錄原住民或部落的意見。除了用書面表達，還應將調查結果透過錄影或錄音記錄下來以除去語言障礙的因素。參考生物多樣性公約 UNEP/CBD/WG8J/3/5，「Akwe：Kon 自願性準則」規定。
第二十一條　（傳統知識使用者之義務） 依本法申請使用傳統知識者，應依計畫內容按期向部落會議提交使用報告。 前項使用報告應包括傳統知識發表、出版或其他商業利用之完整資料。	一、 為使原住民族或部落得定期知悉申請者之使用進度，申請使用者應定期提交報告，爰規定本條。 二、 若使用的方式為發表或出版的形式，應該要有完整的資料，以供原住民或部落確保其傳統知識之正確被使用。

第二十二條　（未經代表機關事先同意之再授權限制） 依本法申請使用傳統知識者，非經傳統知識所屬之原住民族或部落之同意，不得將其使用權轉讓與第三人。 違反前項規定之讓與行為，無效。	為保障傳統知識所屬之原住民族或部落，申請並得同意之傳統知識使用者，不得再將其使用權利轉讓予第三人。參照巴拿馬行政命令第二十二條、秘魯第三十三條、太平洋模範法第十一條。
第二十三條　（秘密性之維護） 原住民族或部落之成員，非經原住民族會議或部落會議之同意，不得將未公開之傳統知識洩露或交付予該知識所屬之原住民族或部落以外之人。 違反前項規定者，依原住民族或部落之規範或習慣處理之。 因職務或業務知悉未公開之傳統知識者，不得將之洩露或交付他人。	一、 原住民族或部落之成員應認識到他人擬調查或使用皆須經過申請，由原住民族會議或部落會議同意、簽訂契約等步驟，才得以調查或使用其傳統知識，爰規定第一項。 二、 若違反第一項之原則，係屬原住民族或部落自治之事項，本法不予干預。 三、 因資料庫或因辦理申請業務而知悉未公開之傳統知識者，應該謹慎遵守第一項，不得將傳統知識未經同意而洩漏或交付於他人，參考太平洋區域保護傳統生態知識、創新及實施模範法第十一條。爰規定第三項。
第五章　延續及創新傳統知識之方法	
第二十四條　（傳統知識之教育） 主管機關應提供適當之教育與培訓，促進原住民對傳統知識及其保護制度重要性之瞭解，以達成傳統知識保護、永續利用及創新之目的。 原住民族地區各級各類學校相關課程及教材之設計，應提供學生學習傳統知識之機會，課程內容應與部落生活相結合，並應包括校外教學。 前項課程屬於原住民族教育法第三條第三	一、 傳統知識之保護，首重其傳承，因此適當之教育及培訓相關人才乃為必要，故課與主管機關提供適當教育與培訓之義務。爰參考「Akwe：Kon 自願性準則」，規定於第一項。 二、 第二、三項參考生物多樣性公約會議 UNEP/CBD/WG8J/3/4 文件，要求學校相關之課程及教材應酌情納入傳統知識。然而考慮傳統知識與環境共生共榮之本質，

項所稱之民族教育事項，其規劃應符合部落自主之精神。 原住民族之各級各類學校或其他推廣教育機構為實施前二項傳統知識之教學或培訓，得由部落會議遴選原住民族耆老或具相關專長人士教導之。 主管機關應訂定辦法獎勵前項之耆老或具相關專長人士。	因此引用原住民族教育法第三條之精神，強調傳統知識相關課程應由部落主導，加強校外之生活教育。 三、 傳統知識的傳承仰賴口耳相傳，耆老或具相關專長原住民之教導，較諸課本更為有效。爰於第四項規定由部落會議遴選適當之傳統知識傳承師；為表示對傳承師之尊重，第五項規定主管機關訂立相關之獎勵辦法。
第二十五條　（輔導、獎勵與補助） 主管機關應輔導、獎勵與補助原住民維持其基於生物多樣性知識之傳統生活。 前項輔導、獎勵與補助之措施，由主管機關另以辦法訂之。	保護傳統知識，除在教育上設計傳承機制，使之得以相傳以外，原住民維持慣習生活方式，使生活與環境之互動得以繼續，更是傳統知識創新知之所賴。然而現今依慣習之生活方式，已無法維持生計，因此本條明訂主管機關輔導、獎勵與補助之義務。
第二十六條　（載明來源地） 依本法申請使用傳統知識並經開發者，於申請專利時，除依專利法規定外，應事先經該傳統知識所屬原住民族或部落之同意，且於其申請書載明所使用傳統知識之來源地，並提出與該原住民族或部落訂定之契約。	本法規範傳統知識來源揭露之目的係為了防止傳統知識被剽竊，且為傳統知識有效管理之必要措施，但為避免傳統知識來源之揭露與專利作過多的連結，是以未依規定揭露傳統知識來源者並不影響專利之授予，違反之法律效果，完全依本法之規定處理。
第六章　民事救濟與罰則	
第二十七條　（民事救濟） 違反本法規定，致侵害原住民族或部落之權益者，原住民族或部落得請求損害賠償，並得請求排除其侵害；有侵害之虞者，得請求防止之。	基於傳統知識之抽象特性，及傳統知識之權利歸屬於原住民族或部落，因此違反本法規定而侵害該原住民族或部落之傳統知識權益者，應賦予該原住民族或部落有向侵害人請求損害賠償、排除侵害與請求防止侵害之權利，爰

	制訂本條規定。
第二十八條　（以不正當方式使用傳統知識之處罰） 違反第七條第一項規定，就傳統知識取得智慧財產權或主張其他權利，或以不正當方式使用傳統知識者，處新台幣十萬元以上一百萬元以下罰鍰。	基於原住民族或部落對其傳統知識發展與使用之關係，以及為維護原住民族或部落之聲譽及尊嚴，爰制定違反本法第七條第一項規定者，應予處罰。
第二十九條　（未經同意而揭露、取得或使用未公開傳統知識之處罰） 違反第九條第一項規定，未經原住民族或部落之同意，而揭露、取得或使用未公開之傳統知識者，處新台幣十萬元以上二百萬元以下罰鍰，並通知限期停止使用，逾期不停止使用者，得按次連續處罰。	傳統知識之權利歸屬於發展該知識之原住民族或部落，因此若未經其同意而揭露、取得或使用未公開之傳統知識者，應予處罰。經通知限期停止使用仍不停止者，得按次連續處罰。
第三十條　（未經同意而調查或使用之處罰） 未依本法徵得原住民族或部落之同意而從事傳統知識之調查者，處新台幣十萬元以上五十萬元以下罰鍰，並通知限期停止，逾期不停止者，得按次連續處罰。 未依本法徵得原住民族或部落之同意而從事傳統知識之商業使用者，處新台幣十萬元以上一百萬元以下罰鍰，並通知限期停止，逾期不停止者，得按次連續處罰。	為保障原住民族或部落之權益，故未徵得原住民族或部落之同意訂定契約而擅自對傳統知識進行調查或商業上使用者，應予處罰。且因商業上使用行為可能已經獲取利益，故對此規範較高之罰鍰額度。經通知限期停止仍不停止者，得按次連續處罰。
第三十一條　（逾期未改正之處罰） 違反第二十條或第二十一條之規定者，主管機關應限期命其改正，逾期未改正者，得處新台幣五萬元以上三十萬元以下之罰鍰。	違反本法第二十條或第二十一條未為報告之規定，可能使該原住民族或部落處於資訊不對等之地位，不利其對傳統知識之管理與保存，爰制訂本條規範其處罰。
第三十二條　（違反職務上保密義務之處罰）	為避免原住民族或部落未公開之傳統知識被不當洩露，爰參考刑法第 132 條規定職務或業務上保

違反第二十三條第三項規定，因職務或業務知悉未公開之傳統知識而洩露或交付之者，處新台幣五十萬元以上五百萬元以下罰鍰。	密義務，若有違反應予處罰。
第三十三條　（違反專利申請規定之處罰） 違反第二十六條之規定，未於專利申請書載明傳統知識之來源地者，處新台幣十萬元以上五十萬元以下罰鍰。	為維護傳統知識之完整、避免被盜用，以及便於專利審查機關審查相關專利，乃課予專利申請人有說明其所使用相關傳統知識來源地之義務，若有違反應予處罰。
第七章　附則	
第三十四條　（施行細則） 本法施行細則，由主管機關定之。	
第三十五條　（施行日） 本法自公布日施行。	

第三篇、歷次會議紀錄與回應

一、第一次部落會議（2005/12/16）

「原住民族傳統生物多樣性知識保護法」草案樂野公聽會會議紀錄

壹、　時間：民國九十四年十二月十六日下午二點至下午五點

貳、　地點：樂野活動中心

參、　主席：梁景德主任　　紀錄：林小燕

肆、　與會人員：

謝銘洋教授、陳士章秘書長、梁主任、鄉公所人員

伍、　案由:

「原住民族傳統生物多樣性知識保護法草案」制訂公聽會

陸、　綜合討論

一、提問：應由地方（部落）中對傳統知識已有研究之人組成團隊，來深入探討傳統知識之立法，但相關傳統知識多是口傳，需花時間與長輩討論，三月亟需訂出法案可能太趕。

謝銘洋教授：傳統知識資料蒐集需時頗多，本次公聽會乃著重於制度面之探討，例如以何種方式保護方為適當？是否以登記制度保護？是否有登記方予以保護？

梁景德主任：由部落中熟悉相關傳統知識之耆老、長輩組成團隊，做部落與部落間的溝通，將能使本部法案之訂定更完備。

二、提問：動、植物皆屬國家之資源，如何登記加以保護？

梁景德主任：以國家登記制度來保護，此亦會牽涉自治區的問題。若自治區成立，此法將更有助於自治區的運作，此法案若訂立通過，則自治區內範圍之資源皆屬原住民，於登記制度便較無問題。

陳士章秘書長：現在國家奚以立法方式來肯認原住民對傳統知識之權利，金希望瞭解的是，若外人欲取得傳統知識，要以何種方式？以及以何種方式使傳統知識延續。

謝銘洋教授：長在原住民區域的遺傳資源，於遺傳資源法中未加以處理，而是由原主民自己同意，若未取得同意，則可對之主張相關權利。

鄉公所：原住民之發展強調知識，若此法訂立不當，將是對原住民之阻礙。

鄉公所：為使立法能更周延，希將報告期程延後，確認何知識需保護，再交由研究團隊研究，並加以立法，否則若立法過嚴，反使原住民發展受阻。

三、 提問：植物利用之經濟利益如何加以規範？

謝銘洋教授：此部分以後必當受規範，惟今需先研究哪些資源確是需要被規範的。

四、 鄉公所：研究報告之期程問題，涉及計畫之契約，加以延後恐有困難。

五、 梁主任建議：不僅是部落溝通，甚至是族群間的溝通，將使傳統知識保護法的訂定更完備。

柒、臨時動議：無

捌、散會

二、期中報告（2006/01/18）

「原住民族傳統生物多樣性知識保護法」草案期中報告審查委員意見徵詢會議記錄（含意見徵詢之處理情形）

壹、 時間：民國九十五年一月十八日上午十點至十二點三十分

貳、 地點：中油大樓 505 會議室（台北市松仁路 3 號 5 樓）

參、 主席：鄭副主任天財　　紀錄：孫惠君

肆、 與會人員：鄭副主任天財、潘維大院長、張懿云教授、邵廣昭主任、楊智偉理事長、楊鴻謙副處長、謝銘洋教授、郭華仁教授、石正人教授、陳昭華教授

伍、 主持人致詞：(略)

陸、 計畫主持人報告：(略)

柒、 討論事項

案由: 「原住民族傳統生物多樣性知識保護法」草案期中報告審查。

綜合討論:

潘維大院長

(一) 參考期中報告第三頁，在傳統知識定義「原住民和地方社區的知識、創新和作法」(參照 CBD 之定義，並考量台灣傳統知識包含中醫藥與原住民藥用植物兩部)，而在第七頁保護要件中，包括「傳統的、與生物多樣性有關的」。則定義範圍較廣，似乎超過保護要件之範圍，是否該界定保護範圍？亦即保護範圍是否不限於原住民，而亦包括台灣傳統中醫藥知識？

(二) 傳統知識之目的是在傳承知識而非經濟利益。

(三) 登記制度上，權利歸屬主體會有問題，是否認申請人可以是主管機關主動調查登記。

張懿云教授

(一) 傳統知識是與生物多樣性相關的。

(二) 原住民智慧創作很複雜且各國原住民需求也不同，研究時間非常急迫。草案內容已涉及所有相關問題，資料蒐集相當完整，但真正困難的在後半部權利內容，該如何決定立法政策，訂出台灣真正需要之法案。

(三) 原住民傳統知識之登記並非保護要件，則誰是權利人？該如何登記？且有些東西是屬於好多民族的，該如何處理？

(四) 不管登記是否保護要件，如何防止或保障將未登記之傳統知識納入自己申請專利之範圍，是重要的問題。

(五) 地方未公開之知識，主管機關兩級制度，地方資源是否足夠？如果不夠反而會傷害到原住民。若未有行政機關之相關資源，此制度是否能落實？

(六) 研究時間在可接受之範圍內能延長較好，因為後面事前告知、利益分享所要處理之問題仍多。

邵廣昭主任

(一) 定義參考 CBD 之翻譯，但本法強調遺傳資源，是否需調整？

(二) 傳統知識似乎是強調舊的、傳統的知識，而非新的。

(三) 原住民是否知道該主動登記？原住民可能不容易知道哪些是傳

統知識，故登記制度是否要由政府主動發掘或由專家研究？

（四）資訊是否公開難拿捏，公開後難保護，但公開可鼓勵學術研究。

楊智偉理事長

（一）從例子來思考問題，提供原則性、方向性之意見。如原住民族傳統織布圖紋，被原住民商業團體或個人作為商業利用，甚至登記為商標，如何保護部落整體之利益？

（二）郭英男之歌曲到底是屬於部落整體或是其個人的創作，最後應該判賠其個人或部落？

（三）蘭嶼達悟特有豬種被拿來配種成新豬種，利益歸屬卻非達悟族人。

（四）很多單位假借抽血之名行研究之實，如五、六年前花蓮有部落一年被抽六次血，被研究出來原住民基因有抗酒精的成分，但尚未商業化，原住民是否該受尊重？

（五）哪些部落、耆老具有代表性？他們做出來的共識，是否就足以代表整個族？做研究時，應該順著其歷史的脈絡做研究。

（六）登記是主動或被動，許多原住民不知道什麼知識該受保護，哪些不受保護，研究團隊應該可以列舉出來讓部落作些挑選。

楊鴻謙副處長

（一）如何保護？包括涉及之權利主體、客體等，大部分法案是實體法兼程序法，在程序法之部分，如登記制度，如何落實執行乃是最重要的部分。

（二）本法案是否有涉及其他法律的規範？與其他法律競合時該如何處理？例如智慧創作保護條例，只要其他法律涉及者就不規範。如其他法律有規定，適用其他法律或排除其他法律，應該明確規定。

（三）本法案偏重生物多樣性知識，包括圖騰創作，動物藥用資源、食材運用知識，應和智慧創作保護條例草案、遺傳資源法也應該有所區隔。

(四) 多引用秘魯、巴西、巴拿馬等資源豐富國家的資料，但是為何不引用先進國家規定，如美、澳、紐等，請說明之。

(五) 研究期程在草案出來後，建議邀請中央相關部會討論條文內容，如國科會、環保署、林務局、農改場等。例如：馬告部落之勇士湯，花蓮農改場取得活力養生勇士湯之商標登記，此是否亦屬生物剽竊。行有餘力可以列舉方式告訴原住民這類的知識屬於其傳統知識。

(六) 應注意行政院研提法案應注意事項，一、中央行政機關法制作業應注意事項；二、行政院主管部會研提法案應注意事項。。

(七) 法案名稱應統一之，台灣原住民族生物多樣性知識保障法或保護法？保護法似乎比較好。

(八) 在期末報告之前邀請相關單位來討論, 由原民會具名邀請開會。

(九) 時間過於壓迫，實力無法展現出來。受託單位應該主動提出要求展延。

鄭副主任天財

(一) 原住民族基本法第十三條規定，原住民族傳統之生物多樣性知識及智慧創作另以法律定之，生物多樣性知識保障法案與智慧創作保護條例是否有競合之處？遺傳資源法和本法是否有關，若競合該如何處理？

(二) 主管機關是原民會或其他相關部會？將來未必以本會為主管機關，若由本會擔任，目前原民會人力、專業皆不足，若本法通過，該如何推動？

(三) 台大生物多樣性學者也可以邀請參與。

(四) 蒐集各國相關資料，若無中文翻譯，原民會可委託翻譯出版。

謝銘洋教授

針對各審查委員之回應：

(一) 本法案所涵蓋之範圍是地方或社區？本法重點擺在原住民族。

(二) 登記制度之權利歸屬後續問題會繼續討論。包括他人將傳統知識拿去申請智財權，後續會有權利保護甚至處罰規定。

(三) 關於兩級登記制是否會有地方資源不足之處，此亦是本法所關注的重點，故認可在本法中規定協助、鼓勵或投入經費，成立地方性質之資料庫。

(四) 關於傳統知識權利主體之認定問題，如誰是實質上真正擁有者，此認定困難，例如台灣原住民族多，彼此往來密切，容易搞不清楚知識是誰的，故有待未來實質認定，本法不容易處理此問題，但會思考相關處理機制。

(五) 政府應主動說明傳統知識之意義。

(六) 資訊公開後之保護難，此的確是個問題，可參考國際間之兩級制度（中央規定已公開、地方規定未公開）。

(七) 關於傳統知識被為商業利用之問題，誰可主張權利及主張權利後之利益歸屬屬於個人或部落？此值得探討，惟傳統知識歸屬於一定族群或部落應無問題，因其創新成分較低。未來會進一步規劃，如事先知情同意、利益分享等問題。

(八) 關於程序問題，細部登記應由施行細則處理，母法主要係針對原則性規定，未來可能授權用辦法處理。本案時間有限，若處理過於細部問題，時間恐怕不及。

(九) 與其他法之競合關係，不同法有不同目的及保護要件，依個案若符合專利法保護要件，由專利法保護，但傳統知識通常不會符合專利要件。傳統智慧創作與著作權較可能產生競合。至於遺傳資源法，不處理有關原住民所在地之傳統知識部分，委由其他法律處理。若只涉及原住民地區遺傳資源之採集、探勘，不涉及傳統知識，可能要另外立法處理。

(十) 外國先進國家無相關立法，乃先進國家通常非屬資源豐富國家。

(十一) 敬邀各中央部會討論，屬後階段之部分。

（十二） 法案名稱，委託計畫之名稱是「保障法」，可能有待商榷。惟採「保護法」亦未必妥適，可能遭原住民質疑不受尊重。

（十三） 主管機關未來仍可能由原民會擔任。

郭華仁教授

（一） 關於法律競合部分，受制於時間關係只能先處理部分，無法做太多規劃。傳統知識為一整體性之知識，很難去做切割，當智慧創作與生態知識發生重疊時很難處理，故認為智慧創作與生態知識皆是現行智財權之特別法，若能放在一起處理較好。

（二） 漢人之中草藥不受保護？將來可能遭受質疑。本研究案之出發點是針對權利來保護，包括原住民傳統知識開發後所能得到之利益。但傳統知識所能得到之利益不多，反倒是原族民族如何永續生存之最大資產。主流社會對原住民傳統知識重視乃是因其中部分可加以開發牟利，但此部分只佔原住民傳統知識之小部分。若僅要規範利益，原住民之傳統知識與漢人之中草藥知識，乃是此部分所處理之重點，惟時間有限，無法好好處理。若目前只欲處理原住民傳統知識權利之保護，最好能在法律名稱加上「原住民族權利保護法」，因原住民傳統知識，除原住民族權利保護外，如何提升原住民族的能力、如何永續生存乃更重要的課題。

石正人教授

（一） 登記之可行性如何，牽涉傳統生物多樣性知識不明確，故權利歸屬之區分不易。

（二） 傳統知識應該朝文化資產保護之方向，不只注重權利之保護，並要防止傳統知識之流失，此亦應是保護法所要處理之問題。在登記制度中，希望未來能成立一研究中心，課以負責主動調查、蒐集、保存傳統知識之義務，此亦可協助原民會人力、經費之不足。

決議：

今天期中報告所有與會人士皆提供相當寶貴之意見，受託單位

亦有相關回應，未來整個草案進行過程中應可參酌今天之意見，本日之期中報告完成。

捌、　研究單位回應（參意見徵詢之處理情形）

玖、　散會

「期中報告審查委員意見徵詢」之處理情形

出席單位及人員發言要點	處理情形
一、 潘維大院長	
（一）傳統知識保護範圍是否不限於原住民，而亦包括台灣傳統中醫藥知識？	本法為「原住民族傳統生物多樣性知識保護法草案」，故保護範圍應僅限於原住民族之傳統知識。
（二）登記制度上，權利歸屬主體會有問題，申請人可否為主管機關主動調查登記？	登記制度之權利歸屬後續問題會繼續討論。
二、張懿云教授	
（一）地方未公開之知識，主管機關兩級制度，地方資源是否足夠？若未有行政機關之相關資源，此制度是否能落實？	關於兩級登記制是否會有地方資源不足之處，此亦是本法所關注的重點，故認為可在本法中規定協助、鼓勵或投入經費，成立地方性質之資料庫。
（二）原住民傳統知識之登記並非保護要件，則誰是權利人？該如何登記？	關於傳統知識權利主體之認定問題，如誰是實質上真正擁有者，此認定困難，例如台灣原住民族多，彼此往來密切，容易搞不清楚知識是誰

	的，故有待未來實質認定，本法不容易處理此問題，但會思考相關處理機制。
三、邵廣昭主任	
（一）傳統知識定義參考 CBD 之翻譯，但本法強調遺傳資源，是否需調整？	於制定草案時會參酌CBD及國際組織之意見，並未以遺傳為主。
（二）原住民是否知道該主動登記？登記制度是否要由政府主動發掘或由專家研究？	登記制度問題未來會做進一步討論。
（三）資訊是否公開難拿捏，公開後難保護，但公開可鼓勵學術研究。	資訊公開後之保護難，此的確是個問題，可參考國際間之兩級制度（中央規定已公開、地方規定未公開）。
四、楊智偉理事長	
（一）原住民族傳統知識，被原住民商業團體或個人作為商業利用，其利益歸屬於個人或部落？	關於傳統知識被為商業利用之問題，誰可主張權利及主張權利後之利益歸屬屬於個人或部落？此值得探討，惟傳統知識歸屬於一定族群或部落應無問題，因其創新成分較低。未來會進一步規劃，如事先知情同意、利益分享等問題。
（二）哪些部落、耆老具有代表性？他們做出來的共識，是否就足以代表整個族？	依已公佈之原住民族部落會議實施要點取得部落共識。
五、楊鴻謙副處長	
（一）如何保護？包括涉及之權利主體、客體等，大部分法案是實體法兼程序法，	關於程序問題，細部登記應由施行細則處理，母法主要係針對原則性規

在程序法之部分，如登記制度，如何落實執行乃是最重要的部分。	定，未來可能授權用辦法處理。本案時間有限，若處理過於細部問題，時間恐怕不及。
（二）本法案是否有涉及其他法律的規範？與其他法律競合時該如何處理？	與其他法之競合關係，不同法有不同目的及保護要件，依個案若符合專利法保護要件，由專利法保護，但傳統知識通常不會符合專利要件。傳統智慧創作與著作權較可能產生競合。至於遺傳資源法，不處理有關原住民所在地之傳統知識部分，委由其他法律處理。若只涉及原住民地區遺傳資源之採集、探勘，不涉及傳統知識，可能要另外立法處理。
（三）為何不引用先進國家規定，如美、澳、紐等，請說明之。	外國先進國家無相關立法，乃先進國家通常非屬資源豐富國家。
（四）法案名稱應統一之，台灣原住民族生物多樣性知識保障法或保護法？保護法似乎比較好	法案名稱，委託計畫之名稱是「保障法」，可能有待商榷。惟採「保護法」亦未必妥適，可能遭原住民質疑不受尊重。
六、鄭天財副主委	
（一）原住民族生物多樣性知識保障法案與智慧創作保護條例是否有競合之處？遺傳資源法和本法是否有關，若競合該如何處理？	傳統智慧創作與著作權較可能產生競合。至於遺傳資源法，不處理有關原住民所在地之傳統知識部分，委由其他法律處理。若只涉及原住民地區遺傳資源之採集、探勘，不涉及傳統知識，可能要另外立法處理。
（二）主管機關是原民會或其他相關部	主管機關未來仍可能由原民會擔任。

會？將來未必以本會為主管機關。	

三、第二次部落會議（2006/01/21）

「原住民族傳統生物多樣性知識保護法草案」霧台公聽會

會議記錄

壹、　時間：民國九十五年一月二十一日下午二點至五點

貳、　地點： 霧台鄉公所

參、　主席：謝銘洋教授　　紀錄：劉姿吟

肆、　出（列）席人員：郭華仁教授、陳昭華教授、李崇僖教授、杜春生議員、霧台鄉杜傳鄉長、代表會柯副主席、鄰長、鄉公所技士、鄉公所秘書、霧台村巴山光村長、佳暮村柯知玲村長、巴黎巴老師、杜花枝女士

伍、　主持人致詞：(略)

陸、　計畫主持人報告：

謝銘洋教授：

此份研究計畫為原民會委託台灣大學原住民族中心所做的法案研究，根據原住民族基本法 13 條，原住民的傳統知識應該要受到保護，原住民族委員會積極推動立法，台大為周延的立法案，想藉由此機會聽取各位寶貴的意見。

柒、　討論事項

案由:「原住民傳統之生物多樣性知識保護法」專家學者及原住民代表意見徵詢

綜合討論:

杜春生議員：

（一）陳水扁總統發表原住民是國中國，原住民（比照）準國家，憲法提及財產權、以及總統有注意到原住民的智慧財產權，例如刺繡、琉璃珠變成漢人的技術，設計圖好意公開，都變成都市的風貌，例如頭目雕刻等，要用人家照片應該要收基本價，例如最便宜一張伍佰，鬼湖的照片一張一萬塊。

（二）將來等基本法落實後能夠自治，沒有先整理自己的財產，祖先給我們的傳統的知識和智慧、資產都變成別人的。原住民靠山吃山，採愛玉子、藤類的東西，變成政府的資產，讓原住民不能收，金線蓮等，有經濟價值的植物都被政府管制，山裡能賣的政府都管，還要抓去關。

郭華仁教授：

（一）何謂傳統生物多樣性知識：和台中科博館的嚴博士到獵人家做訪談，問植物有何用途？知識的內容哪裡來的？應該是傳承，在自身體驗。傳統知識，就是原住民一代代傳遞下來和環境互相了解所產生的知識。生物多樣性的知識，任何活的東西，微生物、酒蛆等，都算是生物的範圍。有的小米長有的小米短，光是小米，品種就很多樣，這稱作多樣性。

（二）傳統生物多樣性知識為何重要：靠多種生物共同來維持，例如陷阱用很多的植物，若植物單一，陷阱也無法做。受傷的用藥知識，也是生活所必須，沒有這些多樣性，就很難生存下去。傳統的生物多樣性對主流社會更重要，例如德國人發現印地安人打獵的弓箭塗一種藥，射下去山豬就不會動了，箭的毒是用樹皮蒐集在芭蕉捲圓桶狀加水讓它慢慢滴下，射野豬會麻痺，這就是傳統知識，傳統知識對主流社會的好處是麻醉藥劑的發現，用此成分來做麻醉藥，現在大藥廠在世界各地做藥草調查的工作。在過去，傳統知識被盜取大公司並沒有回饋，十年前，第三世界國家（原住民較多）開始要求回饋、利益分享，才開始有法律的限制。政府配合世界潮流，要求原民會訂法。法律重點內容包括：1．事前告知同意、2．利益回饋；傳統知識除了權利的分享以外，現面臨的危機是傳統知識的流失，年輕人並經常不在身邊，珍貴知識因此不見，因此除了**分享**也要**保存。**

謝銘洋教授：

法案重點介紹

（一）權利歸屬：

傳統知識在原住民族裡頭是否比較多是整個民族所共有？ (主體是誰)還是有些是屬於家族，不外傳的？有沒有傳統知識根本是屬於個人的、單獨創設的？牽涉到傳統知識權利的保護。如果要徵得同意才能有商業性的利用，應該由誰來同意？頭目還是部落會議？頭目能否代表整個族來同意別人做商業性利用？如果賺到錢要分得多少百分比才適當，由誰決定？若非整個族所共有的，由家族擁有的呢？

（二）登記制度：

以往傳統知識被拿去用，難徵得事前同意，若法案實施，用 TK 之前應該要得到同意。傳統知識在腦海裡，沒有文字記錄，更多是口耳相傳，生活經驗傳承累積，是不是鼓勵大家把知識彙整，因為年輕人（少去打獵）可能不如老一輩的了解的多？傳統知識大概要走訪耆老紀錄，應該要有一個登記的制度或資料庫。本草案分為兩級制度：中央與地方。中央：原民會；各個民族的資料，地方：各族設資料庫中心，有經費來源來收集整理族裡頭的傳統知識，可能一族設一中心，至少確保一個原住民族有一個中心／有更多人的族可分更多中心，要求政府中央有義務要撥經費使各中心來搜集知識，使維護和保存，因為文化多元性、在地化也很重要，希望透過登記制度，能讓傳統知識獲得維護，如果登記但沒經過同意，可以用侵權的方式提起訴訟。

杜傳鄉長：

（一）傳統知識是否為共有知識？打獵的知識是否為整族共有的知識？有沒有個人的傳統知識?

（二）有個人傳授、教育的部份，例如如何做刀槍，傳授的人有什麼權利？

巴桂武村長：

（一）應該是大家擁有的知識　如果是個人專業的知識，都管不到了，例如打造刀槍，是個人專業，但政府禁止。至於生物多樣性是部落的知識，應該透

過部落的許可；只由頭目比較專制，應該透過大家同意。

陳昭華教授：

（一）想請問村裡的醫藥知識是否為家族單傳？

杜傳鄉長：

（一）醫藥部分很多是傳授的，巫師本來是大家的，但不是每個人都會；但只有某些人會，傳授時，傳授的人有酬勞，知識是開放的，有能力想要學的人，是自己找師父，學會了要酬勞給師父。

（二）但強調的是有沒有特別的知識是個人的？（肯定）獵人的知識，山豬特別被刺殺進去會死，農師傅(獵人)：狩獵知識是共享的，沒有秘密

（三）傳統知識是大家的。魯凱族是分享的。

（四）生物多樣性對原住民而言太深奧知識的保障，在原住民眼中比較像分享制度，沒有保障，沒有智慧財產或著作權法，多樣知識的保障　希望將來也可以跟隨趨勢，像智財權一樣風行一樣這麼需要。

（五）不能迴避的生物多樣性的保障是將來趨勢，例如地瓜葉是否有可能做茶葉?將來都會有，但此知識應該要有保障，這知識的保障應該是趨勢，希望是屬於大家的，知識的保障是趨勢，希望透過部落議會來討論歸屬誰。

（六）歌是誰做的？別人把歌曲整理，就變別人的智慧財產，被發表。原住民的刺繡，誰的？以前人傳下來的，靠口傳的，魯凱族恨不得把知道的東西就和大家分享，不似(秦始皇)焚醫書。

謝銘洋教授：

（一）進一步確認分享的範圍？魯凱族內自己的分享，還是分部落，不同部落不同分享，還是也分享到其他部落？**部落**自己分享還是**族**分享？

杜傳鄉長：

（一）部落是一個國家，部落自己分享，吉露是一個國家；霧台是自己的一個國家，**但每個部落都有自己的使用規範**，刺繡，每個人都可以知道，這個圖案，大家都可以做，但特定人只能用特定圖案，使用的時候有規範。以部落為單位。

杜花枝女士：

（一）學者進入，逕自詢問到的文化（盜用文化），即當論文發表，獲得學位，即使詢問過程有經過部落會議同意，但學位的取得和部落的認可之間有無關係？例如曾經有學者，來幾個月，就可以用人類學 xxx 當論文題目，問題是長老有確認你這個學者嗎？拿魯凱族的百步蛇來做論文，說明錯誤，是否應該經過部落同意才能取得學位？

（二）被盜用：刺繡圖案到底能不能給？

杜傳鄉長：

（一）原民會要保障這些東西，所以原住民應該要有覺醒。分享的習性也是魯凱族最大毛病，得到別人得到利益才發聲。例如原住民語發音；鄉長曾經和博士爭論，鄉長被指正，確認正確與否居然是“ 博士 ”？音一定要增加幾個，像這種明明知道的東西，應該由誰確認對不對。衣服為什麼是黑的，非原住民居然逕自推斷因為石板是黑的！

郭華仁教授：

（針對杜小姐做回應）

（一）解決方法：將來應該先經過部落會議同意，假如有外來學者要做調查，先開部落會議，並請該學者簽文件，發表之前應該要經過部落，用契約約束；版權等應該予以分享。

（二）進一步報告：日本人開始就有調查魯凱族，很多東西又已經發表了，這部份算是已經公開的傳統知識；公開比較難禁止，但可以進一步禁止的，是申請專利的部份。(利用無法阻擋，但申請專利是可以阻擋的)例如美國利用薑黃治療傷口這是印度的知識，已公開的傳統知識所能做的僅是消極的保護，未公開但有些還沒調查的，外面還沒有人調查的，要積極的保護。

杜傳鄉長：

（一）是否有可能建立人才資料庫？（傳統知識的人才資料庫）外面人要找資料應該是找特定人。

（二）以魯凱語講解消極及積極保護比方說：歌、故事、舞蹈，已被動作快的人申請專利這部份消極的保護可以救，積極的保護，祭儀、技術、還未公開的應該怎麼積極的保護，要靠自己去發現。

（三）原民會因基本法，讓原住民能透過部落會議決定這知識是屬於誰的，讓原住民邁向自治區。看村長能否號召魯凱族讓自己站起來。 例如股飯子（樹）：洗衣服(魯凱的傳統知識)，但被客家人拿去用此賺錢；用小米的莖燒成草木灰，配地瓜葉--洗頭髮，特別乾淨，才不會長白頭髮；老人家保護牙齒不掉落：老人家用 xx 用牙齒，使牙齒變成黑黑的不會蛀牙也不會掉；小辣椒是威爾鋼，磨成粉，消除疲勞、增強體力…（很多知識因為外面的物資進來反而忘記了）將來若原住民研發這些傳統知識，看能不能賺錢，部落應該還有很多這樣的知識。

陳昭華教授：

（一）資料庫的問題：以部落為單位，如果有研究小組應該如何？讓部落自己整理；還是需要外力進入？ 如果讓部落自己整理，進行時可能會有什麼困難？

（二）如果已公開的部份只能防別人不來申請專利；但未公開：使用上要得到同意；事後要求回饋，整理資料的中心，要事先保密，在透過部落會議之前不能公開。

杜傳鄉長：

（一）雙方一定要合作—政府公佈的專家要配合現代科技（照相、電腦），需要外面指導協助；資金需要外援（政府）；但找尋傳統知識可以部落內部進行。

（二）能否對外公開是部落會議同意才能公開，分享一定是大家的，例如傳統藥草要整理成資料庫，透過研究小組來整理；如何用和如何回饋，透過部落。因為目前知識都為口傳，比較沒有個人的，都是大家的，現在應該是挖一些祖先留下來的東西。

郭華仁教授：

（一）問一個問題　可能有冒犯，以前，頭目最大；頭目有權威，族人要對外應該要先經過頭目同意現在每個人都可以自由和外界溝通，是否有可能性，部落內的人自己私下賣知識？（用便宜的價位不透過部落會議賣出）應該如何解決？

杜傳鄉長：

（一）有可能會有，以霧台為例；但（吉露）就管理的很好。有這個可能會走私，六十歲以下的知道很少，六十歲以上才有可能會走私（六十歲以上的可能會告訴自己的孩子。）將來要透過部落的力量來約束，村長和代表會的管理很重要，所以應該要建立統一的機制

謝銘洋教授：

（一）該統一機制，是尊重各族或各部落的內規？魯凱族有無類似的內規、族規？

杜傳鄉長問民眾：部落有無內規（魯凱語）

杜春生議員：

（一）希望在保障法裡有約束，最近要成立部落議會，相關問題希望能在部落會

議透過議題討論過，整理好再呈現。

杜傳鄉長：

（一）霧台鄉先得知未來的政策感到相當榮幸，霧台鄉也是積極推動原民會的部落自治，原住民的基本法，是希望小部落自治，將來各族群的聯盟才有族群自治，尤其是手工藝幾乎都已經被盜用了，以及口傳的文學（神話故事和祭儀等都已被盜用），（未公開的部份）別人還沒發現的傳統知識(傳統的藥)先暫時不要外流，若將來被別人拿出去用就不能再生存了。

謝銘洋教授：

結語：只是先討論規範這樣的法律應該要有的內容，等法案的草案出來，會再請指教。希望是在法案成形之前，希望聽到各位對議題的看法，須特別說明的是：繪畫和歌曲，在原住民族基本法被當成兩樣東西規範，編織、圖騰屬於智慧創作，由另一草案規範，在將來法律適用上，希望未來能夠把文化的部份整併進來，不然兩個制度上會有歧異；未來整併與否，可能也是要看原民會的態度。

捌、　臨時動議：無

玖、　散會

四、專家學者與原住民代表座談會（2006/03/28）

「原住民族傳統生物多樣性知識保護法草案」專家學者與原住民代表意見徵詢會議記錄（含意見徵詢之處理情形）

壹、　時間：民國九十五年三月二十八日上午十點至十二點三十分

貳、　地點：台灣大學農藝系館 208 會議室

參、　主席：郭華仁教授　紀錄：孫惠君

肆、　出（列）席人員：謝銘洋教授、陳昭華教授、吳豪人（輔大法律系）、王進發（稻江科技暨管理學院 休閒遊憩管理學系）、盧道杰（台大森林環境資源學系）、林益仁（靜宜大學 生態學系）、嚴新富（國立自然科學博物館 植物學組）、台邦撒沙勒（前高雄市原民會主委，華盛頓大學博士侯選人，魯凱族）、陳士章、夏曼藍波安、浦忠勝（原民會企畫處科長，鄒族）、 蔣正信（原民會專任委員）

伍、　主持人致詞：（略）

陸、　計畫主持人報告：（略）

柒、　討論事項

案由：「原住民族傳統生物多樣性知識保護法」草案專家學者及原住民代表意見徵詢

綜合討論：

吳豪人教授

（一） 根據基本法所衍生，權利主體採集體權的觀念，與傳統法律不同，基本法中有提到原住民族或部落，但這是外人所強加的概念、認定，有些原住民族或部落並不這樣認為，因此「原住民族或部落」的認定會有困難，將會導致權利主體的認定有困難。

（二） 國際上有許多生物海盜的情形發生，但本法中，並未提到人本身是一個資源的時候，這種情形下應如何處理？

（三） 若我們目前所提出的草案，與原住民的基因無關的話，就不需在此討論了！但本法似乎只指知識。本法中所牽涉的的例子可能是，大藥廠去搶原住民的傳統知識，勢力上並不對等，尤其原住民族不諱言容易被分化。

（四） 本法規定係在於立法後應該如何給予保護，並不回溯，但若要將社會長久的不正義扭正過來，應該要給予回溯保護才對，目前的立法都是以往後為考量點，但實際上很多東西都已經被用了，現在立法之後不能去請求嗎？像是交通部用蘭嶼的拼板船，本法立

法前所做的行為是否可因本法的訂立施行而停止？是否有此可能？

（五） 退一步來說，若該行為是持續性的，從以前到現在，是否有適用本法的可能？

（六） 第七條所謂的「他人」是否僅指漢人，我覺得應該不是，這應該不是原漢的區別！應該只要是與該知識無關的人就是外人。

盧道杰教授

（一） 本法跟好幾個跟原住民法都有相關、或有所重疊，是否請原住民主管機關，先說明有哪些應該考慮，有哪些不需要？那些部分是我們要談的哪些是不需要的，可以比較聚焦！

（二） 若按照第三條的定義來講，應該是包含原住民本身的！

（三） 農委會應該不僅是諮詢機關，應該將之訂為主管機關之一，將農委會或其他機關納入作為主管機關，傳統知識有很多部分是在生活中去實踐的，但本法中似乎是把他凍結，並未去討論生活、社會制度部分，若未將此部分納入，例如對社會制度作一鋪陳，將會導致傳統知識僵化，流為純粹的資料庫。所以第三條部分，應在鋪陳更仔細些。

（四） 執行的機制會有困難，原住民的核定，都是由國家政府，原住民本身沒有核定的機會，我們現在談的部落是不是最後的部落，原民會所認定的部落又是否相同？

（五） 若本法通過但認定機制尚未成熟，要如何因應這樣的過渡期？

（六） 部落跟部落間有共通性，也有差異性，若有一知識，兩部落皆認為是其所有，是否有一機制去協調，當有一知識在部落間或族群間產生之爭議時應如何處理？

（七） 很多研究單位都有各自的調查資料庫，與本法中的調查資料庫，要如何去協調？因為有些知識在其他資料庫中已經存在了。

（八） 在談採集或許可的時候，「倫理」的問題，倫理上的問題比細部的

問題更重要，原住民委員會是否有統一的原則？

（九） 處罰的部分，實在有點過嚴！職務上保密義務，部落的主委就不能洩漏嗎？若是不經意洩露的呢？這也會使我們把傳統知識變成死的資料庫，原則上，我們設想的架構應該是「大家都是善意的、知識是可以流通的，但是當他產生了利益之後，應該要回到原住民或部落本身」才是。

（十） 本法規雖並未被授權制訂相關自治事項，但若在原則上沒有很清楚，當相關法規出來後，經過競合，就會被稀釋掉。

（十一） 原住民是否清楚某些傳統知識是屬於他們的，應該有一個機制去對族人宣傳教育，讓原民能對保護傳統知識有意識及共識！教育的部分應該放進來！

（十二） 調查方面的部分不一定需要法規，用行政程序來處理也就可以，例如到部落去調查的時候要得到鄉公所的核可，以此來控制即可！

夏曼藍波安

（一） 第三條用詞的定義，關於人是否是「在適應環境」的議題在很多地方已經有討論，應該是用「永續環境」此種適合第三世界的條文，會比較好！

（二） 延續吳老師的意見，除了交通部用蘭嶼的標誌這件事外，一些政府的外交部門，使用了達悟族的一些圖案，政府是否可以這樣使用原住民的圖案？

（三） 第二條的部分，原民會在定義原民的傳統領域的時候，傳統領域沒有海洋，只有土地，但蘭嶼不只是土地還有海洋！因此不僅是農委會，甚至漁業署也應該一起來參加這個法的討論。

浦忠勝（原民會、鄒族）

（一） 目前海洋當然也包括在裡面（連雲海亦包括其中），原民法中對部

落的定義很奇怪，但後來發現，部落與目前既有的任何組織的概念都不合！若要將部落作為權利主體還有很多要考慮的地方！

（二） 蔡明誠所主持計畫制訂的法律中是以部落的代表人自為權利主體，算是比較取巧的方式，有些部落既有的機制，若不在本法中建立起來或加以維護的話，要達到本法中的立法目的，並不太可能。

（三） 其他的法律可能已經限制了原民對於某地區的生物多樣性的使用，例如國家公園法，若不加以考慮的話，將造成盧老師所說的知識會變成死的。

（四） 部落會議的組織是蠻必要的，但在本法中是否要給予授權，讓其成立有法律依據，亦較有代表性？以避免進入部落隨意找一些人來開部落會議，但沒有代表性！

（五） 罰則部分是否要參考地方議會在刑責上的規定，免得定得過高！

（六） 以達那伊谷為例，部落的規範若牽涉的罰緩時，應該要有法律的依據！

蔣正信

（一） 立了本法能保護到多少原住民的傳統知識？根本保護不到原住民，最近有很多研究人員到原住民族部落進行研究，本法的訂定保護不了這種情形。

（二） 第九條及第十二條，很多事情都可以被認定為善意，善意的解釋很廣，如此對於原住民的保護就更少了。

（三） 本法立了後，權利通通被拿走，對於原住民的保護就根本沒有了！

（四） 是否在有部落會議後，應要求各部落將原民習慣法建立起來，以免無限擴張，導致對其他民族的傷害。

（五） 就已公開未公開，大概是以法案通過為基準點，但是有些已經調查好但未公開發表，例如影片已剪輯好但未發表，請問本法會如何處理？

回應

郭華仁教授

（一） 第一個牽涉到是遺傳資源法，遺傳資源法並不管人體，原住民生物多樣性知識保障法未牽涉到文化部分會有一些缺口，在遺傳資源法中，已提點到若牽涉到原住民傳統知識的就過渡傳統知識法，第二個是到原住民族做調查的辦法，另外，原住民族基本法第十三條智慧創作的法規，目前有蔡明誠教授提出的法規做規範，但會有重疊的部分，因為一個藝術創作不可避免的會牽涉到生物多樣性。

（二） 根據主流社會專利法的概念，當知識公開後，經過二十年，大家都可以用，但本法第八條，會限制外人來用，以阿美族勇士湯為例，若不標示是阿美族的勇士湯，大家都可以用樹豆來煮，但若標示的話，就要回到本法來。

（三） 我們徵詢過魯凱族的意見，交給鄉公所不如交給部落會議，但部落會議的定義應該交由原民會去定義，暫時不去處理定義或內容的問題。

（四） 關於保護方向的問題，目前的規定的確是針對現有的知識，關於如何讓原住民維持目前原有的生活形態、如何使其因環境的改變而能持續下去，這方面問題很大，尤其是教育，若要將教育放到本法中，實在有點困難，因此暫時先不處理社會制度問題，但我們已提醒原住民委員會要去注意到這個問題，最好再將文化的部分放進來，會更完整。

（五） 調查倫理的部分，學者做研究的時候，要自己做倫理規範，這應該算是一種自我反省。

（六） 本法中是將生態保育的定義交給原民的，不過或許改成永續利用會比較好。

（七） 原民慣習的部分，是為避免原民動輒觸犯法律，也是寄望原住民自治的形成。

（八） 關於自治制度等，我們並未被授權制訂。

謝銘洋教授

（一） 原住民族基本法第十三條是我們的法源基礎，原住民傳統知識有時會與人有關的，人做為基因、素材是否在本法的規範中，當時並不為考慮進來，我們在規範的目的上並不相同，應該再另外立法

（二） 關於本法是否能確實保護原住民部分，我們會再斟酌。

（三） 牽涉到回溯保護的問題，過去的一些使用行為，若要去主張權利金，可能會造成更多問題。若本法通過後，應設一時間點使部分行為得以回溯適用。

（四） 不排除國家使用原住民傳統知識的情況，除非是緊急的狀況下，不然還是要得到原住民之同意，但本法中並未對文化的部分，例如圖騰標誌，有所規範，我們也建議主管機關，將來應該要整合兩部法律。

（五） 就本法定義來看，這應該還是屬於未公開，但此時會牽涉到，已調查好，但未公開，若要去使用，就應該要去簽訂使用契約。

台邦撒沙勒

（一） 我們大概被侷限在生物多樣性這個名詞，但生物多樣性和文化多樣性是很難區分的，例如原住民的基因，若是被藥廠研究，就會轉化成知識，基因本身究竟是屬生物多樣性或文化多樣性，很難區分清楚，若有可能，我是建議，就通通放在本法中，把文化多樣性與生物多樣整合在本法中。

（二） 第二條中，目前很多生物多樣性的東西不是原委會在管，是否應該邀請各主管機關來一起討論，將會使本法更為完備。

（三） 第十九條以後的監督機制，有一個名詞「部落會議」，依我的理解，部落會議應該是一個組織，還是此處應該是「部落議會」？或是向鄉公所申請也可以？應該去定義一下部落會議，不知道這是一個法人的組織或是行政組織？

（四） 另外，若我的研究牽涉到其他族或部落的知識，或有些傳統知識是家族的，有比部落更小的單位，是否應該要去尊重這些知識的擁有者？

（五） 誰來認定原住民？若我的母親是父親不是原住民，該如何處理？

（六） 我認為本法的可操作性不高，因本法有點太光冕堂皇，除了罰則之外行政部門很難去施行！

（七） 第二十三條規定依照原住民部落的規範，但目前原住民並未有很嚴格的規範，這會有風險，例如很多保留地就這樣消失了，因為並沒有很多習俗或慣習能制裁這些行為，所以我認為要用原住民的習慣來規範會比較困難！

（八） 第十八條關於申請與許可的部分，對於「生態保育」的原則，誰來界定調查是符合生態保育？尤其生態保育在目前亦有所爭議！是否改成「永續利用」會比較符合？

（九） 我們的自治政府何在？既然部落會議在未來是被期待的，那自治政府亦應該被期待，若兩部落間有爭議，將如何解決？自治政府有必要放進來！

（十） 若未來還有辦類似的會議，應邀請相關部會參與討論，避免在進入國會後被刪得無法實踐！

盧道杰

(一) 將農委會或其他機關納入作為主管機關，在政治上若可行，可以提高可操作性，且降低原民會壓力。

(二) 傳統知識本是生活之實踐方式，但本法中似乎是把他凍結，並未去討論生活、社會制度部分，有點只討論已成為知識之部分，有點一切兩半，與其生活失去連結。若未將此部分納入，例如對社會制度作一鋪陳，將會導致傳統知識僵化，流為純粹的資料庫。

(三) 第三條定義部分，應再鋪陳更仔細些。

(四) 執行的機制會有困難，原住民的核定，都是由國家政府，原住民本

身沒有核定的機會。我們現在談的部落是不是最後的部落，原住民會所認定的部落又是否相同？若本法通過但認定機制尚未成熟，要如何因應這樣的過渡期？

(五) 傳統知識是誰擁有？部落與部落間有其獨特性與共通性，族群間對於知識之歸屬會有衝突？是否有何機制可協調？關於族群間關於權利歸屬認定問題，是否有機制可作為折衝。

(六) 資料庫設置之後，產生知識經濟，且知識是否該公開，可繼續討論。很多研究單位間的調查資料庫，與本法中的調查資料庫，要如何去協調？因為有些知識在其他很多的資料庫中已經存在。

(七) 在談採集或許可的時候，當進入一部落或一地區時，是否需做倫理之要求？倫理上的問題比細部的問題更重要，原住民會是否有統一的原則？

(八) 處罰的部分，實在有點過嚴。如職務上保密義務，部落長老就不能洩漏嗎？若不經意洩漏呢？這又牽涉到，我們把傳統知識變成死的嗎？此會完全封鎖會擋住傳統知識之繼續發展。原則上，我們設想的架構應該是採取開放態度，大家都是善意的、知識是可以流通的，但是當為商業利用時，直接處罰為商業行為之主體。且商業利用產生利益後，利益應回到原住民及部落。

郭華仁教授：

(一) 我們徵詢魯凱族的意見，其認交給鄉公所不如交給部落會議，但部落會議的定義應該交由原住民會去定義，暫時不去處理定義或內容的問題。

(二) 保護方向的問題，目前的規定是對現有的知識，知識是死不是活的，如何讓原住民維持目前原有的生活形態、因應環境的改變而能持續下去是最重要的。但這方面問題很大，尤其是教育，若要將教育放到本法中，實在有點困難，也暫時先不要弄社會制度。但有提醒原委會要去注意到這個問題，最好再將文化的部分放進來，會是更完整之法律。

(三) 調查倫理的部分，學者做研究的時候，要自己做倫理規範，算是一種自我反省。

夏曼藍波安：

(一) 第二條的部分，原住民會在定義原住民的傳統領域的時候，傳統領域沒有海洋，只有土地。但蘭嶼傳統知識最豐富的就是在海洋。故本法案亦應知會農委會、漁業署等，免得原住民被邊緣化。農委會甚至漁業署也應該一起來參加這個法的討論。

浦忠勝科長：

(一) 關於原住民族傳統領域方面，目前有很多討論，但皆認包含海洋，連領海亦包含在內。

(二) 原住民法中對部落的定義很奇怪，但後來發現，部落與目前既有的任何組織的概念都不合。若要將部落作為權利主體還有很多要考慮的地方。蔡明誠教授所草擬之文化保護條例中是以部落的代表人來自為權利主體，算是比較取巧的方式有些部落既有的機制，若不在本法中建立起來或加以維護的話，要達到本法中的立法目的，並不太可能。其他的法律可能已經限制了原住民對於某地區的生物多樣性的使用，例如國家公園法，若不加以考慮的話，將造成盧老師所說的知識會變成死的。部落會議的組織是蠻必要的，但在本法中是否要給予授權，讓其成立有法律依據，亦較有代表性。以避免隨意找一些人來開部落會議，但沒有代表性。

(三) 部落議會、部落會議等，尚未有法源依據，目前先讓其成為一代表性組織。否則要去調查申請等，不知向誰申請。但是否可在本法中授權其法源依據？這樣以後本法運作時會比較順暢。

(四) 罰則是否要參考地方議會在刑責上的規定，免得定得過高。

(五) 達那伊谷的例子，部落的規範若牽涉個人權益之限制或罰緩時，應該要有法律的依據。

陳士章秘書長

(一) 第七條，可看到有三個權利，用詞上是否可更明確，未來要如何表彰？可能需再詳細規定。

(二) 第十七條，締約雙方訂契約時，是否應有中立第三者，來做評估？是否就規定成主管機關「應」有義務去協助部落？

(三) 罰則的部分是一很大的進步，以前都是原住民在自家打獵被抓，現剛好相反，承認原住民其自主之地位。但嫌保守的部分，是僅有民事救濟及行政罰，但若是有很大的利益，此罰緩相對來講就十分微小，對大公司並沒有約束力。

台邦撒沙勒

(一) 原住民自己本身之違反，可依其習慣，依其內規等於沒有罰則。這有一種風險，例如很多保留地就這樣消失了，因為並沒有很多習俗或慣習能制裁這些行為，故除非原住民之傳統慣習能夠復活，且法定認定其為合法，否則作用不大。所以我認為要用原住民的習慣來規範會比較困難。

(二) 第十二條，申請與許可的部分，對於「生態保育之原則」，誰來界定調查是符合生態保育？尤其生態保育在目前亦有所爭議。建議改為生態永續利用原則。

郭華仁教授：

(一) 本法中是將生態保育的定義交給原住民的，不過或許改成永續會比較好。

(二) 原住民慣習的部分，是為避免原住民動輒觸犯法律，例如原住民本身常被告，因喝酒就洩漏出去。

蔣正信

(一) 是否在有部落會議後，應要求各部落將原住民習慣法建立起來，以免無限擴張，導致對其他民族的傷害。

(二) 罰則仍應考量公平正義原則。

台邦撒沙勒

(一) 我們的自治政府何在？既然部落會議室在未來被期待的，那自治政府亦應該被期待。若兩部落間有爭議，將如何解決？故自治政府有必要放進來。

(二) 遊說對象除原住民本身外，應包括立法委員。像基本法原本一百多條被刪很多。若未來還有辦類似的會議，應邀請相關部會討論，避免在進入國會後，被刪得無法實踐。

郭華仁教授：

(一) 並未被授權處理自治政府部分的問題。

盧道杰

(一) 本法規雖並未被授權，但若在原則上沒有很清楚，當相關法規出來後，一競合，就會被稀釋掉，

(二) 原住民是否清楚某些傳統知識是屬於他們的，是否在本法中加入宣導教育？以免不經意就洩漏？應該有一機制過程去對族人宣傳教育，讓原住民能對保護傳統知識有意識及共識。

(三) 調查方面的部分不一定需要法規，用行政程序來處理也就可以，例如到部落去調查的時候要得到鄉公所的核可，以此來控制即可。

捌、 臨時動議：無

玖、 散會

「專家學者及原住民代表意見徵詢」意見處理情形

出席單位及人員發言要點	處理情形
台邦撒沙勒：	
（一）生物多樣性，原住民基因本身是生物多樣性或文化多樣性很難分清楚？我認為原民會無法就生物多樣與文化多樣性分開立法，是否建議原民會將二者結合立法？	分開立法乃依原住民族基本法第十三條之規定，此應屬原住民族委員會政策決定之事項，但仍建議應將二者合併立法會是較完整之法律。
（二）目前很多生物多樣性的東西不是原委會在管，是否應該邀請各主管機關來一起討論，將會使本法更為完備。	未來會召開跨部會會議，邀集相關單位就本法為討論。
（三）第十九條向部落會議提交調查報告，部落會議是什麼？是部落自行的會議或是部落的議會？不向部落會議申請可以嗎？例如自己向鄉公所申請。	關於部落會議之定義，原住民族部落會議實施要點已有定義與規範。
（四）有些傳統知識是家族的，有比部落更小的單位，是否應該要去尊重這些知識的擁有者？是否重新定義權利歸屬？	關於傳統知識權利歸屬問題，已於本法第五條規定主管機關應成立傳統知識審議及調解會，辦理傳統知識歸屬之審議與爭議之調解等事項。權利的歸屬，如何認定，皆由審議及調解會來認定。
（五）原住民之身分如何認定？誰來認定原住民？	原住民之身分，應屬於原住民族委員會之負責事項。
（六）原住民自己本身之違反，可依其習慣，依其內規等於沒有罰則。故除非原住民之傳統慣習能夠復活，且法定認定其為合法，否則作用不大。所以我認為要用原住民的習慣來規範會比較困難。	基本上這部分還是儘量尊重原住民族的自治。
（七）第十二條，申請與許可的部分，	已參酌修改。

對於「生態保育之原則」，建議改為生態永續利用原則。	
（八）我們的自治政府何在？既然部落會議室在未來被期待的，那自治政府亦應該被期待。若兩部落間有爭議，將如何解決？故自治政府有必要放進來。	並未被授權處理自治政府部分的問題。
（九）遊說對象除原住民本身外，應包括立法委員。若未來還有辦類似的會議，應邀請相關部會討論。	未來會召開跨部會會議，邀集相關單位就本法為討論。
盧道杰（台大森林環境資源學系）	
（一）將農委會或其他機關納入作為主管機關，在政治上若可行，可以提高可操作性，且降低原民會壓力。	本法主要乃規範原住民之傳統知識，故主管機關仍應以原住民族委員會為宜。
（二）傳統知識本是生活之實踐方式，但本法似乎有點凍結，有點只討論已成為知識之部分。若未將此生活部分納入，例如對社會制度作一鋪陳，將會導致傳統知識僵化，流為純粹的資料庫。	已於本法設立「延續及創新傳統知識之方法」專章，處理關於傳統知識之教育及主管機關應輔導、獎勵與補助原住民之傳統生活之相關事項。
（三）第三條定義部分，應在鋪陳更仔細些。	未來將在立法理由中進一步說明傳統知識。
（四）原住民、部落如何認定？	關於原住民、部落之認定，應屬於原住民族委員會之負責事項。
（五）傳統知識是誰擁有？部落與部落間有其獨特性與共通性，族群間對於知識之歸屬會有衝突？是否有何機制可協調？關於族群間關於權利歸屬認定問題，是否有機制可作為折衝？	關於傳統知識權利歸屬問題，已於本法第五條規定主管機關應成立傳統知識審議及調解會，辦理傳統知識歸屬之審議與爭議之調解等事項。權利的歸屬，如何認定，皆由審議及調解會來認定。
（六）研究單位間的調查資料庫，與本法中的調查資料庫，要如何去協調？	本法設有國家資料庫與部落資料庫，已公開或欲公開的傳統知識皆納入原住國家資料庫蒐集範圍；如其他研究單位之相關傳統知識之內容，若由原住民族同意公開即可納入

	國家資料庫中。
（七）倫理之問題，當進到一部落或一地區時，是否需做倫理之要求？	調查倫理的部分，學者做研究的時候，要自己做倫理規範，算是一種自我反省。
（八）原住民是否清楚某些傳統知識是屬於他們的，是否在本法中加入宣導教育？以免不經意就洩漏？	已於本法設立「延續及創新傳統知識之方法」專章，第二十四條並規定關於傳統知識之教育之相關事項。
夏曼藍波安	
（一）第二條的部分，原住民會在定義原住民的傳統領域的時候，傳統領域沒有海洋，只有土地。但蘭嶼傳統知識最豐富的就是在海洋。故本法案亦應知會農委會、漁業署等一起來參加這個法的討論。	未來會召開跨部會會議，邀集相關單位就本法為討論。
浦忠勝科長	
（一）部落與目前既有的任何組織的概念都不合，若要將部落作為權利主體還有很多要考慮的地方。且部落議會、部落會議等，尚未有法源依據，目前先讓其成為一代表性組織。否則要去調查申請等，不知向誰申請。但是否可在本法中授權其法源依據？這樣以後本法運作時會比較順暢。	部落會議之定義及相關事項，目前已有原住民族部落會議實施要點。並參酌意見，於本法第三條，以原住民族會議及部落會議為原住民族集體意思之形成機關。
（二）罰則是否要參考地方議會在刑責上的規定，免得定得過高。	關於罰則的部分，會進一步作調整。
陳士章理事長	
（一）第七條，可看到有三個權利，用詞上是否可更明確，未來要如何表彰？可能需再詳細規定。	未來將進一步參酌修改。
（二）第十七條，締約雙方訂契約時，是否應有中立第三者，來做評估？是否就規定成主管機關「應」有義務去協助部落？	已於參酌修正。
（三）罰則的部分是一很大的進步，承認原住民其自主之地位。但嫌保守的部分，	關於罰則的部分，會進一步作調整。

是僅有民事救濟及行政罰，但若是有很大的利益，此罰緩相對來講就十分微小，對大公司並沒有約束力。	
蔣正信（原民會專任委員）	
（一）是否在有部落會議後，應要求各部落將原住民習慣法建立起來，以免無限擴張，導致對其他民族的傷害。	未來仍有必要協助原住民建立其習慣法，以落實其自治。

五、跨部會會議（2006/04/25）

「原住民族傳統生物多樣性知識保護法草案」跨部會研商會議

會議紀錄（含意見徵詢之處理情形）

壹、　時間：民國九十五年四月二十五日下午二時

貳、　地點：本會十樓中型會議室（台北市重慶北路二段 172 號）

參、　主席：鄭副主任委員天財　　記錄：孫惠君、劉姿吟

肆、　主持人致詞：原住民基本法第十三條的規定原有兩部份，包括智慧創作和傳統知識，有關原住民智慧創作已草擬完成，經行政院通過，待立法院審理。今天要研商的是生物多樣性部分，因原民會欠缺此部分專業，原民會特別委託台大原住民研究中心來幫忙草擬，之前召開過期中報告，經過相當短的時間，原民研究中心非常辛苦的已草擬相關條文，遂請大家來針對草案條文內容來討論。開會通知寫了兩個時間，原想法希望能逐條討論，進行方式看是否逐條討論或大體上請大家提供意見後，再請台大部分來做修正回應。其中條文還要仰賴大家寶貴意見。請石教授、謝教授先做報告。

伍、　業務單位報告：（略）

陸、出（列）席：法務部王乃芳編審、內政部營建署華予菁技士、經濟部智慧財產局王美花組長、喬建中、蕭蓓如、行政院農業委員會方國運組長、行政院農業委員會林務局方國運組長、陳超仁技正、行政院文化建

設委員會陳佳伶、國立台灣大學李玲玲教授、國立政治大學顏愛靜教授、內政部地政司施明賜科長、本會法規會研究員馬千里、本會企劃處浦忠勝科長、本會土地管理處張振哲處長、楊鴻謙副處長、楊貴榮科長、國立台灣大學石正人教授、謝銘洋教授、陳昭華教授。

柒、綜合討論：

主持人：先徵詢大家的意見，原開會通知是兩次的討論，是否逐條來討論，或大家認為應該就條文內容來提出意見而非逐條。有意見即提出。再請台大來做參採。

智財局王組長：

1. 還在受託委辦階段，邀請其他單位，在程序上是否合宜
2. TK 的稱呼、定義有無問題？保護主體 vs. 執行手段，有無先做瞭解，定出的對象為何？
3. 智財局針對 24 條，若要將此議題和專利申請作連結，仍無配套措施，主管機關應如何和專利做聯繫，各國的態度極端。用開發中國家的立場或許不完全適合。

主持人：謝謝智財局王組長，這樣看來，我們就先就這次開會，今天就像剛才王組長所說，就第一條到最後一條，條文有建議或要不要訂定都可以提出。我說明為什麼需要在委託草擬期間即請各部會。因為本會無這部份的專業，希望借重各部會的專業來協助本會，於受委託單位在草擬階段即能提供行政部門未來可能的意見，希望不要到未來執行的時候才發現難行，所以希望藉由此機會早點讓相關部會來參與，能讓此草案能研擬的更周延。所以從剛才王組長所提的意見，可以見得這次在草擬階段請大家提供意見對草案研擬是會有幫助的。另外就是，在大家提供意見之前，也請大家考量，主管機關不一定要本會，過去傳統智慧創作保護法，在草擬之前，草擬原住民族發展法，談到原住民族傳統智慧的條文，專利局那時候的代表，提議草擬專章，後請蔡明誠教授草擬專章，後到院時，認為草擬專法，才又用成一個專法。原則上不希望當主管機關，承蒙不起，本會也不是這方面專業，請大家一併的表示意見。

專責機關的部份，因為行政院表示，作用法不能列成立機關，該怎麼處理，再請受委託單位討論。

土地處楊副處長鴻謙：

一、各個會議、期中及期末報告，各單位和專家學者的意見，受託單位應參考本會委託中國土地經濟協會研擬之「原住民族土地及海域法與土調會組織法」草案研究報告，將處理情形具體以書面回應並列於總結報告之附錄內，以便本會長官出席立法院及行政院審查基本法案之參考。

二、就草案內容提出個人意見：

1. 第二條，係參考著作權法之立法體例，故未有地方主管機關。故從政策研擬法規研訂及執行，悉屬本會；此為立法政策課題，不知外國亦復如是。
2. 第四條，作用法不得規定設置機關組織，尚需修改本會組織條例，困難度高。
3. 第五、第六條，TK 審議及調解會，應改為調解會而非委員會；不論調解或調處，皆屬於行政權之介入，為使調解後，具有法效，應參考鄉鎮市的調解條例 24~26 條，送請地方法院審核，審核後才有民事判決的效力；否則事後都可被推翻。第二項宜修正為「前項委員會之組織、設置、審議、調解程序及其他應遵行事項之辦法」，由主管機關定之。
4. TK 歸屬之爭議處理，由第 6 條觀之，TK 為權利客體，而權利體屬原住民族或部落所有，其間如有爭議，交由調解會處理，故須有一套完整之調解機制。
5. 第二十四條部份，建議增加：”得依專利法”；建議增列有關法律適用順序於第二條內，目前新的法律，仍有採取此一立法例。
6. 草案格式，應改為兩欄式；說明部份，以本會角度來寫，原住民族委員會改成本會；另「遺傳資源法」目前農委會尚在研擬中，應改為「遺傳資源法草案」。

顏愛靜教授：

1.第四條，專責機關和土調會有無不同？整理事項可能和土調會有所重疊，原民會應考慮是否將調查職責歸於土調會處理。

2.第八條，已公開 TK 之表彰和第十條第四款，差別為何？第八條難道不是權利？

3.第十條第二款，研究使用是否應排除？研究使用是否真的可以跳脫本法範圍？

4.部落資料庫應如何設置？一個部落一個資料庫？部落規模小，是否過於分割？不符合經濟規模？是否依規模而設置？

5.第十二條之組織應如何建置？

法務部代表王編審：

1.第七章，侵害救濟僅 27 條民事救濟，其餘為行政罰，是否應獨立為罰則專章

2.侵權行為可否以本法之第 27 條為請求權基礎？ 還是仍為民法第 184 條？還是本法第 27 條僅為宣示性質？若特別成立請求權基礎，宜先詢問司法院。

3.第三十條之依據為第 14 條，且調查是否一定要為申請許可？向部落的聯絡單位申請取得同意？部落的聯絡單位是否為機關？且徵得同意，是否為許可？（若為行政處分，才為行政罰，要有機關才能許可准駁於否） 部落單位是否為機關不清楚，則此處罰是否妥適？

4. 第 21 條訂定契約，向部落會議交報告，部落會議是否為機關？不交報告要處罰。第 31 條由主管機關原民會處罰。但契約簽訂者並非原民會，亦非向原民會交報告，為何由原民會處罰。第 31 條處罰應由主管機關發動抑或由會議發動？主管機關僅為協助？為何不是會議處罰？請再考量。

5.第二十三條第二項用字，原住民部落 “ 處罰 ”或 “ 處理 ”？
若對象是人，怎麼處理？錢或是其他?

6. 第 32 條 罰責為違反第 22 條，不得轉讓否則處罰鍰，主管機關介入是否妥適？

7．第四條，設機關、設委員會和中央法規基準法不合

謝銘洋教授回應：

研究案期程短，立法習慣以往參考已開發國家既有，這次開發中國家不可參考太多。有努力，但疏漏還是很多。

1．法務部意見，第四條第五條，會再考量

2．部落會議位階如何？同意是否算是行政處分？會進一步思考。

3．§28 行政處分，為罰則而非行政救濟，§27 是獨立的請求權基礎，為侵權行為之特殊規定。

4．每個部落都設資料庫，多大規模設資料庫，交由主管機關決定。

5．有無地方主管機關因原住民自治，不宜為地方主管機關。

會配合鄉鎮市調解條例納入適用他法之條款。

6．權利的歸屬，如何認定，審議委員會來認定

法務部王編審：

國際上對傳統知識尚無確定，如何處理？參考國際上的內容，未必完善，但盡最大可能，把傳統知識定義下來。TK 立法立場未必與已開發國家一致，並不希望挑戰專利效力。

主持人回應：

1．本法有無制定必要性？除基本法條文之外，生物多樣性知識需要保障的各方面，有無必要性？基本法雖然規定，包括設置財團法人原住民族文化基金會，能不能設？可能有時候不能光看法，要看法成立之必要性，請給予本會意見。

2．成立專責機關，主管機關是否請謝老師這邊，台大這邊，立法院也有立委表示原民會能當主管機關嗎？到底是原民會，或是經濟部？或農委會？原民會若為主管機關，又不能成立專責機構；以原民會不能成立專責機構，沒有專業，執行上會有困難。

3．恐怕還不能直接和土調會扯在一起。土調會尚在草案階段，成立與否仍有問題。

請大家繼續發言。

內政部地政司施明賜科長：

1．第四條，該調查、整理、保存等為處理該項事務，是否可由相關專家學者來組成委員會？

2．同意§6，區分原住民族和部落，視決定的事項不同而有原住民族的會議、或單一原住民族、或部落的區別。

3．第 11 條，登記在國家資料庫，名稱太大，建議為：原住民族傳統知識資料庫；名稱須斟酌。

李玲玲教授：

1.已公開知識，經常使用的是否為獨有，還須定義清楚，無法直接交由調解會舉證。

2．能力建設是否由本法規範，概念如何處理？

3．如何區隔地域差別，先做說明，部落範圍多大？第 3 條第二款，議事規則，由主管機關定之，是否合理？原有的議事規則，又要主管機關作確認？和現況不符。

4．第 5 條，協調委員會多久開一次會？角色和排解爭端部分宜再斟酌。

5．國家資料庫，哪些是此資料庫應該收集的，是否能被原住民族生物誌所涵蓋？

6．第 14 條，訂定契約，收權利金，牽扯能力建設，規劃相當龐大。是否有概念構想，原民會和受託單位應先構想。

7．第 25 條　傳統知識教育重要，由何階層負責？對象？培訓？主管機關，主導者和對象仍不清楚，僅為原住民族還是其他人也需要？

土地處楊科長貴榮：

國家資料庫建議改用原住民族資料庫，部落資料庫改為族群資料庫，以單個

族群為單位，較為適宜。

企劃處浦科長：

1.立法的方式保護，與原住民族基本法第 13 條後半段有所不同，除了制度和傳統知識之外，還有相關的做法也需要被保護。做法有很多可能性。

2.鄒族保護獵區、生物多樣性的做法，其制度和文化層面，是保護原住民族更重要的體制；但現在，和現行法令有衝突或競合；特定場域才能發生，例如獵區，若無特定場域，知識不可能延續，南非和哥倫比亞可做參考。

3.是否將原住民族會議；部落會議改為 “ 議會 ”，是為組織才能形成意志。

智財局王組長：

1．TK 定義，所有人，保護期間認定即有難題，外部的人如何知道何為 TK 條文中沒提。

2．TK 的定義由誰定，是否恰當？只提及到原住民的 TK？閩南的 TK？

3．定義和調查必須踐行，否則無所本，設計條文但無法知道要保護什麼？有償、無償，國際上有討論，已公開的部份，比較難要補償金，和國際上的意見有出入。建資料庫與否，和不公開的本意有所違背。

林務局方組長：

TK 如何定義，慧益均享為最具爭議部分，利益如何公平分享，是由族群或部落？

本會土管處楊副處長：

1.期中報告時，受託單位認為 TK 應該要做登記，惟本次法案並未提到登記內容，第 3 條有關 TK (1) (2) (3)（4）之定義，我仍不解其義，請在說明中，以具體內容描寫（1）至（4）所指之意涵或對象。

2．第 24 條一條法律恐不足以成章，故本條可納入附則。

3.本法的操作是否建立在自治區建構之下？若自治區沒有成立怎麼辦。

李玲玲教授：

教育宣導、能力建設應要適時推動，無法等待立法！

智財局王組長：

誰調查？主管機關如何建資料庫？中國大陸先從田野調查起，哪些先公開哪些不公開，而非法規先。

謝銘洋教授回應：

1.從原住民族的保護著手，逆向操作，怕沒錢做調查。專責機構才有辦法有經費、預算。

2.仍眾說紛紜，仍會參考其他國家的做法，用語仍受限制，會在說明部份加強。

3. 回應林務局方組長，利益分享，部落分散要如何分享？同一 TK 流通性很高，數原住民享有同 TK，操作會複雜和困難。

4.回應智財局王組長，不公開的 TK 只登記標題（title），部落的登記要較謹慎。

智財局王組長：

雖有困難度，國際上尚有爭議，建議第 24 條刪掉，和專利局有關。

主持人結論：

原民會成立沒有幾年，原民會成立之前，許多問題原先就都存在的。行政院成立永續發展委員會，底下有個生物多樣性的組，也才四、五年，四、五年這段時間，原民會也沒有被交付任務，直至這陣子，原民會才被交付。我國在這方面看來是比較慢。原民會最近在編纂原住民生物學誌也沒有經費，為了爭取年度經費，也是相當困難，所以連編纂都有困難，更遑論調查的經費。從今天的一個會議，對本會和研究團隊而言都有很大的幫助。不然以本會的能耐，大概條文看一看，期末報告後就結束，實行上的困難就無從解決，得從新來過。

原住民族基本法，雖未訂定部落法源，但部落本來一直都存在，部落的運作一直都存在。以阿美族而言，每個部落都有頭目，花蓮的部落都是票選、投票的，一直都有在運作。因為台灣過去地方自治尚未將部落納入，而用村里取代，有些村里，一村有好多部落，或一部落多村，和地形各方面都有關係，在法治上未被重視，最近才在建置中，較可惜的是，沒有法源將部落來成為自治機關或其他可能性，尚在建置中，所以也訂定了部落會議的辦法，還需要努力。今天特別感謝各部會代表及學者專家，對本法案研訂提供寶貴意見和方向，請受託單位能夠參採，至於 95 年 5 月 2 日原訂召開之研商會議則取消。

「跨部會研商會議」意見處理情形

出席單位及人員發言要點	處理情形
一、原民會鄭副主委	
（一）專責機關的部份，作用法不能設機關	為落實原住民族傳統知識之保護與利用，設置專責機關有其必要性，至於如何設置，可由主管機關自行處理。
二、 智財局王美花組長	
（一）TK 的定義，是否只限於原住民之 TK？	本草案為原住民基本法第十三條授權制定之法律，故僅就原住民傳統知識加以規範。
（二）若要將 TK 和專利申請作連結，仍無配套措施，主管機關應如何和專利做聯繫	本法規範傳統知識來源揭露之目的係為了防止傳統知識被剽竊，且為傳統知識有效管理之必要措施，但為避免傳統知識來源之揭露與專利作過多的連結，是以未依規定揭露傳統知識來源者並不影響專利之授予，違反之法律效果，完全依本法之規定處理。
（三）保護的期間似無規定	基於傳統知識之特殊性，多數國家於保護時並無期間之限制，此與一般智慧財產權並不相同。至於使用傳統知識並經開發而申請專利者，其保護期限依專利法之規定。
（四） 未公開之傳統知識是否經由登記入資料庫而有公開之危險。	未公開的 TK 只登記標題，且洩漏者亦有處罰之規定，應無公開之危險。

三、原民會楊副處長	
（一）第二條，係參考著作權法之立法體例，故未有地方主管機關。故從政策研擬法規研訂及執行，悕屬本會；此為立法政策課題，不知外國亦復如是	原住民族的跨縣市分布相當普遍，且傳統知識經常為多族共有，為尊重原住民族自治，因此相關業務宜由中央統籌。外國亦復如是。
（二） 第五、第六條；審議調解會，應為調解會而非委員會；不論調解或調處，仍屬於行政機關，送請地方法院審核，審核後才有民事判決的效力；否則事後都可被推翻。第二項宜修正為「前項委員會之組織、設置、審議、調解程序及其他應遵行事項之辦法」，由主管機關定之。	審議調解會之設置亦見於其他法規，如著作權法第八十二條。 傳統知識之調解事項，性質與一般民事紛爭並不相同，基於保護原住民權益，對調解之效力不宜賦予過強之法律效果。 第二項已參酌修正。
（三）第三條，傳統知識為何，定義不易懂，是否於說明處增加具體內容。	已增加說明
（四）TK 歸屬之爭議處理，究為原住民族間或應為部落之間的爭議，該如何操作。	原住民族間或部落間皆有可能；權利的歸屬，如何認定，皆由審議及調解會來認定。
（五） 第二十四條部份，建議增加：“得依專利法”。	已參酌修改
建議增列第二條：本法沒規定的部份考慮其他法律。	已於第一條參酌修改
(六) 草案格式，建議改為兩欄式；說明，以本會角度來寫，原住民族委員會改成本會	已修正
(七) §24 條單條似不足以成章，是否納入附則？	已併入第五章，更動為二十六條
（八） 本法的操作是以原住民會自治而建構？若自治區沒有成立該如何？	本法操作是以部落會議為意思機關，行使部落自治之事項，有助於自治區之推動
（九） 各條文說明，多為遺傳資源法的援引，遺傳資源法僅為草案階段？有無其他外國、本國的援引？	已參酌修改
四、政治大學顏愛靜教授	
（一） 專責機關和土調會有無不同？整理事項可能和土調會有所重疊，原民會應考慮是否將調查職責歸於土調會處理。	本法所規定專責機關之業務與土調會性質不同，並無重疊之處。

（二） 第八條，已公開 TK 之表彰和第十條第四款，差別為何？	第八條以商業上之使用為規範對象，非屬於第十條第四款「為保存、發展傳統知識及促進傳統創新之必要措施」
（三） 第十條第二款，研究使用是否應排除？	為鼓勵對傳統知識之研究與創新，故本法將其排除於保護範圍之外
（四） 部落資料庫應如何設置？一個部落一個資料庫？或是依規模而設置？	根據第十一條，「部落資料庫由主管機關協助部落會議成立之」。至於是否一個部落設置一個資料庫，或數部落共同設置一個資料庫，由各部落會議決定之
（五）第十二條之組織應如何建置？	授權主管機關制定之
五、法務部王乃芳	
（一）僅 27 條民事救濟，其餘為行政罰，是否應獨立為罰則專章	已將章名改為「民事救濟與罰則」
（二）侵權行為可否以本法之§27 為請求權基礎？	§27 為侵權行為之特別規定，亦得作為請求權之基礎，本法未規定者自得以民法侵權行為之規定補充適用之
（三）第三十條之依據為第十四條，部落的聯絡單位是否為機關？ 徵得同意，是否為許可？處罰是否妥適？	第十四條已修正為：「調查或使用未公開之傳統知識者，應事先向原住民族會議或部落會議提出申請，徵得其同意，並簽訂調查或使用契約後，始得為之。」徵得同意應屬契約行為，並非許可。第三十條之處罰係由主管機關為之，非由部落會議為之
（四）§21 向部落會議交報告之義務，部落會議是否為機關？§31 處罰是由主管機關發動抑或由會議發動？主管機關既然僅為協助？為何不是由會議處罰？	部落會議係根據九十五年三月十日由本會公佈實施之「原住民族部落會議實施要點」設置。處罰由主管機關為之。
（五）第二十三條第二項用字，原住民部落 “ 處罰 ” 或 “ 處理 ” ？	為尊重原住民族之自治，對違反之行為，由原住民族依部落公約處理之。
（六）§32 罰則為違反§22，不得轉讓否則處罰鍰，主管機關介入是否妥適？	已增列第二十二條第二項：「違反前項規定之讓與行為，無效。」並刪除罰則之規定。
六、內政部地政司施明賜科長	
（一）第四條該調查、整理、保存等為處理該項事務，是否可由相關專家學者來組成委員會？	由主管機關視實際需要決定專責機關之組成及成員

（二）十一條之國家資料庫，建議為“ 原住民族傳統知識資料庫 ”	已修正為：原住民族傳統知識國家資料庫，及原住民族傳統知識部落資料庫
七、 李玲玲教授	
（一） 能力建設是否由本法規範，概念如何處理？	已明列於第四條
（二）如何區隔地域差別，先做說明，部落範圍多大？	部落之範圍依原住民族基本法之定義定之
（三）第三條第二項，議事規則，由主管機關定之，是否合理？ 原有的議事規則，又要主管機關作確認？和現況不符。	本會已頒布原住民族部落會議實施要點
（四） 第五條，審議與調解會多久開一次會？	視需要而定
（五） 國家資料庫的部分，哪些是此資料庫應該收集的，是否能被原住民族生物學誌所涵蓋？	已公開或欲公開的傳統知識皆納入原住民族傳統知識國家資料庫蒐集範圍；生物學誌中相關傳統知識之內容若由原住民族同意公開即可納入原住民族傳統知識國家資料庫
（六） 第二十四條傳統知識教育由何階層負責？對象？培訓？主管機關，主導者和對象仍不清楚，僅為原住民族還是其他人也需要？	原住民族教育法中已有規定對於原住民以外民眾之多元文化教育，在本法中不另為規定
八、原民會企劃處浦科長	
（一） 立法的方式保護與原住民族基本法第十三條後半段有所不同；除了制度和傳統知識之外，還有“ 相關的做法 ”也需要被保護。	已於第三條第一項定義之
（二） 是否將原住民族 “ 會議 ”、部落 “ 會議 ”改為 “ 議會 ”，是為組織才能形成意志。	目前並無部落議會之設置，故先參酌部落會議實施要點，至於議會之設置，本會將積極辦理之
九、林務局法務部方組長	
（一） 利益如何公平分享？ 以族群為單位抑或部落？	由原住民族會議或部落會議與申請者協調決定之
十、內政部營建署	
（一）建議整體考量國家之生物多樣性知識之智慧財產權，優先訂定「國	本草案為原住民基本法第十三條授權制定之法律，故僅就原住民傳統知識

家生物多樣性知識保護法」為母法，非限以「原住民族」傳統生物多樣性知識來訂定法令。	加以規範。
（二）依原住民族基本法第 13 條有關「政府對原住民族傳統之生物多樣性知識及智慧創作，應予保護，並促進其發展;其相關事項, 另以法律定之。」規定，並無明確授權需訂定「原住民族傳統生物多樣性知識保護法」及「原住民族傳統智慧創作保護法」二種法律 ，似可以一種法律規範即可。	此應屬原住民族委員會政策決定之事項，建議宜將該二法合併為一法。
（三）請明確詮釋「原住民傳統生物多樣性知識」用詞所指內容及範圍；有關原住民族傳統生物多樣性知識保護法（草案）第 3 條針對原住民族傳統生物多樣性知識之定義尚有未明之處，與原住民族傳統知識如何區分界定，攸關後續相關條文之訂定，其所引用生物多樣性公約及相關準則原義為何？應請釐清以免誤用，造成擴權疑慮。	已參酌修訂相關定義。
（四）同條有關定義原住民族會議為「原住民族集體意思之形成機關」，及部落會議為「部落集體意思之形成機關」，所謂「集體意思」如何形成正式「機關」？	部落會議為意思機關，行使部落自治之事項，並非正式之行政機關。
（五）第 14 條有關調查或使用未公開之傳統知識者，應先向原住民族或部落所設置之聯絡單位提出申請…，依國家公園法第 18、19 條，進入國家公園生態保護區者，應經國家公園管理處之許可，而為學術研究進入生態保護區進行採集工作者，亦需經內政部許可，並非向原住民族或部落所設置之單位提出申請。	本法僅規範原住民族傳統知識之調查，若有涉及國家公園生態保護區，仍應依國家公園法之規定提出申請。

※針對跨部會意見修改條文對照表

修改前版本	修改後版本
第一條（立法目的） 為保護原住民族之傳統生物多樣性知識，及維護原住民族對該知識之權益，以促進傳統生物多樣性知識之永續利用及創新，特制定本法。	第一條（立法目的） 為保護原住民族之傳統生物多樣性知識，及維護原住民族對該知識之權益，以促進傳統生物多樣性知識之永續利用及創新，特制定本法。 本法未規定者，適用其他法律之規定。
第五條（審議及調解會之設置） 主管機關應成立傳統知識審議及調解會，辦理下列事項： 四、　傳統知識歸屬之審議與爭議之調解。 五、　第八條規定權利金爭議之調解。 六、　其他涉及原住民族或部落間關於傳統知識爭議事項之審議與調解。 前項委員會之組織及設置辦法，由主管機關定之。	第五條（審議及調解會之設置） 主管機關應成立傳統知識審議及調解會，辦理下列事項： 一、　傳統知識歸屬之審議與爭議之調解。 二、　第八條規定權利金爭議之調解。 三、　其他涉及原住民族或部落間關於傳統知識爭議事項之審議與調解。 前項委員會之組織、設置、審議、調解程序及其他應遵行事項之辦法，由主管機關定之。
第三章　傳統知識資料庫	第三章　原住民族傳統知識資料庫
第十一條（登記機關及登記申請人） 傳統知識所屬之原住民族或部落，得將其傳統知識中欲公開之部分，登記於國家資料庫；其不欲公開之部分，得登記於部落資料庫。 前項之國家資料庫，由本法第四條所稱之專責機構成立之。部落資料庫由主管機關協助部落會議成立之。	第十一條（登記機關及登記申請人） 傳統知識所屬之原住民族或部落，得將其傳統知識中欲公開之部分，登記於原住民族傳統知識國家資料庫；其不欲公開之部分，得登記於原住民族傳統知識部落資料庫。 前項之原住民族傳統知識國家資料庫，由本法第四條所稱之專責機關成立之。原住民族傳統知識部落資料庫由主管機關協助部落會議成立

第一項未公開之傳統知識內容應予以保密。	之。 第一項未公開之傳統知識內容應予以保密。
第十四條（申請調查或使用） 調查或使用未公開之傳統知識者，應事先向原住民族或部落所設置之聯絡單位提出申請，徵得原住民族或部落同意，並簽訂調查或使用契約後，始得為之。 前項調查或使用計畫，涉及數個部落者，由該等部落共同決定之。	第十四條（申請調查或使用） 調查或使用未公開之傳統知識者，應事先向原住民族會議或部落會議提出申請，徵得其同意，並簽訂調查或使用契約後，始得為之。 前項調查或使用計畫，涉及數個部落者，由該等部落共同決定之。
第二十二條（未經代表機關事先同意之再授權限制） 依本法申請使用傳統知識者，非經傳統知識所屬之原住民族或部落之同意，不得將其使用權轉讓與第三人。	第二十二條（未經代表機關事先同意之再授權限制） 依本法申請使用傳統知識者，非經傳統知識所屬之原住民族或部落之同意，不得將其使用權轉讓與第三人。 違反前項規定之讓與行為，無效。
第六章　傳統知識之延續及創新	第五章　延續及創新傳統知識之方法
第二十四條（載明來源地） 依本法申請使用傳統知識並經開發者，於申請專利時，除應事先經該傳統知識所屬原住民族或部落之同意者外，應於申請書載明所使用傳統知識之來源地，並提出與該原住民族或部落訂定之契約。	第二十六條（載明來源地） 依本法申請使用傳統知識並經開發者，於申請專利時，除依專利法規定外，應事先經該傳統知識所屬原住民族或部落之同意，且於其申請書載明所使用傳統知識之來源地，並提出與該原住民族或部落訂定之契約。
第七章　侵害之救濟	第六章　民事救濟與罰則
第二十八條（以不正當方式使用傳	第二十八條（以不正當方式使用傳

統知識之罰鍰）	統知識之處罰）
第二十九條（未經同意而揭露、取得或使用未公開傳統知識之罰鍰）	第二十九條（未經同意而揭露、取得或使用未公開傳統知識之處罰）
第三十條（未經同意而調查或使用之罰鍰） 未依本法申請許可而從事傳統知識之調查者，處新台幣十萬元以上五十萬元以下罰鍰，並通知限期停止，逾期不停止者，得按次連續處罰。 未依本法申請許可而從事傳統知識之商業使用者，處新台幣十萬元以上一百萬元以下罰鍰，並通知限期停止，逾期不停止者，得按次連續處罰。	第三十條（未經同意而調查或使用之處罰） 未依本法徵得原住民族或部落之同意而從事傳統知識之調查者，處新台幣十萬元以上五十萬元以下罰鍰，並通知限期停止，逾期不停止者，得按次連續處罰。 未依本法徵得原住民族或部落之同意而從事傳統知識之商業使用者，處新台幣十萬元以上一百萬元以下罰鍰，並通知限期停止，逾期不停止者，得按次連續處罰。
第三十一條（逾期未改正之罰鍰）	第三十一條（逾期未改正之處罰）
第三十二條（違反使用權轉讓之罰鍰） 違反第二十二條規定，將使用權轉讓與第三人者，處新台幣十萬元以上一百萬元以下罰鍰。	已刪除
第三十三條（違反職務上保密義務之罰鍰）	第三十二條（違反職務上保密義務之處罰）
第三十四條（違反專利申請規定之罰鍰）	第三十三條（違反專利申請規定之處罰）

※針對跨部會意見修改立法說明對照表

條號	修改前版本	修改後版本
第三條 （用詞定義）	二、第一款有關傳統生物多樣性知識之定義，係參考太平洋區域保護傳統生態知識、創新及實施模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and	二、第一款有關傳統生物多樣性知識之定義，係參考太平洋區域保護傳統生態知識、創新及實施模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and

	Knowledge, Innovations and Practices）中對於傳統生態知識之規定，並參考 WIPO 文件 WIPO/GRTKF/IC/7/9 及巴拿馬第 20 號法律(Regimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indigenas)等立法例。	Knowledge, Innovations and Practices）中對於傳統生態知識之規定，並參考 WIPO 文件 WIPO/GRTKF/IC/7/9 及巴拿馬第 20 號法律(Regimen Especial de Propiedad Intelectual sobre los Derechos Colectivos de los Pueblos Indigenas)等立法例。以狩獵為例，傳統知識包括原住民對動物生理與生態行為之認識，對動物出沒環境之認識，以及對陷阱製作所用植物及方法之認識等，以決定獵區、獵季以及獵捕方法。
第十一條 （登記機關及登記申請人）	為維護及保存傳統知識，故參考生物多樣性公約（Convention on Biological Diversity）及太平洋區域傳統生態知識、創新及實施之保護模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and Practices）之規定，建立國家與地方部落兩級制資料庫，由傳統知識所屬之原住民族或部落主動登記。 國家資料庫由第四條之專責機構加以成立，國家資料庫屬公開資料庫，而部落資料庫由主管機關協助部落會議成立，登記於部落資料庫之傳統知識並不公開，並應予以保密。	為維護及保存傳統知識，故參考生物多樣性公約（Convention on Biological Diversity）及太平洋區域傳統生態知識、創新及實施之保護模範法（Model Law For The Protection of Traditional Ecological Knowledge, Innovations and Practices）之規定，建立國家與地方部落兩級制資料庫，由傳統知識所屬之原住民族或部落主動登記。 原住民族傳統知識國家資料庫由第四條之專責機關加以成立，原住民族傳統知識國家資料庫屬公開資料庫，而原住民族傳統知識部落資料庫由主管機關協助部落會議成立，登記於原住民族傳統知識部落資料庫之傳統知識並不公開，並應予以保密。

六、期末報告（2006/05/19）

「原住民族傳統生物多樣性知識保護法草案」期末報告審查委員意見徵詢會議記錄（含意見徵詢之處理情形）

壹、　時間：民國九十五年五月十九日下午二點至四點三十分

貳、　地點：本會十樓中型會議室（台北市重慶北路二段 172 號）

參、　主席：鄭副主任委員天財　　紀錄：孫惠君、林小燕、歐瓊心

肆、　主持人致詞：各位教授、同仁，過去我們有期中報告，以及邀請各部會先生來針對我們委託台灣大學草擬的法案，今天安排此期末報告，感謝各位教授來參加，希望在這最後的階段，能夠提供我們更寶貴的意見，方式是由受託單位作報告之後，交給大家互相討論。

伍、　業務單位報告：（略）

陸、　出（列）席：國立台灣大學李玲玲教授、國立政治大學顏愛靜教授、國立台灣大學陳妙芬教授、本會土地管理處張振哲處長、楊鴻謙副處長、輔仁大學吳豪人教授、中研院民族學研究所黃樹民教授、國立台灣大學石正人教授、謝銘洋教授、郭華仁教授、李崇僖教授。

柒、　討論事項

案由：「原住民族傳統生物多樣性知識保護法」草案期末報告審查

綜合討論：

楊鴻謙副處長

(一)　對謝教授治學嚴謹表示敬佩，法條用詞嚴謹，且團隊能將歷次會議各方學者專家之意見予以回應，相當詳細，十分敬佩。

(二)　關於傳統知識的定義問題：第三條第一項第一款已用具體意象表徵且在立法說明中補充，對傳統知識之定義已有初步瞭解。惟對於第三條第一項（二）（三）（四）還是感到模糊，希望能以具體意象說明。

(三)　關於第四條專責機構的設立，之前生物多樣性研討會議有專家學者意見表示原民會可成立原住民文化及生物處，此可與本法作搭配。

(四) TRIPS 的諮詢會議中，有些印度代表團要求專利申請人需揭露、且需有事前同意和利益分享的證明，謝教授將之具體反應在本法案的第八條、第九條，此涉及我國之政策。依我的印象，本國代表團採反對立場，理由是「會阻礙我國生化科技發展」。本法案似乎與代表團意見相反，關於此點以後可能要做政策辯論。

(五) 在部會協商會議時，有提到一個問題，本法有無制訂必要？若有人提出此問題，本會應如何回應？可否請研究團隊針對本法制訂的理由及必要作補充。

(六) 行政院所屬各機關主管法案報院審查處理辦法有兩點要求：一、應同時檢討與現行法例是否有矛盾之處；二、法案影響衝擊層面及其範圍，包過成本、效益、及對人權等，此問題要請研究單位幫忙整理

鄭副主任委員天財：

(一) 謝謝楊副處長，我先補充一點，有時候我們會想說為什麼原住民族基本法已經規定了要制訂這個法律，我們還要再提出這個問題，是因為我們在行政院會面對這個問題。本會從民國八十六年開始討論原住民族發展法草案，當時只有提到「傳統智慧財產」的部分，發展法送到立法院後，立法委員們並不採用我們的版本，亦即不採用行政院的版本，而另外訂了原住民族基本法，此基本法不僅留了傳統智慧財產，還增加了我們今天所討論的「傳統知識」。雖然法律已經規定，但到了行政院會未必會依法制訂其他法律，舉個例子，原住民族基本法規定應設財團法人原住民族文化事業基金會，不僅在基本法有此規定，九十三年修正的原住民族教育法第二十九條也規定應設財團法人原住民族文化事業基金會，可是當我們這個法送到行政院會，行政院還是會問我們這個法有無制訂的必要，到了行政院我們可能還需要再做說明，所以為求周延我們才需要團隊再針對此說明。

郭華仁教授

(一) 既然基本法已規定要立法，若未在三年內訂定，不僅是面對行政院

的問題，最主要的是要面對立法院的問題，這是消極面。而積極面，站在原住民立場，當然要保護原住民之傳統知識，這是目前的國際趨勢。

吳豪人教授：

(一) 針對楊副處長作回應，法案的成本效益及人權，就我認知，行政院比較在意的是成本效益，不在乎人權。而本草案就是在補足人權的部分。CBD 有一個弔詭的地方，其本身係為了鼓勵開發而去保護，故在引用 CBD 時，應注意其漏洞。

(二) 為何原民會無法抵抗行政院其他部會？此乃原住民基本法之位階太低，真正衝突乃財產權與財產權對抗。而本法係在盡可能保護原住民，最有效之方式應將基本法提升至憲法層次，因乃兩種不同財產權制度之思考。以基本法為母法之本草案仍站在原住民角度，否則會對原住民更不利。故應將原住民保護提高到憲法層次，承認原住民財產權，則智財權根本不敢對抗。現實法上因為基本法位階低，故只能先訂立出來，且戰且走。

(三) 本法案完全符合行政院所要求的「人權」，現在的問題是「成本與效益」。生物科技與本法完全相反，未來可能會產生衝突，故只能現在將原住民立場表明，以後可能會有國家性辯論。

黃樹民教授

(一) 針對文字建議：第三條之「生物」是不是指生物種類（species）？

(二) 第三條第一項（三）人類與環境互動知識為何？

(三) 第七條之「非經同意」是否須點明同意主體？（回應：應連結到第六條，指部落的同意）

(四) 第九條「非事先徵得所屬原住民族或部落之同意」能否以正面的方式表達？

(五) 第三章第十一條第一項「原住民族傳統知識部落資料庫」，此處是否以部落為單位？而不是以民族為單位？

(六) 第十五條，是否可以加入「標本之採集」？此很重要，研究工作研

究者會採集標本，該採集標本之歸屬為何？

郭華仁教授：

(一) 就您的觀察，本法之訂立是否會對研究者造成不利之影響？

黃樹民教授：

(一) 我覺得是應該的，以前都沒有管制，到部落也都不需要徵得同意，這情形是不對的。我覺得對學術的研究應有某種程度的規範，且研究成果應與原住民分享。

吳豪人教授：

(一) 針對楊回應，第一條應要強調立法目的，原住民基本法是法律位階，有沒有可能將之提升至憲法位階？是否有辦法將之連結？既然 CBD 鼓勵開發，與本法有本質上衝突，需另闢蹊徑。我想到的是 ICCPR（公民與政治權利公約），從人權法角度切入，將生命權、自決權放進來，在第一條或第六條將之作連結，如此本法之保護就帶有國際憲法之意味，效力很強。

楊鴻謙副處長：

(一) 針對基本法的法律位階的問題，目前包括原住民基本法有五個基本法。如何提升基本法位階，有兩個途徑：一、修改中央法規標準法；二、在法條中明訂排除哪些法律條文之規定。

鄭副主任委員天財：

(一) 針對吳教授的問題，這個法的總說明裡也有提到生物多樣性公約，那我們是否也是簽約國？請李教授說明一下。

李玲玲教授：

(一) 目前我國不是 CBD 會員國，是 WTO 會員國，所以 WTO 對我國的衝擊較大。CBD 本質仍在維護，但如不提到利用，站在功利主義思考，大家就不願去維護，故若 CBD 不將相關利用考量進來，便無法推動，

因此有人要利用、有人要維護之情形下，CBD 其實是妥協下之產物。

(二) 為何原民會會提出這樣的草案？基本法通過相當迅速，對於原住民基本法制訂過程本有些忽略，會與其他部會產生衝突，需要各部會間的溝通。

(三) 建議法案名稱應加以統一。

(四) 是否針對傳統知識所有較具爭議之點，作更深入之背景分析。

(五) 需有總章，說明目前法案後續仍要處理之問題。如所有權的問題、登記制度等問題。期中報告時張懿云教授、楊智偉理事長之意見可參考。

(六) 遺傳資源法草案亦有之問題，如何有效追溯未經同意之商業利用？有無機制真正去落實這些規範？例如誰要去執行利益分享與名稱標示？

(七) 建議可將霧台公聽會中地方鄉長；議員的名稱標示出來。

(八) 原住民族部落「會議」或「議會」？應適當處理。

(九) 有關單位應成立機關，是否為另外成立單位或是在單位內設單位？

(十) 權利金協議不成，調解協調機制如何運作？是否有後續相關細部規範？

(十一) 十一條、十二條資料庫名稱統一的問題。

(十二) 十三條最後一句「應符合原住民族權益、公共利益及永續發展等原則」，仍有些模糊，是否應更進一步考量？

(十三) 十四條有關調查使用涉及數部落，到底要跟多廣的人作協調？申請人要透過何單位要跟多少部落作協調？有無相關機制？

(十四) 第二十五條應加強原住民之瞭解，但也要對一般大眾作宣導。現在是否有原住民學校之成立？是否要加以調整？

(十五) 第二十七條損害賠償是原住民自己進行嗎？還是可以透過原民會提供協助或直接處理之行政權？

顏愛靜教授：

(一) 一般來講知識有顯性的與隱性的，此處我是將顯性定義為公開的，隱性定義為不公開的，若是如此，需要釐清的就是「何謂傳統知識」以及「何謂傳統生物多樣性知識」，但期末報告第五頁有提到「傳統

知識是動態的並非靜態不動或古老的」，表示有更新的情形，但卻又說是「傳統的」，所謂的傳統表示有一些部分是不變的，這部分的不變，是何種情況下的不變？這裡的動態指的又是什麼？要保護原住民族或部落的「傳統知識」，這個傳統知識究是何種狀況？從期末報告中仍不清楚？是否能夠草案中更清楚的說明？雖然報告第二十四頁中有對於「傳統知識」之說明，但究竟哪一部份是指生物多樣性的部分？應更清楚加以說明，以後在對外說服他人時會更有力。

(二) 另外，第五章是講「傳統知識之創新」，這部分是否會與「稀少性」有衝突？因為我認為，生物多樣性知識是具有稀少性的，所以如果又有創新，是否會有衝突？「創新」與「傳統之維護」有何區別性？

(三) 針對「議會」或是「會議」之問題，原住民族基本法只有講到部落，還沒有講到會議或會議，就我的認知，部落議會才是真正的意思形成機關。

(四) 「專責機關」，我並不堅持與土地調查及處理委員會作一權責釐清。在第十一條第二項有提到由專責機關去成立原住民族傳統知識資料庫，為何不直接在第四條說明專責機關之職責包括建置原住民族傳統知識資料庫？另外，條文也提到專責機關應協助部落成立或維護部落之權益，此之「協助」，如何去進行？

(五) 第五條之傳統知識審議及調解委員會，因土地審議及調解委員會，已後來改成「土地審議及調解會」，是否有必要作一相應的調節？

(六) 第四條已有專責機關的成立，為何專責機關不去協助處理部落未公開的傳統知識？

(七) 第十二條之原住民族傳統知識資料庫要如何去「組織」？在我的想法，資料庫通常是用「建置」的。

(八) 第十九條有提到未公開的傳統知識經使用後應與部落分享，我的疑慮是，未公開的傳統知識經使用後是否即變成已公開？是否是一種揭露，若是一種揭露，是否與第二十九條抵觸？

郭華仁教授：

(一) 傳統知識一般人還不清楚其定義，若仍比照遺傳資源法的方式，以小冊子的方式推廣使大家瞭解，會是比較妥當的。一般而言，傳統

知識與現代知識，最大的不同在於傳統知識是一個整體且難以切割，因是幾千幾百年所累積，其並非固定知識而是會變動的，例如環境變了，原住民為適應環境，會去嘗試錯誤，可能會犧牲一些生命，漸漸地，經過幾十年或幾百年，可能又會有所變化，並不會永久不變，是與時併進，但因為時間較長，在一個人的有限生涯中，幾乎是不變，但就一個民族的發展，其是變動的。

(二) 創新亦是如此，例如，環境變了，即需提出相對應之方式，這就是一種創新的知識，對原住民而言，若欲在部落中永續生存，這種維持和創新的機制是最重要的。以上是我們對傳統知識之理解。

陳妙芬教授：

(一) 本草案似欲跳出民法權利歸屬的概念？所以刻意避開「所有權」等字眼？我不清楚研究團隊究竟是刻意避開，還是欲另創一種權利內容？

(二) 第六條與所有權有何關係？原有法律上所有人的概念，本草案皆未使用，是否為刻意？若是，則是否要建立一新的制度？是否需在溝通用語上予以統一？

(三) 第九條與一般法律的概念不太相同，沒有知識可以專屬於任何人，就這個知識的揭露採「不得」字眼，有點奇怪？例如開會時之研究是否為揭露？因此有對揭露加以定義的必要。

(四) 關於傳統知識資料庫，登記制度一旦建立，是否沒有放進資料庫的，其權利將被排除？

(五) 關於罰則，目前的處罰都是屬於行政罰，所以只要繳罰金就可以了事，是否可考慮在罰則中加入「撤銷專利權」？因為對於營利單位，罰錢似乎沒有嚇阻作用，建議提高或加入撤銷罰鍰。

張振哲處長：

(一) 昨天至智慧財產局去談，針對此議題我們國家將來在 WTO 要採取何種態度，目前我國仍不表態，繼續觀察國際立法趨勢，採取對原住

民最有利的方式加以立法。感謝謝老師所領導的團隊，十分用心，作了很深入的研究；另外，除了保護法之外，尚有其他配套措施，例如生物學誌及資料庫之建置。

鄭副主任委員天財：

(一) 剛才提到部落議會、部落會議、原住民族會議或原住民族議會等等，我們原民會現在規劃的部分有原住民族部落會議的實施要點，原住民族基本法雖然對部落有所定義，但並未授權本會對部落做定位，關於部落如何成立、如何才算是正式的部落或部落地位是法人或社團等問題，很可惜基本法並沒有授權本會認定，未來新法應會有規定，但目前在法律尚未規範前，我們先推動部落會議，此外，我們也在草擬部落議會的規範，但因為沒有法的授權，目前能做的還是有限。目前所稱的「部落會議」只是一個開會的組成，即透過這個部落會議凝聚共識與決議，所以未來很多同意權的行使，例如原住民族基本法第二十一、二十二條規定「當地原住民族的同意」，就是透過部落會議的決議作為此同意，所以部落會議不是一個機關，畢竟機關在法律上有正式的定義，在此做個釐清。在整個法案的要求上，除了部落會議行使同意權的產生外，關於權利歸屬上會有比較大的問題，原住民族自治的法案未必會那麼快通過，所以有時候可以在其他法案中關於部落如何定位等問題進行法的授權，或者另外制訂子法也是一個方法。

(二) 第四條部分的專責機關，若未來本法通過的話，在執行與實際運作上都要靠專責機關，而原民會能不能再設附屬機關其實是面臨行政機關基準法將原民會定位為一個統合協調的單位的規定，因此我們不能於作用法中再設機關。像顏教授所草擬的法案設立一個調查機關，跨部會開會時大家都反對，所以也無法送行政院，因此我想請教各位：在不能設機關的情形下，有沒有可能成立財團法人基金會並在其中規範公權力的委託去執行相關事項？或者是有沒有可能在未來或現在委託其他民間單位去行使執行這些公權力事項？

(三) 此法案中規範了很多罰金，而這些罰金如果全部都繳國庫對原住民也沒有幫助，應該可以增列罰金的使用方式來幫助原住民。

謝銘洋教授：

（回應陳妙芬教授）

(一) 罰金的使用方式，在法律中是否可以規定「專款專用」並不清楚，會否違反國庫法或類似法律？

（楊鴻謙副處長回應：「專款專用」的方式是有的。）

謝銘洋教授：謝謝麻煩楊處長提供。

(二) 在草案中，使用會議的字眼，是因為把會議當成原住民族或部落意思之形成機關，若是議會的話，要決定的事情更多，必須要有法源的依據，已非本法所能涵蓋。

(三) 至於增訂「撤銷專利」之方式，但此會牽涉到相關主管機關的執掌，問題較大。撤銷專利的部分就保護的力道來講最強，但在 WTO 中是否能夠接受？有主管機關之考慮，故本草案採用較低度的方式。

(四) 以資料庫為保護方式，本法未規定有登記才受保護，只要是符合傳統知識保護要件即應受保護，若未來使用的人與原住民對於傳統知識的認定意見相左，則交由法院去認定，法院請專家來認定。

(五) 本法排除研究或非營利之使用，若實際是公司之實，但以研究或非營利之名來使用傳統知識，則違反本法之規定，應加以禁止。

(六) 至於權利之歸屬，本草案中是以無體財產權的觀念來處理，至於其名稱，即為「傳統知識權」，類似現有的智慧財產權制度，對於權利之歸屬也都有重新加以架構，本草案也是以最符合原住民利益之方式來重新架構這些權利歸屬，並不以傳統共有之觀念來套用，至於權利之屬性是否為集體權，則留待未來學說探討。

(七) 是否對「揭露」加以定義，因未公開的知識在屬性上較近似「營業秘密」，只要屬於原住民，且未公開，未經過同意，即不可任意揭露，本法中之揭露也就是公開的意思。

（回應顏愛靜教授）

(八) 對於傳統知識定義不夠清楚，其實在國際上亦尚未有定論，本草案在未有定論的情況下，取最大公約數，將所有特徵納入規範。若將來有更清楚明確的界定，亦可配合調整。

(九) 有關第十一條專責機構，是否要在第四條就把原住民傳統知識資料庫寫入，是有體系上的問題，此處僅是將一機關帶出，並將其職權加以規範，資料庫在第十一條規範，並在第二項責成專責機關來成立，這樣規範會比較完整，至於第十二條的組織，意思就是其成員、規模如何設置。

(十) 至於未公開經使用後是否公開，則是未必，若是未公開，但同意他人使用，並要求他人有保密義務，此時仍屬未公開。

（回應李玲玲教授）

(十一)對於爭議點之背景加以深入分析說明，本團隊亦很想處理，但時間上不允許，本團隊的主要目的為草擬法案，以有限的時間與經費，力有未逮，進一步的學理討論，則留待原民會進行處理。

(十二)本法中需後續處理的部分，例如與其他法有衝突的部分，將在本報告中某處加以交代。

(十三)關於名稱的問題，封面是委辦的計畫名稱，但我們認為委辦的名稱不夠周延，所以建議應改變名稱。

（回應黃樹民教授）

(十四)感謝黃教授在文字用語上的指示。

（回應吳豪人教授）

(十五)關於所提到憲法層次的問題，將會考慮在第一條加入這樣的規範。

（回應楊鴻謙副處長）

(十六)對於本國代表團已表示反對，感到驚訝！

楊鴻謙副處長：

我完整的敘述一下：「印度代表提案將揭露作為專利核准之條件，且需揭露事先同意及利益分享，鑑於我國遺傳資源雖豐富，惟亦有發展生物科技，而

使用國外遺傳資源之情形，故現階段無法贊同印度代表之提案，免損及我國生物科技之發展…」這部分可以再問一下智財局。

(十七)剛講那部分主要是針對遺傳資源，其實在草案第二十六條中，係針對傳統知識，除徵得同意，並應揭露來源地，並需提出契約書，其中包括利益分享之問題，這樣的設計對於原住民較周延，無須處處以智慧局之見解為依據。

(十八)針對法案衝擊評估，將盡最大可能性去完成，因時間與預算有限。

鄭副主任委員天財：

期末報告的名稱不要拘泥於公文中的名稱，應該以研究後決定的法案名稱為主，讓內容跟標題一致。

楊鴻謙副處長：

(一) 本法有無制訂之必要性，請謝教授幫我們提理由。

(二) 因為目前仍是草案階段，所以應將「條文」改成「草案條文」，「立法理由」改成「說明」。

(三) 另外，第三條的說明二，應改成第一項第一款，最好清楚標示出第一項第三款第四款。

(四) 專責機關也可以以成立業務單位的方式來進行。

鄭副主任委員天財：

是否可能委託民間或成立基金會，現在有無可以處理這些事項或行使此種權力的民間單位？

陳妙芬教授：

可以在第四條改成應成立專責單位，或委託其他單位。以「或」的方式來規定較彈性。

鄭副主任委員天財：

這也要增加其他公權力行使委託的規範。

李玲玲教授

(一) 第二十三頁是否可以把法案名稱的「之」去掉？

郭華仁教授

(一) 關於名稱的問題，一般在研究原住民傳統知識，就是講傳統知識，較具體的就是「傳統生態知識」，傳統生態知識就是基本法中講的與生物多樣性有關的知識。但是，在參考國外文獻時，並未有見到「傳統生物多樣性知識」的字眼，僅有 TK 或 TEK，此在定義上釐清可以取代掉「傳統生物多樣性知識」。

鄭副主任委員天財：

此部分要成立機關是比較難，未來本會會再跟相關部會作協調。各位還有沒有其他意見？如無，非常謝謝大家提供許多寶貴意見，也感謝台大這邊的配合，我們在非常短的時間委託辦理，也只有非常有限的資源，各位教授非常辛苦，未來可能還有其他問題需要與台大的教授做討論。今天的期末報告就到此結束，謝謝大家！

捌、 研究單位回應（參意見徵詢之處理情形）

玖、 散會

「期末報告審查會議」意見處理情形

出席單位及人員發言要點	處理情形
一、楊鴻謙副處長	
（一）傳統知識的定義問題，第三條第一項第二、三、四還是感到模糊，希望能以具體意象說明。	已於草案立法說明中具體說明。
（二）第四條專責機構的設立，生物多樣性研討會議有專家學者意見	本法之執行與運作，應由專責機關統籌負責始能見其成效，是以專責機關之設

表示原民會可成立原住民文化及生物處，此可與本法作搭配。專責機關也可以以成立業務單位的方式來進行。	置有其必要性，至於未來於政府組織再造時，其專責機構應如何定位，由主管機關自行處理。
（三）第八條、第九條似乎與我國在 TRIPS 諮詢會議代表團的意見相反，關於此點以後可能要做政策辯論。	草案第二十六條係針對傳統知識，除徵得同意，並應揭露來源地、提出契約書，其中包括利益分享之問題，這樣的設計對於原住民權利之保障較周延。
（四）本法制訂的理由及其必要？	基本法已規定要立法，若未在三年內訂定，不僅是面對行政院的問題，最主要的是要面對立法院的問題，這是消極面。而積極面，站在原住民立場，當然要保護原住民之傳統知識，這是目前的國際趨勢。
（五）本法與現行法例是否有矛盾之處？法案影響衝擊層面及其範圍，包括成本、效益、及對人權等，此問題要請研究單位幫忙整理。	針對法案衝擊評估，將盡最大可能性去完成，因時間與預算有限。
（六）目前仍是草案階段，所以應將「條文」改成「草案條文」，「立法理由」改成「說明」。第三條的說明二，應改成第一項第一款，最好清楚標示出第一項第三款第四款。	已參酌修正。
二、黃樹民教授	
（一）第三條之「生物」是不是指生物種類（species）？第三條第一項第三款人類與環境互動的知識為何？	生物指動物、植物、及微生物之物種（species）。 第三條第一項第三款人類與環境互動的知識，例如：狩獵知識中，如何設立獵區之知識。
（二）第七條之「非經同意」是否須點明同意主體？	此處應連結到第六條，係指部落的同意。已參酌修改。
（三）第九條「非事先徵得所屬原住民族或部落之同意」能否以正面的方式表達？	本條在於賦予原住民族權利，參酌其他法律對於權利之規範，多採負面之方式，故本法亦從之。
（四）第十一條第一項「原住民族傳統知識部落資料庫」，此處是否以部落為單位？而不是以民族為單位？	第十一條第一項「原住民族傳統知識部落資料庫」，是以部落為單位。
（五）第十五條的調查文件是否亦應記載標本的採集？研究工作研究	已參酌修正。至於所蒐集材料之利用及歸屬，並非本法所能涵蓋，宜另以其他

者會採集標本，該採集標本之歸屬為何？	法律規範之。
三、吳豪人教授	
（一）第一條應要強調立法目的，有沒有可能將原住民基本法提升至憲法位階？是否有辦法將之連結？建議從 ICCPR（公民與政治權利公約）出發，以人權法角度切入，將生命權、自決權放進來，在第一條或第六條將之作連結，如此本法之保護就帶有國際憲法之意味，效力很強。	已於立法說明內加入憲法增修條文第十條第十一項之規定內容：「國家肯定多元文化，並積極維護發展原住民族語言及文化。」至於憲法之位階，宜由修憲時處理。
四、李玲玲教授	
（一）建議法案名稱應加以統一	關於法案名稱的問題，報告封面是委辦的計畫名稱，但我們認為委辦的名稱不夠周延，所以建議應改變名稱為：「原住民族傳統生物多樣性知識保護法」。
（二）是否針對傳統知識所有較具爭議之點，作更深入之背景分析。需有總章，說明目前法案後續仍要處理之問題。如所有權的問題、登記制度等問題。	本團隊亦很希望對於爭議點之背景加以深入分析說明，但時間上不允許，本團隊的主要目的為草擬法案，以有限的時間與經費，力有未逮，宜另以說帖詳細說明之。
（三）如何有效追溯未經同意之商業利用？有無機制真正去落實這些規範？例如誰要去執行利益分享與名稱標示？	第四條第二項已規範，由專責機關協助原住民族或部落維護之。利益分享與名稱標示之執行，宜由雙方當事人協議之。
（四）原住民族部落「會議」或「議會」？應適當處理。	本草案參酌現行「部落會議實施要點」訂定部落會議為意思形成機關。至於議會，必須有法源依據，並非本法所能處理。
（五）有關單位應成立機關，是否為另外成立單位或是在單位內設單位？	本法之執行與運作，應由專責機關統籌負責始能見其成效，是以專責機關之設置有其必要性，至於未來於政府組織再造時，其專責機構應如何定位，由主管機關自行處理。
（六）權利金協議不成，調解協調機制如何運作？是否有後續相關細部規範？	基於尊重原住民之原則，協議不成由傳統知識審議及調解委員會調解之，至於調解不成者，則不得利用。
（七）十一條、十二條資料庫名稱統一的問題	已參酌修改。

（八）十三條最後一句「應符合原住民族權益、公共利益及永續發展等原則」，仍有些模糊，是否應更進一步考量？	本條為基本原則，具宣示性質，其內容無法一一詳列。
（九）十四條有關調查使用涉及數部落，到底要跟多廣的人作協調？申請人要透過何單位要跟多少部落作協調？有無相關機制？	根據申請書所涵蓋之相關部落決定其協調對象，至於權利所屬之部落，由傳統知識審議及調解委員會認定之。
（十）第二十四條應加強原住民之瞭解，但也要對一般大眾作宣導。現在是否有原住民學校之成立？是否要加以調整？	一般人還不清楚傳統知識定義，若仍比照遺傳資源法的方式，以小冊子的方式推廣使大家瞭解，會是比較妥當的。 已於第二十四條第二項修正為「原住民族地區各級各類學校…」。
（十一）是否可以把法案名稱的「之」去掉？	已參酌修正。
（十二）第二十七條損害賠償是原住民自己進行嗎？還是可以透過原民會提供協助或直接處理之行政權？	第四條第二項已明定專責機關之職責為「…於原住民族或部落依本法所保障之權益受侵害時，應協助原住民族或部落維護之」。
（十三）建議可將霧台公聽會中地方鄉長；議員的名稱標示出來。	已參酌修正。
五、顏愛靜教授	
（一）需釐清「何謂傳統知識」以及「何謂傳統生物多樣性知識」？期末報告第五頁有提到「傳統知識是動態的並非靜態不動或古老的」，表示有更新的情形，但卻又說是「傳統的」，所謂的傳統表示有一些部分是不變的，這部分的不變，是何種情況下的不變？這裡的動態指的又是什麼？要保護原住民族或部落的「傳統知識」，這個傳統知識究是何種狀況？是否能夠在草案中更清楚的說明？雖然報告第二十四頁中有對於「傳統知識」之說明，但究竟哪一部份是指生物多樣性的部分？	一般而言，傳統知識與現代知識最大的不同在於傳統知識是一個整體且難以切割，因是幾千幾百年所累積，其並非固定知識而是會變動的，例如環境變了，原住民為適應環境，會去嘗試錯誤，可能會犧牲一些生命，漸漸地，經過幾十年或幾百年，可能又會有所變化，並不會永久不變，是與時併進，但因為時間較長，在一個人的有限生涯中，幾乎是不變，但就一個民族的發展，其是變動的。 對於傳統知識定義不夠清楚，其實在國際上亦尚未有定論，本草案在未有定論的情況下，取最大公約數，將所有特徵納入規範。若將來有更清楚明確的界定，亦可配合調整。
（二）第五章是「傳統知識之創新」，這部分是否會與「稀少性」有	環境若有改變，即需提出相對應之方式，這就是一種創新的知識，對原住民

衝突？因為我認為，生物多樣性知識是具有稀少性的，所以如果又有創新，是否會有衝突？「創新」與「傳統之維護」有何區別性？	而言，若欲在部落中永續生存，這種維持和創新的機制是最重要的。以上是我們對傳統知識之理解。
（三）「議會」或是「會議」之問題，原住民族基本法只有講到部落，還沒有講到會議或會議，就我的認知，部落議會才是真正的意思形成機關。	本草案參酌現行「部落會議實施要點」訂定部落會議為意思形成機關。至於議會，必須有法源依據，並非本法所能處理。
（四）為何不直接在第四條說明專責機關之職責包括建置原住民族傳統知識資料庫？條文也提到專責機關應協助部落成立或維護部落之權益，此之「協助」，如何去進行？	第十一條專責機關，是否要在第四條就把原住民傳統知識資料庫寫入，是有體系上的問題，此處僅是將一機關帶出，並將其職權加以規範，資料庫在第十一條規範，並在第二項責成專責機關來成立，這樣規範會比較完整。
（五）土地審議及調解委員會已改成「土地審議及調解會」，第五條之傳統知識審議及調解委員會，是否有必要作一相應的調節？	已參酌修正。
（六）第四條已有專責機關的成立，為何專責機關不去協助處理部落未公開的傳統知識？	尊重部落之自主性，由部落自行決定是否要求專責機關協助。
（七）第十二條之原住民族傳統知識資料庫要如何去「組織」？在我的想法，資料庫通常是用「建置」的。	已參酌修正。
（八）第十九條有提到未公開的傳統知識經使用後應與部落分享，我的疑慮是，未公開的傳統知識經使用後是否即變成已公開？是否是一種揭露，若是一種揭露，是否與第二十九條抵觸？	若該傳統知識足以申請專利，則建議先申請專利，否則建議於協商時，要求使用者不公開該傳統知識。
六、陳妙芬教授	
（一）本草案似欲跳出民法權利歸屬的概念？所以刻意避開「所有權」等字眼？我不清楚研究團隊究竟是刻意避開，還是欲另創一種權利內容？	權利之歸屬，本草案中是以無體財產權的觀念來處理，至於其名稱，即為「傳統知識權」，類似現有的智慧財產權制度，對於權利之歸屬也都有重新加以架構。
（二）第六條與所有權有何關係？原有法律上所有人的概念，本草案	本草案是以最符合原住民利益之方式來重新架構這些權利歸屬，並不以傳統共

皆未使用，是否為刻意？若是，則是否要建立一新的制度？是否需在溝通用語上予以統一？	有之觀念來套用，至於權利之屬性是否為集體權，則留待未來學說探討。
（三）知識並無所謂專屬他人，第九條關於知識的揭露採「不得」字眼，有點奇怪？例如開會時之研究是否為揭露？因此有對揭露加以定義的必要。	本法排除研究或非營利之使用，若實際是公司之實，但以研究或非營利之名來使用傳統知識，則違反本法之規定，應加以禁止。至於「揭露」之定義，因未公開的知識在屬性上較近似「營業秘密」，只要屬於原住民，且未公開，未經過同意，即不可任意揭露，本法中之揭露也就是公開的意思。
（四）登記制度一旦建立，是否沒有放進資料庫的，其權利將被排除？	本法未規定有登記才受保護，只要是符合傳統知識保護要件即應受保護。
（五）目前的處罰都是屬於行政罰，所以只要繳罰金就可以了事，是否可考慮在罰則中加入「撤銷專利權」？因為對於營利單位，罰錢似乎沒有嚇阻作用，建議提高或加入撤銷專利權。	此會牽涉到相關主管機關的職掌，問題較大。撤銷專利權在 WTO 中是否能夠被接受，尚未可知，故本草案採用較折衷的方式。
七、張振哲處長	
（一）昨天至智慧財產局去談，針對揭露與否的議題我們國家將來在 WTO 要採取何種態度，目前我國仍不表態，繼續觀察國際立法趨勢，採取對原住民最有利的方式加以立法。	本草案即是從保護原住民族之權益出發，採取對原住民族最有利之方式，建議原民會積極堅持對原住民有利之立場。
八、鄭副主任委員天財	
（一）在不能設機關的情形下，有沒有可能成立財團法人基金會並在其中規範公權力的委託去執行相關事項？或者是有沒有可能在未來或現在委託其他民間單位去行使執行這些公權力事項？	已參酌修正。
（三）法案中規範了很多罰鍰，而這些罰鍰如果全部都繳國庫對原住民也沒有幫助，應該可以增列罰鍰的使用方式來幫助原住民。	其他法律似未見類似之規定，若其他法律有相關之規定，則可考慮參酌修訂。
（四）若未來本法通過的話，在執行與實際運作上都要靠專責機關，	本法之執行與運作，應由專責機關統籌負責始能見其成效，是以專責機關之設

而行政機關基準法將原民會定位為一個統合協調的單位的規定，因此我們不能於作用法中再設機關。	置有其必要性，至於未來於政府組織再造時，其專責機構應如何定位，由主管機關自行處理。

第四篇、法案影響層面評估

壹、　本草案與原住民傳統智慧創作保護之關係

廣義之原住民傳統知識係涵蓋生態相關知識(traditional ecological knowledge)以及民俗文化表現(traditional cultural expression)，並包括運用這些知識時所涉及之生態資源。此三領域之傳統知識在實存生活面係彼此高度相關，但在規範面則又各有不同性質，適合於不同保護模式。本草案所保護之對象為無形之傳統知識，因此保護方式特重在對無形資訊之流通控制，尤其對於未經公開之傳統知識加強其保護。至於傳統智慧創作之性質則為具體之文化表現形式，例如歌曲、舞蹈、圖騰、儀式等，原本即具有公開發表之性質，因此其保護重點應在於禁止他人抄襲、仿冒。在此前提下，雖然原住民族基本法第十三條所規定者為「政府對原住民族傳統之生物多樣性知識及智慧創作，應予保護，並促進其發展；其相關事項，另以法律定之」，解釋上兩部分可合併立法，亦可分別立法，但由於原住民族委員會前已提出傳統智慧創作之保護條例待審議，是故本草案乃僅針對生態相關知識之保護加以規範。然建議日後在審議此兩草案之其中一案時，仍應審酌此兩草案之相關性部分，盡可能促其協調妥適。

貳、　員額及經費預估

一、員額

原住民族傳統生物多樣性知識保護乃屬近年來新興之法律課題，一般公務人員對其法律問題與規範模式均屬陌生，為避免制定本法保護原住民族傳統知識之美意喪失，強化法律執行能力實屬必要，是以本草案建議在原住民族委員會下設立專責機關辦理相關業務，或者將相關業務委託較有專業能力之機構團體負責執行。若採取設立專責機關方式，則原住民族委員會應增加員額編制。所需增加之員額數應參考該專責機關之主要職責如下：

（一）　協助原住民族或部落調查、整理傳統知識。

（二）　協助原住民族或部落保存及開發利用傳統知識。

（三）　於原住民族或部落有關傳統知識之權益受侵害時，協助其維護權益。

由上述可知，此專責機關之主要任務在於對原住民族或部落之能力建設(capacity building)，因此必須配備有足夠之人力與經費。至於合理之員額數，可參考一個處所配備之人力，同時應考量該專責機關可能兼具處理傳統智慧創作保護等其他法令所規定之業務。

本草案第五條所規定主管機關應成立之「傳統知識審議及調解會」並不涉及

增設員額之問題，因為審議及調解並非固定業務，因此可由學者專家、族群代表以及政府官員兼任委員，其秘書工作亦可由前述專責機關派員充任之。

二、經費

本草案所涉及經費預算支出，除一般人事費用外，尚包括傳統知識調查、整理與規劃費用（本草案第四條）、傳統知識資料庫之營運管理費用（本草案第十一條）、教育培訓經費（本草案第二十四條），茲分述如次：

（一） 傳統知識調查、整理與規劃費用

為避免傳統知識流失或是其歸屬產生爭議，本草案規定主管機關應設立專責機關或委託專業機構，並編列預算，以協助原住民族或部落調查、整理、保存及開發利用傳統知識。依本草案之規範意旨，調查、整理、保存及開發利用傳統知識者為各原住民族或部落本身，因此專責機關之預算應補助其經費需求。此外，為使該項補助更有效率及符合本草案之精神，專責機關應主動規劃此業務。

（二） 傳統知識資料庫之營運管理費用

擁有傳統知識之部落，可依其是否公開傳統知識之意願而分別將該傳統知識登記於國家資料庫或部落資料庫。無論國家資料庫或部落資料庫，均需具備基本營運與維護功能，且部落資料庫更須建立保密管理之能力，因此專責機關應以預算補助各資料庫之運作。

（三） 教育培訓經費

主管機關應提供適當之教育與培訓，促進原住民對傳統知識及其保護制度重要性之瞭解，以達成傳統知識保護、永續利用及創新之目的。此種教育培訓工作包括課程編撰、人才訓練、耆老之獎助等。

參、 衝擊層面及範圍評估

（一）政治層面

我國近年來重視原住民各項權益，並於二○○五年制定通過「原住民族基本法」，使原住民權益保護確立法律基礎。政策上更從原住民族語言教育、傳統習俗傳承、部落風貌塑造、原生文化保存等著手，進一步延續原住民族文化的特殊性。而在文化與環境的互動中，原住民族依其尊重、維護自然資源的宇宙觀，發展出其特有的生活方法及技術，延續並鼓勵發展該特有生活方法與技術，對保存原住民族文化與未來科技產業發展，將具潛在利益，故本草案於政策方向上將產生相當之助力。

（二）經濟層面

關於傳統知識之保存、維護與管理，本草案以設立資料庫與相關人員守密義務等規範為方式，期以最經濟而有效之方式進行相關工作。且因本草案目的在於保障原住民族文化特殊性之呈現，原住民族自身亦應負擔維護其特殊技術或生活方式之責任，此部分需賴教育培訓工作之配合，使原住民族瞭解自身文化與傳統知識，並進一步養成其自行維護之觀念，則得以最不影響相關經濟層面之方式達成本草案之目標。

（三）社會層面

原住民傳統知識之維護除能保存原住民族特殊文化背景外，原住民族亦可藉由授權外人使用其名稱或技術獲得實質或潛在利益，另方面因技術流傳於社會大眾則可促進開發。再者，原住民族保存、利用其傳統知識亦可提升原住民就業機會、改善其經濟地位與生活品質，故本草案應有助於社會交流，改善原住民之社會地位。

（四）人權層面

近來對於原住民議題之關注係源自對少數民族人權之重視，及強調多元文化之世界趨勢，我國亦開始建構族群平等法制，並著重於台灣社會多元價值之創造。本草案以尊重原住民族傳統生活方式與技術為出發點，企圖保存維持其特殊文化背景下所生成之無形資產，故而有助於保障原住民族之人權，並為國際趨勢之所在。因此本草案對於原住民人權應有所助益。

肆、　授權法規命令

本草案通過公佈施行後，尚應由主管機關（行政院原住民族委員會）頒訂以下幾項配套命令，以執行本草案之事項：

一、原住民族會議及部落會議組成與議事規則

由行政院原住民族委員會訂定之，內容為規範原住民族會意及部落會議之組成成員，以及決議相關事項之議事規則。（草案第三條）

二、傳統知識審議及調解會相關辦法（名稱暫訂）

由行政院原住民族委員會訂定之，內容為規範草案第五條審議及調解會之組織成員、設置辦法、審議與調解程序事項等。（草案第五條）

三、傳統知識資料庫相關辦法（名稱暫訂）

由行政院原住民族委員會訂定之，內容為相關資料庫如何組織、運作、管理、取得及保密等事項。（草案第十二條）

四、傳統知識教學培育獎勵辦法（名稱暫訂）

由行政院原住民族委員會訂定之，內容為獎勵由部落會議遴選實施傳統知識教學培育之耆老與相關專長人士。（草案第二十四條）

附件、國際規範及各國立法例

一、生物多樣性公約第八條 j 款

Convention on Biological Diversity（CBD）
Article 8. In-situ Conservation
Each Contracting Party shall, as far as possible and as appropriate:
(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

二、巴西第 2186-16 號暫行條例

資料來源 http://www.grain.org/brl/?docid=850&lawid=1768

BRAZIL - PROVISIONAL MEASURE No. 2.186-16 OF AUGUST 23, 2001

Enacting provisions under paragraphs (1)(ii) and (4) of Article 225 of the Constitution, Articles 1, 8(j), 10(c), 15 and 16(3) and (4) of the Convention on Biological Diversity, regulating access to the genetic heritage, protection of and access to associated traditional knowledge, sharing of benefits and access to and transfer of technology for their conservation and use, and introducing other provisions.
THE PRESIDENT OF THE REPUBLIC, by virtue of the powers invested in him by Article 62 of the Constitution, adopts the following Provisional Measure, with force of law:
CHAPTER I　GENERAL PROVISIONS
Article 1. This Provisional Measure provides for the benefits, rights and obligations concerning:
I. access to components of the genetic heritage on the national territory, on the continental shelf and in the exclusive economic zone for purposes of scientific research, technological development or biological prospection;
II. access to traditional knowledge relating to the genetic heritage that is relevant to the conservation of biological diversity, the integrity of the Country’s genetic heritage and the use of its components;
III. the fair and equitable sharing of the benefits deriving from exploitation of components of the genetic heritage and the associated traditional knowledge; and
IV. access to and transfer of technology for the conservation and use of biological diversity.
§1. Access to components of the genetic heritage for purposes of scientific research, technological development or bioprospection shall be had in accordance with this Provisional Measure, without prejudice to any material or immaterial property rights that might subsist in components of the genetic resources accessed, or the location where access is had.
§2. Access to components of the genetic heritage on the continental shelf shall be subject to the provisions of Law No. 8.617 of January 4, 1993.

Article 2. Access to components of the genetic heritage within national boundaries shall only be had with the authority of the Union and its use, marketing and exploitation for whatever purpose shall be subject to inspection, restrictions and benefit-sharing on the terms and conditions established in this Provisional Measure and in the regulations under it.
Article 3. This Provisional Measure does not apply to human genetic resources.
Article 4. The exchange and dissemination of components of the genetic heritage and associated traditional knowledge practised within indigenous and local communities for their own benefit and based on customary usage are preserved.
Article 5. Access to the genetic heritage for purposes that are harmful to the environment and to human health, and for the development of biological and chemical weapons, is prohibited.
Article 6. If at any time there is scientific evidence to suggest a risk of serious and irreversible damage to biological diversity resulting from activities provided for in this Provisional Measure, the public authorities, acting through the Council for the Management of the Genetic Heritage provided for in Article 10, shall, on the basis of technical opinion and criteria, decide on measures to prevent the damage, which may include suspension of the activity, due regard being had to the competence of the body responsible for the biological security of genetically modified organisms.
CHAPTER II Definitions
Article 7. In addition to the concepts and standard definitions in the Convention on Biological Diversity, the following definitions shall apply for the purposes of this Provisional Measure:
I. Genetic heritage: information of genetic origin contained in samples of all or part of plant, fungal, microbial or animal specimens, in the form of molecules and substances deriving from the metabolism of such living beings and extracts obtained from such organisms, live or dead, encountered in situ, including domestic situations, or kept in ex situ collections after in situ collection within the national territory, on the continental shelf or in the exclusive economic zone;
II. Associated traditional knowledge: information or individual or collective practices of an indigenous or local community having real or potential value and associated with the genetic heritage;
III. Local community: human group, including remnants of Quilombo communities, distinguished by its cultural conditions, that traditionally organizes itself throughout successive generations and through its own customs and preserves its social and economic institutions;
IV. Access to the genetic heritage: acquisition of samples of components of the genetic heritage for purposes of scientific research, technological development or bioprospection, with a view to its application in industry or elsewhere;
V. Access to associated traditional knowledge: acquisition of information pertaining to knowledge or individual or collective practices, associated with the genetic heritage, of an indigenous or local community for purposes of scientific research, technological development or biological prospection, with a view to its application in industry or elsewhere;
VI. Access to and transfer of technology: action whose purpose is access to and the development and transfer of technology for the preservation and use of biological diversity or technology developed from samples of components of the genetic heritage or from associated traditional knowledge;
VII. Bioprospection: exploratory activity aimed at identifying components of the genetic heritage and information on associated traditional knowledge with potential for commercial use;
VIII. Species threatened with extinction: species carrying a high risk of disappearance from nature in the near future, and recognized as such by the competent authority;
IX. Domesticated species: a species in whose course of evolution human beings have

intervened in order to meet their own needs;
X. Authorization of Access and Dispatch: document that allows, under specific conditions, access to samples of components of the genetic heritage and the dispatch thereof to a receiving institution, and access to associated traditional knowledge;
XI. Special Authorization of Access and Dispatch: document that allows, under specific conditions, access to samples of components of the genetic heritage and the dispatch thereof to a receiving institution, and access to associated traditional knowledge, for a period of up to two years, renewable for equal periods;
XII. Instrument of Material Transfer: formal document to be signed by the receiving institution before any samples of components of the genetic heritage are dispatched, with a mention where appropriate of whether access has been had to associated traditional knowledge;
XIII. Contract for Use of the Genetic Heritage and Benefit-Sharing: multilateral legal instrument which gives the particulars of the parties, the purpose and the conditions of access to and dispatch of components of the genetic heritage and associated traditional knowledge, and also the conditions for the sharing of benefits;
XIV. Ex situ state: maintenance of samples of components of the nation's genetic resources outside their natural habitat, in collections of live or dead material.

CHAPTER III

PROTECTION OF ASSOCIATED TRADITIONAL KNOWLEDGE

Article 8. Traditional knowledge of indigenous and local communities relating to the genetic heritage is protected by this Provisional Measure against illegal use and exploitation and other actions that are harmful or have not been authorized by the Management Council referred to in Article 10 or by an accredited institution.
I. The State recognizes the right of indigenous and local communities to decide on the use of their traditional knowledge associated with the genetic heritage, as provided in this Provisional Measure and the regulations under it.
II. The traditional knowledge associated with genetic heritage that is covered by this Provisional Measure encompasses the cultural heritage of Brazil and may be subject to a cadastral record, as directed by the Management Council or provided in specific legislation.
III. The protection afforded by this Provisional Measure may not be interpreted in such a way as to impede the preservation, use and development of traditional knowledge of an indigenous or local community.
IV. The protection hereby instituted shall not affect, prejudice or limit rights pertaining to intellectual property.
Article 9. Indigenous or local communities that create, develop, hold or preserve traditional knowledge associated with the genetic heritage are guaranteed the right to:
I. have the origin of the access to traditional knowledge mentioned in all publications, uses, exploitation and disclosures;
II. prevent unauthorized third parties from:
(a) using or carrying out tests, research or investigations relating to associated traditional knowledge;
(b) disclosing, broadcasting or re-broadcasting data or information that incorporate or constitute associated traditional knowledge;
III. derive profit from economic exploitation by third parties of associated traditional knowledge the rights in which are owned by the community as provided in this Provisional Measure.
Sole Paragraph: For the purposes of this Provisional Measure, any traditional knowledge associated with the genetic heritage may be owned by the community, even if only one single member of the community holds that knowledge.

CHAPTER IV
INSTITUTIONAL COMPETENCIES
AND POWERS

Article 10. The Council for the Management of Genetic Resources is hereby created within the Ministry of the Environment, being deliberative and normative in nature and composed of representatives of organs and agencies of the Federal Public Administration that are competent to perform the various actions provided for in this Provisional Measure.

§1. The Management Council shall be presided over by the representative of the Ministry of the Environment.

§2. The composition and action of the Management Council shall be laid down in the regulations.

Article 11. The Management Council shall be competent to:

I. coordinate the implementation of policies for the management of the genetic heritage;

II. establish:

(a) technical standards;

(b) criteria for authorization of access and dispatch;

(c) directives for drafting the Contract for Use of the Genetic Heritage and Benefit-Sharing;

(d) criteria for the creation of a database for recording information on associated traditional knowledge;

III. take part, in concert with Federal bodies or by agreement with other institutions, in the work of accessing and dispatching samples of components of the genetic heritage, and accessing associated traditional knowledge;

IV. deliberate on:

(a) authorization of access and dispatch of samples of components of the genetic heritage, subject to the prior consent of the owner;

(b) authorization of access to associated traditional knowledge, subject to the prior consent of the owner;

(c) special authorization of access to and dispatch of samples of components of the genetic heritage for a national institution, whether public or private, which carries on research and development activities in the areas of biology and related subjects, and for a national university, whether public or private, for a term of up to two years, renewable for equal periods, as provided in the regulations;

(d) special authorization of access to associated traditional knowledge for a national institution, whether public or private, that carries on research and development activities in the biological and related fields, and for a national university, whether public or private, for a term of up to two years, renewable for equal periods, as provided in the regulations;

(e) accreditation of a national public research and development institution or Federal public management institution for authorizing another national institution, whether public or private, which carries on research and development activities in the biological and related fields, to:

1. access samples of components of the genetic heritage and associated traditional knowledge;

2. dispatch samples of components of the genetic heritage to a national institution, whether public or private, or to an institution with its headquarters abroad;

(f) accreditation of a national public institution as a depositary of samples of components of the genetic heritage.

V. approve Contracts for the Use of the Genetic Heritage and Benefit-Sharing as complying with the requirements of this Provisional Measure and the regulations under it;

VI. promote discussion and public consultation on the subjects provided for in this Provisional Measure;

VII. function as a higher court of appeal in relation to decisions of an accredited institution and acts resulting from the application of this Provisional Measure;

VIII. approve its statutes.
§1. Decisions of the Management Council may be referred to the plenary session, as provided in the regulations.
§2. The Management Council may organize itself into subject groups to prepare decisions of the plenary session.
Article 12. The activity of collecting components of the genetic heritage and access to associated traditional knowledge that contributes to the advancement of bioprospection shall, when it involves the participation of a foreign legal entity, require authorization by the body responsible for national policy on scientific and technological research, subject to the terms of this Provisional Measure and the laws in force.
Sole Paragraph. The aforesaid authorization shall conform to the technical standards laid down by the Management Council, which shall oversee such activities.
Article 13 . The Chairman of the Management Council shall be competent to sign, in the name of the Union, the Contract for the Use of the Genetic Heritage and Benefit-Sharing.
§1. While retaining the competence specified in the heading of this Article, the Chairman of the Management Council may delegate that competence to the incumbent of a Federal public research and development institution or Federal public management institution, depending on the area of activity with which it is concerned.
§2 Where the institution mentioned in the preceding paragraph has an interest in the contract, the contract shall be signed by the Chairman of the Management Council.
Article 14. The accredited institution referred to in Article 11.IV(e) 1 and 2 of this Provisional Measure may be accorded one or more of the following powers, as directed by the Management Council:
I. to analyze applications and to issue authorizations to third parties for:
(a) access to samples of components of the genetic heritage existing in situ within the national territory, on the continental shelf and in the exclusive economic zone, subject to the prior consent of the owners;
(b) access to associated traditional knowledge, subject to the prior consent of the owners from the area;
(c) dispatch of samples of components of the genetic heritage to a national institution, whether public or private, or to an institution with its headquarters abroad;
II. With Federal bodies, or by agreement with other institutions, to take part in the work of access to and dispatch of samples of components of the genetic heritage and access to associated traditional knowledge;
III. to create and maintain:
(a) a register of ex situ collections, as provided in Article 18 of this Provisional Measure;
(b) a database for recording information obtained during the collection of samples of components of the genetic heritage;
(c) a database of Authorizations of Access and Dispatch, Terms of Transfer of Material and Contracts for the Use of Genetic Heritage and Benefit-Sharing, as provided in the regulations;
IV. to disclose periodically a list of Authorizations of Access and Dispatch, Terms of Transfer of Material and Contracts for the Use of the Genetic Heritage and Benefit-Sharing;
V. to take part in the implementation of Terms of Transfer of Material and Contracts for the Use of the Genetic Heritage and Benefit-Sharing in the case of processes that it has itself authorized.
§1. An accredited institution shall every year report fully on its activity to the Management Council and supply a copy of its databases to the executive body provided for in Article 15.
§2. An accredited institution under Article 11 shall comply with the terms of this Provisional Measure, the regulations under it and the decisions of the Management Council, on pain of forfeiture of its accreditation and liability also, where applicable, to the penalties provided for

in Article 30 and in the relevant legislation.
Article 15. The creation is authorized, within the Ministry of the Environment, of an executive body which shall exercise the function of executive secretariat of the Management Council provided for in Article 10 of this Provisional Measure, and which shall have the following powers, among others:
I. to implement the resolutions of the Management Council;
II. to give support to the accredited institutions;
III. to issue, in accordance with the resolutions of the Management Council and in its name
(a) Authorizations of Access and Dispatch;
(b) Special Authorizations of Access and Dispatch;
IV. to take part, in concert with other Federal bodies, in the work of accessing and dispatching samples of components of the genetic heritage and accessing associated traditional knowledge;
V. to give accreditation, in accordance with resolutions of the Management Council and in its name, to a national public research and development institution or a Federal public management institution for authorizing a national institution, whether public or private, to:
(a) access samples of components of the genetic heritage and associated traditional knowledge;
(b) dispatch samples of components of the genetic heritage to a national institution, whether public or private, or to an institution with its headquarters abroad, subject to the requirements of Article 19 of this Provisional Measure;
VI. to give accreditation, in accordance with resolutions of the Management Council and in its name, to a national public institution as depositary of samples of components of the genetic heritage;
VII. to register Contracts for Use of the Genetic Heritage and Benefit-Sharing, following their approval by the Management Council;
VIII. to disclose a list of species designated for facilitated exchange in international agreements, including those relating to food safety, of which the country is a signatory, in accordance with Article 19.II of this Provisional Measure;
IX. to create and maintain:
(a) a register of ex situ collections, as provided in Article 18;
(b) a database for recording information obtained during the collection of samples of components of the genetic heritage;
(c) a database of Authorizations of Access and Dispatch, Terms of Transfer of Material and Contracts for Use of the Genetic Heritage and Benefit-Sharing;
X. to disclose periodically a list of Authorizations of Access and Dispatch, Terms of Transfer of Material and Contracts for Use of the Genetic Heritage and Benefit-Sharing.
CHAPTER V
ACCESS AND DISPATCH
Article 16. Access to components of the genetic heritage existing in situ within the national territory, on the continental shelf or in the exclusive economic zone, and to associated traditional knowledge, shall be had by collection of samples and information respectively, and authorization shall only be given to a national institution, whether public or private, that carries on research and development activities in the biological and related fields by prior authorization, as provided in this Provisional Measure.
§1. The person responsible for the expedition to collect samples shall, at the end of his work in each area accessed, sign with the owner or representative thereof a declaration listing the material accessed, as provided in the regulations.
§2. In exceptional cases, where the owner of the area or his representative was not identified or located when the expedition to collect samples took place, the declaration listing the

material accessed shall be signed by the person responsible for the expedition and sent to the Management Council.
§3. A representative sub-sample of each accessed population constituting a component of the genetic heritage shall be deposited ex situ with an accredited depositary, described in Article 11.IV(f) of this Provisional Measure, as provided in the regulations.
§4. When there is a prospect of commercial use, in situ access to samples of components of the genetic heritage and to associated traditional knowledge may only occur after the Contract for Use of the Genetic Heritage and Benefit-Sharing has been signed.

§5. If potential for economic use has been identified in either a product or a process, whether or not it qualifies for intellectual protection on the basis of a sample of a component of the genetic heritage and information derived from associated traditional knowledge, accessed by virtue of authorization that did not establish that hypothesis, the benefiting institution is obliged to communicate with the Management Council, or the institution with which the process of access and dispatch originated, for execution of the Contract for the Use of the Genetic Heritage and Benefit-Sharing.
§6. Participation of a foreign legal entity in an expedition to collect samples of components of the genetic heritage in situ and to gain access to associated traditional knowledge shall only be authorized when it is to be in conjunction with a national public institution, which shall compulsorily be responsible for the coordination of activities, and provided that all institutions involved carry out research and development activities in biological and other related fields.
§7. Research on components of the genetic heritage shall preferably be done on the national territory.
§8. The Authorization of Access to and Dispatch of samples of components of the genetic heritage in the case of species that are strictly endemic or threatened with extinction shall be dependent on the prior consent of the competent body.
§9. Authorization of Access and Dispatch shall be granted with the prior consent of:
I. the indigenous community involved, the views of its official representative body having been heard where access occurs on indigenous territory;
II. the competent body where access occurs in a protected area;
III. the owner where access occurs on private land;
IV. the National Defense Council where access occurs in an area indispensable to national security;
V. the maritime authority where access occurs in Brazilian territorial waters, on the continental shelf or in the exclusive economic zone.
§10. The holder of an Authorization of Access and Dispatch under §9.1 to V of this Article is responsible for indemnifying the owner of the area for any damage or harm that has been duly proved.
§11. An institution holding a Special Authorization of Access and Dispatch shall send to the Management Council the consents referred to in paragraphs §8 and §9 of this Article before or on the occasion of collection expeditions to be carried out during the period of validity of the Authorization, and failure to do so shall result in its cancellation.
Article 17. In the event of relevant public interest, as defined by the Management Council, entry into a public or private area for access to samples of components of the genetic heritage shall not require prior authorization by its owners, who shall be assured of the benefits provided for in Articles 24 and 25 of this Provisional Measure.
§1. In the case provided for in the heading of this Article the indigenous community, local community or owner shall be given advance notice.
§2. In cases involving indigenous lands, the provisions of Article 231(6) of the Federal

Constitution shall apply.
Article 18. The ex situ preservation of samples of components of the genetic heritage shall take place on the national territory, provided that it may take place abroad at the discretion of the Management Council.
§1. Ex situ collections of samples of components of the genetic heritage must be registered with the executive body of the Management Council, as provided in the regulations.
§2. The Management Council may delegate registration under paragraph (1) of this Article to one or more institutions accredited as provided in Article 11.IV(d) and (e) of this Provisional Measure.
Article 19. The dispatch of samples of components of the genetic heritage by a national institution, whether public or private, to another national institution, whether public or private, shall make use of material held ex situ subject to information on the intended use and cumulative compliance with the following conditions, in addition to others that the Management Council might establish:
I. deposit of a representative sub-sample of components of the genetic heritage in a collection maintained by an accredited institution, even if the provisions of Article 16§3 of this Provisional Measure have not been complied with;
II. where samples of components of the genetic heritage have been accessed in situ before the publication of this Provisional Measure, the deposit referred to in the preceding paragraph shall be made in the form accessed, if still available, as provided in the regulations;
III. provision of information obtained during collection of samples of components of the genetic heritage for recording in the database mentioned in Article 14.III(b) and Article 15.IX(b) of this Provisional Measure;
IV. prior signature of the Terms of Transfer of Material.
§1. Whenever there is a prospect of commercial use of a product or process resulting from the use of components of the genetic heritage, the Contract for Use of the Genetic Heritage and Benefit-Sharing shall be signed in advance.
§2. Dispatch of samples of components of the genetic heritage in the case of species designated for facilitated exchange in international agreements, including those on food safety, of which the country is a signatory, shall be carried out in accordance with the conditions defined therein, the requirements of such agreements being constantly observed.
§3. Dispatch of any sample of components of the genetic heritage by a national institution, whether public or private, to an institution with its headquarters abroad, shall make use of ex situ material, subject to information on the intended use, prior authorization by the Management Council or the accredited institution and cumulative compliance with all the conditions laid down in subparagraphs I to IV and paragraphs §1 and §2 of this Article.
Article 20. The format of the Terms of Transfer of Material shall be approved by the Management Council.
CHAPTER VI
ACCESS TO AND TRANSFER OF
TECHNOLOGY
Article 21. The institution receiving samples of components of the genetic heritage or associated traditional knowledge shall facilitate access to and transfer of technology for the preservation and use of that heritage or knowledge for the national institution responsible for access and dispatch of samples and information on the knowledge, or an institution specified by it.
Article 22. Access to and transfer of technology between the national research and development institution, whether public or private, and an institution with its headquarters abroad may be achieved, among other activities, by means of:
I. scientific research and technological development;

II. basic and specialized training of human resources;
III. exchange of information;
IV. exchange between the national research institution and the research institution with its headquarters abroad;
V. consolidation of the infrastructure for scientific research and technological development;
VI. economic exploitation, in partnership, of a process or product derived from the use of components of the genetic heritage; and
VII. establishment of a technology-based joint venture.
Article 23. A company that invests in research and development activity in the Country in the process of affording access to and transfer of technology to a national institution, whether public or private, responsible for access to and dispatch of samples of components of the genetic heritage and for access to information on associated traditional knowledge shall qualify for tax incentives for technological training in industry, agriculture and livestock breeding and for other incentives in accordance with relevant legislation.
CHAPTER VII
BENEFIT-SHARING
Article 24. The benefits arising from economic exploitation of a product or process developed from samples of components of the genetic heritage and associated traditional knowledge, obtained by a national institution or an institution with its headquarters abroad shall be shared in a fair and equitable way between the contracting parties, as provided in the regulations and relevant legislation.
Sole paragraph. When the Union is not a party to the Contract for Use of Genetic Heritage and Benefit-Sharing, it shall be assured where applicable of a share in the benefits referred to in the heading of this Article, as provided in the regulations.
Article 25. The benefits derived from the economic exploitation of a product or process developed from samples of the genetic heritage or associated traditional knowledge may consist of the following among other things:
I. division of profits;
II. payment of royalties;
III. technology access and transfer;
IV. unrestricted licensing of products or services; and
V. training of human resources.
Article 26. Economic exploitation of a product or process developed from samples of components of the genetic heritage or associated traditional knowledge that have been accessed in a manner not conforming to the terms of this Provisional Measure shall make the guilty party liable to payment of an indemnity equivalent to a minimum of twenty per cent of the gross invoiced amount obtained through the marketing of the product or of royalties obtained from third parties by the guilty party as a result of the licensing of the product or process or the use of the technology, whether or not protected by intellectual property, without prejudice to administrative sanctions and appropriate penalties.
Article 27. The Contract for Use of the Genetic Heritage and Benefit-Sharing shall mention and clearly identify the contracting parties, being on the one hand the owner of the public or private area or the representative of the indigenous community and the official indigenous body, or the representative of the local community and, on the other hand, the national institution authorized to have access and the receiving institution.
Article 28. Essential clauses in the Contract for Use of the Genetic Heritage and Benefit-Sharing, as provided in the regulations, and without prejudice to others, are those that relate to:
I. purpose, elements, quantification of samples and intended use;
II. duration;

III. method of fair and equitable sharing of benefits and, where applicable, access to and transfer of technology;
IV. rights and responsibilities of the parties;
V. intellectual property rights;
VI. cancellation;
VII. penalties;
VIII. jurisdiction in Brazil.
Sole Paragraph. When the Union is a party to the contract referred to in the heading of this Article, it shall be governed by the provisions of public law.
Article 29. Contracts for Use of the Genetic Heritage and Benefit-Sharing shall be submitted to the Management Council for registration and shall only become effective once approved.
Sole paragraph. Contracts for Use of the Genetic Heritage and Benefit-Sharing that are signed in a manner not conforming to the terms of this Provisional Measure and the regulations shall be null and devoid of legal effect.
CHAPTER VIII
ADMINISTRATIVE SANCTIONS
Article 30. Any act or omission that contravenes the terms of this Provisional Measure and other relevant legal provisions shall be considered an administrative offense against the genetic heritage and associated traditional knowledge.
§1. Administrative offenses shall be punished, as provided in the regulations under this Provisional Measure, with the following sanctions:
I. a warning;
II. a fine;
III. confiscation of samples of components of the genetic heritage and of instruments used for collecting or processing them, or of products obtained on the basis of information relating to associated traditional knowledge;
IV. confiscation of products derived from samples of components of the genetic heritage or associated traditional knowledge;
V. suspension of sales of the product derived from the sample of components of the genetic heritage or the associated traditional knowledge, and confiscation thereof;
VI. a ban on activities;
VII. partial or total prohibition of the establishment, activity or undertaking;
VIII. suspension of registration, patent, license or authorization;
IX. cancellation of registration, patent, license or authorization;
X. loss or restriction of tax incentives and benefits accorded by the Government;
XI. loss or suspension of financing arrangements with an official credit establishment;
XII. intervention in the establishment;
XIII. a ban on signing contracts with public authorities for a period of up to five years.
§2. The fate of the samples, products and instruments referred to in subparagraphs III, IV and V of paragraph §1 of this Article shall be determined by the Management Council.
§3. Sanctions provided for in this Article shall be applied according to the procedure set out in the regulations under this Provisional Measure, without prejudice to civil sanctions or appropriate penalties.
§4. The fines referred to in subparagraph II of paragraph §1 of this Article shall be determined by the competent authority according to the gravity of the offense and as provided in the regulations, and may vary from R$200 (two hundred reals) to R$100,000 (one hundred thousand reals) in the case of a natural person.
§5. If the offense was committed by a legal entity or with its consent, the fine shall be from R$10,000 (ten thousand reals) to R$50,000,000 (fifty million reals), as determined by the competent authority, according to the gravity of the offense and as provided in the

regulations.
§6. In the event of a repeat offense, the fine shall be doubled.
CHAPTER IX
FINAL PROVISIONS
Article 31. The grant of industrial property rights by the competent bodies for a process or product obtained using samples of components of the genetic heritage is contingent on the observance of this Provisional Measure, the applicant being obliged to specify the origin of the genetic material and the associated traditional knowledge, as the case may be.
Article 32. The competent Federal bodies shall carry out inspection, interception and confiscation of samples of components of the genetic heritage or of products obtained from information on associated traditional knowledge that have been accessed in a manner not conforming to the provisions of this Provisional Measure, it being possible to decentralize those activities by agreement, as provided in the regulations.
Article 33. The portion of income and royalties payable to the Union as a result of the economic exploitation of a process or product developed on the basis of a sample of components of the genetic heritage, as well as the value of fines and indemnities provided for in this Provisional Measure, shall be credited to the National Environment Fund created by Law No. 7.797 of July 10, 1989, to the Naval Fund created by Decree No. 20.923 of January 8, 1932, and to the National Fund for Scientific and Technological Development created by Decree-Law No. 719 of July 31, 1969, and confirmed by Law No. 8.172 of January 18, 1991, as provided in the regulations.
Sole Paragraph. The resources to which this Article refers shall be used exclusively for the conservation of biological diversity, recovery and the creation and maintenance of depositary institutions, for the furtherance of scientific research, for technological development associated with genetic resources and for the training of human resources associated with the conduct of activities relating to the use and conservation of genetic resources.
Article 34. Any person using or economically exploiting components of the genetic heritage and associated traditional knowledge shall ensure that or her activities conform to the standards laid down in this Provisional Measure and the regulations under it.
Article 35. The Government shall regulate this Provisional Measure up to December 30, 2001.
Article 36. The provisions of this Provisional Measure shall not apply to material regulated by Law No. 8.974 of January 5, 1995.
Article 37. Acts based on Provisional Measure No. 2.186-15 of June 26, 2001, shall remain valid.
Article 38. This Provisional Measure shall enter into force on the date of its publication.
Brasilia, August 23, 2001; 180th year of Independence and 113th year of the Republic.
FERNANDO HENRIQUE CARDOSO
José Gregori
José Serra
Ronaldo Mota Sardenberg
José Sarney Filho

三、秘魯第 27811 號法律

資料來源 http://www.grain.org/brl/?docid=81&lawid=2041

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LAW INTRODUCING A PROTECTION REGIME FOR THE COLLECTIVE KNOWLEDGE OF INDIGENOUS PEOPLES DERIVED FROM BIOLOGICAL RESOURCES

TITLE I

RECOGNITION OF THE RIGHTS OF INDIGENOUS PEOPLES IN THEIR COLLECTIVE KNOWLEDGE

Article 1.- Recognition of rights

The Peruvian State recognizes the rights and power of indigenous peoples and communities to dispose of their collective knowledge as they see fit.

TITLE II

DEFINITIONS

Article 2.- Definitions

For the purposes of this legislation:

(a) “Indigenous peoples” means aboriginal peoples holding rights that existed prior to the formation of the Peruvian State, maintaining a culture of their own, occupying a specific territorial area and recognizing themselves as such. These include peoples in voluntary isolation or with which contact has not been made, and also rural and native communities. The term “indigenous” shall encompass, and may be used as a synonym of, “aboriginal,” “traditional,” “ethnic,” “ancestral,” “native” or other such word form.

(b) “Collective knowledge” means the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity. The intangible components referred to in Decision 391 of the Commission of the Cartagena Agreement include this type of collective knowledge.

(c) “Prior informed consent” means authorization given under this protection regime, by the representative organization of the indigenous peoples possessing collective knowledge and in accordance with provisions recognized by them, for the conduct of a particular activity that entails access to and use of the said collective knowledge, subject to the provision of sufficient information on the purposes, risks or implications of the said activity, including any uses that might be made of the knowledge, and where applicable on its value.

(d) “License contract for the use of collective knowledge” means an express agreement concluded between the organization of indigenous peoples possessing collective knowledge and a third party that incorporates terms and conditions for the use of the said collective knowledge. Such contracts may constitute an annex to the contract mentioned in Article 34 of Decision 391 of the Commission of the Cartagena Agreement introducing the Common Regime on Access to Genetic Resources.

(e) “Biological resources” means genetic resources, organisms or parts thereof, populations or any other kinds of biotic component of ecosystems that are of real or potential value or use to mankind.

TITLE III

SCOPE OF PROTECTION

Article 3.- Scope of protection afforded by this legislation

This legislation establishes a special protection regime for the collective knowledge of indigenous peoples that is connected with biological resources.

Article 4.- Exceptions to the regime

This regime shall not affect the traditional exchange between indigenous peoples of the collective knowledge protected under this regime.

TITLE IV

OBJECTIVES

Article 5.- Objectives of the regime

The following shall be the objectives of this regime:

(a) To promote respect for and the protection, preservation, wider application and development of the collective knowledge of indigenous peoples;
(b) To promote the fair and equitable distribution of the benefits derived from the use of that collective knowledge;
(c) To promote the use of the knowledge for the benefit of the indigenous peoples and mankind in general;
(d) To ensure that the use of the knowledge takes place with the prior informed consent of the indigenous peoples;
(e) To promote the strengthening and development of the potential of the indigenous peoples and of the machinery traditionally used by them to share and distribute collectively generated benefits under the terms of this regime;
.
(f) To avoid situations where patents are granted for inventions made or developed on the basis of collective knowledge of the indigenous peoples of Peru without any account being taken of that knowledge as prior art in the examination of the novelty and inventiveness of the said inventions.

TITLE V

GENERAL PRINCIPLES

Article 6.- Conditions of access to collective knowledge

Those interested in having access to collective knowledge for the purposes of scientific, commercial and industrial application shall apply for the prior informed consent of the representative organizations of the indigenous peoples possessing collective knowledge. The organization of the indigenous peoples whose prior informed consent has been applied for shall inform the greatest possible number of indigenous peoples possessing the knowledge that it is engaging in negotiations and shall take due account of their interests and concerns, in particular those connected with their spiritual values or religious beliefs. The information supplied shall be confined to the biological resource to which the collective knowledge under negotiation relates in order to safeguard the other party's interest in keeping the details of the negotiation secret.

Article 7.- Access for the purposes of commercial or industrial application

In the event of access for the purposes of commercial or industrial application, a license agreement shall be signed in which terms are provided that ensure due reward for the said access and in which the equitable distribution of the benefits deriving therefrom is guaranteed.

Article 8.- Percentage accruing to the Fund for the Development of Indigenous Peoples

A percentage which shall not be less than ten per cent of the value, before tax, of the gross sales resulting from the marketing of goods developed on the basis of collective knowledge shall be set aside for the Fund of the Development of Indigenous Peoples provided for in Articles 37 et seq. The parties may agree on a greater percentage according to the degree of direct use or incorporation of the said knowledge in the resulting end product and the degree to which the said knowledge contributed to the reduction of the cost of research and development work on derived products, among other things.

Article 9.- Role of present generations

The present generations of the indigenous peoples shall preserve, develop and administer their collective knowledge for the benefit of future generations as well as for their own benefit.

Article 10.- Collective nature of the knowledge

The protective knowledge protected under this regime shall be that which belongs to an indigenous people and not to particular individuals forming part of that people. It may belong to two or more indigenous peoples. The rights shall be independent of those that may come

into being within the indigenous peoples, which may have recourse to their traditional systems for the purposes of the distribution of benefits.

Article 11.- Collective knowledge and cultural heritage

Collective knowledge forms part of the cultural heritage of indigenous peoples.

Article 12.- Inalienability and indefeasibility of rights

Because they form part of the cultural heritage, the rights of indigenous peoples in their collective knowledge shall be inalienable and indefeasible.

Article 13.- Collective knowledge in the public domain

For the purposes of this regime, it shall be understood that collective knowledge is in the public domain when it has been made accessible to persons other than the indigenous peoples by mass communication media such as publication or, when the properties, uses or characteristics of a biological resource are concerned, where it has become extensively known outside the confines of the indigenous peoples and communities. In cases where the collective knowledge has passed into the public domain within the previous 20 years, a percentage of the value, before tax, of the gross sales resulting from the marketing of the goods developed on the basis of that knowledge shall be set aside for the Fund for the Development of Indigenous Peoples provided for in Articles 37 et seq.

Article 14.- Representatives of indigenous peoples

For the purposes of this regime, indigenous peoples shall be represented by their representative organizations, due regard being had to the traditional forms of organization of the indigenous peoples.

TITLE VI

REGISTERS OF THE COLLECTIVE KNOWLEDGE OF INDIGENOUS PEOPLES

Article 15.- Registers of the collective knowledge of indigenous peoples

The collective knowledge of indigenous peoples may be entered in three types of register:

(a) Public National Register of Collective Knowledge of Indigenous Peoples;

(b) Confidential National Register of Collective Knowledge of Indigenous Peoples;

(c) Local Registers of Collective Knowledge of Indigenous Peoples.

The Public National Register of Collective Knowledge of Indigenous Peoples and the Confidential National Register of Collective Knowledge of Indigenous Peoples shall be under the responsibility of INDECOPI.

Article 16.- Purpose of the Registers of Collective Knowledge

The purposes of the Registers of Collective Knowledge of Indigenous Peoples shall be the following, as the case may be:

(a) to preserve and safeguard the collective knowledge of indigenous peoples and their rights therein;

(b) to provide INDECOPI with such information as enables it to defend the interests of indigenous peoples where their collective knowledge is concerned.

Article 17.- Character of the Public National Register of Collective Knowledge of Indigenous Peoples

The Public National Register of Collective Knowledge of Indigenous Peoples shall contain such collective knowledge as is in the public domain. INDECOPI shall register the collective knowledge that is in the public domain in the Public National Register of Collective Knowledge of Indigenous Peoples.

Article 18.- Character of the Confidential National Register of Collective Knowledge of Indigenous Peoples

The Confidential National Register of Collective Knowledge of Indigenous Peoples may not be consulted by third parties.

Article 19.- Registration at the request of indigenous peoples

Any people may, through its representative organization, apply to INDECOPI for the registration of collective knowledge possessed by it in the Public National Register or in the Confidential National Register.

Article 20.- Applications for the registration of collective knowledge

Applications for the registration of collective knowledge of indigenous peoples shall be filed with INDECOPI through the representative organizations of the said peoples, and shall contain the following:

(a) Identity of the indigenous people applying for registration of its knowledge;

(b) Identity of the representative;

(c) Designation of the biological resource to which the collective knowledge relates, it being possible to use the indigenous name;

(d) A mention of the use or uses that are made of the biological resource concerned;

(e) A clear and full description of the collective knowledge to be registered;

(f) The instrument embodying the agreement of the indigenous people to the registration of the knowledge.

The application shall be accompanied by a sample or specimen of the biological resource to which the collective knowledge to be registered relates. In cases where the sample or specimen is difficult to transport or manipulate, the indigenous people applying for registration may request INDECOPI to exempt it from the submission of the said sample or specimen and to allow it to file instead photographs that allow the characteristics of the biological resource to which the collective knowledge relates to be ascertained. The said sample or specimen, or as the case may be the said photographs, shall enable INDECOPI to identify unmistakably the biological resource concerned and to enter the scientific name thereof in the file.

Article 21.- Processing of the application

INDECOPI shall satisfy itself, within a period of ten days after the filing of the application, that the said application contains all the data specified in the foregoing Article. Where anything has been omitted, the indigenous people applying for registration shall be served notice to complete the application within a period of six months, which period may be renewed at its request, with a warning that otherwise the application shall be declared abandoned. Once INDECOPI has satisfied itself that the application contains all the data specified in the foregoing Article, it shall proceed to register the collective knowledge in question.

Article 22.- Sending of representatives of INDECOPI

In order to make the registration of collective knowledge of indigenous peoples easier, INDECOPI may send duly accredited representatives to the various indigenous peoples for the purpose of gathering the information necessary for the prosecution of such applications for registration as they may wish to file.

Article 23.- Obligation on INDECOPI to send the information contained in the Public National Register to the main patent offices of the world

With a view to its opposing pending patent applications, disputing granted patents or otherwise intervening in the grant of patents for goods or processes produced or developed on the basis of collective knowledge, INDECOPI shall send the information entered in the Public National Register to the main patent offices of the world in order that it may be treated as prior art in the examination of the novelty and inventiveness of patent applications.

Article 24.- Local registers of collective knowledge of indigenous peoples

Indigenous peoples may organize local registers of collective knowledge in accordance with their practices and customs. INDECOPI shall lend technical assistance in the organization of such registers at the request of the indigenous peoples.

TITLE VII

LICENSING

Article 25.- Compulsory registration of license contracts

License contracts shall be entered in a register kept for the purpose by INDECOPI.

Article 26.- Compulsory written form for license contracts

The representative organization of indigenous peoples in possession of collective knowledge may license third parties to use the said collective knowledge only by written contract, in the native language and in Spanish, for a renewable period of not less than one year or more than three years.

Article 27.- Contents of the license contract

For the purposes of this regime, contracts shall contain at least the following clauses:

(a) Identification of the parties;

(b) A description of the collective knowledge to which the contract relates;

(c) A statement of the compensation that the indigenous peoples receive for the use of their collective knowledge; such compensation shall include an initial monetary or other equivalent payment for its sustainable development, and a percentage of not less than five per cent of the value, before tax, of the gross sales resulting from the marketing of the goods developed directly and indirectly on the basis of the said collective knowledge, as the case may be;

(d) The provision of sufficient information on the purposes, risks and implications of the said activity, including any uses of the collective knowledge and its value where applicable;

(e) The obligation on the licensee to inform the licensor periodically, in general terms, of progress in the research on and industrialization and marketing of the goods developed from the collective knowledge to which the license relates;

(f) The obligation on the licensee to contribute to the improvement of the ability of the indigenous peoples to make use of the collective knowledge relating to its biological resources.

Where the contract embodies a safeguard obligation, it shall expressly so state.

INDECOPI shall not register contracts that do not conform to the provisions of this Article.

Article 28.- Applications for registration of license contracts. Confidentiality of the contract

Applications for the registration of a license contract filed with INDECOPI shall enclose the following:

(a) Identity of the indigenous peoples party to the contract and their representatives;

(b) Identity of the other parties to the contract and their representatives;

(c) A copy of the contract;

(d) The instrument evidencing agreement to enter into a license contract on the part of the indigenous peoples party to the contract.

The contract may not be consulted by third parties except with the express permission of both parties.

Article 29.- Processing of the application

INDECOPI shall satisfy itself within ten days of the filing of the application that it contains all the data specified in the foregoing Article. If anything has been omitted it shall serve notice on the party who applied for the registration to complete the application within a period of six months, which period may be renewed at his request, with the warning that otherwise the application shall be declared abandoned.

Article 30.- Verification of the contents of the contract

With a view to the registration of a license INDECOPI shall, within 30 days of the filing of the application, satisfy itself that the clauses mentioned in Article 27 have been included.

Article 31.- Additional information on environmental impact

INDECOPI shall request additional information, either at the request of a party or ex officio, in cases where it considers that there is risk of the balance of the environment

being affected in the territories inhabited by the indigenous peoples as a result of the contract filed for registration. Registration of the contract shall be refused if such a risk is detected and where the parties fail to undertake to do what is necessary to avoid it to the extent required by the national authority responsible for environmental concerns.

Article 32.- Scope of licenses for use

The licensing of the use of the collective knowledge of an indigenous people shall not prevent others from using or licensing the same knowledge, nor shall it affect the right of present and future generations to continue to use and develop collective knowledge.

Article 33.- Prohibition of sublicensing

Sublicensing shall be allowed only with the express permission of the representative organization of the indigenous peoples that granted the license.

TITLE VIII

CANCELLATION OF REGISTRATION

Article 34.- Causes of cancellation

INDECOPI may, either ex officio or at the request of a party, cancel a registration of collective knowledge or a license, after the parties concerned have been heard, where:

(a) the registration or license has been granted in violation of any of the provisions of this regime;

(b) it is shown that the essential data contained in the application are false or inaccurate.

Cancellation actions arising out of this Article may be initiated at any time.

Article 35.- Request for cancellation

The request for cancellation of a registration shall record or enclose, as the case may be, the following:

(a) Identity of the party requesting cancellation;

(b) Identity of the representative or agent, if any;

(c) Registration affected by the cancellation;

(d) A statement of the legal grounds for the action;

(e) Evidence substantiating the grounds for cancellation invoked;

(f) Address at which notice was served on the owner of the registration whose cancellation is requested;

(g) Where appropriate, copies of whatever powers of attorney are necessary;

(h) Copies of the application and its enclosures for the owner of the registration.

Article 36.- Processing of the request

The request for cancellation shall be notified to the owner of the registration, who shall be allowed a period of 30 days to make his rebuttal. After that period, INDECOPI shall settle the issue with or without the relevant rebuttal.

TITLE IX

FUND FOR THE DEVELOPMENT OF INDIGENOUS PEOPLES

Article 37.- Purpose of the Fund for the Development of Indigenous Peoples

The Fund for the Development of Indigenous Peoples and Communities is hereby created for the purpose of contributing to the comprehensive development of indigenous peoples through the financing of projects and other activities. The Fund shall enjoy technical, economic, administrative and financial autonomy.

Article 38.- Access to the resources for the Fund for the Development of Indigenous Peoples and Communities

Indigenous peoples have the right to draw on the resources of the Fund for the Development of Indigenous Peoples through their representative organizations for the purpose of development projects, subject to prior evaluation and approval by the Administrative Committee.

Article 39.- Administration of the Fund for the Development of Indigenous Peoples
The Fund for the Development of Indigenous Peoples shall be administered by five members of representative organizations of indigenous peoples and two members of the National Commission for the Andean, Amazonian and Afro-Peruvian Peoples, who shall constitute the Administrative Committee. The Committee shall to the extent possible use the machinery traditionally used — by indigenous peoples — for allocating and distributing collectively-generated benefits. The Administrative Committee shall give the representative organizations of indigenous peoples quarterly information on funds received.
Article 40.- Obligation on members of the Administrative Committee to submit sworn statements
The members of the Administrative Committee shall, on taking up their duties and annually thereafter, submit a sworn statement of assets and income to the National Commission for the Andean, Amazonian and Afro-Peruvian Peoples.
Article 41.- Resources of the Fund for the Development of Indigenous Peoples
The resources of the Fund for the Development of Indigenous Peoples shall be derived from the State budget, international technical cooperation, donations, the percentage of economic benefits referred to in Articles 8 and 13, the fines referred to in Article 62 and other sources.
TITLE X
PROTECTION CONFERRED BY THIS REGIME
Article 42.- Rights of indigenous peoples possessing collective knowledge
Indigenous peoples possessing collective knowledge shall be protected against the disclosure, acquisition or use of that collective knowledge without their consent and in an improper manner provided that the collective knowledge is not in the public domain. It shall likewise be protected against unauthorized disclosure where a third party has legitimately had access to collective knowledge covered by a safeguard clause.
Article 43.- Actions for violation of rights of indigenous peoples
Indigenous peoples possessing collective knowledge may bring infringement actions against persons who violate the rights specified in the foregoing Article. An infringement action shall also be permissible where there is an immediate danger of such violation. Infringement actions may be brought ex officio by order of INDECOPI.

Article 44.- Reversal of the burden of proof
Where infringement of the rights of an indigenous people possessing specific collective knowledge is alleged, the burden of proof shall be on the defendant.
Article 45.- Actions claiming ownership and indemnification
The representative organizations of indigenous peoples possessing collective knowledge may bring the actions claiming ownership and indemnification that are available to them under the laws in force against a third party who, in a manner contrary to the provisions of this regime, has directly or indirectly made use of the said collective knowledge.
Article 46.- Settlement of disputes between indigenous peoples
In order to settle such disputes as may arise between indigenous peoples in connection with the implementation of this regime, including those concerning the compliance, on the part of the indigenous people that has negotiated a license contract for the use of its collective knowledge, with the provisions of the second paragraph of Article 6 of this Law, they may have recourse to the law of equity and to their traditional forms of dispute settlement, it being possible to apply to a higher-ranking indigenous organization for mediation.
TITLE XI
INFRINGEMENT ACTIONS
Article 47.- Contents of the complaint
Indigenous peoples wishing to bring an infringement action shall submit an application,

through their representative organization, to the Office of Inventions and New Technology, which shall contain:
(a) the identity of the representative organization of the indigenous peoples bringing the action, and that of their representatives;
(b) the identity and address of the party committing the infringement;
(c) a mention of the registration number assigned to the rights of the complainant or, failing that, a description of the collective knowledge and a mention of the biological resource to which the collective knowledge at issue relates;
(d) an account of the facts constituting the infringement, with a mention of the place and of the means actually or presumably used, and any other relevant information;
(e) a submission or offer of proof;
(f) an express mention of the provisional measure applied for.

Article 48.- Processing of the complaint
Once the complaint has been accepted for processing, it shall be conveyed to the defendant so that the latter may submit his rebuttal. The period for the filing of the rebuttal shall be five years following notification, on the expiry of which the administrative authority of INDECOPI shall declare the defendant who has failed to file it to be in contempt. In the case of ex officio procedures, the period for the filing of rebuttals shall start on the date on which the administrative authority notifies the defendant of the circumstances being investigated, and also the nature and description of the alleged infringement. The administrative authority of INDECOPI may make such inspections and investigations as it considers necessary before sending the said notification. The complaint may be notified at the same time as an inspection is made, either at the request of the plaintiff or ex officio, where the administrative authority of INDECOPI considers such a step judicious.
Article 49.- Provisional measures
At any stage in the proceedings, either ex officio or at the request of a party, the administrative authority of INDECOPI may, within the limits of its relevant competence, order one or more of the following provisional measures in order to ensure compliance with the final ruling:
(a) Cessation of the acts that gave rise to the action;
(b) The seizure, confiscation or immobilization of the goods produced using the collective knowledge to which the action relates;
(c) The adoption of the measures necessary to ensure that the customs authorities prevent the entry into the country and the departure from it of goods produced using the collective knowledge to which the action relates;
(d) The temporary closure of the defendant’s premises;
(e) Any other measure whose purpose is to avoid the occurrence of any prejudice deriving from the act to which the action relates, or to bring about the cessation of that act.
The administrative authority of INDECOPI may, if it sees fit, order a provisional measure different from that requested by the interested party. The party against whom a provisional measure is ordered may file a request with INDECOPI to have it modified or lifted where new evidence comes to light that justifies such a step.
Article 50.- Failure to comply with a provisional measure
Where the party required to comply with a provisional measure ordered by the administrative authority of INDECOPI fails to do so, he shall be automatically subjected to a sanction not exceeding the maximum of the permitted fine, for the gradation of which due regard shall be had to the criteria used by the administrative authority of INDECOPI for handing down final rulings. That fine shall be paid within a period of five days of notification, on the expiry of

which enforced collection shall be ordered. Where the party under obligation persists in failing to comply, he shall be subjected to further fines successively doubling, without limitation, the amount of the previous fine imposed until the provisional measure ordered is complied with, and without prejudice to the possibility of the party responsible being reported to the Public Prosecutor with a view to the latter ordering the appropriate criminal proceedings. The fines imposed shall not prevent the administrative authority of INDECOPI from imposing a different fine or other sanction at the end of the proceedings.

Article 51.- Conciliation

At any stage in the proceedings, until such time as the complaint is entertained, the competent administrative authority of INDECOPI may summon the parties to a conciliation hearing. If both parties arrive at an agreement on the complaint, an instrument shall be drawn up recording the agreement concerned, which will have the effect of an out-of-court settlement. The administrative authority of INDECOPI may in any event continue with the proceedings ex officio if it considers, on analyzing the circumstances reported, that third-party interests might still be affected.

Article 52.- Alternative dispute settlement mechanisms

At any stage in the proceedings, until such time as the complaint is entertained, the parties may submit to arbitration, mediation or conciliation or mixed dispute settlement arrangements conducted by third parties. Where the parties decide to submit to arbitration, they may immediately sign the appropriate arbitration convention in accordance with the rules that the governing body of INDECOPI shall have approved for the purpose. The administrative authority of INDECOPI may in any event continue with the proceedings ex officio if it considers, on analyzing the circumstances reported, that third-party interests might still be affected.

Article 53.- Evidence

The parties may submit the following forms of evidence:

(a) Expert opinion;
(b) Documents, including all kinds of written or printed matter, photocopies, plans, tables, drawings, x-rays, cinema film and other audio and video reproductions, computer-based communications in general and other subject matter and property that encompasses, contains or represents any fact or human activity or the result thereof;
(c) Inspection.

Evidence different from that mentioned may be submitted as an exceptional measure, but only if, in the judgment of the competent administrative authority, it is of particular importance to the settlement of the case.

Article 54.- Inspection

In the event of an inspection being necessary, it shall be conducted by the competent administrative authority of INDECOPI. Whenever an inspection is conducted, a record shall be taken which shall be signed by the party in charge of it and also by the interested parties or those representing them, or by the appointed representative of the establishment concerned. Where the defendant, his representative or the appointed representative of the establishment refuses to sign, that fact shall be recorded.

Article 55.- Assistance of the National Police

The administrative authority of INDECOPI may, both for the administration of evidence and for the making of representations, request the intervention of the National Police, without prior notification being necessary, in order to ensure that it is able to carry out its functions.

Article 56.- Administration of evidence. Insufficiency of evidence

Where, on inspection of the information submitted, the administrative authority of INDECOPI considers it necessary to procure stronger evidence, it shall serve notice on the

parties to respond to the comments made within the period that the said authority shall specify, or shall administer ex officio such evidence as it considers necessary. The parties shall respond to the comments in writing, and shall submit such supporting evidence as they consider appropriate.

Article 57.- Oral report

The administrative authority of INDECOPI shall notify the parties that the case is ready for settlement. The parties may request the conduct of an oral proceeding before the said authority within five days. The acceptance or refusal of the said request shall be at the discretion of the administrative authority of INDECOPI, depending on the importance and implications of the case.

Article 58.- Calculation basis for fines

The amounts of the fines imposed by the administrative authority of INDECOPI shall be calculated on the basis of the tax unit (UIT) applicable on the day of voluntary payment, or on the date on which enforced collection takes place.

Article 59.- Reduction of the fine

The fine applicable shall be reduced by 25 per cent where the infringer pays the amount thereof prior to the expiry of the period for appealing against the ruling that concluded the proceedings, provided that no appeal against the ruling has been filed.

Article 60.- Expenses for administration of evidence

The cost of experts' reports, the administration of evidence and inspections, and other costs arising from the conduct of the proceedings shall be initially borne by INDECOPI. In all cases the final rulings shall determine whether the costs should be borne by one or other of the parties and refunded to INDECOPI in addition to the payment of any fine that may have been imposed.

Article 61.- Register of sanctions

INDECOPI shall keep a register of sanctions imposed for the information of the public and also in order to detect instances of recidivism.

Article 62.- Sanctions

Violations of the rights of indigenous peoples possessing collective knowledge shall give rise to the imposition of a fine, without prejudice to such measures as may be ordered to cause the infringing acts to cease or to prevent them from being committed. The fines that may be imposed shall be up to 150 tax units. The imposition and gradation of fines shall be determined according to the economic benefit secured by the infringer, the economic prejudice caused the indigenous peoples and communities and the conduct of the infringer throughout the proceedings. Recidivism shall be considered an aggravating circumstance, and the sanction applicable shall therefore not be less severe than the previous one. Where the defendant fails to comply within a period of three days with the terms of the ruling that concludes a proceeding, he shall be subjected to a sanction not exceeding the maximum of the fine allowed, according the criteria referred to in the foregoing Article, and enforced collection shall be ordered. Where the defendant persists in failing to comply, the fine imposed may be successively doubled without limitation until such time as compliance occurs without prejudice to the possibility of the party responsible being reported to the Public Prosecutor with a view to the latter initiating the appropriate criminal proceedings.

TITLE XII

COMPETENT NATIONAL AUTHORITY AND INDIGENOUS KNOWLEDGE PROTECTION BOARD

Article 63.- Competent National Authority

The Office of Inventions and New Technology of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI) shall be competent to hear and settle in the first instance all matters concerning the protection of the collective knowledge of

indigenous peoples. The Intellectual Property Chamber of the Tribunal for the Defense of Competition and Intellectual Property of INDECOPI shall hear and settle all appeals in the second and last administrative instance.

Article 64.- Functions of the Office of Inventions and New Technology

The following shall be the functions of the Office of Inventions and New Technology of INDECOPI:

(a) To maintain the Register of Collective Knowledge of Indigenous Peoples and keep it up to date;

(b) To maintain the Register of Licenses for the Use of Collective Knowledge and keep it up to date;

(c) To assess the validity of contracts for the licensing of collective knowledge of indigenous peoples, taking due account of the opinion of the Indigenous Knowledge Protection Board;

(d) To perform such other functions as may be entrusted to it under these provisions.

Article 65.- Indigenous Knowledge Protection Board

The Indigenous Knowledge Protection Board shall be composed of five persons specialized in the subject, three of them designated by the representative organizations of indigenous peoples and two designated by the National Commission for the Andean, Amazonian and Afro-Peruvian Peoples, whose membership of the Board shall be honorary in character.

Article 66.- Functions of the Indigenous Knowledge Protection Board

The following shall be the functions of the Indigenous Knowledge Protection Board:

(a) To monitor and oversee the implementation of this protection regime;

(b) To support the Administrative Committee of the Fund for the Development of Indigenous Peoples and the Office of Inventions and New Technology of INDECOPI in the performance of their functions;

(c) To give its opinion on the validity of contracts for the licensing of the collective knowledge of indigenous peoples;

(d) To give advice and assistance to the representatives of indigenous peoples who so request regarding matters connected with this regime, and in particular in the planning and implementation of projects within the framework thereof;

(e) To supervise the Administrative Committee of the Fund for the Development of Indigenous Peoples in the exercise of its functions.

To that end it may demand of the Administrative Committee any kind of information relating to the Fund’s administration, order inspections or audits, examine its books and documents and appoint a representative who shall attend its meetings with the right to speak but not to vote. The decision ordering the conduct of an audit shall be accompanied by a statement of reasons. It shall be empowered to impose sanctions on them, including warnings, temporary suspension from the exercise of their functions or final dismissal from their positions, where they infringe the provisions of this regime or regulations under it, or where they are implicated in cases that affect the interests of indigenous peoples and communities, without prejudice to any criminal sanctions or civil actions that may be appropriate.

TITLE XIII

ADMINISTRATIVE APPEALS

Article 67.- Request for review

A request for the review of decisions handed down by the Office of Inventions and New Technology may be filed within 15 days following the notification thereof, and shall be accompanied by new evidence.

Article 68.- Appeal

An appeal, which shall be solely against a decision concluding proceedings that is handed down by the Office of Inventions and New Technology, may be lodged within 15 days following notification of the said decision. An appeal may not be lodged against

first-instance rulings that impose provisional or precautionary measures.

Article 69.- Substantiation of appeals

Appeals shall be lodged when the challenge relies on a different interpretation of the evidence produced, or where purely legal questions are involved, the latter having to be substantiated before the Office of Inventions and New Technology. On verification of the requirements laid down in this Article and in the Single Text on Administrative Procedure (TUPA) of INDECOPI, the Office shall allow the appeal and raise the case to the second administrative level.

TITLE XIV

PROCEDURE BEFORE THE TRIBUNAL

Article 70.- Second-instance procedure

When the file on the case has been received by the Intellectual Property Chamber of the Tribunal for the Defense of Competition and Intellectual Property of INDECOPI, the appeal shall be conveyed to the other party, who shall be required to submit his rebuttal within a period of 15 days.

Article 71.- Evidence and oral report

No evidence shall be allowed other than documents. Nevertheless, any of the parties may ask to speak, and shall be required to specify whether matters of fact or of law will be raised. The grant or refusal of the request shall be at the discretion of the Chamber of the Tribunal. Where the parties are summoned to an oral proceeding, it shall be conducted in the presence of those who attend it.

COMPLEMENTARY PROVISIONS

FIRST.- Independence of current intellectual property legislation. This special protection regime is independent of that provided for in Decisions 345 of the Commission of the Cartagena Agreement and 486 of the Commission of the Andean Community, in Legislative Decrees Nos. 822 and 823 and in Supreme Decree No. 008-96-ITINCI.

SECOND.- Submission of the license contract as a requirement for obtaining a patent. Where a patent is applied for in respect of goods or processes produced or developed on the basis of collective knowledge, the applicant shall be obliged to submit a copy of the license contract as a prior requirement for the grant of the rights concerned, except where the collective knowledge concerned is in the public domain. Failure to comply with this obligation shall be a cause of refusal or invalidation, as the case may be, of the patent concerned.

TRANSITIONAL PROVISION

SOLE PROVISION.- Composition of the Administrative Committee of the Fund for the Development of Indigenous Peoples. The designation of the members of the Administrative Committee of the Fund for the Development of Indigenous Peoples shall be the responsibility of the National Commission for the Andean, Amazonian and Afro-Peruvian Peoples, and shall be coordinated with the representative organizations of the indigenous peoples.

FINAL PROVISION

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SOLE PROVISION.- Rules of the Fund for the Development of Indigenous Peoples. Within a period of 90 days following the entry into force of this Law, the representative organizations of indigenous peoples shall submit draft rules to the Administrative Committee of the Fund for the Development of Indigenous Peoples, referred to in Article 39 of this Law, for approval. The said rules shall govern the organization and operation of the Fund for the Development of Indigenous Peoples, and shall determine the maximum amount or percentage of the Fund’s resources that may be used to defray expenses incurred in its administration.

四、巴拿馬第 20 號法律及巴拿馬第 12 號行政命令

資料來源 http://www.grain.org/brl/?docid=461&lawid=2002

PANAMA
LEGISLATIVE ASSEMBLY
LAW No. 20(of June 26, 2000)
On the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge, and whereby set forth other provisions.
THE LEGISLATIVE ASSEMBLY
DECREES:
CHAPTER 1
PURPOSE
Article 1. The purpose of this law is to protect the collective rights of intellectual property and traditional knowledge of the indigenous communities upon their creations such as inventions, models, drawings and designs, innovations contained in the pictures, figures, symbols, illustrations, old carved stones and others; likewise, the cultural elements of their history, music, art and traditional artistic expressions, capable of commercial use, through a special registration system, promotion, commercialization of their rights in order to stand out the value of the indigenous cultures and to apply social justice.
Article 2. The customs, traditions, believing, spirituality, religiosity, folkloric expressions, artistic manifestations, traditional knowledge and any other type of traditional expressions of the indigenous communities, constitute part of their cultural assets: consequently, cannot be object of any form of exclusive right by unauthorized third parties under the intellectual property system such as copyrights, industrial models, trademarks, geographical indications and others, unless the application is filed by the indigenous community. However, rights previously recognized under the legislation on the matter will be respected and will not be affected.
CHAPTER II
OBJECTS SUSCEPTIBLE OF PROTECTION
Article 3. It is recognized as traditional dresses of indigenous communities, those used by the communities of Kuna, Ngobe and Bugle, Embera and Wounaan, Naso and Bre-bre, such as:
1. Dule Mor. It consists in the combined use of the garment by which the Kuna men and women identify the culture, history and representation of their community. Morsen, Saburedi, Olassu and Wini constitute this.
2. Jio. It consists in the combined use of the garment by which the Emberas and the Wounaán men and women identify the culture, history and representation of their community. The women use Ua (Paruma), Boró Barí, Dyidi Dyidi, Kondita, Neta, Parata Kerá, Manía, Soritja Kipará (Jagua), Karichí (achiote), and Kera Patura. The men use the same garments with exception of the Paruma, and also use earflap, breast strap, Amburá and Andiá.

3. Nahua. It consists in the garment by which the Ngobes and Buglés identify the culture, history and representation of their community. This dress is of a single piece. It is wide and it covers half of the leg; it is made with plain cloths of attractive colors, decorated with geometric applications of the cloths of contrasting colors and it includes a wide necklace made with chaquiras. The technical description of these traditional dresses will be contained in their respective registrations.
Article 4. The collective rights of the indigenous communities are recognized on their

musical instruments, music, dances or form of performance, oral and written expressions contained in their traditions that constitutes their historical, cosmological and cultural expression.

The application for registration of these collective rights shall be filed by the respective general congresses or indigenous traditional authorities, before the General Office for the Registry of the Industrial Property of the Ministry of the Commerce and Industry here in after referred to as DIGERPI or before the National Copyright Office of the Ministry of Education, depending on the case, for its approval and registration.

Article 5. The collective rights of the indigenous communities are recognized on their work instruments and traditional art, as well as the technique for making them, expressed in the national basic materials, through the elements of the nature, their method of process, elaboration, combination of natural dyes, such as the carved tagua (ivory plant) and wood (cocobolo and nazareno), traditional baskets, nuchus, chaquiras, chacaras and any other cultural expression of traditional aspects of these communities.

The registration of these rights shall be requested by the general congresses or indigenous traditional authorities before the offices mentioned in the previous article.

Article 6. Registrable objects susceptible of protection, as this Law determines to protect their originality and authenticity, are deemed to be collective rights.

CHAPTER III

REGISTRATION OF COLLECTIVE RIGHTS

Article 7. The department of Collective Rights and Folkloric Expressions shall be created within DIGERPI, through which will be granted, among others, the registration of the collective rights of the indigenous communities.

This registration shall be requested by the general congresses or indigenous traditional authorities in order to protect their dresses, arts, music and any other traditional rights susceptible of protection.

The registrations of the collective rights of the indigenous communities will not expire, neither will have duration. The procedure before DIGERPI will not require the service of a lawyer and it is exempt of any payment. The administrative appeals against this registration shall be notified personally to the representative of the general congresses or indigenous traditional authorities.

Article 8. The provisions on collective marks and guarantees contained in the Law 35 of 1996 will be applicable to the present regime, as long as they do not harm the rights recognized in the present Law.

Article 9. DIGERPI will create a position of examiner on indigenous collective rights, for the protection of the intellectual property and other traditional rights of the indigenous communities. This public officer will have the power to examine all the applications that are filed before DIGERPI related with the collective rights of the indigenous communities, so the registration will not be granted against this law.

CHAPTER IV

PROMOTION OF THE INDIGENOUS ARTS AND CULTURAL EXPRESSIONS

Article 10. The arts, the craftsmanship, the dresses and other forms of cultural expression of the indigenous community, will be object of promotion and development by General Office for the Registry of the Industrial Property of the Ministry of the Commerce and Industry.

The General Directorate of National Craftsmanship or the Provincial Directorate of the mentioned Ministry, with awareness of the local indigenous authorities and by the request of interest party, will seal, print or stamp, without any cost, a certification in the artistic work, dress, craft or other protected forms of industrial property or copyright, in which shows that it has been elaborated by means of the traditional indigenous procedures and or by indigenous hands. For this purpose, the Directorate that issues the certificate is authorized to inspect the

workshops, materials, finished products and procedures used.
Article 11. The Ministry of Commerce and Industry shall do the necessary task in order to assure the participation of the indigenous craftsmen in the national and international fairs and to expose their handcrafts. The General Directorate of National Craftsmanship will do the required to carry out the celebration of the indigenous artisan's day with the sponsor of this Ministry.
Article 12. In the national and international presentations of the Panamanian indigenous culture, the exhibition of their dresses, dances and traditions will be mandatory.
Articles 13. The Ministry of Education shall include in the school curriculum contents related to the indigenous artistic expressions, as integral part of the national culture.
Article 14. The public institutions vested with legal power are authorized to disclose and to promote, in agreement with the general congresses and indigenous traditional authorities, the history, customs, values and artistic and traditional expressions (including the garments) of the indigenous communities, as integral part of the national culture.
The exhibition and sale of indigenous crafts elaborated by students shall be allowed in the school fairs for the benefit of their school center.
CHAPTER V
RIGHTS OF USE AND COMMERCIALIZATION
Article 15. The rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, must be governed by the regulation of each indigenous communities, approved and registered in DIGERPI or in the National Copyright Office of the Ministry of Education, according to the case.
Article 16. The folkloric dance groups that perform artistic presentations in the national and international level will be exempt of the compliance of the previous article. However, the natural or legal person that organizes artistic presentations to stand out the indigenous culture, whole or in part, he (she) shall include members of this communities for this performance. If the recruiting of these is not possible, the authorization of the respective general congress or indigenous traditional authority is required, in order to preserve its authenticity. The National Institute of Culture will look after for the compliance of this obligation.
CHAPTER VI
PROHIBITIONS AND SANCTIONS
Article 17. The literal j is added to the article 439 of the Fiscal Code, amending as follow:
Article 439. Foreign goods originating from all countries can be imported except the following:
j. The non-original products, recorded, embroidered, weave or any other articles that imitate, in whole or partly, the making of the traditional dresses of the indigenous communities, as well as musical instruments and traditional artistic works of these communities.
Article 18. The numeral 7 is added to the article 16 of the Law 30 of 1984, amending as follow:
Article 16. The following acts constitute the crime of smuggling:

7. The possession of not expressed, neither declared, neither authorized transitory goods, under the custom regulation, of the not original products that imitate in whole of partly, the traditional dresses of the Panamanian indigenous communities, as well as the materials and musical instruments and artistic or handmade works of these communities.
Article 19. An additional paragraph is added to the article 55 of the Law 30 of 1984, amending as follow:
Article 55. ...
When it is concerned with custom crimes of goods that imitate products belonging to the Panamanian indigenous communities, from fifty percent (50%) of the fine, not transferable to

the informer and accusers mentioned in this article, fifty percent (50%) will be destined for the benefit of the National Treasure, and the other fifty percent (50%) will be dedicated to cover the investment expenses of the respective indigenous community or district, according to the procedures that establishes the law.

Article 20. The industrial reproduction, either total or partial, of the traditional dresses and other collective rights recognized in this Law, is forbidden, unless it is authorized by the Ministry of Commerce and Industry, with the previous and express consent of the general congresses and indigenous council, and if it is not against the provision established hereon.

Article 21. In the cases not contemplated in the custom legislation and in that of industrial property, the infringement of this Law will be sanctioned, depending on the seriousness of the act, with the fine of a thousand dollars ($ 1,000.00) to five thousand dollars (B/.5,000.00). In the repeating event, the fine will be double of the previous quantity. The sanctions established hereon will be applied in addition to the forfeiture and destruction of the products in violation of this law.

The fifty percent (50%) of the imposed fine according to this article will be assigned for the benefit of the National Treasure and the other fifty percent (50%) will be dedicate to cover the investment expenses of the districts or correspondent indigenous communities.

Article 22. The following authorities are vested with the legal power to persecute the offenders of this Law, to take preventive measures on the respective products and goods, and to forward them to the corresponding appointed public officers:

1. The regional governor or the county governor, in case the first one does not exist.
2. The general congress of the corresponding district. For such effects, the traditional authorities will be able to request the cooperation and the support of the Public Force.

Article 23. The small non-indigenous artisans that dedicates to the manufacture, productions and sale of the reproduction of crafts belonging to indigenous Ngobes and Buglés that reside in the districts of Tolé, Remedios, San Félix and San Lorenzo of the Province of Chiriqui are exempt of this law. These small non-indigenous artisans will be able to manufacture and to market these reproductions, but they will not be able to claim the collective rights recognized by this Law to the indigenous group.

CHAPTER VII

FINAL PROVISIONS

Article 24. At the day in force of the present law, the small not indigenous artisans who dedicate to the elaboration, reproduction and sale of traditional indigenous crafts registered in the General Office of National Craftsmanship, will be able to carry out this activities, with the awareness of the indigenous traditional authorities.

The Ministry of Commerce and Industry, previous verification of the registration date and issuance of license, will issue the permits and respective authorizations. However, the Panamanian non-indigenous artisans shall affix, print, write or identify in easily visible way that the product is a reproduction, as well as its origin place.

Article 25. For the effects of the protection, use and marketing of the intellectual property collective rights of the indigenous communities contained in this Law, the artistic and traditional expressions of other countries will have the same benefits set forth in hereon, whenever they are made by means of reciprocal international agreements with these countries.

Article 26. This Law will be regulated by the Executive Branch through the Ministry of Commerce and Industry.

Article 27. The present Law adds to the Law 30 of November 8 of 1984, the number 7 to the article 16 and a paragraph to the article 55, as well as the literal j to the article 439 of the Fiscal Code, and it abolishes any disposition contrary to this law.

Article 28. This Law shall enter into force from its promulgation.

LET IT BE KNOWN AND EXECUTED,
Approved in third debate, in the Justo Arosemena Palace, City of Panama, on the fifteen days of the month of May of the year two thousand.

President The General Secretary

ENRIQUE AROSEMENA JOSÉ GOMEZ NUÑEZ
NATIONAL EXECUTIVE BRANCH - PRESIDENCY OF THE REPUBLIC. -
PANAMA, REPUBLIC OF PANAMA, JUNE 26TH, 2000.

MIREYA MOSCOSO JOAQUIN JACOME TEN
President of the Republic Minister of Commerce and Industry

MINISTRY OF TRADE AND INDUSTRIES
EXECUTIVE DECREE NO. 12
(of March 20, 2001)

"Regulating Law No. 20 of June 26, 2000, on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and Enacting Other Provisions."
THE PRESIDENT OF THE REPUBLIC
In exercise of her constitutional and legal powers
CONSIDERING:
That Law No. 20 of June 26, 2000, has as its purpose the protection of the collective intellectual property rights and the traditional knowledge of indigenous peoples embodied in their creations, such as inventions, models, designs and drawings, innovations contained in images, figures, graphic symbols, petroglyphs and other material, and also the cultural elements of their history, music, art and traditional artistic expressions susceptible of commercial use, which is to be done through a special system of registration, promotion and marketing of their rights in such a way as to give prominence to the indigenous socio-cultural values and do them social justice;
That, by virtue of the regulatory power conferred upon it by Article 26 by Law No. 20 of June 26, 2000, published in Gaceta Oficial No. 24,083 of June 27, 2000, the Executive, acting through the Ministry of Commerce and Industries, has to regulate Law No. 20 of June 26, 2000, for the better implementation thereof without departing in any case from either its text or its spirit;
That the Executive, acting through the Ministry of Commerce and Industries, following consultation with the sectors connected with the promotion, production and marketing of the arts and handicraft, and also with the holders of indigenous traditional knowledge and especially with the indigenous authorities, 2000, has directed that such Regulations be adopted by this Executive Decree with a view to facilitating the procedures and formalities for the protection and defense of the collective rights, cultural identity and traditional knowledge of indigenous peoples,
Decrees as follows:
CHAPTER 1
PURPOSE
Article 1. The purpose of this Decree is to regulate the protection of the collective intellectual property rights and the traditional knowledge of indigenous peoples embodied in their creations, such as inventions, models, designs and drawings, innovations contained in images, figures, graphic symbols, petroglyphs and other material, and also the cultural elements of

their history, music, art and traditional artistic expressions, as well as other provisions contained in Law No. 20 of June 26, 2000.
Article 2. For the purposes of this Decree, the following definitions apply:
(i) “Law” means Law 20 of June 26, 2000.
(ii) “Intellectual property” means the right that creators and owners have in the products of their intellect, which, on being recognized by the Law, prohibit third parties from availing themselves thereof without the owner’s consent.
(iii) “Traditional knowledge” means the collective knowledge of an indigenous people based on the traditions of centuries, and indeed millennia, which are at once tangible and intangible expressions encompassing their science, technology and cultural manifestations, including their genetic resources, medicines and seeds, their knowledge of the properties of fauna and flora, oral traditions, designs and visual and representative arts.
(iv) “Cosmovision” means the conception that indigenous peoples have, both collectively and individually, of the physical and spiritual world and the environment in which they conduct their lives.
(v) “Collective indigenous rights” means the indigenous cultural and intellectual property rights relating to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people.
(vi) “MICI” means the Ministry of Commerce and Industries.
(vii) “DIGERPI” means the Directorate General of the Industrial Property Registry.
(viii) “Copyright” means the intellectual protection of the rights of authors in their literary, educational, scientific or artistic works, regardless of type, medium of expression, merit or purpose thereof.
(ix) “Collective intellectual property registration” means the exclusive right granted by the State, by virtue of an administrative instrument, to prohibit third parties from the exploitation of collective rights deriving from traditional knowledge or an expression of folklore, the effects and limitations of which shall be determined by the law and this Decree.
(x) “General congresses or traditional authorities” constitutes State recognition of the existence of general congresses or traditional authorities as agencies of maximum expression, decision, consultation and administration adopted by indigenous peoples in accordance with their traditions and the Law Creating the Indigenous Districts and Their Organizational Charter, subject to the safeguards written into the Constitution and laws of the Republic.
(xi) “Representative” means the person or persons designated by the general congress(es) or the traditional authority (authorities) for the management of the registration of collective rights.
(xii) “Rules of use” means the rules that specify the characteristics common to traditional knowledge and subject matter eligible for registration as intellectual property. They are the substantiation of the traditional character of a collective right and its implementation in relation to indigenous peoples.
(xiii) “License contract” means the right of the indigenous people or peoples to grant third parties, by written contract, a registered collective right to the use of knowledge.
(xiv) “Replicas” means reproductions of original object where their similarity in some way evokes traditional and autochtonous objects, including copies of an artistic work.
(xv) “Royalties” means pecuniary rights, exclusive privileges of economic character or grants.
(xvi) “Council of Elders” means the assembly or decision-making body of the Naso people.
(xvii) “Industrial reproduction” means, for the purpose of the implementation of the Law, the production of goods by virtue of a collective right that is registered under and/or covered by the Law, and also the procedures engaged in by virtue of the collective rights of the

indigenous people or peoples. Third-party use of registered collective rights for commercial, industrial and scientific purposes, shall be appropriate when it has been authorized by MICI with the express prior consent of the general congresses, traditional authorities or Councils of Elders, as the case may be.

(xviii) “Cognitive processes” means knowledge acquired over time through observation of and experimentation with the environment in which man conducts his existence. It is a specific, special, rich knowledge derived from the relationship of man and nature and also from the need to dominate the environment.

CHAPTER II

SUBJECT MATTER ELIGIBLE FOR PROTECTION

Article 3. DIGERPI shall classify subject matter eligible for protection in accordance with the rules of use of indigenous collective rights submitted by the general congress(es) or traditional authority (authorities), which subject matter shall be that described in Article 3, 4 and 5 of the Law and those that are specified below:

(1) Paruma: wa (in the Emberá tongue) h apkajúa (in the Wounaan tongue): this is a clothing article worn round the hips by native Emberá and Wounaan women which consists of a measured amount of palm bark fabric (previously rubber-tree bark), soaked and crushed, or of the textile material currently used.

(2) Olua’a: oval rings or hoops that Kuna women use as clothing accessories (earrings).

(3) Orbirid: pectoral garments made of several sections joined by links to a size sufficient to cover the entire chest of the native Kuna woman. Chest protectors.

(4) Nuchu: carving in balsa wood (Ochroma limonensis), used in religious and cultural ceremonies by Kuna natives. Anthropomorphic figure.

(5) Chaquira: Muñon-Kus (in Ngöbe), Crade (in Buglé): necklace of two or more rows produced by threading small colored beads to produce abstract designs. Neckwear used by Ngöbe and Buglé natives.

(6) Wigo: necklace made of small multicolored beads, used as an article of clothing by native Ngöbe and Buglé women.

(7) Canoa/Cayuco/Piragua, Jap (in Wounaan), Jambá (in Emberá): small boat made of a single tree trunk and propelled by oars or sails; mode of transport used at sea or on rivers by Panamanian natives and rural communities.

(8) Cra: purses or bags woven with threads made of various fibers, decorated with traditional designs and patterns and used in various ways by the Ngöbe and Bugle people.

(9) Canalete or Remo, döi (in Wounaan), Dobi (in Emberá): a paddle made of wood and used by natives and rural people to propel a small boat.

(10) Pikiu (in Wounaan), pikiw’a (in Emberá): basket made of reeds by Emberá and Wounaan natives).

(11) Dicha ardi: hostelry, cabin or hut of the Wounaan native.

(12) Medicine stick or baton of rank: Barra (in Emberá) Papörmie (in Wounaan): zoomorphic and anthropomorphic figures carved in wood, forming part of ritual accoutrement.

(13) Hajua (in Wounaan), Antia (in Emberá) or Wuayuco: article of clothing used by natives of Emberá and Wounaan culture. Loincloth or cache-sexe consisting of a narrow strip of cloth secured by a cord (p’ösié) and worn round the hips. The raw material is derived from a palm called ferju by the natives.

(14) Mola (Morra in Kuna); a women’s blouse; application of a small decorative piece to a larger piece of fabric with working on the back. A combination of fabrics of many different, striking colors. The technique used is derived from the craft of embroidery (or appliqué). These are hand-made by native Kuna women, and they consist of one or more layers of fabric cut and sewn together in such a way that the color of each of the lower layers shows through. The designs on a Mola are based on cosmovision, while others merely use a geometric shape.

(15) Jiw’a (in Emberá), Hosig di (in Wounaan); chunga basket: small basket made of the tender leaves of the Astrocaryum standleranum palm (or chunga). The tresses are sown together; they may be white or colored, forming a design. The Emberá make masks from this fiber.
(16) Jirak: basket woven from stems of the Jirak bush, made by Wounaan natives.
(17) Kigá: thread or fiber from the Acchmean mafdalenae plant, extracted by means of a non-industrial process and used by the Ngöbe natives to make bags.
(18) Kuas (in Wounaan), Jumpe (in Emberá), Pescao Uacuco: name of one of the many baskets made by Emberá and Wounaan natives.
(19) Küchuur (in Wounaan), sweeping basket: funnel-shaped basket, closed at one end, made by Emberá and Wounaan natives.
(20) Turpas: native Kuna name given to the hanging part of the breasts.
(21) Wini: bead necklaces serving as bracelets and anklets, used by native Kuna women as clothing accessories.
(22) Meudau ó Pat’eenb (in Wounaan), N’edau (in Emberá): pieces carved in the wood of the cocobolo (Delbergia d. retusa) by Emberá and Wounaan natives. The designs carved on the articles are based on flora and fauna and human manifestations.
(23) H^rp: baskets manufactured by Wounaan natives, woven from the fibers of the reed of the same name.
(24) Jagua: K’ipaar (in Wounaan), Kipar’a (in Emberá): after a handicraft process, the black dye obtained from the fruit of the Genipa americana tree is used as a body paint and to dye the fibers of baskets and the ivory nut articles of Panamanian natives.
(25) Nimim (in Emberá), Titiimie (in Wounaan): black dye used by natives for basketwork and ivory nut objects. It is obtained from the Arrabidea chica reed by means of a craft process.
(26) Nukuata: plant-based cloth manufactured by the Ngöbe natives for making clothes. It is obtained from the bark of the rubber tree (Castilla elástica).
(27) Chir Chir (in Wounaan), Cha (in Emberá): earrings made of silver.
(28) Choo K’ier (in Wounaan): arrows made by Emberá and Wounaan natives.
(29) Choo p’o (in Wounaan), Enedruma (in Emberá): bow (throwing weapon used by Emberá and Wounaan natives).
(30) Hik’oo (in Wounaan), M’ania (in Emberá): bracelets of conical shape made of silver, worn on both hands by Emberá and Wounaan natives.
(31) H^r rsir: flute: musical instrument used by Wounaan natives in their religious ceremonies.
(32) Hesapdau: writing, Wounaan alphabet.
(33) Jait: tool used by the Wounaan for making dugout canoes or pirogues.
(34) Orejer (in Wounaan). Orej’era (in Emberá): oval-shaped silver earrings used by Emberá and Wounaan natives.
(35) Sortik (in Wounaan). Sort’ia (in Emberá): ring made of silver, copper or ivory palm seeds.
(36) Pör sir: type of crown made of gold or another precious metal by Wounaan natives. Used by men who exercise ancestral authority.
(37) T’ur (in Wounaan), Zokó (in Emberá): large vessel of white clay in which Emberá and Wounaan natives keep their alcoholic and other beverages and water. Also used for cooking.
(38) Teerjú: bed made of the bark of a palm. This raw material undergoes initial processing, and is used thereafter as a bed by the Wounaan native.
(39) Taudau: figures carved in ivory palm seeds (Phytelephas seemannii), a craft that distinguishes the Wounaan carver.
(40) Pazadö (in Wounaan), Miaz’u (in Emberá): type of spear used by Emberá and Wounaan

natives for hunting.
(41) P’en sir: toy for Wounaan boys. Type of rattle.
(42) Pörk’au (in Wounaan), Antougué (in Emberá): Type of bench made of a single tree trunk. Used as a seat or headrest by natives.
(43) Nangún: one-piece garment made of variously colored fabrics with traditional applications and designs, used by Ngöbe and Buglé women.
(44) Drü: musical instrument used by the Ngöbe and Buglé people in their ritual activities and traditional entertainments. It is made of material extracted from the vegetation available locally.
(45) Ka: traditional Ngöbe and Buglé songs used to enliven celebrations, rituals and other activities.
(46) Picheer (in Wounaan): chest protecting garment, made by mixing glass beads with silver.
(47) Tamburr (in Wounaan), T’ono’a (in Wounaan): drum.
(48) P’ip’an (in Wounaan): three-holed flute.
(49) T’okeemie (in Wounaan), Chir’u (in Emberá): set of minor flutes.
(50) H^rrsir (in Wounaan). Pi’pano (in Emberá): major flute.
(51) Haguaserit: music of the Wounaan natives.
(52) K’ari chipar: Wounaan dances.
(53) J^di (in Wounaan): sharpening stone.
(54) U’gu (in Emberá), Patt’ër (in Wounaan): blowpipe: reed or tube for firing darts or arrows. Hunting implement whose manufacture involves the cutting of chunga leaves.
(55) Döt’ur (in Wounaan): pitcher.
(56) Dear a d’e (in Emberá): traditional Emberá house made of wood and local vegetation.
(57) Jirab’a (in Emberá): Indian hammock made of lianas, known by the natives as a pinuguilla.
(58) J’ue por’o (in Emberá), Terjú (in Wounaan): sleeping mat (Esterilla) made by Emberá and Wounaan natives from the bark of the rubber tree.
(59) Ch’a: arrow made of white cane. Weapon for hunting, propelled with a bow by Emberá natives.
(60) Jegui: dance of the Ngöbe and Buglé natives.
(61) Ja Togo Ju Dogwobta: rhythm of a Ngöbe and Buglé song. Song of Mantarraya.
(62) Noro Tregue (squeezing the flutes): opening song to initiate a dance of the Ngobé and Buglé native peoples.
(63) Noro: flute: musical instrument used by the Ngobé and Buglé natives.
(64) Balsería: a sport of the Ngobé and Buglé natives. Practiced on festive occasions.
(65) Amb’ura (in Emberá). P’öcie Cam (in Wounaan): necklace-type ornament worn on the hips by men of the Emberá and Wounaan peoples. Made of beads.
(66) Ne’: drawing and artistic skills of the Emberá people.
(67) K’arl: dance. Spiritual performance of the Emberá people.
(68) K’achir’u: bamboo shell used by the medicine men of the Emberá people in their curing ritual.
(69) Boro b’ari: crown made of gold and silver. Used by Emberá women.
(70) K’ewasoso: a craft process that makes use of a local climbing plant and produces a blue dye, which the Emberá and Wounaan use for their baskets and ivory palm work.
(71) J’orop’o: baskets whose manufacture involves the use of the bark and fruit of the “nawala.” Indigenous craft of the Emberá and Wounaan peoples.
(72) Nek’a (in Emberá): Basket made by the Emberá and Wounaan natives out of fibers of the chunga leaf (Astrocaryum standleranum) and the “nawala.” Characterized by the variegated colors and designs used by the artisans in making them.
(73) Jebdop (in Wounaan): Clay bowl made by Wounaan and Emberá natives.

(74) Sip’inpa (in Wounaan): fishing rod of the Emberá and Wounaan natives.
(75) Pir: works wrought in gold and silver by the Wounaan people. Rings.
(76) Som Dau (in Wounaan): necklaces of beads worn by native Emberá and Wounaan women.
(77) Pa j^g Dee (in Wounaan): perfume extracted from plants.
Article 4. Applications for the registration of collective native rights may be filed with the traditional native authorities where the applicant indigenous community does not have a general congress.
Article 5. Objects eligible for protection may come from two or more indigenous communities, but registration with DIGERPI shall be the responsibility of the congress(es) or traditional native authority (authorities), as the case may be, which meets or meet the prescribed requirements.
Sole Paragraph: The traditional knowledge of indigenous peoples consists of creations shared by the members of several communities, and the benefits are construed as accruing to all of them collectively.
CHAPTER III
REGISTRATION OF COLLECTIVE RIGHTS
Article 6. The application for registration of collective rights shall specify the following:
- that a collective right is involved;
- that it belongs to one of the indigenous peoples of the country;
- the technique used (in the case of an object);
- history (tradition) and brief description; this shall be accompanied by the agreement (or record) constituting the application for registration of the collective right with the departments designated by the Law. The application shall be supported by the inclusion of a copy of the rules of use of the indigenous collective right.
Article 7. The rules of use of the collective right shall be drawn up on a form which shall be manufactured by the Registry, and with which the following particulars and material shall be enclosed:
(i) the indigenous people or peoples applying for registration of their traditional knowledge or of an object eligible for registration;
(ii) the general congress(es) or traditional native authority (authorities) filing the application for registration;
(iii) the indigenous collective right filed for registration; it should be identified by its name and content in the native language, with a literal translation in Spanish;
(iv) the use or uses that are made of the traditional knowledge or of the object qualifying for protection;
(v) the history (tradition) of the collective right;
(vi) the dependent communities and population benefited;
(vii) a specimen of the traditional object qualifying for registration.
Article 8. The registration authorities designated by the Law shall satisfy themselves, within a period of 30 days of the filing of the application, that it contains all the submissions required under the foregoing Article. Where any required particular or document has been omitted, the general congress(es) or traditional native authority (authorities), hereinafter referred to as “the representative,” of the indigenous people or peoples that have applied for registration shall be informed accordingly, in order that the filing may be completed within a period not exceeding six months following the filing of the application. Following that date they shall file a new application with the documentation in question. Where the submissions required have been made and verified by the authorized national agencies, registration of the collective right applied for shall proceed.
Article 9. The indigenous representative shall file with the Registries authorized by the Law

the application for registration of the collective right in respect of each of the objects or all of the traditional knowledge eligible for registration.
Article 10. Appeals against such registration shall be notified in person to the representatives of the collective rights in the manner laid down in Article 7 of the Law, once publication has taken place in the Official Bulletin of Industrial Property (BOPI).
Article 11. Registration of the collective rights in an object or in traditional knowledge shall not affect the traditional exchange of the object or knowledge in question between indigenous peoples.
Article 12. Access to the register of collective rights shall be public, with the exception of the experiments and cognitive processes conducted by the indigenous peoples and the traditional production techniques or methods used.
Nevertheless, registries may publicize statistics and cultural data of interest to educational centers, culture researchers and communal custodians of culture, trade and industry.
Article 13. For the purposes of Article 7 of the Law, and in order to facilitate the registration of the collective rights of indigenous peoples, DIGERPI may send officials from the Department of Collective Rights and Expressions of Folklore to the indigenous communities with a view to gathering the information necessary for the prosecution of such applications for registration as they may wish to file.
Article 14. The Department of Collective Rights and Expressions of Folklore created by the Law shall have the following general objective: to coordinate, develop, guide and register, in a general manner, the work of protecting the collective rights of the holders of traditional knowledge and expressions of folklore.
To that end it shall perform the following functions among others:
(a) examination of applications filed for the registration of collective indigenous rights and expressions of folklore;
(b) creation of a manual and an automated archive of traditional knowledge and expressions of folklore, with preference being given to the country, which shall contain registrations (the information permitted by the rules), data, publications, oral transmissions, the practice of traditions and other elements;
(c) creation of a standardized typology of collective rights and expressions of folklore;
(d) monitoring of compliance with existing laws relating to the protection of collective intellectual property rights in traditional knowledge and expressions of folklore, and promotion of the enactment of new laws on the subject;
(e) promotion of the program of intellectual property protection for collective rights and expressions of folklore;
(f) technical support and training in the field of the intellectual property protection of traditional knowledge and expressions of folklore for the peoples in possession of such knowledge and expressions;
(g) coordination with domestic and international organizations and agencies concerned with conducting programs for the intellectual property protection of traditional knowledge and expressions of folklore;
(h) close cooperation between our country and others with a view to ensuring, at the international level, the benefits of the pecuniary rights deriving from the registration of the collective rights in traditional knowledge and expressions of folklore of the peoples and the holders of such knowledge and expressions.
CHAPTER IV
PROMOTION OF INDIGENOUS ART AND EXPRESSION OF CULTURE
Article 15. For the purposes of Article 10 of the Law, which provides for the development and promotion of traditional indigenous art, handicraft and clothing, those concepts are provided for in Law 27 of July 30, 1997 “Establishing the Protection, Promotion and

Development of Handicraft.” With regard to the other cultural expressions of indigenous peoples, and specifically the certification issued by the Directorate General of Handicraft or the Provincial Directorates of MICI, with the consent of the indigenous authorities, recourse shall be had to the advice and assistance of the National Directorate of Historical Heritage of the National Institute of Culture (INAC), authorized by Law No. 14 of May 5, 1982 Enacting Measures on the Custody, Conservation and Administration of the Historical Heritage of the Nation.

The certification of the artistic work, garment, craft work or other subject matter protected by industrial property shall be issued by the Directorate General of National Handicraft (DGAN) of the Ministry of Commerce and Industry (MICI) and shall attest that the subject matter is:

(i) a work of indigenous traditional art or handicraft;

(ii) handmade by natives.

CHAPTER V

RIGHTS OF USE AND MARKETING

Article 16. For the purposes of Article 15 of the Law, the rules of use of each indigenous people shall be submitted to the authorized Registries together with the filing of the application for registration of collective rights in respect of each of the objects and all of the traditional knowledge eligible for protection.

CHAPTER VI

PROHIBITIONS AND SANCTIONS

Article 17. For the purposes of Article 20 of the Law, the Ministry of Commerce and Industry, with the express prior consent of the general congresses, traditional authorities and councils, shall authorize industrial reproduction, either total or partial, under the registered collective rights. That authorization shall be issued by the Directorate General of National Handicraft of MICI, responsible for the promotion and development of handicraft, after the Registries authorized by law have studied and analyzed the submissions by the owners of the registration, which, in addition to the express consent and the application itself, the following documentation:

(a) a record of the agreement or express authorization of the congress, indigenous authority or, failing that, the indigenous council that is holding the registered traditional indigenous knowledge, which shall specify that the use of the collective rights shall be licensed to third parties by contract;

(b) a copy of the license contract for use of the registered collective rights;

(c) the identity of the representative(s) of the congress(es) or indigenous authority (authorities) of the indigenous community (communities) holding the registered traditional knowledge or expression of folklore, who have signed the contract;

(d) the identity of the other parties to the contract and of their representatives;

(e) the use that is to be made of the traditional knowledge or expression of folklore.

Article 18. A license contract for the use of collective rights shall be registered only where the following requirements have been met:

(a) identification of the parties;

(b) description of the registered collective rights to which the contract relates;

(c) specification of the royalties that the indigenous peoples will receive for the use of the collective rights; those royalties shall include an initial payment or some form of immediate, direct compensation to the indigenous peoples, and a percentage of the value of the sales resulting from the marketing of products developed on the basis of the said collective rights;

(d) provision of sufficient information on the purposes, risks and implications of the activity concerned, the periods of use, including possible uses of the collective rights, and the value thereof where applicable;

(e) the obligation on the licensee to give a periodical account to the licensor, in general terms,

on the progress made in research and industrialization and the marketing of the goods developed on the basis of the licensed collective rights; where the contract contains a reserved rights obligation, that fact shall be expressly stated.
Article 19. License contracts for use shall be entered in a register kept for the purpose by DIGERPI.
Article 20. The Registry shall satisfy itself, within a period of 30 days from the filing of the application, that the said application embodies all the data and documents specified in Article 17 of the relevant legislation. Where an omission has occurred, the person applying for the registration shall be informed so that the application may be completed within a period of six months, subject to a warning that otherwise it shall be considered abandoned.
Article 21. The license for the use of the collective rights of an indigenous people shall not prevent that people from continuing to use it in the indigenous communities that possess the traditional knowledge, neither shall it affect the right of present and future generations to continue to use it and develop it on the basis of the collective knowledge. The license likewise shall not prevent other peoples that hold the same registered collective rights, but have not signed the contract, from licensing them.
Article 22. Sublicensing may only take place with the authorization of MICI and the express prior consent of the owner or owners of the registered collective rights who meet the requirements prescribed in Article 1 of the Regulations.
Article 23. The Registries shall, ex officio at the request of one of the parties to the contract, cancel the license for the use of collective rights, after the parties concerned have been heard, where:
(a) it has been granted in violation of any of the provisions of this enactment;
(b) it has been granted on the basis of false or inaccurate data contained in the application which are essential.
Article 24. The request for cancellation of a registration shall specify or submit, as the case may be, the following:
(a) identity of the party requesting cancellation;
(b) identity of the representative;
(c) registration of the collective rights of which the cancellation is requested;
(d) a statement of the grounds for the action;
(e) evidence proving the reasons submitted for the cancellation;
(f) domicile of the representatives;
(g) copy of the instrument or agreement by which the congress or indigenous authority or Council of Elders has revoked the license contract for use.
Article 25. The file shall be submitted for settlement within a period of 30 days.
Article 26. For the purposes of Article 23 of the Law, artisans who are not natives of Tolé, Remedios, San Félix and San Lorenzo in the province of Chiriquí who devote themselves to the production of replicas of traditional indigenous handicraft shall carry an artisan’s identity card issued by the Directorate General of Handicraft of MICI, and shall in addition print, write, fix or otherwise identify on every work or product, clearly and in a visible place, the place of origin, as provided in Articles 18, 19 and 20 of Law No. 27 of July 30, 1997.
CHAPTER VII
FINAL PROVISIONS
Article 27. MICI, acting through the Directorate General of Handicraft, shall issue permits and authorizations to non-indigenous artisans who are registered and hold the artisan’s identity card and devote themselves to the development and production of replicas of traditional indigenous handicraft at the time of the entry into force of the Law. To that end the Directorate General of National Handicraft shall send the list of authorized artisans to the congresses, Councils of Elders or traditional indigenous authorities.

Article 28. This Decree shall enter into force on its promulgation.
The foregoing shall be published and implemented.
JOAQUIN E. JACOME DIEZ MIREYA MOSCOSO
Minister of Commerce and Industry President of the Republic

五、菲律賓社群智慧財產保護法

資料來源 http://www.grain.org/brl/?docid=767&lawid=1469
Community Intellectual Rights Protection Act - CIRPA
Philippines (2001, draft)
WELFTH CONGRESS OF THE REPUBLIC OF THE PHILIPPINES First Regular Session
S E N A T E - S. NO. 101
Introduced by Senator Flavier
EXPLANATORY NOTE
The objective of this bill as its main title indicates is to provide for a system of community intellectual rights protection of local and indigenous cultural communities with respect to the development of genetic resources and the conservation of the country's biological diversity. The bill explicitly concedes that biodiversity has been and should remain the commons of local communities with both resources and knowledge being freely exchanged among different communities who are also users of the innovation.
The existing legal framework for intellectual property rights (IPR) in the country today recognizes only the dominant industrial model of innovation. It has failed to recognize the more informal, communal system of innovation through which farmers and indigenous communities produce, select, improve, and breed a diversity of crop and livestock varieties – a process which takes place over a long period of time. The existing IPR framework effectively sidesteps the traditional knowledge of indigenous communities even if it is widely acknowledged that without the input of indigenous knowledge, many products used extensively throughout the modern world would not exist today.
For example, a World Health Organization bulletin reports that of the 120 active compounds currently isolated from the higher plants and widely used in medicine today, 74% show a positive correlation between their modern therapeutic use and the traditional use of the plant from which they were derived.
Dr. Vandana Shiva of the New Delhi-based Research Foundation for Science, Technology and Natural Resources Policy captures the unfortunate circumstances besetting local innovations best when she said in a recent article that "centuries of innovation in the Third World are totally (being) devalued to give monopoly rights to plant material to transnational corporations who make minor modifications compared to the evolutionary changes that mature and Third World farmers have made."

This bill therefore seeks to re-define innovations to recognize both the collective and cumulative intellectual right of the country's cultural communities over the same innovations. In addition, the bill's definition of innovation recognizes such indigenous knowledge howsoever recorded, whether formally or informally (oral, anecdotal, etc.). This is in consideration of the fact that many indigenous communities in the country do not have a written tradition or culture.
This proposed measure likewise seeks to complement and realize one of the more important provisions embodied in the international Biodiversity Convention, which the Philippines

ratified during the last Congress, pertaining to the “equitable sharing of (the) benefits” arising from the utilization of the knowledge, innovations, and practices of indigenous and local communities. The bill’s provisions towards this end are meant to emphasize the non-monopolistic facet of community innovations.
To overcome the difficulty of defining local communities, communities can register as an organization which will have a legal personality with rights similar to any other legal entity. But it is also emphasized that failure to register does not alter the fact that the community concerned is and will remain the custodian of the innovation.
These and the other provisions of this proposed measure are intended to attenuate and prevent the assault against our country’s genetic resources by major multinational companies (especially those working in the areas of drugs and agriculture) and their home governments. Its central thesis aims to overthrow the long-standing paradigms embodied in such international institutions as the World Trade Organization (WTO) –- formerly the GATT --, and the Food and Agriculture Organization (FAO) which recognize genetic resources as a “universal heritage” in order to guarantee free access for the First World commercial interests to the raw materials of the South.
Thus the “common heritage principle” is being abandoned in favor of “sovereignty over natural resources” as enshrined in the Biodiversity Convention.
Approval of this bill is therefore earnestly requested.

[signed]
JUAN M. FLAVIER
Senator

TWELFTH CONGRESS OF THE REPUBLIC)
OF THE PHILIPPINES)
First Regular Session)

S E N A T E
S. NO. 101
Introduced by Senator Flavier
AN ACT PROVIDING FOR THE ESTABLISHMENT OF A SYSTEM OF COMMUNITY INTELLECTUAL RIGHTS PROTECTION

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. Title. – This Act shall be known as the “Community Intellectual Rights Protection Act” or CIRPA.
SEC. 2. Declaration of Policies –
(a) State Recognition of Traditional Knowledge. - The State recognizes the original rights of indigenous peoples and local communities over plant and genetic resources, traditional medicines, agricultural methods and local technologies they have discovered and developed. As such; these communities shall become the general owners, with primary and residuary title to: (i) the formal or informal communal systems of innovation through which they produce, select, improve and breed a diversity of crop and livestock varieties; and (ii) the plant varieties, genetic resources, traditional medicines, agricultural practices and devices, and technologies produced through these systems.
(b) Registration as a Form of Intellectual Property Protection. - It shall be the policy of the State to document and make a systematic inventory of plant and genetic resources and

knowledge originating from indigenous and local communities, and from all other sectors without the usual access to journals of the scientific, business and academic communities, especially those who do not have a written traditional knowledge, while distinct and separate from the awarding of patents, shall become a basis for proprietary ownership.
(c) Community Ownership of Traditional Knowledge – All benefits arising from the knowledge and innovations by indigenous and local communities should accrue to their development and welfare and should therefore be equitably shared. Any commercial utilization of such knowledge and innovations should be made only with the free and informed consent of its general owners or custodians under terms mutually agreed upon. The State shall also strive to protect and encourage the customary use of biological resources in accordance with traditional cultural practices which are compatible and which promote conservation and sustainable use.
SEC. 3. Definition of Terms. – As used in and for purposes of this Act, the following terms shall mean:
a) Biological diversity – refers to the wide and rich variety of species and plants and animals, their genetic material, and the ecosystems of which they are part.
b) Biological resources – includes all species of plants and animals and other organisms, their genetic material and any other biotic component of ecosystems with actual or potential use for humanity.
c) Commercial utilization – occurs when any process or product is made available for sale with profits in the market.
d) Community process – knowledge produced through a community process are those whose discovery or development could not be ascribed to a single individual or juridical person, and/or which resulted from the contributions of different groups or generations.
e) Ex-situ conservation or use – means the conservation or use of genetic resources outside of their natural habitats. For example, gene banks and botanical gardens hold ex-situ (or off-site) collections. In-situ means on-site conservation or use.
f) Farmer – refers to all those engaged in the cultivation of crops living within the territory of the Philippines. A farmer-innovator means: i) an individual who has provided or was the source of parent strains used in the development of a new plant variety; ii) the local community which has helped to conserve and develop the genetic stocks which have gone into the pedigree of a new variety; or iii) the residents of an area rich in plant genetic resources from where breeders or breeding institutions responsible for the new variety have obtained donors of genes for resistance / tolerance / avoidance to biotic and/ or abiotic stress or other valuable characters.
g) Gene bank – refers to a temperature- and humidity-controlled facility used to store seed (or other reproductive materials) for future use in research and breeding programs. Also called a seed bank.
h) Germplasm – means the total genetic variability, represented by germ cells or seeds, available to a particular population of organisms.
i) Indigenous peoples or indigenous groups or cultural communities – refers to a group of people sharing common bonds of language, customs, traditions and other distinctive traits, and who have, since time immemorial, occupied, possessed, and utililized a territory except when such possession is either prevented or interrupted by war, force majeure, displacement or force, deceit or stealth, or other usurpation.
j) Innovation – refers to the process or products derived from such processes, whether documented in written, recorded, or oral form, which constitute an introduction of new changes, including alteration, modifications, or improvements.
k) Plant variety – includes cultivar, clone, folk variety hybrid and strain.
l) Reproductive material – in relation to a plant will mean a) the sexual seed of a plant; b) a

cutting from a plant; or c) any other part or product of that plant from which another plant can be produced by different technologies including tissue culture methods.
m) Sustainable use – means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biodiversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.
n) Traditional method – are discoveries, innovations and technologies made by indigenous peoples and local communities that are usually not recorded in written form, and are transmitted orally from generation to generation. Indigenous knowledge forms part of traditional knowledge, and refers to knowledge distinct to indigenous peoples. Both terms may be used interchangeably.
SEC. 4. Community Intellectual Property – the following are hereby declared as the intellectual property of their communities of origin, and these communities shall at al times and in all perpetuity be the lawfully recognized holders of the primary and residuary title to these property:
a) parent strains and genetic material discovered or selected and conserved by local communities, which were used in the development of new plant varieties, and which can be harnessed for other potential uses;
b) seeds and reproductive material selected, cultivated, domesticated and developed by local communities in situ;
c) agricultural practices and devices developed from indigenous material, customs, and knowledge;
d) medicinal products and processes developed from the identification, selection, cultivation, preparation, storage and application of medicinal herbs by local communities and indigenous peoples;
e) cultural products form local communities, such as weaving patterns, pottery, painting, poetry, folklore, music, and the like;
f) all other products or processes not made by a single person or juridical personality, which was discovered through a community process, or when the individual making the innovation does not claim the knowledge as his own, provided, that any individual or juridical personality making such a claim should present proof of innovation or a history leading to the discovery that would justify his claim.
SEC. 5. Community Ownership of Intellectual Property – A Community is any group of people living in a geographically defined area with a common history and definitive patterns of relationship. It may be registered with the appropriate government agency as a tribal council, foundation, cooperative, people’s organization, or any other form of organization that would effectively represent its interests, provided that their failure to do so shall not prejudice its status as custodians or stewards of this traditional knowledge, as provided for in Section 4 of this Act.
A community shall automatically become the general owners of any form or product of traditional knowledge, once this is entered in any of the registers provided for in Section 6 of this Act. As general owners, they are entitled to collect a justifiable percentage from all profits derived from the commercial use of their knowledge, for a period of ten years starting from the date of registration.
All benefits shall be given directly to the organization that effectively represents the community’s interests. In the absence of such an organization, the benefits will be held in trust by the State and will be released only by legislation enacted in favor of the community.
SEC. 6. Registration of Community Intellectual Property. – In consultation with the concerned local communities, academic experts, and non-government organizations, the State shall take the initiative in providing technical and other related forms of assistance in the documentation, identification, and characterization of community intellectual property. The

State shall also promote rules whereby non-government organizations can extend similar assistance to local communities.
All identified and documented community intellectual property shall be entered by the concerned agencies of government in the following registers:
a) For Plant Varieties, and Other Plant Reproductive Materials: The National Commission on Plant Genetic Resources, which is created through Section 7 of this Act shall keep and update a National Inventory of Plant Varieties, which is composed of different Regional Registers of Plant Varieties maintained by the Commission.
b) For Cultural Products and Heritage: The National Museum shall keep and maintain a National Register of Indigenous Cultural Heritage.
c) For Inventions, Industrial Designs and Utility Models: Republic Act 165 and the Rules and Procedure of the Technology Transfer Registry under DTI Administrative Order 6, series of 1992 is hereby amended to include as a function of the Bureau of patents, Trademarks, and Technology Transfer (BPTTT), the maintenance and updating of a National Register of Indigenous Inventions, Designs and Utility Models, which will include agricultural practices and devices developed from indigenous material, customs, and knowledge as well as medicinal products and processes developed from the identification, selection, cultivation, preparation, storage, and application of medicinal herbs by local communities and indigenous peoples. All other products and processes which become community intellectual property not covered by the National Inventory of Plant Varieties or the National Register of Indigenous Cultural Heritage shall be the jurisdiction of the BPTTT.
SEC. 7. The National Commission on Plant Genetic Resources. – The National Commission on Plant Genetic Resources, hereinafter referred to as the commission, is hereby created under the Office of the President to keep an updated National Inventory of Plant Varieties in pursuit of a mandate to record and recognize the contributions of local communities and indigenous peoples to the development and discovery of new plant varieties, and to provide for the protection of Philippine plant genetic resources from unfair and inequitable exploitation.
SEC. 8. Composition of the Commission. – The commission shall be composed of nine commissioners, one of which shall be appointed as Chairperson by the President. The Chairperson must be an eminent agriculturist with expertise in the fields of crop improvement, seed science and technology, and genetic resources conservation and management. S/he shall be in charge of administering procedures giving recognition and protection of genetic resources in the country as provided for in this Act.
Aside from the Chairperson, the Commission shall also be composed of the following:
a) a representative of the Secretary of the Department of Science and Technology, who must be knowledgeable about biodiversity and biotechnology;
b) a representative of the Secretary of the Department of Agriculture, who must be knowledgeable about biodiversity and / or biotechnology;
c) a representative of the Secretary of Health who must be knowledgeable about pharmaceutical research and development;
d) a representative of the Secretary of the Department of Trade and Industry who must be knowledgeable about patent laws and intellectual property;
e) a representative from the non-government organization sector active in the protection of biological diversity to be selected by the NGO’s themselves through a process designed by them;
f) a representative from the farmers’ sector active in the promotion of farmers’ rights selected through a process designed by the said sector; and
g) two representatives from people’s organizations or tribal councils with a membership consisting of indigenous cultural communities and/or their organizations, selected by the

aforementioned groups through a process designed by them.
SEC. 9. Implementing Rules and Regulations. – After the lapse of ninety (90) days from the approval of this Act, the Commission shall be convened to draft the implementing rules and regulations that will ensure the enforcement and implementation of the provisions of the Act. The Implementing Rules and Regulations shall cover the creation or organization of the Regional Registers of Plant Varieties in every region of the country, and Genetic Resources Centers suitable for the storage and maintenance of germplasm material, the recognition of Community Gene Bank organized under non-government auspices, Genetic Identity Centers competent to establish the novel and inventive nature of varieties submitted for recognition and protection under this Act, and an autonomous Trust to administer a Community Gene Fund, deriving its funds from the contributions coming from national and international institutions and others interested in strengthening genetic conservation by local communities.
SEC. 10. Separability Clause. – If any of the provisions of this Act is held or declared to be unconstitutional or invalid by a competent court, the other provisions hereof not so declared shall continue to be in force as if the provision as annulled or voided had never been incorporated in this Act.
Sec. 11. Repealing and Amending Clause. – All laws, executive orders, presidential decrees, rules and regulations or parts hereof which are inconsistent with any of the provisions of this Act are hereby repealed or amended accordingly.
Sec. 12. Effectivity Clause. – This Act shall take effect after thirty (30) days following its publication in two (2) newspapers of general circulation in the Philippines.
Approved,

六、太平洋區域保護傳統生態知識、創新及實施模範法

資料來源 http://www.grain.org/brl/?country=Pacific+Forum

MODEL LAW FOR THE PROTECTION OF TRADITIONAL ECOLOGICAL KNOWLEDGE, INNOVATIONS AND PRACTICES

ANALYSIS

TRADITIONAL ECOLOGICAL KNOWLEDGE, INNOVATIONS AND PRACTICES ACT 200X

An Act to prevent unauthorised use of traditional ecological knowledge, innovations, and practices and to ensure equitable sharing of benefits derived from the use of such knowledge, innovations and practices.

1. Article 8(j) of the Convention on Biological Diversity (CBD) uses the phrase "knowledge, innovations and practices" which is adopted by this Act.

2. A distinction is made between "commercial" and "non-commercial" use; see sections 10 and 11.

3. The Act encompasses not only knowledge, but also products (ie, innovations) and practices based on that knowledge. In this regard it differs from the proposed Peruvian regime which focuses only on knowledge.

1 Short title
This Act may be cited as the Traditional Ecological Knowledge, Innovations and Practices Act 200X.

2 Interpretation
In this Act unless the context otherwise requires:

"**commercial use**" occurs when traditional ecological knowledge, or an innovation or practice, becomes the subject of a commercial transaction;

"Commercial transaction" is a deliberately wide term and covers transactions such as sales, leases, licenses, mortgages, conditional sales, etc.

"**entity**" means a national government or the Regional Coordinator in their capacity as trustees;

"**group**" means a number of people belonging to a Pacific island having a long standing social organisation that binds them together whether in a defined area or in any other manner and includes a village, community or family;

"**innovation**" means biological material - defined as any part, including the genes, of a plant, animal or microorganism - rendered of any or of enhanced use or value through the application of traditional ecological knowledge;

The focus of the Act is not only plants (eg, kava, nonu, etc) but includes animals and microorganisms. The Act, though modelled along the lines of the Third World Network "Community Intellectual Rights Act" 1994, is therefore broader inasmuch as the focus of the latter is solely plant varieties.

The term "rendered" refers to the transformation of raw material by human intervention.

"**own**" means to belong - as this word is understood according to the culture or rules of the relevant individual, entity or group - to that individual, entity or group and "owner"

"owned" and "ownership" have corresponding meanings;

The term "own", depending on the cultural context, can signify not only total control, but different forms of control such as trusteeship, custodianship, stewardship etc.

"**practice**" means a generations-old process, method or way of doing things, gained over generations of living in close contact with nature;

"**Regional Coordinator**" means a regional body or an individual position to be designated or established by the governments of the South Pacific;

"**traditional ecological knowledge**" means generations-old knowledge whether embodied in tangible form or not, gained over generations of living in close contact with nature regarding:
- living things, their constituent parts, their life cycles, behaviour and functions, their effects on and interactions with other living things (including humans) and with their physical environment;
- the physical environment including water, soils, corals, weather, solar and lunar effects, processes and cycles;
- the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life.

3 Application

(1) This Act applies to traditional ecological knowledge whether in the public domain or not.

(2) The extent to which the Act should be applied to the public domain will depend upon an assessment of the following factors:

(a) whether there was an intention by the owner to share the knowledge, and if so the purpose for sharing;
(b) whether permission was given to publicise or disseminate the knowledge;
(c) whether the owner knew that the knowledge might be used for commercial ends;
(d) whether the owner understood that sharing the knowledge with outsiders would result in a loss of control over its subsequent use;
(e) the extent to which unauthorised use of the knowledge may undermine the spiritual and cultural integrity of the owners.

1. The public domain refers to literary, music and artistic works on which copyright has expired or never existed. Accordingly it represents a valuable pool of knowledge which can be used by anyone without restriction or the need to compensate. Despite this there are instances where European, Japanese and US legislators have each found occasion to extend intellectual property protection to information in the public domain in order to secure protection over databases, architectural designs and publications, respectively (B. Tobin, 2000). In addition, the French concept of domaine public payant requires payment of royalties for the use of literary and musical works in the public domain (K. Puri, 2000).There are therefore precedents upon which rights may be attached to knowledge in the public domain.

2. The Act treats knowledge in the public domain (eg, recipes, cures, place names, methods of fishing navigation, boat building, house building, etc) as capable of being subject to ownership rights. While the Act establishes this new principle, in practice it

would not be desirable or practical to enforce owners' rights over this material at one time. It is suggested that a selective approach should be used, focusing on the most glaring examples of misappropriation and commercial abuse. The five factors listed are meant to guide this selection.

3. Section 10 makes it an offence to use knowledge (including knowledge in the public domain) unless prior informed consent has been given and an access and benefit-sharing agreement has been concluded.

(2) This Act applies to traditional ecological knowledge, innovations and practices existing before or after the commencement of this Act.

1. Retrospectivity is considered objectionable because existing rights and arrangements will be affected which may go back many years possibly involving substantial sums of money. It may provoke retaliatory legislation - every country has traditional ecological knowledge, innovations or practices obtained from another country - resulting in a myriad of claims and counter claims involving time-consuming tracing as to the origin of knowledge, innovations and practices as well as the circumstances of their subsequent transfer.

2. Nonetheless the Act will have retrospective effect regarding civil actions but not criminal offences.

3. Criminal offences, viz, sections 6 (bringing a false claim); 8 (contravention of moral rights); 10 (unauthorised use of knowledge, innovation or practice); and 11 (unauthorised use of knowledge, innovation or practice by a traditional individual, entity, or group), cannot result in criminally culpable conduct in jurisdictions such as Samoa whose Constitution provides at Article 10(2) that
"*No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence at the time when it was committed...*".
The same wording is also found in Article 37(7) of the Constitution of Papua New Guinea and is probably repeated in any Pacific island country that has a written Constitution with basic freedoms provisions.

3. Could subsection (2) be challenged as unconstitutional? For those countries with the constitutional provision discussed above, a challenge should be brought where subsection (2) has been mistakenly used to commence a criminal prosecution.

4. Some concession may however be made for acts or negotiations that are in progress and legal at the time the law is about to come into force but become an offence once the Act enters into force. A period of grace may be granted allowing those that have been caught out to take steps to comply with the law.

5. No constitutional bar on retrospectivity exists as regards civil proceedings hence civil claims can be brought against pre-Act infringements including, it is submitted, for infringements against new rights created under the Act such as the "moral rights" in section 8(1)(c)-(f).

(3) This Act shall come into force on the day it is assented to by the relevant body.

4 Act to bind government
This Act binds the government.

This means that the government must comply with the Act and agrees to waive any immunity it may have from prosecution (particularly relevant for countries where the Queen of England is the Head of State). Government civil liability will normally be governed by a Government Proceedings Act or similarly named law.

5 All traditional ecological knowledge, innovations and practices owned
(1) All traditional ecological knowledge, innovations and practices are owned in perpetuity by:

The fundamental principle is that all traditional ecological knowledge, innovations and practices are owned, so foreclosing any argument that these things may be ownerless.

(a) a group or an individual; or

The literature on traditional knowledge acknowledges that an individual can own knowledge, not merely as trustee on behalf of others, but outright. By extension this would apply to innovations and practices. The Model Law mirrors this.

In contrast, “The Protection of Traditional Knowledge and Expressions of Culture Act 2001” by Kamal Puri is based on the group as being the owner and not the individual, except insofar as the individual represents the group. That Act would therefore not apply to an individual that owned knowledge.

(b) where competing claims exist as to ownership or where a claim is challenged, until such time as the claims are resolved, either the national government as trustee on behalf of the claimants where the claimants are from a single country, or the Regional Coordinator as trustee on behalf of the claimants where they are from different countries; or
(c) where it is not known who the owner is but the knowledge, innovation or practice originates from a single country, by the national government as trustee on behalf of that country; or where the knowledge, innovation or practice is shown to originate from more than one country, by the Regional Coordinator as trustee on behalf of those countries.

A trust instrument will set out the terms of the trust: its purpose, holding and distribution of funds, beneficiaries, duties of trustees etc. Trustee duties will include safeguarding the knowledge, innovations or practices by legal action where necessary, and to exercise the rights as well as to discharge the responsibilities associated with such knowledge, innovations or practices.

(2) Claims occurring within a single country are to be resolved according to a procedure to be specified by the national government concerned and where more than one country is involved, according to a procedure to be specified by the Regional Coordinator.

1. From the national perspective, either the regular court system can be used, or a special purpose tribunal established to attempt conciliation or failing this, arbitration.

2. The task of the Regional Coordinator may simply be to establish rules as to which

country will be selected to as having jurisdiction to hear the dispute.

6 Proof of ownership

(1) Upon a claimant declaring or acknowledging in a form or manner valid by its customs or practices that it has been using and is the owner of traditional ecological knowledge, an innovation or a practice, and providing proof of such usage, the claimant shall be considered to be the owner of such knowledge, innovation or practice.

(2) Any claimant who brings a wrongful, speculative, frivolous or vexatious claim commits an offence and is liable upon conviction to a fine not exceeding $5,000.00.

The offence provision is needed to deter individuals from bringing spurious or false claims.

Who will bring the prosecution? A prosecution is almost always commenced by the Police through the laying of an information or charge. Citizens can also lay an information but this is rare. Government departments may prosecute an offence in a subordinate court under an Act it administers, eg, the Labour Department under an infringement of the Labour Act in the Magistrates Court. If however the offence falls within the jurisdiction of the principal court, the Department will need to seek assistance from qualified lawyers from the Government Legal Office. In terms of resources and consistency of practice it would be preferable that the Department administering this Act brings the prosecution.

7 Co-ownership

(1) Nothing in this Act shall prevent any other claimant, wherever situated, from claiming ownership of traditional ecological knowledge, an innovation or a practice, and where such claim satisfies section 6, the claimant shall be deemed to be a co-owner.

A co-owner may be from the same community albeit located on the other side of a common border or from a totally different community which has independently developed that knowledge, innovation or practice.

Trustees (ie, national governments or the Regional Coordinator) may become co-owners, for example, in the situation of multiple co-owners, where one owner is known but the others are not.

(2) All benefits that accrue to one co-owner from the knowledge, innovation or practice shall be held in trust for the benefit of the other co-owner or co-owners.

(3) All rights and responsibilities attaching to the knowledge, innovation or practice are equally those of all co-owners.

(4) The relationship between co-owners is to be governed by rules to be prepared by the Regional Coordinator.

The rules should extend to a section 11 use, where one co-owner wants to share the knowledge, innovation or practice with an individual or group but the other co-owners refuse.

8 Nature of ownership right

(1) The ownership right over knowledge, an innovation or a practice:

(a) is inalienable and non-transferable and is in addition to any other rights available under existing intellectual property laws but where there is an inconsistency with intellectual property laws, the intellectual property laws shall, to the extent of the inconsistency, be void;

Any attempt to alienate or transfer such right by contract will be void but does not amount to an offence.

(b) requires that as far as practicable an owner has its name associated with the traditional ecological knowledge, innovation or practice;

(c) requires that there is no false attribution of ownership to an item of knowledge, an innovation or a practice;

(d) includes a right of integrity of ownership requiring that the knowledge, innovation or practice is not subjected to any distortion, mutilation or other modification, or other derogatory action in relation to the work which would prejudice the honour or reputation of the owner.

The above features are drawn from "The Protection of Traditional Knowledge and Expressions of Culture Act 2001". Paragraphs (b) - (d) of subsection (1) are the so-called moral rights now found in Pacific copyright laws based on the WIPO Secretariat "Draft law on Copyright and neighbouring rights". To be effective, recognition of these rights should be included under an Access and Benefit Sharing agreement - see section 10(1)(b).

(2) Any person who without the prior informed consent of the owner uses knowledge, an innovation or a practice in a manner inconsistent with paragraphs (c) - (f) of subsection (1) commits an offence and is liable upon conviction to a term of imprisonment not exceeding 3 months.

(1) How effective is this provision against an offender that resides or has fled overseas?

Although this provision is in the nature of a criminal sanction, extradition of the offender will not be possible unless:

- there exists an extradition treaty between the two countries involved;
- within the treaty the offence needs to be referred to either explicitly or by reference to length of imprisonment (eg, not less than 12 months) - usually only the more serious offences are covered;
- the offence needs to be recognised as such in both countries.

In some jurisdictions however, judgment can be given in the accused's absence (eg, Vanuatu: Criminal Procedure Code, sections 34-36, 44; and Samoa: Criminal Procedure Act 1972, section 42) if the punishment is **a fine only, or a period of imprisonment of not more than 3 months**. Although this may seem small, the Act suggests "three months imprisonment" as the penalty (with the exception of section 5, where the offenders are more likely to be local and a fine alone is stipulated) because,

(a) although short, any term of imprisonment is serious;

(b) all companies or individuals want to project a good personal or corporate reputation and the bad publicity that a prosecution would generate would ruin this image;
(c) convictions can be brought against offenders even when they are overseas, thus tarnishing the offenders reputation, and when followed by a warrant of arrest, the damage to reputation is considerable;

On the other hand, a fine only has the advantage of being able to be adjusted to the circumstances of the offence and is more easily imposed than a term of imprisonment. A fine against an overseas offender still represents a moral victory and has the added advantage that an offender that has repented can still return to the country, pay the fine and begin things anew. This would not be the case where imprisonment awaits an offender.

9 Register of traditional ecological knowledge, innovations and practices
(1) An individual, entity or group may register its traditional ecological knowledge, innovations and practices in a national register, or where the knowledge, innovations or practices are or may be owned by 2 or more countries or by the Pacific region as a whole, in a regional register.

(2) Each national government in respect of a national register, and the Regional Coordinator in respect of a regional register, must put in place rules to establish and maintain a register and to provide for confidentiality.

(3) The fact of non-registration does not affect an individual's, entity's or group's ownership of its knowledge, innovations and practices.

A register has 3 principal roles:

- to serve as prima facie evidence of ownership of the thing registered;
- to serve as evidence of prior art, which might be used to challenge patent applications;
- to protect traditional knowledge, innovations or practices against continuing erosion and promote their revitalisation. (B.Tobin, 2000).

10 Commercial use
(1) Any person using or proposing to use traditional ecological knowledge, or an innovation or any part of such innovation, or a practice for commercial use must:
(a) seek the prior informed consent of the owner, where there is one, or co-owners where there are several, of the knowledge, innovation or practice; and
(b) enter into an access and benefit sharing agreement with the owner or co-owners.

1. Reference should be made to the work of SPREP, WWF (South Pacific) and FIELD in initiating ABS (access and benefit-sharing) policies and laws in several Pacific island countries. Workshops have already been held in Samoa, the Cook Islands and Vanuatu and a model ABS law exists which details the procedures and requirements that need to be met by a potential user. Although the model ABS law focuses on access to "genetic resources" this focus can be broadened to include access to "knowledge, innovations and practices" as they relate to genetic resources.

One of the terms of an ABS agreement should be recognition of moral rights as provided for in section 8(1)(b)-(d).

2. A register, once fully developed will help determine who all co-owners are. If they live in different countries the obligation on a prospective user may become somewhat onerous. For the time being, if an agreement is entered into with an owner, a clause can be included which covers the possibility of subsequent co-owners emerging and how to deal with the issues of their consent and sharing of benefits. This clause needs to be acceptable to all parties so that there is predictability and certainty for an owner or prospective user entering into a contract.

(2) Any person who uses any knowledge, innovation or practice in contravention of subsection (1) commits an offence and is liable upon conviction to a term of imprisonment not exceeding 3 months.

Civil proceedings are always available in addition to criminal prosecutions - see section 11. Some national laws make this explicit, eg, section 172 of Samoa's Criminal Procedure Act 1972 provides "No civil remedy for any act or omission shall be suspended by reason that such act or omission amounts to an offence".

The aim of civil proceedings might be to prevent continued non-compliance, to seek damages for wrongful use (conversion) of the knowledge, innovation or practice or alternatively to request that the monetary gain by the offender be surrendered to the owner (account of profits).

The owner (which in certain circumstances - see section 5 - may be the national government or the Regional Coordinator) of the traditional ecological knowledge, innovation or practice would bring a civil action. This is contrasted with the Department administering the Act, which would be expected to initiate criminal proceedings (see earlier discussion).

(3) Nothing in this section shall prevent more than one person from using any knowledge, innovation or practice for commercial use at the same or later time.

Exclusive use of knowledge, an innovation or a practice is nonetheless something that can be negotiated between the parties.

11 Non-commercial uses

(1) An owner or a co-owner, may in accordance with their customs and practices and such other conditions as they consider appropriate, allow use of their traditional ecological knowledge, innovations and practices by a group or an individual belonging to a group so long as such knowledge, innovations and practices are not acquired for or do not subsequently become the subject of commercial use.

1. If this section is breached, the owner should be prepared to take legal action and to that end might at the outset consider entering into a written contract with the recipient.

2. The possibility of the knowledge, innovation or practice being improved or serving as an inspiration for new knowledge or a new innovation to the recipient should be

addressed so that appropriate recognition including for example a right of co-ownership can be accorded to the original owner.

3. It is possible for an owner who is an individual to pass on knowledge, etc. to his own group (ie, family, village, community) and so the word “a” group is used rather than “another” group.

(2) The recipient of the knowledge, innovation or practice must not make it available to any other person without having first obtained the prior informed consent of the owner of such knowledge, innovation or practice.

(3) Any person who uses any knowledge, innovation or practice in contravention of this section commits an offence and is liable upon conviction to a term of imprisonment not exceeding 3 months.

As to rules as between co-owners, see comment on section 7(4).

12 Remedies and jurisdiction

(1) This Act does not affect any rights of action or other remedies, civil or criminal, whether brought under this Act or any other enactment or any rule of law.

(2) The Court shall have competence under its civil and criminal jurisdictions to determine matters whether brought under this Act or any other enactment or any rule of law, and may grant in addition to any other relief any one or more of the following:
(a) an account of profits;
(b) an order for a public apology;
(c) forfeiture of any tangible items of knowledge, innovation or practice or alternatively compensation for loss of any tangible item of knowledge, innovation or practice.

1. Damages (eg, for conversion and detinue) or an injunction (to restrain the infringement) are standard civil remedies.

2. The “Court” should be the principal rather than a subordinate court given that the range of civil remedies is widest in the principal court.

3. In a criminal matter, paragraphs (a) and (b) would not normally be applicable.

13 Offence by a company

Where a company commits an offence under this Act, any officer, director, employee or agent of the company who directed, authorised, assented to, or acquiesced in the commission of the offence is a party to and guilty of the offence, and is personally liable to the punishment provided for the offence, whether or not the company has been prosecuted or convicted.

Individuals can no longer hide behind the “corporate veil”.

14 Amendment to patent law

Patent law is to be amended by making changes to the following effect:
(a) An applicant for a patent, or a holder of an overseas patent seeking registration of that patent in this country, must provide clear evidence to the Patent Office that if the

invention for which a patent is being sought had used or was based upon traditional ecological knowledge, a traditional innovation or a traditional practice that the prior informed written consent of the owner was obtained, an arrangement had been made as to access and benefit-sharing, and the owner's permission was obtained to seek a patent. Lack of such evidence will result in rejection of the application.
(b) An existing patent is revocable if it is found to have used or been based upon traditional ecological knowledge, a traditional innovation or a traditional practice but had not satisfied the requirements of paragraph (a).

The real value of this section lies in its being made a requirement of overseas patent laws, as almost all inventors would file their patent applications overseas. Indeed there is currently a lobby for overseas patent laws to be so amended in order to assist source countries enforce their access and benefit-sharing laws.

Sections 14-17 are drawn and adapted from "The Protection of Traditional Knowledge and Expressions of Culture Act 2001" and is meant to provide consistency with that regime. No time limit is set for these amendments.

15 Amendment to copyright law
Copyright law is to be amended by:
(a) modifying the law to ensure the continuing freedom of owners to exercise their customary rights in the use of traditional ecological knowledge, innovations and practices;
(b) providing for the economic right known as *domaine public payant*, as adapted to traditional ecological knowledge, innovations and practices in the public domain.

Domaine public payant requires payment of royalties for the use of literary and musical works in the public domain.

16 Amendments to geographical indications, appellations of origin and trade marks laws
(1) Geographical indications, appellations of origin and trade marks laws are to be amended by disallowing an application for registration of a geographical indication, appellation of origin or trade mark for products of an individual, entity or group which manifests goodwill or a reputation created or built up over a long period of time unless there has been prior informed written consent from the owner and a benefit sharing arrangement has been entered into.

(2) Trade marks law is to be amended by:
(a) prohibiting registration of traditional words, names, designs, sounds, scents and symbols as trade marks unless the owner has given prior informed written consent and a benefit sharing arrangement has been entered into.
(b) empowering the Trade Marks Office to refuse registration of trade marks that may be culturally offensive;
(c) allowing individuals, entities or groups who are culturally aggrieved to oppose a trade mark application and to have standing to petition for removal of an existing trade mark from the trade mark register.

17 Amendment to designs law
Designs law is to be amended by empowering the Designs Office to refuse registration of

cultural designs unless the owner has given prior informed written consent and a benefit sharing arrangement has been entered into.

18 Regulations

(1) The national government may from time to time make such regulations as shall be necessary or expedient for giving full effect to the provisions of this Act and for its due administration.

(2) Without limiting the generality of subsection (1), regulations may be made:
(a) prescribing procedures and requirements for the establishment and maintenance of a register and rules of confidentiality;
(b) prescribing a procedure for the resolution of disputes.

The Regional Coordinator also has power to make rules for the due administration of this Act, see for example s5(2).and s7(4).

This Act is administered in the Department of...
Which office should administer this Act?

- a Department of Culture has expertise in traditional knowledge and may provide expert and impartial advice in ownership disputes;
- a Department of Environment has expertise on biological materials, Access and Benefit Sharing laws and the Convention on Biological Diversity;
- a Department of Justice looks after intellectual property matters, has experience with registers, and may facilitate dispute resolution through the Court system.