

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Twentieth Session
Geneva, February 14 to 22, 2012

REPORT ON THE IMPLEMENTATION OF CLUSTER C ACTIVITIES (“OPTIONS ON MUTUALLY AGREED TERMS FOR FAIR AND EQUITABLE BENEFIT-SHARING”)

Document prepared by the Secretariat

1. At its nineteenth session, held from July 18 to 22, 2011, and with reference to document WIPO/GRTKF/IC/19/7 (“Options for Future Work on Intellectual Property and Genetic Resources”), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) “requested the Secretariat to finalize, and update regularly as required, the activities referred to in Cluster C (‘Options on Mutually Agreed Terms for Fair and Equitable Benefit-Sharing’) and to provide information thereon to the Committee at each session.”¹

2. Pursuant to the decision above, the Annex to this document includes a report on the implementation of Cluster C activities.

3. *The Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

¹ Draft Report of the Nineteenth Session of the Committee (WIPO/GRTKF/IC/19/12 Prov.)

1. This document recalls each of the options in Cluster C (Options on intellectual property (IP) issues in mutually agreed terms for fair and equitable benefit-sharing), provides background information on them and describes the activities undertaken by the Secretariat so far in this regard.

C.1 Online database of IP clauses in mutually agreed terms on access and benefit-sharing (ABS)

Considering options for the expanded use, scope and accessibility of the online database of IP clauses in mutually agreed terms for access and equitable benefit-sharing. The contents of the online database could be published in additional, more easily accessible forms, such as on CD-ROM, for wider accessibility and easier use by all relevant stakeholders.

2. At its first session (April 2001), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) expressed support for the development of “contractual practices, guidelines, and model intellectual property clauses for contractual agreements on access to genetic resources and benefit-sharing, taking into account the specific nature and needs of different stakeholders, different genetic resources, and different transfers within different sectors of genetic resource policy.”¹

3. At its second session (December 2001), the Committee considered document WIPO/GRTKF/IC/2/3 (“Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing”) based upon existing contractual agreements.² That document proposed that the WIPO Secretariat undertake a systemic survey of actual contractual agreements, which might include a questionnaire to be sent to Committee Members and other stakeholders, as appropriate.³ A delegation suggested that results of the questionnaire be compiled into a database of IP contractual terms of access to genetic resources (GRs) and benefit-sharing⁴, which should display information about the legal context in which the IP contractual terms had operated.⁵ It further proposed that the database be linked with the CBD’s clearing house mechanism in order to maximize the usefulness and accessibility of this tool, which might also have capacity-building benefits.⁶ This proposal was supported by a number of delegations.⁷ Thus, it was agreed that “the Secretariat would prepare first the structure under which the proposed electronic database could be developed and submit it to the next session of the Committee for discussion. Only after that structure was approved, the Secretariat would begin to collect and organize the relevant data.”⁸

4. At its third session (June 2002), Committee Members were invited to comment on the structure of the electronic database proposed by the Secretariat (documents WIPO/GRTKF/IC/3/3 and WIPO/GRTKF/IC/3/4). The Committee expressed broad support both for the structure of the proposed database and the dissemination of the questionnaire.⁹ The Committee accordingly agreed on the establishment of the database of contractual practices concerning IP, access to GRs and benefit-sharing.

¹ See document WIPO/GRTKF/IC/1/13 (“Report”), para. 128; WIPO/GRTKF/IC/1/3 (“Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore – An Overview”) paras. 35 to 41, task A.1 under Agenda item 5.1

² See document WIPO/GRTKF/IC/2/3 (Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing), Annexed II list all 16 contractual agreements referred to in the document

³ See document WIPO/GRTKF/IC/2/3 (Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing), para. 133

⁴ See document WIPO/GRTKF/IC/2/12 (Proposal for the Compilation of Contractual Terms for Access to Genetic Resources and Benefit-Sharing and document) WIPO/GRTKF/IC/2/16 (Report), para. 68

⁵ See document WIPO/GRTKF/IC/2/16 (Report), para. 68

⁶ See document WIPO/GRTKF/IC/2/12 (Proposal for the Compilation of Contractual Terms for Access to Genetic Resources and Benefit-Sharing and document), para. 6 of Annex; document WIPO/GRTKF/IC/2/16 (Report), para. 68

⁷ See document WIPO/GRTKF/IC/2/12 (Proposal for the Compilation of Contractual Terms for Access to Genetic Resources and Benefit-Sharing and document), paras. 71, 73, 74, 75, 76, 77 and 83

⁸ See document WIPO/GRTKF/IC/2/16 (Report), para. 102

⁹ See document WIPO/GRTKG/IC/3/17 (Report), paras. 59 to 61

5. Following this decision, the Secretariat circulated a questionnaire to Member States and a wide range of stakeholders to secure information about relevant contracts and licenses. The Secretariat created a pilot database, incorporating responses to the questionnaire.¹⁰
6. At the fourth session (December 2002), the Secretariat reported on the questionnaire and the creation of the database (document WIPO/GRTKF/IC/4/10). The Committee approved “the proposed extension of time in which the Questionnaire (WIPO/GRTKF/IC/Q.2) may be disseminated and answered [..., and] the further development of the Contracts Database as a permanent, freely available resource for contracts concerning IP, access to genetic resources and benefit-sharing.”¹¹
7. At the fifth session (July 2003), the Secretariat reported on the updating of the Contracts Database to a more fully operational and comprehensive version (document WIPO/GRTKF/IC/5/9). Member States were invited to approve the maintenance, and updating, of the Contracts Database as a permanent, freely available resource for contracts concerning IP aspects of access to GRs and benefit-sharing, and to encourage contributions of contracts for the Database from a broader base of practical experience.¹² The Committee noted document WIPO/GRTKF/IC/5/9 and postponed discussion of it to a later date.¹³
8. For the eighth session (June 2005), document WIPO/GRTKF/IC/8/9 was prepared to provide general information on the Committee’s past activities relating to GRs and IP, and work in related fora. It covered “the three clusters of substantive questions which have been identified in the course of this work, namely technical matters concerning (a) defensive protection of genetic resources; (b) disclosure requirements in patent applications for information related to genetic resources used in the claimed invention; and (c) IP issues in mutually agreed terms for the fair and equitable sharing of benefits arising from the use of genetic resources.”¹⁴ This document also included various options for possible activities that could partially address the above-mentioned substantive issues. Option C.1 read as follows: “The contents of the Online Database could be published in additional, more easily accessible forms, such as on CD-ROM, for wider accessibility and easier use by all relevant stakeholders.”¹⁵
9. At its tenth session (November 2006), the Committee requested the Secretariat to prepare, for its consideration at its eleventh session (July 2007), a document listing options for continuing or further work, including work in the area of the IP aspects of access and benefit-sharing contracts.¹⁶
10. Document WIPO/GRTKF/IC/11/8(a) (“Genetic Resources: List of options”) identified options for continuing or further work on IP and GRs. Option VIII of the cover document read as follows: “Considering options for the expanded use, scope and accessibility of the Online Database of IP clauses in mutually agreed terms for access and equitable benefit-sharing”. In its Annex, under “Options for possible activities on IP and mutually agreed terms for fair and equitable benefit-sharing”, option C.1 read as follows: “The contents of the Online Database could be published in additional, more easily accessible forms, such as on CD-ROM, for wider accessibility and easier use by all relevant stakeholders.”¹⁷ At the eleventh session of the Committee, Member States discussed these options.¹⁸
11. Document WIPO/GRTKF/IC/11/8(a) was reissued as document WIPO/GRTKF/IC/12/8(a) and as document WIPO/GRTKF/IC/13/8(a) for the twelfth (February 2008) and thirteenth (October 2008)

¹⁰ See document WIPO/GRTKF/IC/4/10 (Report on Electronic Database of Contractual Practices and Clauses Relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing), para. 1

¹¹ See document WIPO/GRTKF/IC/4/15 (Report), para. 166

¹² See document WIPO/GRTKF/IC/5/9 (Contractual Practices and Clauses Relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing), para. 57(ii)

¹³ See document WIPO/GRTKF/IC/5/15 (Report), para. 121

¹⁴ See document WIPO/GRTKF/IC/8/9 (Overview of the Committee's Work on Genetic Resources), para.2

¹⁵ See document WIPO/GRTKF/IC/8/9 (Overview of the Committee's Work on Genetic Resources), para. 51

¹⁶ See document WIPO/GRTKF/IC/10/7 Prov. 2 (Report), para. 255

¹⁷ See document WIPO/GRTKF/IC/11/8(A) (Genetic Resources: List of Options), para. 3

¹⁸ See document WIPO/GRTKF/IC/11/15 (Report), paras. 513, 520, 522 and 539

sessions of the Committee. Member States discussed these options at the twelfth session of the Committee.¹⁹

12. A revised version of document WIPO/GRTKF/IC/11/8(a) was prepared and published as document WIPO/GRTKF/IC/16/6.²⁰ In its Annex, option C.1 read as follows: [Online Database of IP clauses in mutually agreed terms on ABS] “Considering options for the expanded use, scope and accessibility of the Online Database of IP clauses in mutually agreed terms for access and equitable benefit-sharing. The contents of the Online Database could be published in additional, more easily accessible forms, such as on CD-ROM, for wider accessibility and easier use by all relevant stakeholders.”

13. At the sixteenth session (May 2010) of the Committee, a delegation recommended that the Secretariat update the online database of IP clauses and mutually agreed terms (MAT) on ABS.²¹ After an exchange of views²², the Committee requested “the Secretariat to update the database of biodiversity-related access and benefit-sharing agreements currently online on the WIPO website and to report, in an information document, on such updating to the next session of the Committee.”²³

14. Pursuant to this decision, the Secretariat prepared questionnaire WIPO/GRTKF/IC/Q.6 (“Questionnaire on Contractual Practices and Clauses relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing”) to facilitate the updating exercise. No substantial amendments were made to the structure and content of the original questionnaire WIPO/GRTKF/IC/Q.2. This questionnaire focused especially on the clauses and provisions in those contracts that have a bearing on IP.²⁴

15. As indicated in document WIPO/GRTKF/IC/17/INF/11 (“Note on Updating of WIPO's Online Database of Biodiversity-Related Access and Benefit-Sharing Agreements”), the information received has been used to update the existing WIPO Database. This database is currently online on the WIPO website and hyperlinked to the web site of the Clearing House Mechanism (CHM) of the CBD. The information received has also contributed to providing practical experience and additional sample clauses for document WIPO/GRTKF/IC/17/INF/12 (“Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing: Updated Version”) as requested by the Committee at its sixteenth session. The questionnaire stays available for further responses at: <http://www.wipo.int/tk/en/databases/contracts/index.html>.²⁵ Member States discussed this option at the Third Intersessional Working Group (IWG 3) (February 2011), and the eighteenth (May 2011) and nineteenth (July 2011) sessions of the Committee.²⁶

¹⁹ See document WIPO/GRTKF/IC/12/9, paras. 231 and 237

²⁰ A revised version of document WIPO/GRTKF/IC/11/8(a) was prepared and published, as WIPO/GRTKF/IC/16/6 Prov., on January 22, 2010, and Committee participants were invited to provide written comments on that revised version before February 28, 2010. Document WIPO/GRTKF/IC/16/6 is the revised version of working document WIPO/GRTKF/IC/16/6 Prov., reflecting the written comments received thereon during this intersessional written commenting process pursuant to the above invitation.

²¹ See document WIPO/GRTKF/IC/16/8 Prov. 2 (Draft Report), para. 227

²² See document WIPO/GRTKF/IC/16/8 Prov. 2 (Draft Report), paras. 232, 234, 235 and 242

²³ See document WIPO/GRTKF/IC/16/8 Prov. 2 (Draft Report), para. 253

²⁴ See document WIPO/GRTKF/IC/17/INF/11 (Note on Updating of WIPO's Online Database of Biodiversity-Related Access and Benefit-Sharing Agreements), para. 14

²⁵ See document WIPO/GRTKF/IC/17/INF/11 (Note on Updating of WIPO's Online Database of Biodiversity-Related Access and Benefit-Sharing Agreements), para. 19

²⁶ See document WIPO/GRTKF/IC/18/10 (Report), para. 95; document WIPO/GRTKF/IC/18/11 (Report), paras. 344, 350 and 352; document WIPO/GRTKF/IC/19/12 Prov. (Report), paras. 405, 406 and 407

C.2 Draft guidelines for contractual practices

Considering options for stakeholder consultations on and further elaboration of the draft guidelines for contractual practices contained in the Annex of document WIPO/GRTKF/IC/7/9, updated in information document WIPO/GRTKF/IC/7/INF/12, based on the additional information available and included in the online database.

16. At the first session of the Committee (April 2001), it was proposed that “in order to provide a practical intellectual property contribution to these processes and fora, the Intergovernmental Committee may wish to consider the development of ‘guide contractual practices’, guidelines, and model intellectual property clauses for contractual agreements on access to genetic resources and benefit-sharing, taking into account the specific nature and needs of different stakeholders, different genetic resources, and different transfers within different sectors of genetic resource policy.”²⁷ This was supported and certain delegations attached the highest priority to that proposal.²⁸

17. Document WIPO/GRTKF/IC/2/3 (“Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing”) identified and offered for consideration a set of draft principles for the development of Guide Contractual Clauses.²⁹ This document also proposed a two-stage approach for the development of guide contractual practices, guidelines, and model IP clauses for contractual agreements on access to GRs and benefit-sharing, taking into account the specific nature and needs of different stakeholders, different GRs, and different transfers within different sectors of GRs policy. The first stage was to undertake a systematic survey of actual contractual agreements as above-mentioned, and the second stage was for the “principles identified [by the Committee to] be applied for the development of guide practices..., based on the existing practices and clauses.”³⁰ At its second session (December 2001), the Committee discussed those principles.³¹ The Chair concluded by stating that it appeared that the Committee had agreed with the two-step approach proposed for the further work by the Secretariat as included in paragraphs 131 to 134 of document WIPO/GRTKF/IC/2/3.³²

18. Document WIPO/GRTKF/IC/5/9 proposed that, on the basis of the empirical evidence provided in the Contracts Database, work should resume on the development of guidelines, best practices or other guidance, on the IP aspects of contracts and licenses concerning access to GRs and benefit-sharing.³³ At its fifth session (July 2003), the Committee noted this document and postponed its discussion to a later date.³⁴

²⁷ See document WIPO/GRTKF/IC/1/3 (Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - An Overview), para. 41

²⁸ See document WIPO/GRTKF/IC/1/13 (Report), para. 128

²⁹ See document WIPO/GRTKF/IC/2/3 (Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing), paras. 123-129: “Possible Principle 1: The IP-related rights and obligations set out in the Model IP clauses should recognize, promote and protect all forms of formal and informal human creativity and innovation, based on, or related to, the transferred genetic resources. Possible Principle 2: The IP-related rights and obligations set out in the Model IP Clauses should take into account sectorial characteristics of genetic resources and genetic resource policy objectives and frameworks. Possible Principle 3: The IP-related rights and obligations set out in the Model IP Clauses should ensure the full and effective participation of all relevant stakeholders and address process issues related to contract negotiation and the development of IP clauses for access and benefit-sharing agreements, including in particular traditional knowledge holders where traditional knowledge is covered by the agreement. Possible Principle 4: The IP-related rights and obligations set out in the Model IP Clauses should distinguish between different kinds of use of genetic resources, including commercial, noncommercial and customary uses.”

³⁰ See document WIPO/GRTKF/IC/2/3 (Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit-Sharing), paras. 131 to 134

³¹ See document WIPO/GRTKF/IC/6/5 (Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing), paras 13 to 19

³² See document WIPO/GRTKF/IC/2/16 (Report), para. 99

³³ See document WIPO/GRTK/IC/5/9 (Contractual Practices and Clauses Relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing), para. 2

³⁴ See document WIPO/GRTKF/IC/5/15 (Report), para. 121

19. As explained in the overview of document WIPO/GRTKF/IC/6/5 (“Draft Intellectual Property Guidelines for Access and Benefit-Sharing Contracts”): The Committee had completed the first stage of the two-step approach adopted by the Committee at its second session. The agreed second stage was for the “principles identified [by the Committee to] be applied for the development of guide practices ..., based on the existing practices and clauses”. Additionally, the CBD COP had since encouraged WIPO to “make rapid progress in the development of model intellectual property clauses which may be considered for inclusion in contractual agreements when mutually agreed terms are under negotiation.”³⁵ Accordingly, document WIPO/GRTKF/IC/6/5 was prepared to progress this second stage.

20. Document WIPO/GRTKF/IC/6/5 built on information gathered and principles agreed or identified in the previous sessions of the Committee, in order to advance the task of developing guide contractual practices. It applied those principles in the form of draft Guide Contractual Practices.³⁶ At the sixth session of the Committee (March 2004), Member States made comments on this document.³⁷ The Chair noted that some delegations had stated that they had not had sufficient time to study the document and had requested it to be discussed at the next meeting of the Committee, and also that questions had been raised on the priority to be given to the issue. At the proposal of the Chair, the Committee took note of the statements and the observations made and decided to invite further comments and input relating to the issue by June 30, 2004, whereupon a revised version of the document would be published for the next session of the Committee.³⁸

21. Pursuant to this decision, document WIPO/GRTKF/IC/7/9 (“Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing”) furthered the principles identified by the Committee Members which might be applied for the development of guide practices, based on the four principles considered at its second session.³⁹ The Committee was invited to note and comment upon the content of the document, the identified operational principles for the development of the Guide Contractual Practices, the possible distillation of model contractual provisions, and the annexed update to the draft Guide Contractual Practices, and to consider the options for future work including those identified in paragraphs 40 to 42 of the above referenced document.⁴⁰ At the seventh session of the Committee (November 2004), different views were expressed. A number of comments were made on the contents of document WIPO/GRTKF/IC/7/9

³⁵ See document WIPO/GRTKF/IC/6/5 (Genetic Resources: Draft Intellectual Property Guidelines for Access and Benefit-Sharing Contracts), para. 5

³⁶ See document WIPO/GRTKF/IC/6/5 (Genetic Resources: Draft Intellectual Property Guidelines for Access and Benefit-Sharing Contracts), para. 6

³⁷ See document WIPO/GRTKF/IC/6/14 (Report), paras. 112 to 136

³⁸ See document WIPO/GRTKF/IC/6/14 (Report), paras. 138 and 139

³⁹ See document WIPO/GRTKF/IC/7/9, para. 10

⁴⁰ See document WIPO/GRTKF/IC/7/9, paras 40 to 42: “IP aspects of contractual agreements for access to genetic resources and benefit-sharing have been a significant focus of the Committee’s work on IP and genetic resources. The present document builds on information gathered and principles agreed or identified in the first five sessions of the Committee, in order to advance the task of developing guide contractual practices. It applies those principles in the form of draft Guide Contractual Practices which are contained in the Annex to the present document. The next steps in the Committee’s work could be undertaken at three levels: developing the operational principles; developing model provisions such as those encouraged in the CBD COP decision; and, revising and further elaborating the draft Guide Contractual Practices. During its discussion at its seventh session, Committee Members may wish to comment further upon the operational principles already identified, with a view to developing them, and could comment on the first draft of the Guide Contractual Practices contained in the Annex of this document. On the basis of this discussion, a revised set of operational principles may be considered for future elaboration or adoption by the Committee. A further revision of the draft guidelines could be developed on the basis of further input received at the seventh session, as well as further comments, input and examples provided to the Secretariat before February 28, 2005. Such guidelines may be consistent with a more general framework for the Committee’s work, and could be produced without prejudice to the nature and legal status of the overall outcomes of the Committee. Some of the additional principles identified in earlier Committee discussions have not been addressed in the draft Guide Contractual Practices, because they may entail specific policy decisions or other developments. For example, the proposal that a ‘special tribunal be established to adjudicate issues surrounding contracts for access to genetic resources and benefit-sharing’ could be in part met by the development of tailormade alternative dispute resolution procedures, taking account of the specific nature of disputes concerning IP aspects of genetic resources. This could be in line with the proposal, tabled by the Asian Group and China, that ‘WIPO should study possibilities of offering alternative dispute resolution services, including but not limited to arbitration and mediation, which are particularly appropriate for the problems involving intellectual property issues related to traditional knowledge and folklore.’”

expressing support for the future work as proposed in paragraph 43 of the document.⁴¹ A number of delegations expressed strong opposition to the future work proposed in paragraph 43 of the document and to the contractual approach detailed in the document, and stated that this activity would inevitably detract from other work of the Committee, particularly considering the difficult financial situation of the organization. The Chair concluded at this session that there was no consensus on the future work of the Committee in this area and suggested that no decision be taken at this session but that the issue be kept on the agenda for the eighth session of the Committee.⁴²

22. Document WIPO/GRTKF/IC/8/9 provided an overview of the Committee's work on GRs, including its work on the Draft Guidelines. At its eighth session (June 2005), the Committee noted this document and other documents on the GRs agenda item, and "further took note of the diverse views expressed on this issue." The Committee also "requested the Secretariat to prepare for its consideration at its eleventh session: a document listing options for continuing or further work, including work in the areas of [...] the intellectual property aspects of access and benefit-sharing contracts."⁴³

23. Document WIPO/GRTKF/IC/11/8(a) ("Genetic Resources: List of options") identified options for continuing or further work on IP and GRs. Option IX of the cover document read as follows: "Considering options for stakeholder consultations on and further elaboration of the draft guidelines for contractual practices contained in the Annex of document WIPO/GRTKF/IC/7/9". In its Annex, under "Options for possible activities on IP and mutually agreed terms for fair and equitable benefit-sharing", option C.2 read as follows: "Based on the additional information available and included in the Database, the Committee might wish to consider to further develop the guide contractual practices contained the Annex of document WIPO/GRTKF/IC/7/9."⁴⁴ Member States discussed this option at the twelfth (February 2008) and thirteenth (October 2008) sessions of the Committee.⁴⁵

24. A revised version of document WIPO/GRTKF/IC/11/8(a) was prepared and published as document WIPO/GRTKF/IC/16/6. In its Annex, option C.2 read as follows: [Draft guidelines for contractual practices] "Considering options for stakeholder consultations on and further elaboration of the draft guidelines for contractual practices contained in the Annex of document WIPO/GRTKF/IC/7/9, based on the additional information available and included in the online database".

25. At its sixteenth session (May 2010), the Committee invited "the Secretariat to prepare and make available for the next session of the Committee, as an information document, an updated version of document WIPO/GRTKF/IC/7/9 ('Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing')."⁴⁶

26. Pursuant to this decision, document WIPO/GRTKF/IC/17/INF/12 ("Draft Intellectual Property Guidelines for Access and Benefit-Sharing Contracts: Updated Version") was prepared. The updated draft Guidelines incorporated various examples of actual and model contractual clauses contained in the WIPO database of sample contracts and received from Member States in response to questionnaires WIPO/GRTKF/IC/Q.2 and WIPO/GRTKF/IC/Q.6, showing how IP aspects of

⁴¹ Paragraph 43 states that "[t]he Intergovernmental Committee is invited to note and comment upon the content of this document, the identified operational principles for the development of the Guide Contractual Practices, the possible distillation of model contractual provisions, and the annexed update to the draft Guide Contractual Practices, and to consider the options for future work including those identified in paragraphs 40 to 42, above."

⁴² See WIPO/GRTKF/IC/7/15 (Report) para 201

⁴³ See WIPO/GRTKF/IC/10/7 Prov. 2 (Report), para. 255

⁴⁴ See WIPO/GRTKF/IC/5/9 (Contractual Practices and Clauses Relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing); WIPO/GRTKF/IC/6/5 (Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing); WIPO/GRTKF/IC/7/9 (Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing)

⁴⁵ See document WIPO/GRTKF/IC/12/9 (Report), paras. 235 and 237; and document WIPO/GRTKF/IC/13/11 (Report), para. 162

⁴⁶ See document WIPO/GRTKF/IC/16/8 Prov.2 (Report), para. 252

access to GRs and benefit-sharing had been addressed in existing agreements (See further under C.1 above).⁴⁷

C.3 Study on licensing practices on GRs

Compile information, possibly in the form of case studies, describing licensing practices in the field of genetic resources which extend the concepts of distributive innovation or open source from the copyright field, drawing on experiences such as the Global Public License and other similar experiences in the copyright field.

27. At the sixth session of the Committee (March 2004), the representative of the Consumer Project on Technology (CPTech) “referred to examples from the free software movement and the ‘GNU’ public license and the creative commons in the copyright field. People were now searching whether there could be an analogous model in the patenting field to bring a social mission to certain kinds of voluntary licensing agreements.”⁴⁸

28. Document WIPO/GRTKF/IC/8/9 included various options for possible activities that could partially address the abovementioned substantive issues. Option C.3 read as follows: “Compile information, possibly in the form of case studies, describing licensing practices in the field of genetic resources which extend the concepts of distributive innovation or open source from the copyright field, drawing on experiences such as the Global Public License and other similar experiences in the copyright field.”⁴⁹ At the eighth session of the Committee (June 2005), a delegation made comments on it.⁵⁰ The representative of CPTech “explained that the licensing strategy for software, developed by Richard Stallman and others, had led to an important and effective legal strategy for protecting community knowledge. The representative recommended preparation of a paper by the International Bureau that described the foregoing model, and report on its success in protecting the interests of the global community of software programmers.”⁵¹

29. At the ninth session of the Committee (April 2006), the representative of CPTech presented a proposal, which drew from the experience of the free software community, and had implications for a wider set of problems that concerned misappropriation, including important cases involving modern biomedical research. The report of that session recounts that he explained that the free software community was a community of persons who created software code, and who collaborated in software development, and also freely shared the code with others. They were confronted with a problem of misappropriation. Companies were taking code that was in the public domain, making changes, and creating new commercial versions that were protected by copyrights, trade secrets and patents. The community that created the initial code did not have access to the new products. The response by the free software community to that problem was interesting, because it was novel, controversial, and very successful. It was also very relevant to the WIPO discussions on the protection of TK. The free software community, led by Richard Stallman and the Free Software Foundation, created a new copyright licensing strategy, around the GNU General Public License (GPL).⁵² That license gave anyone the right to use GPL’d code, for any purpose, including for commercial purposes, at a zero royalty. In return, however, the user of the GPL’d code had to provide the free software community royalty free access to the new product, including the new source code. Moreover, the new product would also be protected by the GNU GPL license. The “reach through” or “viral” aspect of the GNU GPL was quite important and effective. In the beginning, according to the representative, the GPL was attacked as “communistic”, anti-capitalist, overly restrictive or impractical by a legion of critics. But over time, many software and computer companies began to see the GNU GPL as a very useful device to ensure that collaboratively created

⁴⁷ See document WIPO/GRTKF/IC/17/INF/12 (Draft Intellectual Property Guidelines for Access and Benefit-Sharing Contracts: Updated Version), para. 2

⁴⁸ See document WIPO/GRTKF/IC/6/14 (Report), para. 136

⁴⁹ See document WIPO/GRTKF/IC/8/9 (Overview of the Committee's Work on Genetic Resources), para. 51

⁵⁰ See document WIPO/GRTKF/IC/8/15 Prov. (Report), para. 170

⁵¹ See document WIPO/GRTKF/IC/8/15 Prov. (Report), para. 184

⁵² More information on the GNU General Public License is available at <http://www.gnu.org/copyleft/gpl.html>.

knowledge goods continued to be resources that were widely available. The representative of CPTech considered that the GNU GPL story was relevant to TK or GRs. The free software community was, in many respects, similar to a community that created TK. The difference was that the software programmers had an automatic IP right — copyright, which was easy to get (there were no formalities under the Berne Convention), and which they could license, under a variety of terms. If the *sui generis* right asserted exclusive rights over TK/GRs, it might provide some opportunities for rent seeking when people used those resources, but that approach could also create or lead to monopoly controls over knowledge, which could be a bad outcome if everyone did the same thing. He added that most developing countries were not importers of TK and GRs, so they needed to consider the regime both as owners and as consumers. And, if other countries did not recognize a country's *sui generis* regime, one was only hurting its own consumers. The proposal focused on a different strategy for the *sui generis* regime. In that proposal, the TK/GRs right would not apply to any use of the TK/GRs that was not patented. But when there was a patented invention that used TK/GRs, there would be an obligation for the patent owner to obtain a license to the TK/GRs. But to avoid monopolies and promote innovation, there would be a mandatory compulsory cross license on both the patented invention and the *sui generis* right. The patent owner would have guaranteed access to the TK/GRs, but the TK/GRs owner (or owners) would also have guaranteed access to the patented invention. Under the cross licensing approach, there would be less monopoly power for the patented invention than would be the case if the TK/GRs had been in the public domain. That was because the TK/GRs owners would have the right to directly compete against the patent owner, if they chose to. There was a precedent for that in Europe. The European Directive on the Protection of Biotechnological Inventions provided for a mandatory cross license between owners of patented inventions and owners of improvements in seeds protected by plant variety rights (see Article 12.1). The European Commission adopted that approach because it wanted to weaken the monopoly power in seeds enjoyed by two US patents owners, Monsanto and Dupont. In subsequent reviews, the mandatory cross licensing program had been found to promote access to innovations. A similar approach could be used for TK/GRs. Because it was required by the TRIPS, there would have to be remuneration from the TK/GRs owner to the patent owner, to use the patented invention. But there could also be remuneration from the patent owner to the TK/GRs owner. That could provide a useful framework for meeting CBD obligations on benefit-sharing. This would clearly work to the benefit of a developing country if applied solely within its borders — it would receive royalties from the patent owners, and it would also have the right to use the patented invention under the mandatory cross license. One approach involving cross border pooling of TK/GRs might be particularly effective in promoting recognition of the regime. If a country (community) that “owned” TK/GRs was willing to pool its resources with another country (community), the new co-owner of the TK/GRs would have an incentive to recognize the cross licensing scheme, because it would provide them with greater access to the patented invention. A country (community) with few TK/GRs would benefit from both greater access to the patented invention, and also from the reduction in patent monopoly power. A country (community) with an abundance of TK/GRs would benefit from greater acceptance of its *sui generis* right, including the receipt of remuneration for the use of the TK/GRs in the larger market of countries (communities) that joined the pool.⁵³

30. Document WIPO/GRTKF/IC/11/8(a) (“Genetic Resources: List of options”) identified options for continuing or further work on IP and GRs. Option X of the cover document read as follows: “Development of case studies, describing licensing practices in the field of genetic resources which extend the concepts of distributive innovation or open source from the copyright field, drawing on experiences such as the Global Public License and other similar experiences in the copyright field.”⁵⁴ In its Annex, under “Options for possible activities on IP and mutually agreed terms for fair and equitable benefit-sharing”, option C.3 read as follows: “Compile information, possibly in the form of case studies, that describes licensing practices in the field of genetic resources which extend the concepts of distributive innovation or open source from the copyright field, drawing on experiences such as the Global Public License and other similar experiences in the copyright field.” At the twelfth session of the Committee (February 2008), Member States discussed this option.⁵⁵

⁵³ The complete statement can be found in document WIPO/GRTKF/IC/9/14 Prov. (Report), para. 244.

⁵⁴ See document WIPO/GRTKF/IC/11/8 (A) (Genetic Resources: List of Options), para. 3

⁵⁵ See document WIPO/GRTKF/IC/12/9 (Report), paras. 231 and 237

31. A revised version of document WIPO/GRTKF/IC/11/8(a) was prepared and published as document WIPO/GRTKF/IC/16/6. In its Annex, option C.3 read as follows: [Study on licensing practices on GRs] “Compile information, possibly in the form of case studies, describing licensing practices in the field of genetic resources which extend the concepts of distributive innovation or open source from the copyright field, drawing on experiences such as the Global Public License and other similar experiences in the copyright field”.
32. At the sixteenth (May 2010), eighteenth (May 2011) and nineteenth (July 2011) sessions of the Committee, as well as at IWG 3 (February 2011), Member States discussed this option.⁵⁶
33. At the sessions mentioned, delegations expressed different understandings of and views on the proposal. Some delegations believed that it should be broadened to include all licensing practices, not only copyright related licensing. A delegation called for the scope of any study, should it be undertaken, to be clarified and focused. A delegation wished to learn about alternative licensing methods and the technical details related to these initiatives. A delegation requested to consider “real world” examples and national experiences of existing ABS systems. A delegation did not support this option. An indigenous representative was uncertain about the usefulness of the proposed study as applied to GRs and would have liked some studies to demonstrate that. He explained that it was necessary to make sure that open licensing models provided the kind of controls that indigenous peoples and local communities were looking for, and that those models allowed them to get the benefit-sharing that they sought, and in the form that they sought it.
34. Taking the above into account, at the nineteenth session of the Committee (July 2011), the Chair pointed out that the study on licensing practices on GRs had not been undertaken. He noted that the Committee could instruct the Secretariat to undertake that exercise, if considered an important activity.⁵⁷
35. The Secretariat would welcome receiving guidance from the Committee on the scope of any such study to be undertaken.

[End of Annex and of document]

⁵⁶ See document WIPO/GRTKF/IC/16/8 Prov. (Report), paras. 232, 234 and 235; document WIPO/GRTKF/IC/18/10 (Options on Intellectual Property and Genetic Resources: Summary of Discussions at IWG 3), paras. 91, 94, 98 and 102; document WIPO/GRTKF/IC/18/11 (Report), paras. 344, 350 and 352; and document WIPO/GRTKF/IC/19/12 Prov. (Report), paras. 405, 406 and 407

⁵⁷ See document WIPO/GRTKF/IC/19/12 Prov. (Report), para. 404