

Towards developing a national strategy and policy on intellectual property, traditional knowledge and traditional cultural expressions

Checklist of key questions and issues

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Draft: September 14, 2017



About this Checklist

Answers to these basic questions may help policymakers decide if, in relation to their national developmental, economic, cultural, social and technological policies, traditional knowledge (TK) and traditional cultural expressions (TCEs) should be protected in the intellectual property (IP) sense, and, if so, how to define the general objectives and legal and practical means of their protection.

These questions are intended to assist in the development of a national strategy and policy in relation to IP and TK and TCEs, and, eventually, if so decided by the country, in taking any legislative or practical steps that may be necessary.

Ideally, a national strategy and policy on TK and TCEs would form part of, or be derived from, a national IP policy and be subject to national consultations as appropriate, including with indigenous peoples and local communities whenever it may affect them. National policies on other relevant subjects such as biodiversity conservation, food security and cultural heritage preservation may also provide guidance. This would ensure that, as far as possible, policy decisions on TK and TCEs are undertaken

not in isolation but consistently with other interrelated policies.

The Traditional Knowledge Division of the WIPO Secretariat stands ready to support countries in making use of this Checklist, including through facilitating national consultations and workshops, providing additional materials and providing comments on any draft strategies, policies or laws that may be developed by the country. The Secretariat may be contacted through grtkf@wipo.int.

This short document is complemented by a number of fuller resources referenced in the notes, including, for example, the [WIPO Background Brief No. 3 Developing a National Strategy on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources](#).

This is a draft document and comments on it are very welcome.

Disclaimer: This Checklist does not constitute legal advice, and is for information purposes only.

Important Terms

For purposes of this Checklist:

What is traditional knowledge?

Traditional knowledge refers to the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. TK embodies the traditional lifestyles of indigenous peoples and local communities and is transmitted from generation to generation. TK is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge. TK also often encompasses knowledge associated with genetic resources such as plants and animals.

What are traditional cultural expressions?

Traditional cultural expressions refer to the forms in which traditional culture and knowledge are expressed (such as music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives). TCEs (also known as “expressions of folklore”) often form part of the identity and heritage of an indigenous people or local community, and they are passed down from generation to generation.

What does protection mean in the IP sense?

Protection in the IP sense refers to legal means that prevent the misuse of TK or TCEs by any other party than the originating community that holds it or that enable the community to actively exploit the knowledge and expressions for its own benefit. Protection can be “defensive” where it refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded IP rights over TK and/or TCEs. Protection is “positive” where those strategies aim to prevent unauthorized use by third parties and allow for active exploitation of TK and TCEs by the originating community itself.

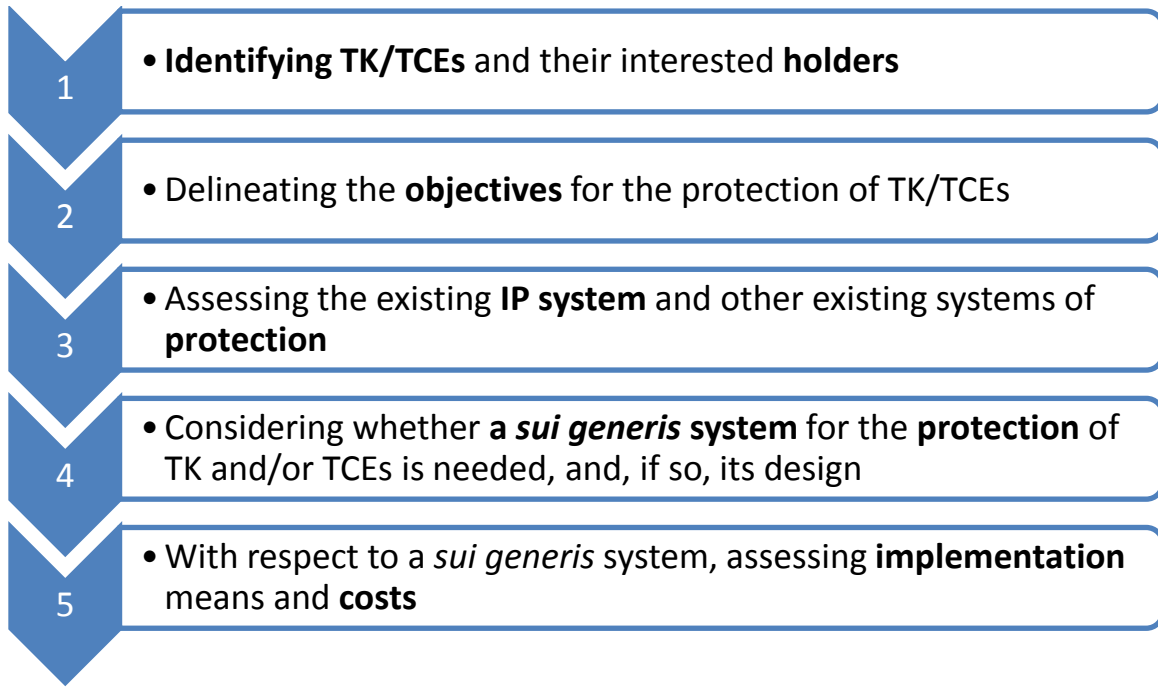
What is a *sui generis* law?

Sui generis law means a law that has been specifically designed to protect TK/TCEs by taking into account the specific features of TK/TCEs and the particular needs of their holders.

The use of terms in this document does not determine which terms countries may wish to use in their own contexts.

Introduction

Defining a national strategy on IP and TK/TCEs normally involves five steps:



I. Identifying TK/TCEs and their Interested Holders

I.1. What do the concepts of “TK” and “TCEs” mean in your country?

- ▶ *For example, does “traditional” knowledge refer only to the underlying knowledge that has been developed over generations, is communally held and is integral to community identity, or does it also include more contemporary adaptations and derivatives thereof, including those made by the communities themselves?*

I.2. What forms of TK/TCEs exist in your country? Are there TK/TCEs that are regarded as “sacred”? What specific examples are there?

I.3. Have TK/TCEs in your country already been identified and surveyed in some systematic manner?

I.4. What is the nature of the TK/TCEs in your country in terms of their form and their public disclosure and availability?

- ▶ *TK and TCEs may be in oral form only or they may be totally or partially documented or recorded in some form and already published or displayed to the public. They may or may not be part of the “public domain” from the viewpoint of the conventional IP system. They may also be secret.*

In this regard, the extent of the documentation of the TK and TCEs and the degree of their public availability can have important implications for their status from an IP perspective.

The [List and Brief Technical Explanation of Various Forms in which Traditional Knowledge May be Found](#), WIPO/GRTKF/IC/17/INF/9, and the [Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore](#), WIPO/GRTKF/IC/17/INF/8, provide insight on this topic. See also the [WIPO Background Brief No. 9 Documentation of TK and TCEs and the WIPO Traditional Knowledge Documentation Toolkit](#).

I.5. Are there indigenous peoples and/or local communities (IPLCs) that create, hold, practice and maintain TK and TCEs in your country? If so, which TK and TCEs in your country, if any, can be directly attributable to those particular communities?

I.6. Are there TK/TCEs in your country that cannot be identified with a particular IPLC(s) but with other types of cultural, ethnic or other communities?

I.7. Are there TK/TCEs that have been “misappropriated” and/or “misused” (i.e., used without the authorization of their holders, used in ways contrary to the customary practices/laws or expectations of their holders, or used in ways contrary to relevant legal standards)? Are there TK/TCEs that are particularly vulnerable to misappropriation/misuse? What actual examples are there in your country? Have those cases been put to an end and if so, how?

- ▶ *Concrete examples in your country, rather than hypothetical cases or examples from other countries or regions, would greatly help in developing a framework that is tuned to the specific needs of your country.*

I.8. Based on consultations with the traditional holders of TK/TCEs in your country, does it appear that there is a potential, and willingness, to use them as economic assets for the communities' economic development?

II. Delineating the Objectives for the Protection of TK/TCEs

- ▶ *Setting policy goals is a crucial step that should be made early on. Policy goals might be framed broadly in terms of, for example, economic development, environmental protection, cultural safeguarding, social cohesion and the like.*

II.1. What would be the IP purposes/objectives of protection of TK/TCEs in your country?

- ▶ *IP objectives might include, for example:*
 - *Preventing others from claiming IP rights in TK/TCEs (defensive protection),*
 - *Establishing IP rights in TK/TCEs as a basis for preventing misappropriation and misuse,*
 - *Establishing IP rights in TK/TCEs to foster community economic development (positive protection),*
 - *Sharing equitably in the benefits that may be generated from the uses of TK/TCEs,*
 - *Avoiding culturally offensive use of TK/TCEs, and/or*
 - *Promoting creation and innovation in relation to TK/TCEs.*

II.2. What other non-IP policy objectives should be considered in developing a strategy on protecting TK/TCEs?

Regarding TK: What do existing IP systems in your country, in particular laws and other legal measures relating to patents, trademarks, trade secrets/confidential information and geographical indications, already cover in terms of protecting TK?

Regarding TCEs: What do existing IP systems in your country, in particular laws and other legal measures relating to copyright and related (neighboring) rights, trademarks, designs, unfair competition and geographical indications, already cover in terms of protecting TCEs?

- ▶ *Non-IP policy objectives should or could include, for example, respect for the rights of indigenous peoples and local communities, conservation of biodiversity, promotion of cultural diversity and pluralism, safeguarding food security, promotion of public health, preservation of intangible cultural heritage and sustainable economic development.*

III. Assessing the Existing IP System and Other Existing Systems of Protection

III.1. Are there rights/interests within the existing IP system that could be used/granted to protect TK/TCEs in your country?

III.2. Are there existing non-IP related laws or regulations addressing the protection of TK/TCEs in your country?

III.3. Are there international or regional instruments that your country is a party to that have a bearing on the protection of TK and/or TCEs?

III.4. Are there already practical mechanisms or platforms of information in your country that are or may be relevant in terms of protecting TK and/or TCEs, such as databases and registries?

III.5. Are there customary laws and protocols that recognize and ensure

customary forms of protection of TK and TCEs in your country?

► [The WIPO Background Brief No. 7 Customary Law and Traditional Knowledge and the WIPO publication on Customary law, Traditional Knowledge and Intellectual Property: an outline of the issues look at these questions in greater detail.](#)

III.6. Are these existing protection tools, if any, efficiently and fully used in your country?

III.7. What do existing IP systems fail to cover in terms of protection? In other words, what gaps are there in terms of protecting TK and TCEs? Which considerations should be taken into account in determining whether and how such gaps should be filled?

IV. Considering a *Sui Generis* System for Protection

► *In the event that existing IP and other laws and legal measures are found to be inadequate, a country may wish to create a sui generis law for the protection of TK and/or TCEs. A “system” for the protection of TK and/or TCEs may include a law but also other practical mechanisms, such as databases and guidelines.*

IV.1. Who should be the rights-holders and/or beneficiaries in such a *sui generis* system?

- Indigenous peoples and local communities?

- Individuals within these communities?
- The nation?
- The State or a specific authority/entity within the State?
- Cultural organizations?

► *Paramount in any national protection should be the rights and interest of the holders of TK/TCEs, who create, hold and practice them, and who are therefore their “authors” in IP terms.*

► *Protection provisions should be established after consultations with the*

interested communities and, if so decided, could be based on the principle of “free, prior and informed consent” (FPIC) of the holders in relation to access, documentation and use of their TK/TCEs.

IV.2. What forms of behavior/uses of TK/TCEs should be considered unacceptable or illegal? Correspondingly, what form of protection is needed (positive and/or defensive)? What rights would be granted? In particular, should there be exclusive rights?

IV.3. Should all TK/TCEs be protected in your country? Or should a distinction be drawn between protectable TK/TCEs and TK/TCEs that are not intended to be protected? Which, if any, criteria for eligibility for protection should there be?

IV.4. Which exceptions and limitations to the rights should there be, if any? In other words, how to strike a balance with the public interest?

IV.5. How would customary laws and protocols be part of the *sui generis* system, if at all?

IV.6. What sanctions or penalties should apply to behavior or acts considered unacceptable or illegal?

IV.7. Would formalities be required, such as registration, if any?

IV.8. For how long would protection be accorded?

IV.9. Should any newly recognized rights have retrospective effect?

IV.10. How should foreign right-holders/beneficiaries be treated?

IV.11. What about TK/TCEs that might be held by more than one indigenous people or local community in your country?

IV.12. What about TK/TCEs that might be located in more than one country?

► *Often the same or similar TK and TCEs are found in neighboring countries. Further, TK and TCEs might be held and practiced by emigrants living around the world.*

V. Assessing Implementation Means and Costs

► *Consultation with and participation of the holders of TK/TCEs is critically important, not only in developing a national strategy on protection of TK/TCEs, but also when it comes to implementation.*

V.1. How should the IP rights related to TK/TCEs be managed and how will implementation and enforcement be ensured?

V.2. What kind of organizational issues should be thought of and addressed?

► *Organizational issues could comprise the following:*

- *Coordination among government agencies and other stakeholders, including, for example, awareness-*

raising and capacity-building workshops, and

- *Coordination with international and regional activities, including in particular negotiations in the WIPO Intergovernmental Committee on IP and GR, TK and Folklore (the WIPO IGC). See the [WIPO IGC website](#) and the [WIPO Background Brief No. 2 The Intergovernmental Committee](#).*

V.3. Which Government agencies are or should be involved in this issue? Is there a “lead” agency?

V.4. Should the relevant industries (such as the cultural and creative industries or the pharmaceutical industry) be involved?

V.5. Would management of IP rights related to TK/TCEs require inventories or databases of TK/TCEs in your country, both in terms of defensive and/or positive protection?

V.6. What forms of other practical measures and tools would your country envisage to protect TK/TCEs?

- Development and promotion of guidelines and protocols?
- Capacity-building and raising awareness initiatives?
- Model contracts?

V.7. What forms should judicial procedures and dispute resolution mechanisms take?

- ▶ *The [WIPO Background Brief No. 8 Alternative Dispute Resolution for Disputes Related to Intellectual Property and TK, TCEs and GRs](#) may be consulted for further details.*

V.8. What costs would an enhanced system of protection involve for the IP offices and /or other public offices in your country? Would these costs be compensated for by the benefits of protection?

Conclusion

In practice, completing these five steps involves fact-finding, research, consultation, cost-benefit analyses and policy determinations. In this regard, it would be important to:

- ✓ Identify the relevant **Government agencies** that might have a say over or role to play in the protection of TK and TCEs;
- ✓ Preferably, nominate a “**lead**” **agency** to ensure coordination and coherence and avoid duplication;
- ✓ Identify other relevant partners, such as **indigenous peoples and local communities (IPLCs)**, NGOs, research institutions, universities and industry/trade associations.

Typically, a country wishing to develop a national strategy will:

- ✓ Organize a **first meeting** with all relevant Government agencies and other relevant partners/stakeholders;
 - ✓ Study **examples of laws** from other countries and other national and regional **experiences**, including practical mechanisms put in place to protect TK, such as databases, and case studies relating to TCEs;
 - ✓ Continuously monitor developments in the **WIPO IGC**, in particular the latest texts of the draft instruments under negotiation on TK and on TCEs and participate actively in the IGC;
 - ✓ Establish a sustainable **consultative mechanism** (such as regular meetings) to facilitate consultations with relevant TK/TCEs holders, like IPLCs, agencies, partners and other stakeholders;
 - ✓ Organize a **national workshop** to share the results of the work with a wider audience, including experts; and,
 - ✓ Establish a formal or informal **inter-agency working group** to coordinate efforts amongst relevant Government agencies.
- *For more information, see the [WIPO webpage Legal texts relevant to traditional knowledge, traditional cultural expressions and genetic resources](#), the [WIPO webpage Regional, National, Local and Community Experiences](#), and the [WIPO Guide Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions](#). The [WIPO IGC website](#) might also be a useful source of information.*
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