



# The Protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions

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- The **value and importance** of traditional knowledge systems

*“Conserving biodiversity without conserving associated knowledge systems is like building and maintaining a library without a catalogue” (Anil Gupta, 2000)*

- The **erosion of local knowledge systems: threats** to their viability and maintenance

- Indigenous peoples, local communities and many States call for:
  - **recognition, safeguarding** and **nurturing** of TK as contribution to sustainable development
  - **promotion** of the value and utility of TK
  - **reciprocity** among knowledge providers and knowledge users
  - **rewarding** of custodians of local knowledge systems as they conserve and adapt them to meet contemporary needs
  - the '**protection**' of TK against unauthorized third party access and use

- What has this to do with intellectual property (IP)?
  - does IP offer the right incentives to meet the needs of TK and TCE holders?
- What do conventional IP systems say about TK and TCEs?
  - what does 'IP protection' mean?
- Which options are there for recognizing and protecting TK and TCEs as IP?
  - update on negotiations in the WIPO IGC

# Various approaches to “protection”

Cultural and biological heritage

↓  
“Stewardship”

↓  
**Safeguarding** of intangible cultural heritage (UNESCO Convention, 2003)

↓  
**Respect for and preservation and maintenance** knowledge, innovations and practices...relevant for the **conservation** of biodiversity (CBD, 1992)

Human rights

↓  
Self-determination, identity, culture

↓  
Rights and interests of **individuals and peoples** under human rights conventions and declarations (eg., ILO, 1969, UNDRIP, 2007)

Intellectual property

↓  
“Ownership”

↓  
Economic and moral rights under IP treaties (e.g., Paris Convention, 1883, Berne Convention, 1886)

# Intellectual property and TK/TCEs – a conceptual and ethical mismatch?

*“A song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory”*

*(Daes, 1995)*

## The great PROTECTION racket

Imposing IPRs on traditional knowledge



13

GRAIN

Over the past three years, the World Convention on Biological Diversity (CBD), the

**WIPO**  
WORLD  
INTELLECTUAL PROPERTY  
ORGANIZATION

“Intellectual property” – creations and innovations of the human mind

Intellectual property “protection” – provides creators and innovators with possibility to regulate access to and use of their works if they so wish

- IP: proprietary (eg., exclusive rights) and non-proprietary rights (eg., moral rights, right to compensation)
- Balance and proportionality: IP rights do not provide perfect control: limitations and exceptions/the public domain
- IP “protection” is not equivalent to “preservation/safeguarding”
- The world of IP is in transformation – e.g. a2k movement

## *Article 6*

### *Exhaustion*

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

## *Article 7*

### *Objectives*

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

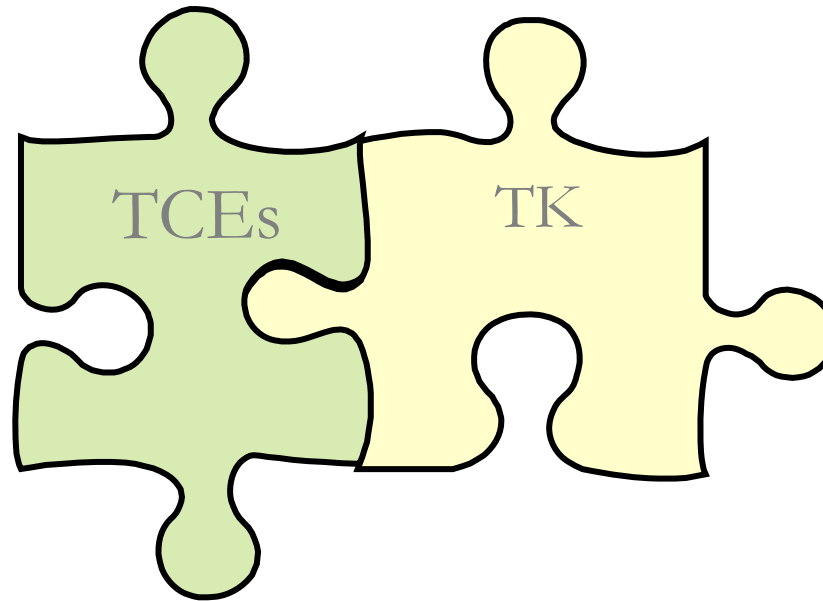
## *Article 8*

### *Principles*

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance



“Traditional knowledge” (TK) and “traditional cultural expressions” (TCEs)



# What do IP law and practice say about TK

- Patents available for any inventions in all fields of technology provided they are new, involve an inventive step and are capable of industrial application (certain exclusions possible)
- International IP law largely silent on TK
  - “traditional” knowledge regarded as “public domain” from perspective of IP system
  - “TK-based innovations” may be protected as inventions; TK may also be protected as confidential information and against unfair competition
- A few *sui generis* mechanisms and laws present in national and regional legal systems: little experience with them
- Several “misappropriation” cases; little empirical study of their effects

# What do IP law and practice say about TCEs

- “Traditional” cultural expressions largely regarded as “public domain”
- Yet, pockets of protection available in international IP law
- Contemporary versions are protectable under copyright and related rights law
- Many *sui generis* mechanisms and systems
- Several “misappropriation” cases; little empirical study of their effects

What do we mean by “protection” of TK/TCEs?

**Positive** protection  
(an IP right in TK/TCEs, to authorize or prevent use)

**Defensive** protection  
(avoidance of IP rights in TK/TCEs – eg., TKDL)

**Setting IP-related objectives**

- what do you want to stop others doing?
- what do you want TK/TCE holders to be able to do?

Unauthorized commercial use, distortion, “passing off”, no attribution, disclosure of secret TK/TCEs

Ownership, PIC, benefit-sharing, prevention,

What options are there to achieve these objectives?

What options are there for attaining IP objectives?

Existing IP law  
Adapted or new (sui generis) IP law  
Customary law, and/or  
Non-IP law

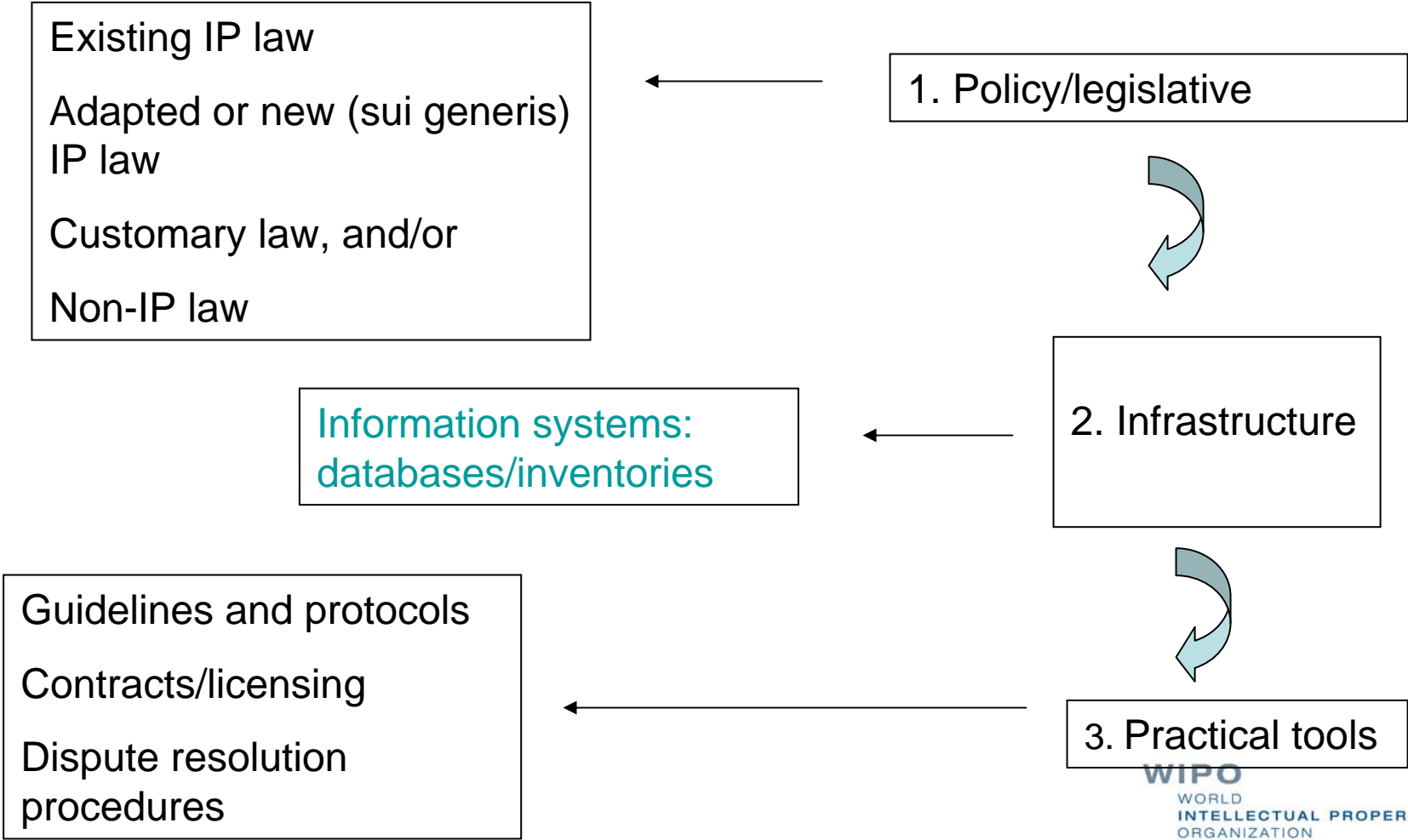


1. Policy/legislative

Example: can existing IP systems protect TK and/or TCEs, directly or indirectly?

- copyright and patent protection for **contemporary** creation and innovation based on TK
- copyright for **unpublished works of unknown authors** (Berne, 15.4)
- related rights protection of **recordings** of cultural expressions and for “**performers of expressions of folklore**” (WIPO Performances and Phonograms Treaty, 1996)
- databases and compilations of TK can be protected
- **collective trademarks/GIs/appellations of origin** can protect TK/TCE products (eg., foods, agricultural products, crafts) against passing off – indirect protection
- protection of **confidential information** for secret TK/TCEs
- protection against “unfair competition”

What options are there for attaining IP objectives?



# WIPO Intergovernmental Committee

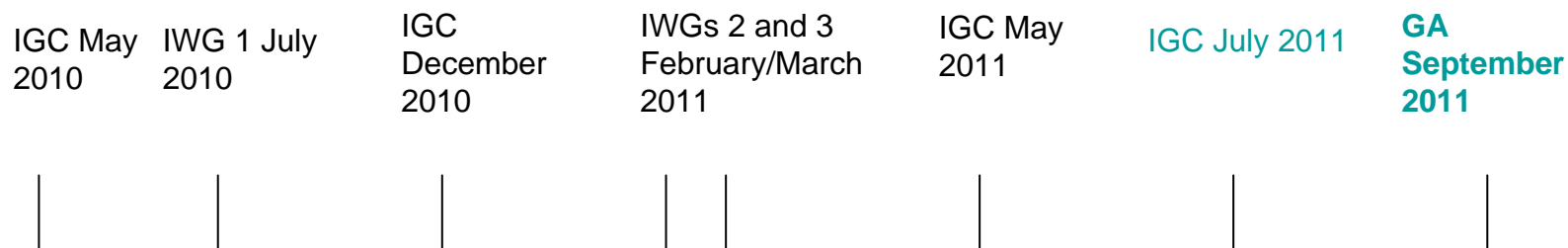
- Established in 2000; met for the first time in April 2001
- IGC was preceded by several years of fact-finding, consultation
- IGC: Member States, indigenous and local communities, business, other NGOs
- Prevailing view is that a *sui generis* system is needed to protect TK and/or TCEs



# New IGC mandate 2010-2011

- text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs
- a clearly defined work program. . . four sessions of the IGC and three inter-sessional working groups, in the 2010-2011 biennium
- build on the existing work of the IGC . . . use all WIPO working documents, including WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8A
- the Committee is requested to submit to the 2011 General Assembly the text of an international legal instrument (or instruments). The General Assembly in 2011 will decide on convening a Diplomatic Conference
- “without prejudice to the work pursued in other fora”
- “bearing in mind the Development Agenda recommendations”

# Program



# Key policy questions

- Why?
- What?
- Who?
- Which model best promotes creativity and innovation, spurs economic growth, maintains a robust public domain and respects the interests of indigenous and local communities as well as of the broader public?
- Such a model should complement and not conflict with protection already available under conventional IP systems, as well as under non-IP systems

## ■ **Definitional issues**

- What is “traditional” knowledge? What are “traditional” cultural expressions?
- Who should be the beneficiaries of new rights in TK/TCEs?

## ■ **Technical issues**

- How would special protection for TK/TCEs interact with protection available under existing IP?
- How should publicly available TK/TCEs and transboundary (“shared”) TK/TCEs be addressed?

## ■ **Operational issues**

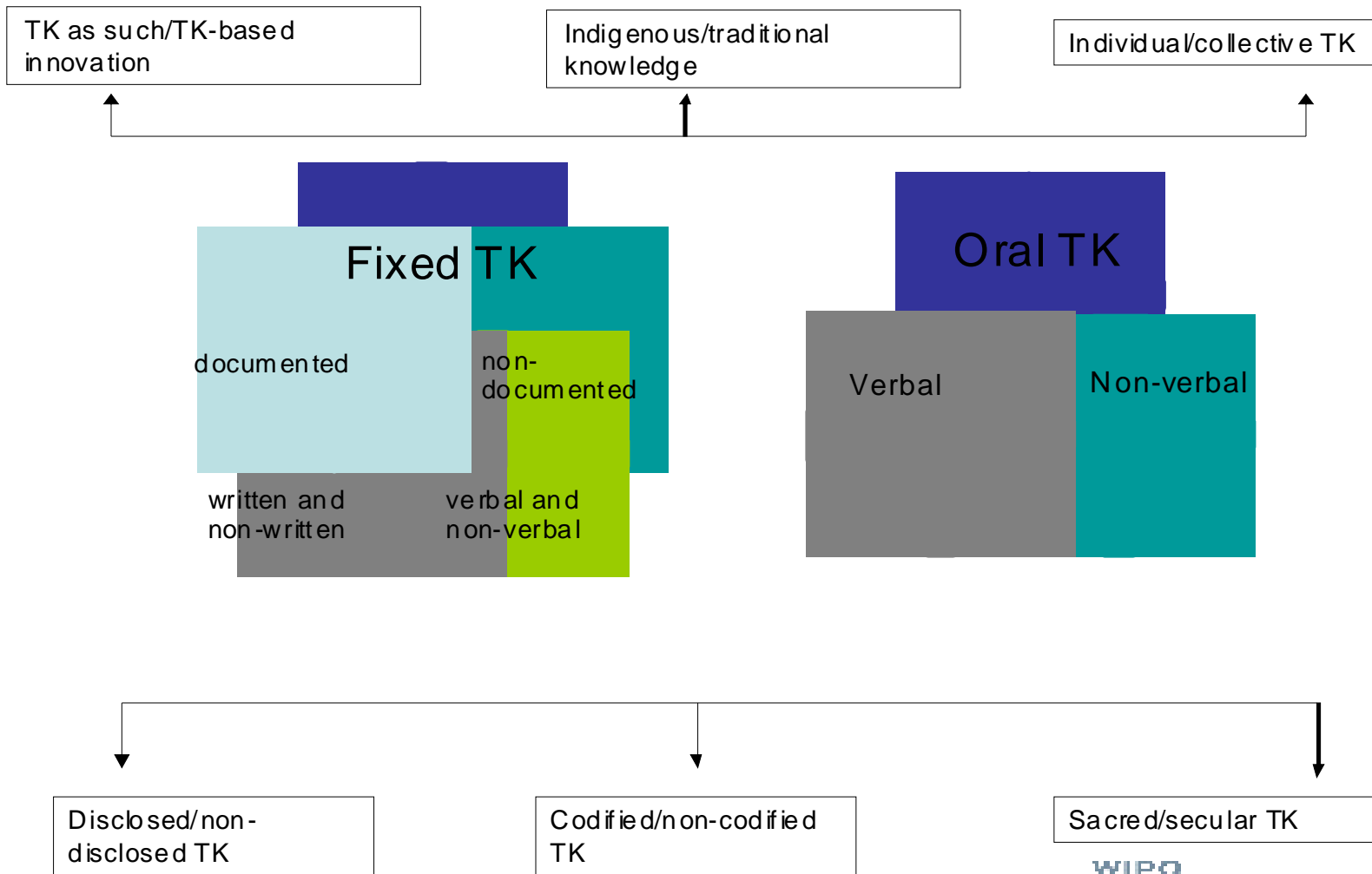
- What role, if any, should registration/documentation play in the protection of TK/TCEs?
- How would new rights be managed and enforced?

# The protection of “traditional knowledge” (WIPO/GRTKF/IC/19/5)

- Objectives
- General guiding principles
- Substantive articles
  1. Subject Matter of Protection
  2. Beneficiaries of Protection
  3. Protection against Misappropriation
  4. Prior Informed Consent, Fair and Equitable Benefit-Sharing, and Recognition of Knowledge Holders
  5. Administration and Enforcement of Protection
  6. Exceptions and Limitations
  7. Duration of Protection
  8. Formalities
  9. Transitional Measures
  10. Consistency with the General Legal Framework
  11. International and Regional Protection

# Subject matter of protection: what is TK?

- Draft Article 1
- Two parts:
  - general nature of TK
  - which qualities TK should have in order to be protected



1.2 → [Protected traditional knowledge is knowledge that is:] / [Protection extends to traditional knowledge that is:] ¶

¶

(a) [the unique product of or is [distinctively]] associated with [an indigenous people or local communities]; and

¶

*Alternative* ¶

¶

(a) distinctively associated with an indigenous people or local community [and customarily recognized as belonging to that indigenous people or traditional community] or nations; and ¶

¶

(b) [collectively generated, preserved and transmitted [from generation to generation] [in a traditional context]; and

¶

*Alternative* ¶

¶

(b) generated and collectively shared, preserved and transmitted [from generation to generation] OR [in a traditional or intergenerational context]; and/or ¶

¶

(c) [integral to the cultural identity of [an indigenous people or local community] or nations, family or individuals]; and

¶

*Alternative* ¶

¶



2 1 4 5 6 7 8 9 10 11 12 13 14  
(b) generated and collectively shared, preserved and transmitted [from generation to generation] OR [in a tradition

intergenerational context]; and/or

¶

(c) [integral to the cultural identity of [an indigenous people or local community] or nations, family or individuals]

¶

*Alternative*

¶

(c) identified with [integral to] the cultural identity of a [local, indigenous or traditional peoples or communities or]  
recognized as the owner through a form of custodian or collective and cultural ownership responsibility. Such a  
may be established formally or informally by customary practices, laws or protocols.

¶

*Option 2*

¶

[(a) to (c) above, plus;

¶

(d) [not made widely known outside that community];

¶

(e) not the application of principles, rules, skills normally, and generally, well-known]

¶

¶

# Other useful documents relating to TK

- Glossary on IP and TK (WIPO/GRTKF/IC/19/INF/8)
- The meaning of the “public domain” in relation to the protection of TK and TCEs (WIPO/GRTKF/IC/17/INF/8)
- Different forms in which TK is found (WIPO/GRTKF/IC/17/INF/9)

# Important dates

- International Technical Symposium on the Documentation and Registration of TK and TCEs, Muscat, Oman – June 26 to 28, 2011
- IGC 19: July 18 to 22, 2011
- WIPO General Assembly: September 2011

# IP and Genetic Resources

- Genetic resources: “*genetic material of actual or potential value*” (CBD, 1992)
- Biodiversity conservation and genetic resources access, use and equitable benefit-sharing governed by the CBD and the FAO
- What does the protection of “genetic resources” in relation to IP refer to?
  - GRs as such are not IP; therefore may not be susceptible of direct protection by IP systems
  - Larger IP question: relationship between patent system and conservation, sustainable use and equitable benefit-sharing in biodiversity (objectives of CBD, 1992)
- Broader context: CBD plus Nagoya; FAO; TRIPS; UPOV

# Current work of the IGC on genetic resources

- Draft **objectives and principles** (WIPO/GRTKF/IC/19/6):
  - Conditions for access to GRs, prevention of erroneous patents, patent information, relationship of IP with other policy areas and role of the IP system
- **Options for future work** (WIPO/GRTKF/IC/19/7):
  - Defensive protection of GRs, disclosure requirements and IP aspects of ABS agreements

# Concluding remarks

- An **historic opportunity** for intellectual property
  - First normative process in IP initiated and led by developing countries
  - At the cutting edge of new approaches to best models for generation and regulation of knowledge
  - New international legal instrument(s) would represent a major normative shift in IP
- IGC = 100% Pure Development Agenda



# Sign up for the TK e-Newsletter and Updates

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