IP Management in the Documentation of TK:

The WIPO TK Documentation Toolkit

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The WIPO TK Documentation Toolkit

- **This Toolkit is under preparation. This presentation is based on the last available draft.**

- The Toolkit is designed to help design and plan a TK documentation process and understand some of its key IP dimensions, as a means to assist in safeguarding the interests and protecting the rights of indigenous peoples and local communities.

- It also provides guidance as to whether and how classical IP tools and other instruments may be useful depending on specific documentation objectives.

- It is a source of information oriented to help in practical situations. It suggests questions which should be raised in each specific situation, according to community and actors needs and interests.
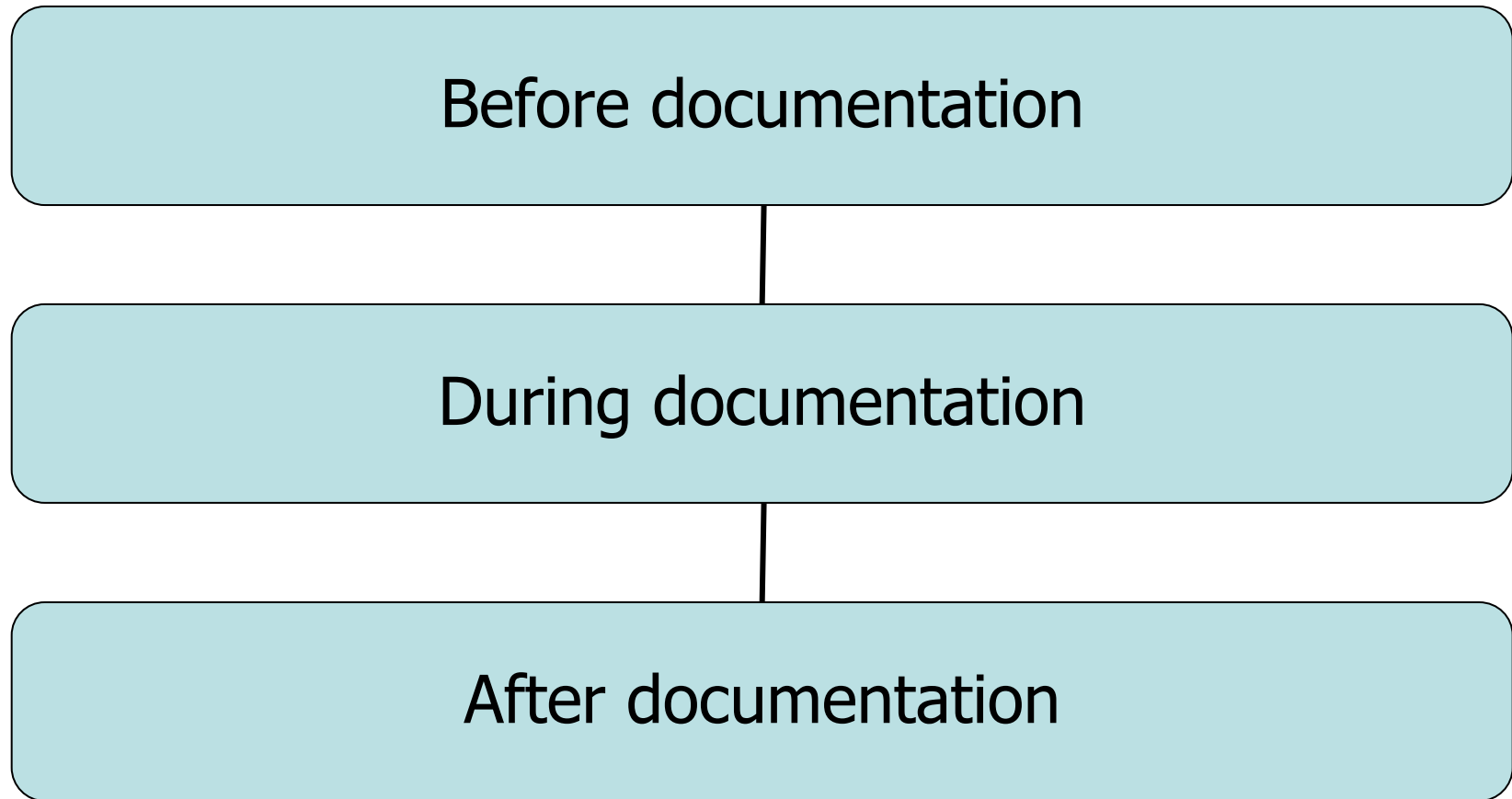
What this Toolkit is not

- The Toolkit:
    - - does not seek to promote documentation
    - - is not a protection of TK instrument per se,
    - - does not prejudge or suggest that TK should be placed in the public domain,
    - - does not replace expert legal advice in regards to more case-specific and thornier issues,
    - - does not suggest or prefer any form of ownership rights over TK,
    - - does not provide information in regards to specific IP laws nor interprets IP in any particular way,
    - - does not provide any specific option to protect TK, and
    - - does not offer advice in regards to whether and how to collect or research in biological and genetic resources which may be related to TK.
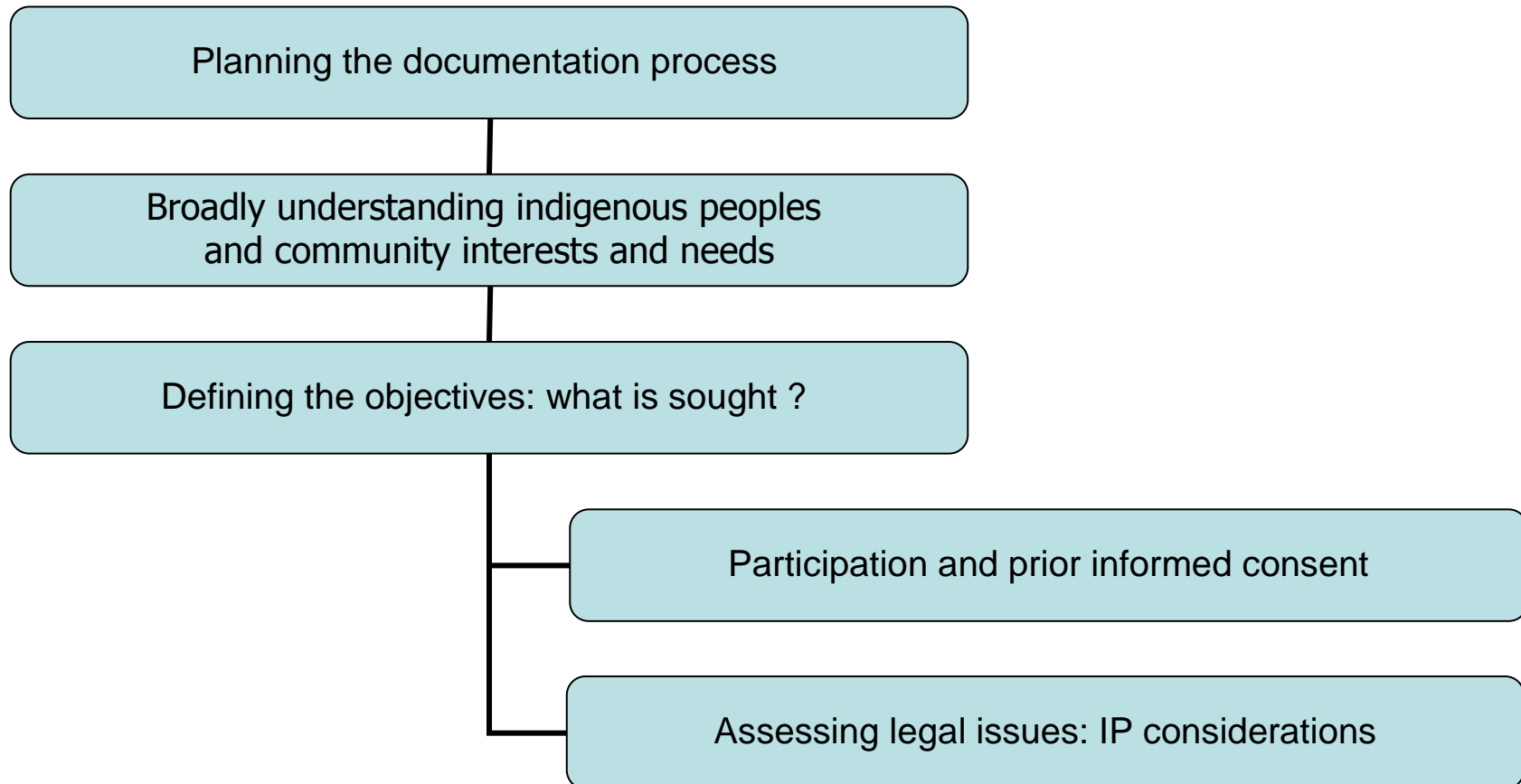
Who this Toolkit is for

■ The main users and beneficiaries of the Toolkit could be indigenous peoples and local communities. However, given the nature of documentation and its potential for involving multiple actors, it can also serve public officials from IP offices, policy makers in general, research institutions which work in the field and interact with communities *in situ* (for example in ethno-botanical projects or museums), among others.

Three Phrases

Before documentation

During documentation

After documentation

Before Documentation – 5 Steps

Planning the documentation process

Broadly understanding indigenous peoples
and community interests and needs

Defining the objectives: what is sought ?

Participation and prior informed consent

Assessing legal issues: IP considerations

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Before Documentation – Check List

- Plan carefully.

- Consult as widely as possible among indigenous peoples, communities and key stakeholders at an early stage.

- Consider and clarify the role of the different stakeholders involved (researchers, government agencies, communities, etc.).

- Ponder on indigenous peoples and communities expectations and how best to respond to and reflect them.

- Consider how to effectively apply prior informed consent (PIC) principles – take note of shared TK issues.

- Set out documentation objectives, including IP objectives and develop an IP strategy if and when needed.

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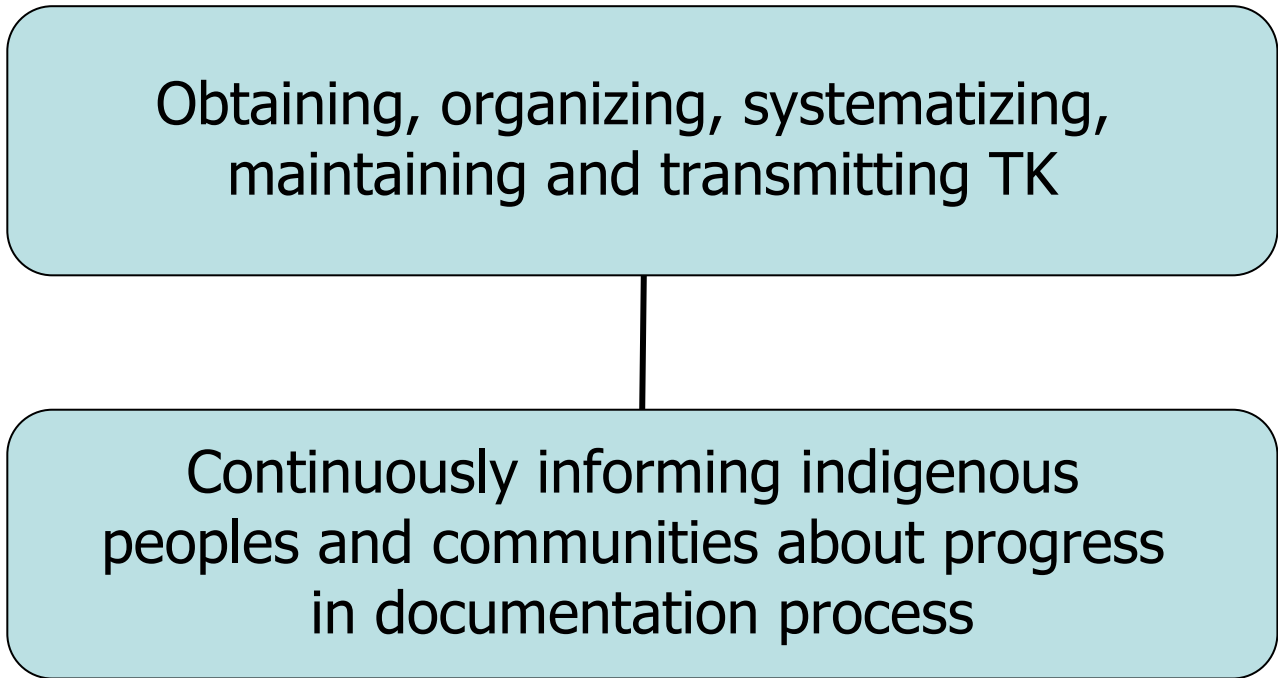ORGANIZATION

Before Documentation – Check List

- Consider the widest possible range of options to meet these objectives.

- Develop a monitoring and verification plan which provides with assurances that documented TK is being used as determined in the documentation process.

- Consider that legal issues may arise in the contexts of existing access to genetic and biological resources policy and legal frameworks and regulations (ABS).

- Distinguish between non confidential TK and TK which may be secret (due to its sacredness) and may require additional conditions and securities (if it were to be documented).

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Before Documentation – IP Issues

- Conducting an IP Assessment
  - Assessing the subject matter to be documented
  - Assessing applicable IP laws
  - Assessing other applicable legal regimes

- Developing an IP Management Strategy to Implement the IP Objectives

During Documentation – 2 Steps

Obtaining, organizing, systematizing, maintaining and transmitting TK

Continuously informing indigenous peoples and communities about progress in documentation process

During Documentation – Check List

■ Ensure appropriate PIC documentation (or evidence) has been obtained (or is obtained during this phase of the process)

■ Document TK in a precise and standardized manner (including through indigenous and local nomenclature or classifications or local management systems)

■ Do not disclose non disclosed or confidential TK

■ Follow agreed guidelines or conducts, obligations and legislation and regulations (including ABS) in place

■ Regularly inform stakeholders, especially indigenous people and communities, about advances and progress in the documentation process

■ Verify whether technological safeties for processing and managing data are operational (safety of the database or registration devices)

■ Adapt technology to local needs (if documentation involves interaction directly with indigenous peoples and communities)

■ Ensure appropriate disclaimers are developed and made visible

During Documentation – IP Issues

■ Recording TK and Associated GR

■ Managing Disclosure

■ Managing Confidentiality

   ■ Key IP clauses for confidentiality contracts among documentation partners

   ■ Sample confidentiality contracts which have been used in documentation initiatives

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After Documentation – 3 Steps

Promoting the TK documentation
database or register

Monitoring uses and users of documented TK

Verifying whether initial planning objectives
and milestones have been met

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After Documentation – Check List

- Verify that TK documentation planning objectives have been met
- Verify that comments and inputs made by stakeholders (especially indigenous peoples and communities) have been appropriately addressed
- Check who is accessing and using TK (if this was the case)
- Check whether and how national IP offices are using the documented TK
- Inform indigenous peoples and communities about the progress and results of the TK documentation process
- Ensure management of the database or register is in hands of competent and technologically savvy professionals (or a well trained community member(s) if they are to ultimately create and manage the database).

After Documentation – IP Issues

- Positive Protection: Acquisition of IP Rights

- Defensive Protection: Public Disclosure

- Establishment and Use of Databases

- Enforcement of IP Rights

Notes:

- Documentation does not ensure legal protection for TK and genetic resources. It can destroy rights and options, if a documentation project is undertaken without an IP strategy;

- "Documentation" is not the same as putting TK and genetic resources in the public domain. Documented TK and genetic resources can still be kept confidential or restricted; and

- There is no single way to approach documentation of TK and biological resources.

  - The range of IP interests involved is as diverse as the range of traditional communities concerned.

  - Since there are many ways of defining and protecting IP interests, all the options should be carefully considered and consulted widely before undertaking a documentation project.

Thanks!

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