



Intellectual Property and Traditional Knowledge: Overview of Options and of Recent Developments in the WIPO IGC

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

“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 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)? What does “IP protection” mean?
- What do conventional IP systems say about TK?
- Which options are there for improving the protection of TK as IP?
 - with particular reference to the WIPO IGC (normative) and the TKDL (practical)

Various approaches to “protection”

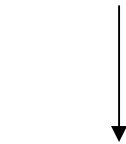
Cultural and biological heritage

↓
“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” – 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., right to compensation)
- 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

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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

The great PROTECTION racket

Imposing IPRs on traditional knowledge

GRAIN



ver the past three years, the World the Convention on Biological diversity (CBD), the

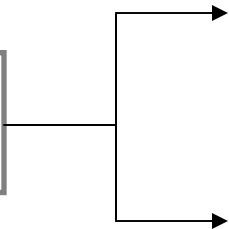


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What does IP law say about TK

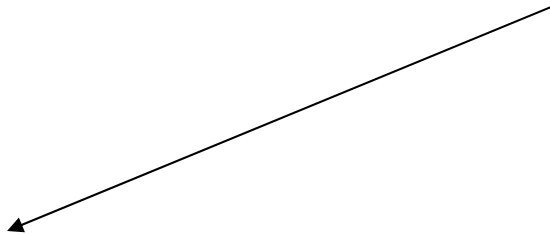
- patents available for any inventions in all fields of technology provided they are new, involve an inventive step and are capable of industrial application (certain exclusions possible)
- international IP law largely silent on TK
 - “traditional” knowledge regarded as “public domain” from perspective 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

What do we mean by “protection” of TK?



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

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



Setting IP-related objectives

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

- Unauthorized commercial use, distortion, “passing off”, no attribution, disclosure of secret TK
- Ownership, PIC, benefit-sharing, prevention,

What options are there to achieve these objectives?

The range of options

- Legislative/normative : practical/infrastructure
 - E.g., WIPO IGC : TKDL (classic defensive mechanism)
- Public law : private law
 - E.g., legislation : contract
- International : regional : national : local
- Conventional IP systems : *sui generis* systems, including customary law

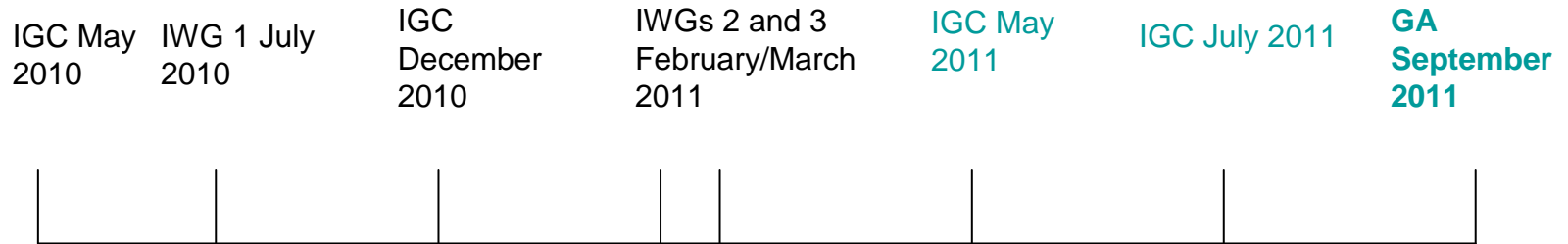
The Intergovernmental Committee: Background and outcomes to date

- Background – consultation, fact-finding and inclusion
- Recognition of TK within patent system
 - Inclusion of TK journals within PCT minimum documentation (2002)
 - Integration of TK classification tools within International Patent Classification (2003)
 - Technical standards for documentation (2002)
- IP guidance for ABS contracts
 - Database of IP-related clauses in ABS contracts (2002, 2010)
 - IP guidelines for ABS contracts (2004, 2010)
- Proposal for a disclosure requirement
 - Technical study submitted to the CBD (2003)

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



Some of the key questions

■ **Definitional issues**

- What is “traditional” knowledge?
- Who should be the beneficiaries of new rights in TK?

■ **Technical issues**

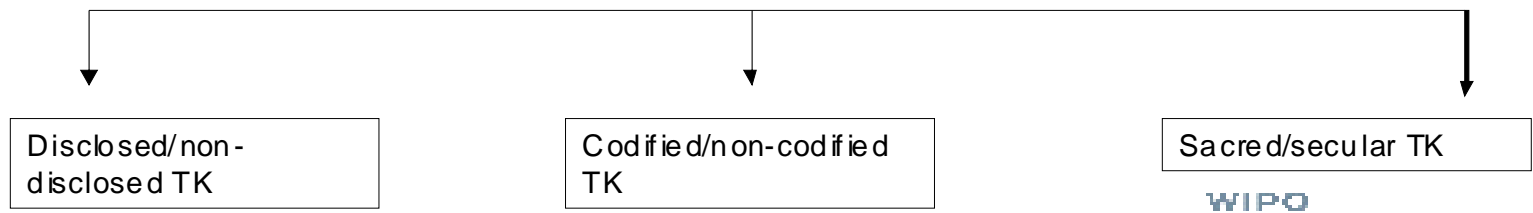
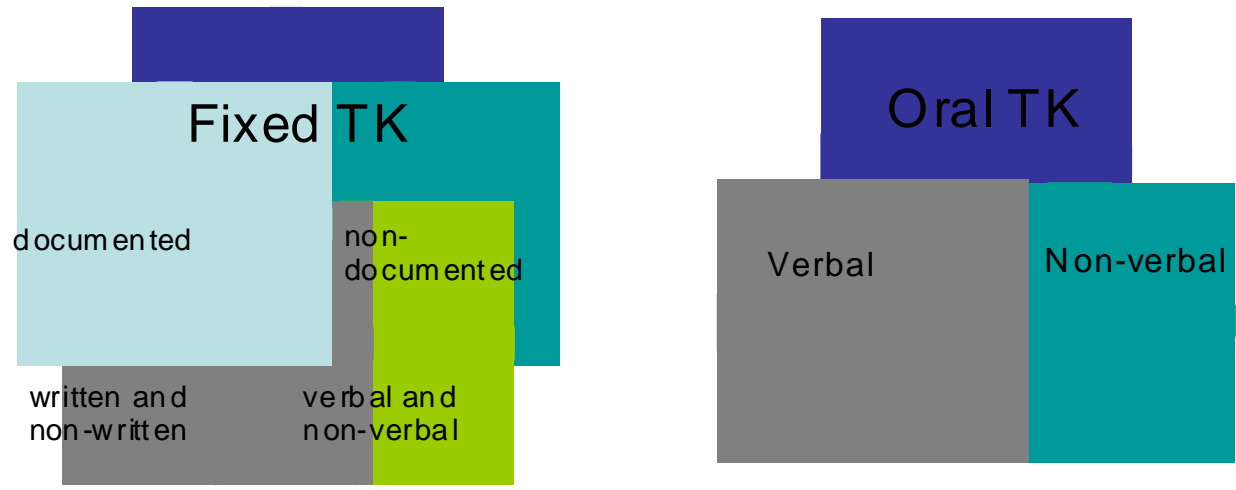
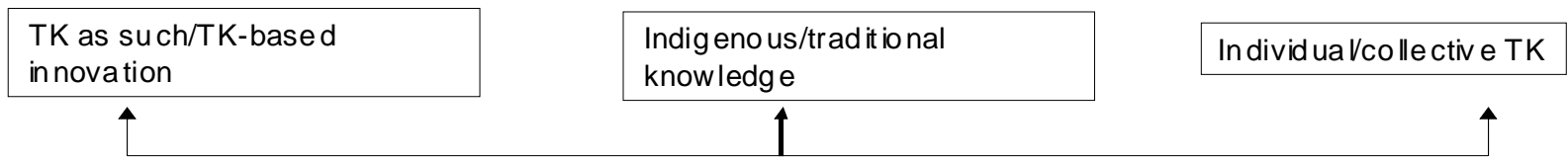
- How would special protection for TK interact with protection available under existing IP?
- How should publicly available TK and transboundary (“shared”) TK be addressed?

■ **Operational issues**

- What role, if any, should registration/documentation play in the protection of TK?

■ **Procedural issues**

- What belongs in an “international instrument” and what should be left to national legislation?



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- IGC 18 : May 9 to 13, 2011

- TK texts:
 - WIPO/GRTKF/IC/18/5: original text of the IGC, first developed in 2004

 - WIPO/GRTKF/IC/18/7: draft articles prepared at IWG 2

- *Sui generis* approaches: positive and defensive elements

I. The protection of “traditional knowledge” (WIPO/GRTKF/IC/18/5)

- 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

What objectives are sought to be achieved?

- Cultural, social, economic and political objectives
 - Recognize the holistic nature of TK and its intrinsic value
 - Promote respect
 - Meet the actual needs of TK holders
 - Promote conservation and preservation of TK
 - Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems
 - Support traditional knowledge systems
 - Contribute to safeguarding TK
 - Concord with relevant international agreements and processes
 - Promote community development and legitimate trading activities
 - Enhance transparency and mutual confidence

- Intellectual property-related objectives
 - Promote innovation and creativity
 - Repress [unfair and inequitable uses] misappropriation and misuse
 - Ensure prior informed consent and exchanges based on mutually agreed terms
 - Promote equitable benefit-sharing
 - Preclude the grant or exercise of improper IPRs to unauthorized parties by requiring [the creation of digital libraries of publicly known TK . . .] [disclosure of source/origin, PIC and B-S]

Beneficiaries and rightsholders

- Draft Article 2
 - Close link with Draft Article 1
- Two aspects:
 - Identification of beneficiaries
 - Choice of term to describe them
- International vs. national vs. customary laws

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Protection of traditional knowledge should benefit the **communities** who generate, **protect**, preserve and transmit the knowledge in a traditional and intergenerational context, who are [associated with it] and who identify with it in accordance with Article 1(3). Protection should accordingly benefit the **indigenous and traditional or local communities** themselves that hold traditional knowledge in this manner, [as well as recognized **individuals** within these communities and peoples] as well as **individuals** within the communities who are recognized under customary laws, practices and protocols to hold the knowledge for the community, or who are designated as trustees of such knowledge by appropriate traditional processes, customs or institutions/, taking into account in particular those individuals who act as the custodians of that knowledge or who are given special recognition within these communities and peoples. Entitlement to the benefits of protection should, [as far as possible and appropriate], [take account of] **be according to the customary protocols, understandings, laws and practices of these communities and peoples.** ¶

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For codified traditional knowledge, either in the form of ancient scriptures or digital libraries of public texts, or if the knowledge is not confined to a community but is generally used, the relevant legislation of Member States shall provide for identification of the beneficiary. ¶

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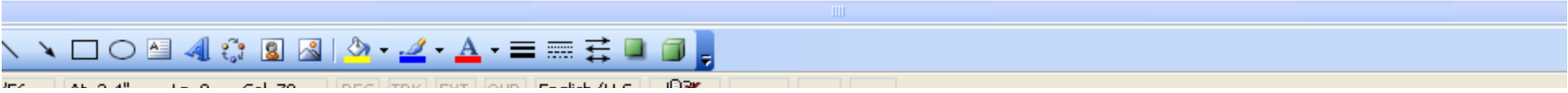
Administration of rights

- Draft Article 5 of the text prepared at IWG 2 (WIPO/GRTKF/IC/18/7)



ARTICLE 5

ADMINISTRATION OF RIGHTS

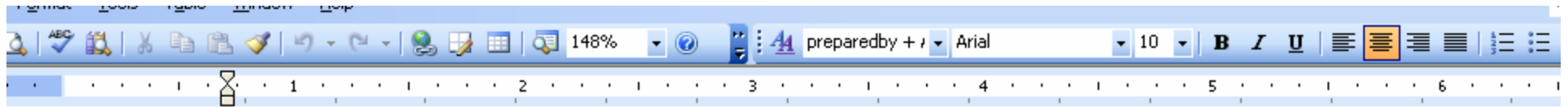
- 5.1 A contracting party may, in consultation with the holders of traditional knowledge, establish an appropriate national or regional competent authority or authorities. The functions may include, but need not be limited to, the following:
- (a) disseminating information about traditional knowledge and its protection;
 - (b) ascertaining whether prior informed consent has been obtained;
 - (c) supervising fair and equitable benefit-sharing; and
 - (d) assisting, where possible and appropriate, the holders of traditional knowledge in the use, exercise and enforcement of their rights over their traditional knowledge, **including assisting in the maintenance of traditional knowledge databases.**
- 5.2 Where traditional knowledge fulfills the criteria under Article 1, and is not specifically attributable to or confined to a community, the authority may, with the consultation of the traditional knowledge holders where possible, administer the rights of that traditional knowledge.
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Formalities

- Draft Article 8 of 18/5 and draft prepared at IWG 2
- Options:
 - No formalities
 - Optional registration/documentation
 - Mandatory registration/documentation

FORMALITIES

1. *[Eligibility for protection of traditional knowledge against acts of misappropriation [or misuse]¹² should not require any formalities.]³*
2. *In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities **may** maintain registers or other records of [protected]⁴⁵ traditional knowledge, where appropriate and subject to relevant policies, laws and procedures, and the needs and aspirations of traditional knowledge holders. Such registers **may** be associated with specific forms of protection, and **should not compromise the status of hitherto undisclosed traditional knowledge or the interests of traditional knowledge holders in relation to undisclosed elements of their knowledge.***



FORMALITIES

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Option 1

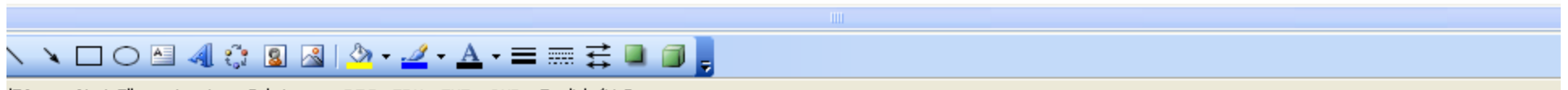
8.1 The protection of traditional knowledge shall not be subject to any formality.

Option 2

8.1 The protection of traditional knowledge requires some formalities.

8.2 In the interests of transparency, certainty and the conservation of traditional knowledge relevant national authorities [should/shall] maintain registers or other records of traditional knowledge.

[Commentary on Article 8 follows]



Subject matter of protection: what is TK?

- Draft Article 1

- Two parts:

- general nature of TK (articles 1(1) and 1(2))

- which qualities TK should have in order to be protected (article 1(3))

Protection [should] shall be extended [at least] to that traditional knowledge which [is] satisfies any of the following.¶

¶

(i) → [Generated, constituted, developed, preserved and transmitted in a traditional and intergenerational context; or¶

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(ii) → [[distinctively] associated with] customarily recognized as belonging to a traditional or indigenous community, local community, [or] people or ethnic group which preserves and transmits it between generations; [and] or] generated, preserved and constituted in a traditional context and shared within a community or collectively and usually transmitted from one generation to another; and/or¶

¶

(iii) → [integral to [the cultural identity of]] [a nation and an indigenous] a local or traditional community; [or] cultural identity of people or ethnic group which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or applicable national laws; and¶

¶

(iv) → [has not been made public;] [has not been made widely and voluntarily known outside that community]¶

¶

(v) → contained in codified knowledge systems;¶

¶

(vi) → passed through generations which may not be necessarily confined to

Some last thoughts . . .

- Outline of an instrument on TK beginning to emerge
 - many issues remain to be resolved
 - differentiated approach to TK (eg., publicly available TK)
 - question of formalities not yet settled
- TKDL a practical complement to normative work of the IGC
 - new references to databases in IGC texts
 - a coherent and precise interaction between TKDL and any new instrument is still being clarified



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