

TOPIC 5

Traditional Knowledge and the Existing Intellectual Property System: Scope and Gaps in the Protection

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Overview

- Clarification of basic concepts
- Why intellectual property protection?
- How to protect? What are the gaps?
- Available options



Shavante Indians using Buriti sticks to make a fire. (UN Photo/Joseane Daher)



Fishing Technique in Nepal Lake Fewa. (UN Photo/Ray Witlin)



Woman collecting fish in Dili District Timor-Leste (UN Photo/Martine Perret)

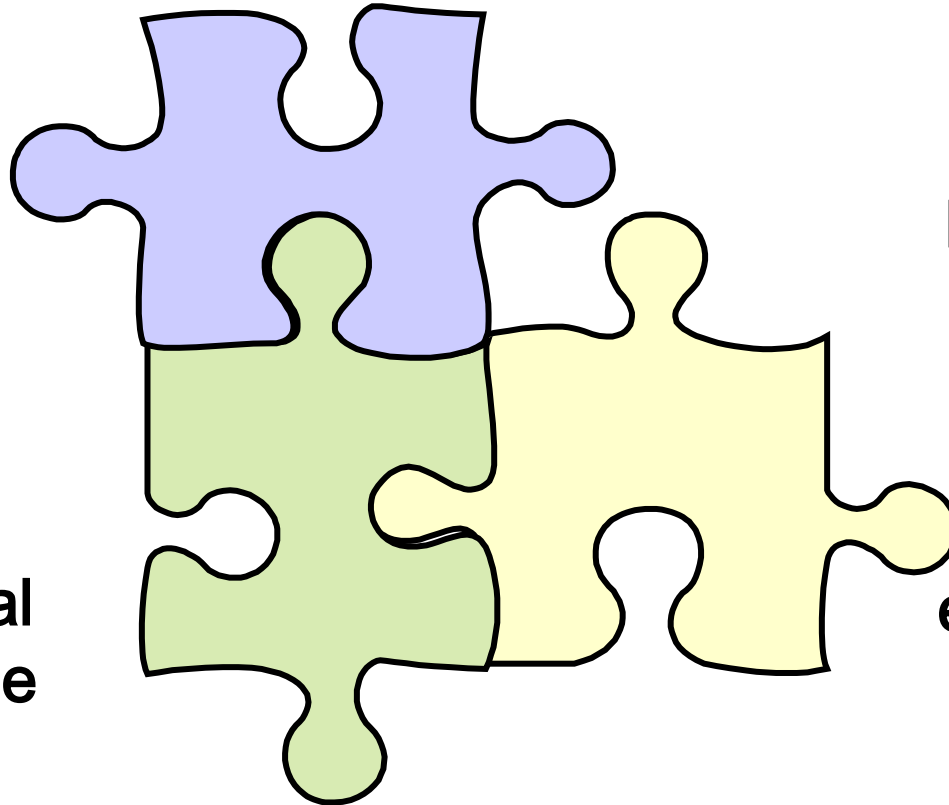
Traditional knowledge



(UN Photo/Martine Perret)

- **knowledge, know how, skills, innovations or practices;**
 - **that are passed between generations;**
 - **in a traditional context;** and
 - **that form part of the traditional lifestyle of indigenous and local communities who act as their guardian or custodian.**
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- **Examples:**
 - knowledge about traditional medicines;
 - traditional hunting or fishing techniques;
 - knowledge about animal migration patterns or water management.

Genetic resources (GRs)



**Traditional
knowledge
(TK)**

**Expressions
of folklore,
or
“Traditional
cultural
expressions”
(TCEs)**

Exercise 1 – Are these TK?

- The use of *Ayahuasca* in the western Amazon to prepare various medicines
- The recipe of vegetable soup which Emma's Grandma told her
- The use of the Hoodia cactus by Kung Bushmen in Africa to stave off hunger

Why protect TK?

Recall: patentability requirements

- Novelty
- inventive step/non-obviousness
- industrial application/utility

Exercise 2 - “Neem Case”

- The *neem* tree is growing in India and “variously known as ‘Sacred Tree’, ‘Heal All’, ‘Nature’s Drugstore’, ‘Village Pharmacy’ and ‘Panacea for all diseases’”. There are many products which are made from *neem* and are observed to be antifungal.
- A patent was granted in 1995 on an antifungal product derived from *neem*.
- What is the problem here?

How to protect TK?

Preservation VS. Protection of TK

- **Protection** of TK against misappropriation

**different from
but supportive of**

- **Preservation** of TK and TCEs

- **Defensive Protection**
 - Prevention and safeguarding against third-party claims of IP rights over TK

- **Positive Protection**
 - an exclusive property right to authorize or prevent the use of TK by third-parties

Exercise 3

- A traditional healer discovers that it will be very fast to cure cough if he adds *glycyrrhiza uralensis* (one herb) to the mixture of herbs which he traditionally used.
- Which IP tools will you advise the traditional healer to use to protect his knowledge?

Existing IP System

- Patent
 - TK based inventions
 - Defensive protection
- Trade Secret
 - Undisclosed TK
- Trademarks and Geographical Indications
 - Products based on TK

Exercise 3

- A traditional healer finds that it will be very fast to cure cough if he adds *glycyrrhiza uralensis* (one herb) to the mixture of herbs which he traditionally used.
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What are “Gaps”/ “Disadvantages”? (1)

Patent

- TK based inventions
- A recognized inventor or inventors

- TK which does not fulfill the patentability requirements (such as novelty and inventive step)
- Innovation which is cumulative and collective over generations within the community
- Indigenous peoples and local communities collectively to be beneficiaries
- Definite protection (20 years)
- Will be placed in the public domain



What are “Gaps”/ “Disadvantages”? (2)

Trade Secrets

- Undisclosed TK

- Once discovered by a third party or leaked to the public, it can be used by others
- Difficult to protect against misappropriation



What are “Gaps”/ “Disadvantages”? (3)

Trademarks

Geographical Indications

- Products based on TK

- Does not protect TK itself

- Does not prohibit use of TK



So...

■ Adapted or new (*sui generis*) IP laws

- For example, New Zealand's trademark law has been amended to exclude trademarks that cause offence, especially to Maori symbols.

■ Customary laws

- For example, customary laws imposing an obligation of confidentiality may be effectively extended to prevent disclosure beyond the traditional circle.
- Customary laws governing use of a sacred symbol may be drawn upon to deny registration of the symbol as a trademark by a third party.

■ Non-IP laws

- Contracts ensure that the grant of IP rights is based on prior informed consent and benefit-sharing.

International *Sui generis* IP protection of TK

- IGC process

WIPO/GRTKF/IC/28/5 -- a *sui generis* system

- Preamble
- Objectives
- Use of Terms
- Article 1 Subject Matter of Protection
- Article 2 Beneficiaries of Protection
- Article 3 Scope of Protection
- Article 4 Sanctions, Remedies and Exercise of Rights/Application
- Article 4bis Disclosure Requirement
- Article 5 Administration of Rights
- Article 6 Exceptions and Limitations
- Article 7 Term of Protection
- Article 8 Formalities
- Article 9 Transitional Measures
- Article 10 Relationship with Other International Agreements
- Article 11 National Treatment
- Article 12 Transboundary Cooperation
- **Why protect?**
- **What to protect?**
- **Who should benefit?**
- **What acts should be forbidden?**
- **Should there be exceptions and limitations?**
- **For how long?**
- **Should there be formalities?**
- **What sanctions or penalties apply?**
- **Should rights be retrospective?**
- **How should foreign right holders be treated?**

Example – Article 1 SUBJECT MATTER OF [PROTECTION]/[INSTRUMENT]

The subject matter of [protection]/[this instrument] is traditional knowledge:

- (a) that is created, and [maintained] in a collective context, by indigenous [peoples] and local communities [or nations] [,whether it is widely spread or not];
- (b) that is [directly] [linked]/[distinctively associated] with the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities [or nations];
- (c) that is transmitted from generation to generation, whether consecutively or not;
- (d) which may subsist in codified, oral or other forms; and [or]
- (e) which may be dynamic and evolving.

[Criteria for Eligibility]

Protected traditional knowledge is traditional knowledge that is [distinctively] associated with the cultural heritage of beneficiaries as defined in Article 2, that is generated, [maintained], shared and transmitted in a collective context, is intergenerational and has been used for a term as has been determined by each [Member State]/[Contracting Party] [but not less than 50 years].]

Defensive protection

- Documentation
- Contracts/licensing
- Protocols and Guidelines

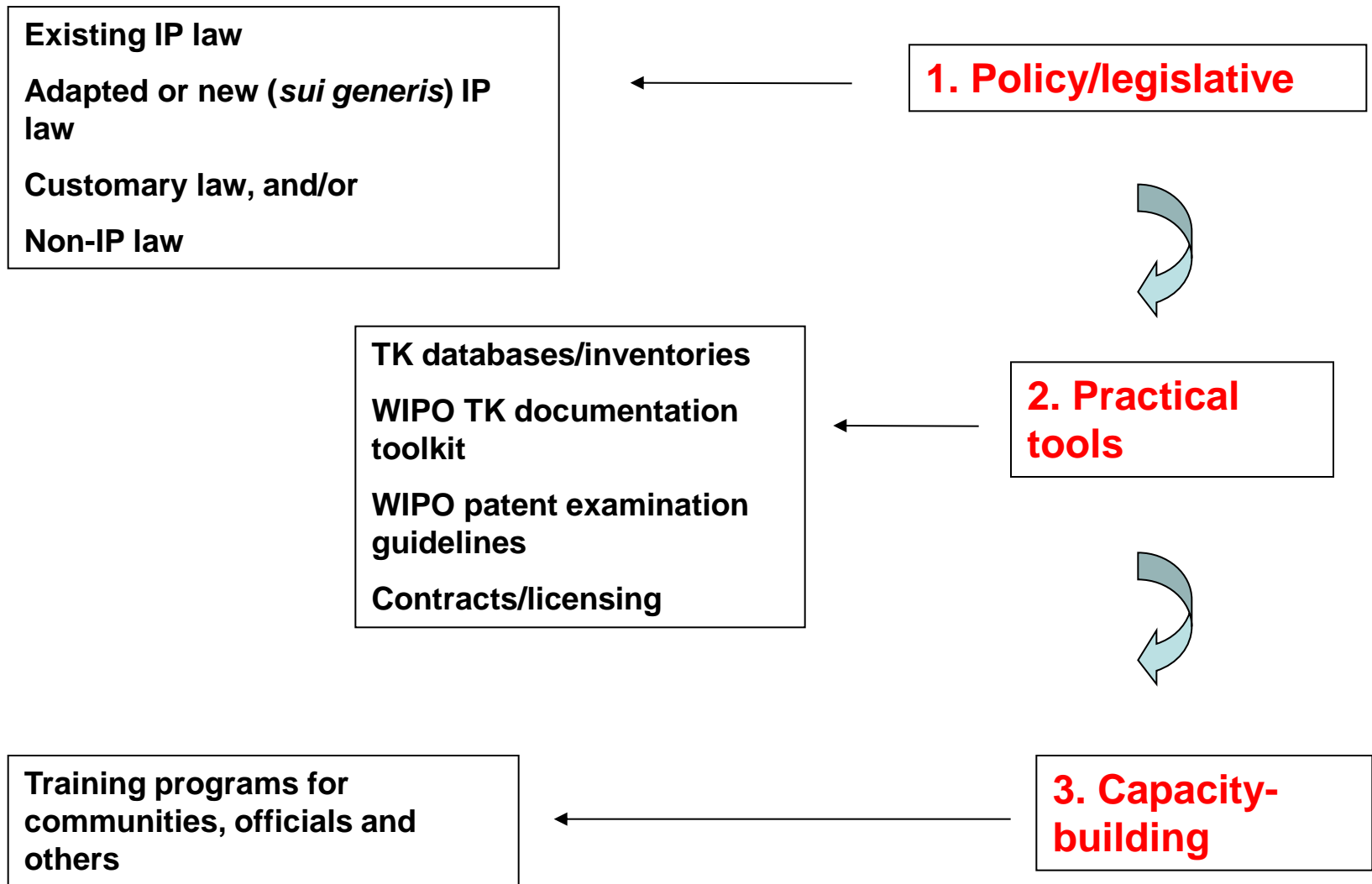


Exercise 4

- A researcher from the University of X talked to traditional healers and learned about their knowledge on a plant they used in their traditional medicines.
- The researcher went back to lab to do the research, and filed a patent on his own for the anti-fungal properties of the plant.
- What's wrong here? How can you help traditional healers?

In Summary

Options



Is there a Suitable Protection System?

- NO single template or comprehensive “one-size-fits-all” solution



Thank you for your attention!

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