



Issues in Documentation and Registration for the Intellectual Property Protection of Traditional Knowledge 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 ("biopiracy")

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

Is intellectual property relevant?

“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

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 Intellectual Property Organization (WIPO) and the Convention on Biological Diversity (CBD), the

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

What do IP law and practice say about TK?

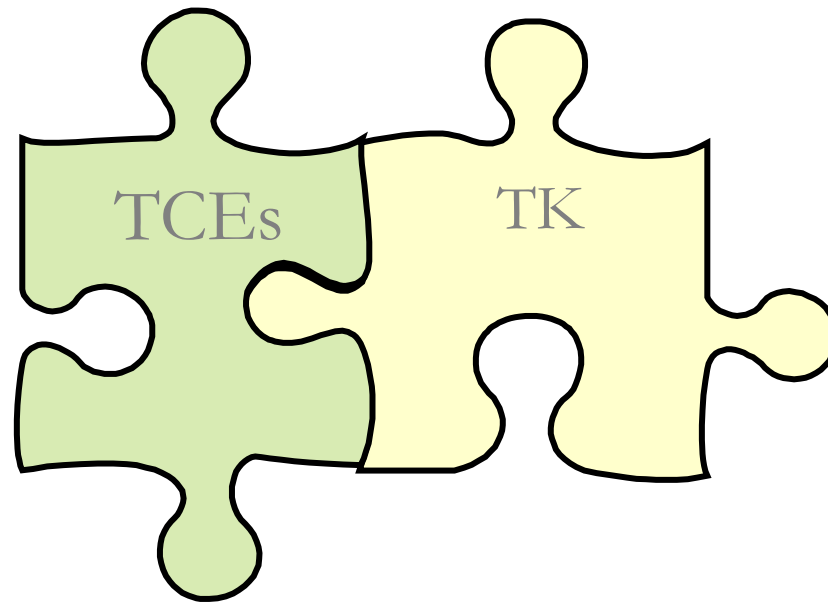
- Patents available for any inventions in all fields of technology provided they are new, involve an inventive step and are capable of industrial application (certain exclusions possible)
- International IP law largely silent on TK
 - “traditional” knowledge regarded as “public domain” from perspective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

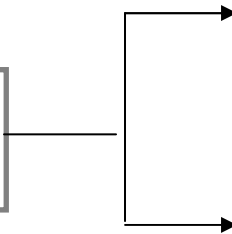
- “Traditional” cultural expressions largely regarded as “public domain”
- Yet, pockets of protection available in international IP law
- Contemporary versions are protectable under copyright and related rights law
- Many *sui generis* mechanisms and systems
- Several “misappropriation” cases; little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

Some terminological questions

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



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 goals

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

Possible objectives

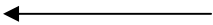
- Promoting innovation and creativity
 - accessible and equitably distributed
 - economic development; benefits for human welfare
- A rich and robust 'public domain'
 - balance and proportionality
- Respect for Indigenous Peoples' rights and interests
- Workability and enforceability

What options are there?

What options are there for attaining IP objectives?

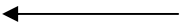
Existing IP law
Adapted or new (sui generis) IP law
Customary law, and/or
Non-IP law

1. Policy/legislative



Information systems:
databases/inventories/registers

2. Infrastructure



Guidelines and protocols
Contracts/licensing
Dispute resolution procedures

3. Practical tools



The role of documentation, databases and registers

- Documentation: any manner of recording knowledge itself or the way it is expressed (includes databases, registers, inventories)
- Documentation can have several aims
 - Preservation of TK/TCEs
 - Defensive protection (providing evidence of prior art)
 - Promotion of TK/TCEs
 - Revitalization of TK/TCEs
 - Education and awareness-raising
 - Information-exchange between communities
 - Assertion of positive protection: as part of legislative system for assertion of rights
- Different forms of documentation
 - Community TK databases
 - External TK databases
 - TK “registers”

(see Hardison, UNEP/CBD/WG8j/5/3/Add.2)

- Documentation of TK/TCEs is not itself necessarily a form of protection
 - Documentation can threaten TK/TCEs and facilitate their misappropriation
 - IP issues arise in all forms of documentation
 - An IP strategy should underpin any documentation exercise

Update on negotiations in the WIPO IGC

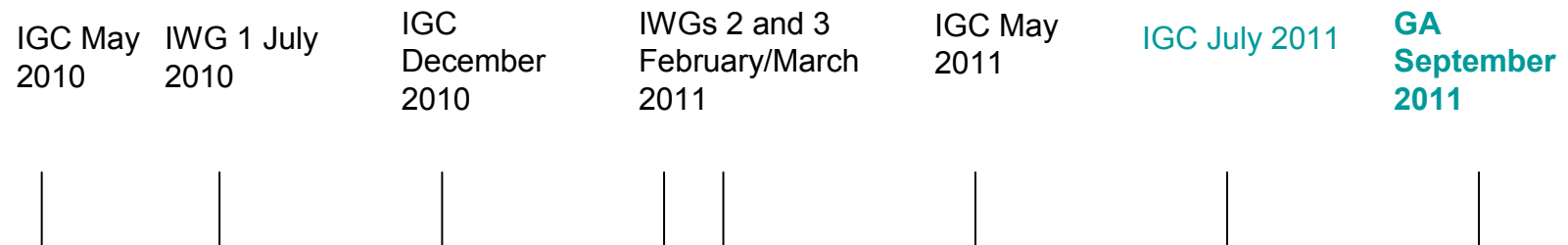
WIPO Intergovernmental Committee

- 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?

- Defining objectives

■ What?

- Identifying the subject matter of protection; addressing sacred, secret and publicly available TK

■ Who?

- Describing the beneficiaries and rights holders

■ How

- Circumscribing the scope of protection – rights, limitations and exceptions, and how rights are obtained and lost

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

Formalities

- Draft Article 7 of 18/4 Rev.
- Options:
 - No formalities
 - Optional registration/documentation
 - Mandatory registration/documentation
 - Registration can be 'constitutive' or 'declaratory'

ARTICLE 7¶
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FORMALITIES¶
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As a general principle, the protection of traditional cultural expressions shall not be subject to any formality. ¶
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**AFRICAN REGIONAL INTELLECTUAL PROPERTY
ORGANIZATION (ARIPO)**

**DRAFT PROTOCOL
ON THE PROTECTION OF
TRADITIONAL KNOWLEDGE
AND
EXPRESSIONS OF FOLKLORE
WITHIN THE
FRAMEWORK OF
THE AFRICAN REGIONAL
INTELLECTUAL PROPERTY**

ORGANIZATION

of that community.

Section 17

Formalities relating to protection of expressions of folklore

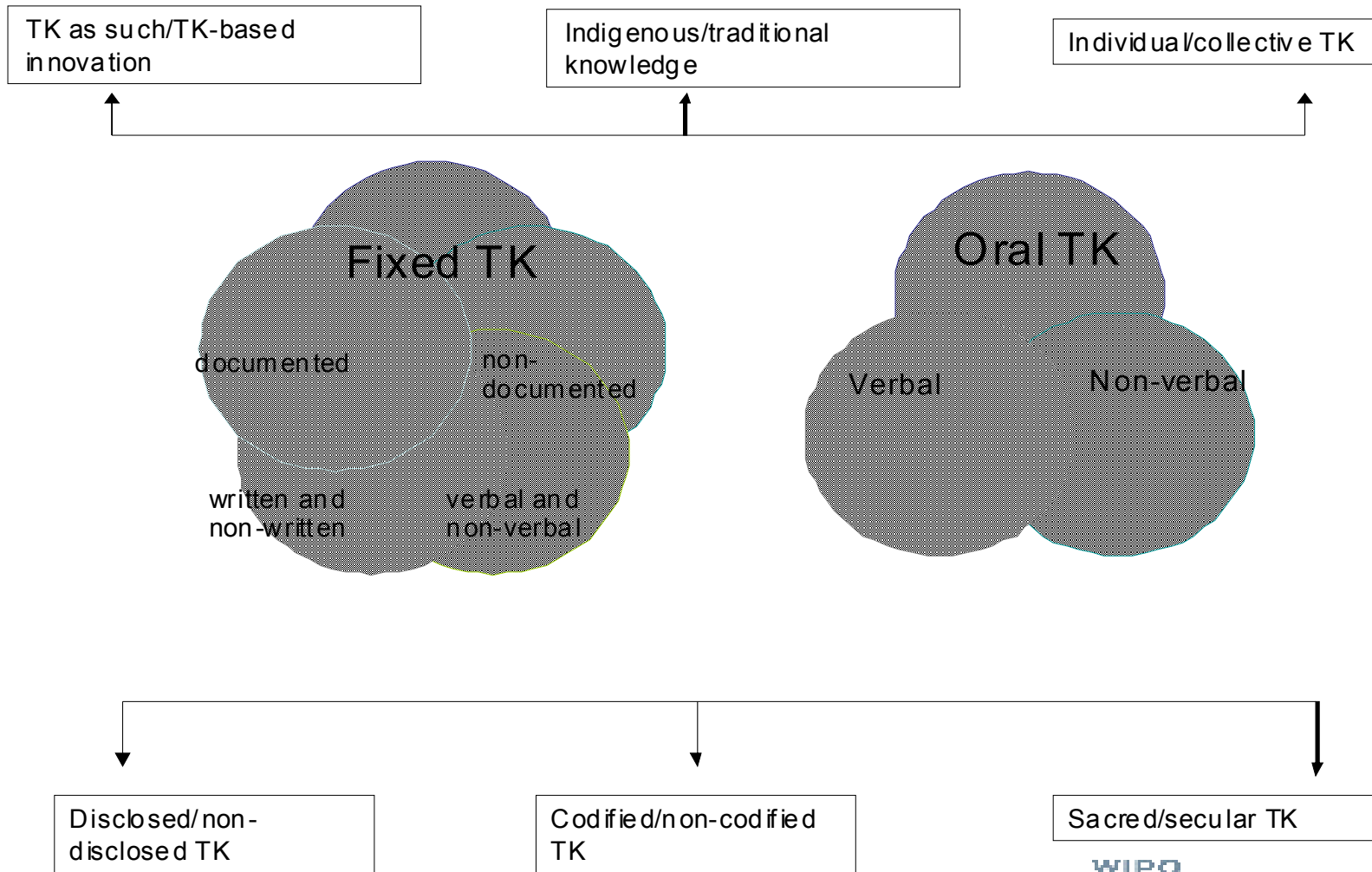
- 17.1. The protection of expressions of folklore shall not be subject to any formality.
- 17.2. For the purposes of evidence, measures for the protection of expressions of folklore may require that certain categories of the expressions for which protection is sought, particularly those with special cultural or spiritual value or significance or those that are sacred in character, be notified to the appropriate authority.
- 17.3. The notification shall have a merely declaratory function and shall not in itself constitute rights, nor shall it involve or require the documentation, recording or public disclosure of the expressions of folklore concerned.
- 17.4. Where two or more communities in the same or different countries share the same expressions of folklore, the relevant national competent authorities of Contracting States and the ARIPO Office shall register the owners of the rights in those expressions of folklore.

Section 18

Beneficiaries of protection of expressions of folklore

The owners of the rights in expressions of folklore shall be the local and traditional communities:

- (a) to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities; and



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