

# THE WORLD INTELLECTUAL PROPERTY ORGANIZATION TRADITIONAL KNOWLEDGE DOCUMENTATION TOOLKIT

CONSULTATION DRAFT  
NOVEMBER 1, 2012



# **The World Intellectual Property Organization Traditional Knowledge Documentation Toolkit**

## **CONSULTATION DRAFT**

**November 1, 2012**

© World Intellectual Property Organization, 2012. Certain rights reserved. WIPO authorizes the partial reproduction, translation and dissemination of this publication for non-commercial and non-profit scientific, educational or research purposes, provided that WIPO and the publication are properly identified and acknowledged. Permission to substantially reproduce, disseminate and/or translate this publication, or compile or create derivative works therefrom, in any form, whether for commercial/for profit or nonprofit purposes, must be requested in writing. For this purpose, WIPO may be contacted at [www.wipo.int](http://www.wipo.int) under "Contact us". Certain images used in this publication have been obtained from commercially available databases to which WIPO subscribes.

*Disclaimer:* This publication does not necessarily represent the views of WIPO or any of its Member States. This publication is not a substitute for legal advice. Its purpose is limited to providing basic information.

## WIPO Traditional Knowledge Documentation Toolkit

BACKGROUND AND ACKNOWLEDGEMENTS .....	4
FOREWORD .....	6
THE SCOPE OF THE TOOLKIT .....	8
THE PURPOSE OF THE TOOLKIT .....	10
GETTING STARTED - SOME BASIC QUESTIONS AND CONCEPTS .....	12
<b>Intellectual Property and Traditional Knowledge: A Brief Primer</b> .....	15
PHASE 1. BEFORE DOCUMENTATION OF TRADITIONAL KNOWLEDGE .....	18
<b>STEP 1. Planning the documentation process</b> .....	18
<b>STEP 2. Broadly understanding indigenous peoples and local communities' interests and concerns</b> .....	20
<b>STEP 3. Defining the objectives of the documentation process: What is sought?</b> .....	22
The clients or users .....	23
<b>STEP 4. Participation and prior informed consent</b> .....	24
<b>STEP 5. Assessing legal issues: the public domain and other intellectual property considerations</b> .....	26
The Public Domain and Traditional Knowledge .....	26
Intellectual property considerations .....	27
Confidentiality .....	30
PHASE 2. DURING DOCUMENTATION OF TRADITIONAL KNOWLEDGE .....	31
<b>STEP 1. Obtaining, organizing, systematizing, maintaining and transmitting traditional knowledge</b> .....	31
Customary Law and Practices .....	33
Documentation through a Database or Register .....	33
Maintaining the database or register: review by indigenous peoples or local communities .....	35
<b>STEP 2. Continuously informing indigenous peoples and local communities about progress in the documentation process</b> .....	36
PHASE 3. AFTER DOCUMENTATION OF TRADITIONAL KNOWLEDGE .....	37
<b>STEP 1. Promoting the Traditional Knowledge documentation database or register</b> .....	37
Documentation to assist Intellectual Property Offices in defensive protection .....	37
<b>STEP 2. Putting in place technological measures for establishing the ownership over the documentation</b> .....	38
<b>STEP 3. Monitoring uses and users of documented Traditional Knowledge</b> .....	39
<b>STEP 4. Verifying whether initial planning objectives and milestones have been met</b> .....	41
CASE STUDY .....	43
GLOSSARY .....	45

## List of Boxes

- Box No. 1 The information on TCEs documentation
- Box No. 2 Examples of documenting TK as part of a documentation process
- Box No. 3 Traditional Knowledge Digital Library
- Box No. 4 The difference between IP protection, preservation and safeguarding
- Box No. 5 Registers *vis a vis* databases
- Box No. 6 The nature of TK
- Box No. 7 An example of a *sui generis* approach to TK protection: The Peruvian Law 27811
- Box No. 8 An IP assessment template
- Box No. 9 Key elements in a documentation format
- Box No. 10 Examples of TK documentation through registers and databases
- Box No. 11 More examples of TK documentation through registers and databases
- Box No. 12 Evaluating the potential benefits and disadvantages generated by a documentation project

## **BACKGROUND AND ACKNOWLEDGEMENTS**

The World Intellectual Property Organization (WIPO) Traditional Knowledge Documentation Toolkit project, originally developed under the auspices of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), aims to assist holders of traditional knowledge (TK), in particular, indigenous peoples and local communities, in identifying and defending their intellectual property (IP) related interests when their TK is documented or otherwise recorded. The project proposal was considered and approved by the WIPO IGC at its third session in 2002. The proposal was developed further in the form of a draft outline, again considered by the IGC at its fourth session in 2002 (WIPO/GRTKF/IC/4/5). Following further consultations, a revised draft outline was submitted to the IGC at its fifth session in 2003 (WIPO/GRTKF/IC/5/5), and it received strong endorsement after a detailed Member State review.

Since then, there has been widespread interest in the Toolkit project and numerous requests for drafts and finished versions. From 2007, some experts started to work on this project. This consultant draft has been developed based on the draft outline referred to above.

Mr. Manuel Ruiz, Director of the Program of International Affairs and Biodiversity of the Peruvian Society for Environmental Law (SPDA), contributed significantly to this work. Dr. V.K. Gupta, Senior Advisor and Director Traditional Knowledge Digital Library, Council of Scientific and Industrial Research (CSIR), and Dr. Brendan M. Tobin, Research Fellow, Australian Centre for Intellectual Property in Agriculture (ACIPA), Law School, Griffith University, prepared papers that were used as inputs for this document.

## **CONSULTATION DRAFT**

This draft is published for consultation and field-testing. A more final version will be published in due course. Comments would be appreciated and may be sent to WIPO's TK Division at [grtkf@wipo.int](mailto:grtkf@wipo.int).

## Acronyms

Convention on Biological Diversity	CBD
European Union	EU
Intellectual Property (rights)	IP
Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore	IGC
Non Governmental Organization	NGO
Prior Informed Consent	PIC
Traditional Cultural Expressions	TCEs
Traditional Knowledge	TK
United Nations Declaration on the Rights of Indigenous Peoples	UNDRIP
United Nations Educational, Scientific and Cultural Organization	UNESCO
World Intellectual Property Organization	WIPO

## FOREWORD

In the past decades, and especially since the entry into force of the *Convention on Biological Diversity* (CBD) in 1993 and the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007, increased attention has been given by policy makers, researchers and civil society, towards finding means to safeguard the interests in creativity and innovation generated by [indigenous peoples](#) and [local communities](#) throughout the world. For a long time, knowledge, innovations and practices of indigenous peoples and local communities (also known as [traditional knowledge](#) or TK) and artistic and cultural expressions such as music, designs, art, dances and stories (also known as traditional cultural expressions ('expressions of folklore') or TCEs) were only timidly recognized as intellectual efforts worthy of legal protection.<sup>1</sup>

In that wake, indigenous peoples, local communities, and some governments have demanded the recognition of traditional forms of creativity and innovation, such as traditional remedies and indigenous paintings and music, as protectable intellectual property (IP).

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010) adopted by the CBD, as well as ongoing negotiations within the World Intellectual Property Organization (WIPO) *Intergovernmental Committee on Genetic Resources and Intellectual Property, Genetic Resources and Folklore* (IGC)<sup>2</sup> to design an international instrument(s) for the protection of TK and TCEs, are recent reflections of an explicit commitment by the international community to protect the intellectual rights of indigenous peoples and local communities<sup>3</sup>. Some indigenous peoples' organizations have also become very active in advocating for an international agenda to develop a binding instrument to protect the IP of indigenous peoples and local communities.

Whereas a wide range of tools and proposals have been developed over the past decade or so to protect TK and TCEs (including using classical IP systems, developing [sui generis](#) legislation, applying [defensive protection](#) instruments, among others), special attention has been given to documentation and the role of databases and registers in this regard. As a result, identifying, collecting and organizing TK and TCEs has become a widely discussed option to guarantee indigenous peoples' and local communities' social, cultural and economic interests. Documenting TK and TCEs has emerged as one of the tools which may play a role in impeding further loss of TK, maintaining TK over time, supporting benefit-sharing and, ultimately, protecting TK and TCEs from unwanted uses.

Yet, the mere documentation of TK or TCEs cannot stand alone as an effective strategy for protecting TK and TCEs. TK and TCEs documentation should not take place within a legal and policy vacuum.

Indeed, concerns and questions have been raised regarding documentation and its potential effects on the rights, culture and livelihoods of indigenous peoples and local communities, including through the placing of TK and TCEs in the "[public domain](#)", the loss of control, the

---

<sup>1</sup> See Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore (Background Paper No. 1). WIPO Publication No. 785(E), May 2003, Geneva.

<sup>2</sup> The WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) served as the foundation for WIPO's General Assembly decision to launch the IGC process in 2000.

<sup>3</sup> UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage (2003) and the UN Declaration on the Rights of Indigenous Peoples (2007) are other examples of an international drive towards TK and TCEs protection. At the regional level, the African Union, the African Regional Intellectual Property Organization (ARIPO) and the Andean Community, as well as individual countries, have also responded by initiating policy processes and developing international agreements and legislation to protect TK and its different manifestations.

making of TK and TCEs publicly available, the loss of the secret nature of some TK and TCEs, etc<sup>4</sup>.

This WIPO Traditional Knowledge Documentation Toolkit provides useful practical guidance on how to undertake a TK documentation exercise as a process and how to address critical IP-related issues and questions, as they surface during this effort.

It does not advocate or promote TK documentation. It aims rather to empower indigenous peoples and local communities to decide for themselves whether they wish to have their TK documented or not, and to make the right decisions regarding how to safeguard their interests and keep control of their IP rights, interests and options. The Toolkit intends to provide guidance on the IP implications of documenting TK.

When using the Toolkit, look out for these icons:



The *caution icon* warns about issues which are essential and need to be taken note of during a documentation process.



The *balance icon* indicates a general guidance or principle that should be kept in mind during documentation.



The *directions icon* refers to further sources of information and provides general tips about the Toolkit.



The *fast-track icon* indicates materials which may be skipped.

---

<sup>4</sup> For instance, the Venezuelan Indigenous Council has stated that the indigenous peoples of Venezuela felt that the cataloguing of their TK ran counter to their culture and also that it would fragment their vision of the universe where there could be no separation between knowledge of the earth and knowledge of religion. They feared that they would lose control over their TK by cataloguing it. See WIPO/GRTKF/IC/5/15, paragraph 72.

## THE SCOPE OF THE TOOLKIT

This Toolkit focuses on “TK” in its narrower sense, i.e., the content or substance of technical knowledge and know-how related to biodiversity, food and agriculture, health, the environment and the like.



For their part, “traditional cultural expressions” (or, “expressions of folklore”) raise a series of distinct IP-related questions.

Traditional cultural expressions (TCEs) are generally literary, artistic and musical productions, often broadly and collectively referred to as “intangible cultural heritage”. Many initiatives are currently being pursued all over the world to record, register and digitize intangible cultural heritage: individuals (such as ethnologists, folklorists and anthropologists), institutions (such as museums and archives) and governments (especially Ministries of Culture) have for decades been recording and disseminating expressions of our planet’s rich cultural diversity. UNESCO’s 2003 *Convention on the Safeguarding of the Intangible Cultural Heritage* actually requires States Parties to keep registers, lists and inventories of their intangible cultural heritage. These forms of documentation are useful for safeguarding, preserving and promoting intangible cultural heritage.

However, as is the case with TK, documenting TCEs raises certain IP questions, although these tend to be different from the kinds of IP issues raised by TK documentation.

In the case of TCEs, examples of documentation activities may include:

- recording traditional songs on audiotape;
- photographing traditional textile designs;
- writing down spoken traditional stories;
- photographing traditional art, such as rock paintings; and
- digitizing ancient manuscripts.

IP-related questions that arise in TCE documentation projects point in two directions: first, the recording and digitization of TCEs, even for valuable cultural heritage safeguarding and promotion programs, can unwittingly make the TCEs more accessible to third parties and, therefore, more vulnerable to unauthorized use and exploitation. In this instance, a tension between “preservation” and “protection” may be detected because the very process of preservation may trigger concerns about the lack of protection and may run the risk of unintentionally making TCEs, which are in the ‘public domain’, vulnerable to unwanted exploitation. For example, ethnographic recordings containing sensitive material depicting initiation rites have been made available by a cultural institution for educational and commercial purposes. Yet, cultural institutions play a critically valuable role in preservation, promotion and education, and many institutions are pioneers in establishing mutually-beneficial relationships with indigenous peoples and local communities. WIPO’s “Intellectual Property and the Safeguarding of Traditional Cultures: Legal and Practical Options for Museums, Libraries and Archives”<sup>5</sup> is a useful resource in this regard.

Second, even though the TCE itself may be in the “public domain”, the process of documenting it may create rights in the recorded material: for example, recording a traditional song creates IP rights in the recording, even if the underlying song is in the ‘public domain’. The problem here, from a community perspective, is that it is the person or entity responsible for the

<sup>5</sup> WIPO Publication No. 1023(E). It is available at <http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf>.

recording (such as an ethnomusicologist or museum) that owns the IP rights in the recording, not the community whose tradition the song forms part of and which might have performed the song. This means that if the documentation exercise is not carried out by the community itself, the community is neither the owner of the song nor of its recording! Should the community wish to enjoy control over the documentation of its TCEs, it should acquire the technical skills to undertake the documentation itself and the legal skills to manage its own IP: this is precisely the focus and objective of WIPO's Creative Heritage Training Program. This initiative in community-led documentation is complemented by work being done, supported by WIPO, on developing software and digital rights management tools for indigenous and local communities to enable them electronically to manage rights and interests in their digitized collections of TCEs.

The registration of TCEs can also form part of legislative systems designed to vest TCEs with either [positive or defensive protection](#). For example, Panama's Law of 2000<sup>6</sup>, which provides for a special IP regime for the collective rights of indigenous peoples, provides rights in TCEs when they are registered with the Panamanian IP office.

Documentation can also play a defensive role: the United States Patent and Trademark Office (USPTO) Database of Official Insignia of Native American Tribes, established in 2011, is a comprehensive database containing the official insignia of all State and Federally recognized Native American tribes. Under the trademark legislation of the United States of America, and on the basis of the insignia registered in the database, the USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe.

More generally, unlike with TK, there are several instances of protection for TCEs, and contemporary derivatives thereof, to be found in conventional IP systems. Many countries have also developed special *sui generis* protection for TCEs in their copyright laws. These should also be taken into account in any TCE documentation exercise. A general useful resource on IP and TCEs is WIPO's "Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore"<sup>7</sup>.

### **Box No. 1 The information on TCEs documentation**

The remainder of this Toolkit will focus mainly on TK. However, in practice, TK and TCEs are often closely related and documented together: much of the information in this Toolkit, especially on process, might also apply to TCEs.

---

<sup>6</sup> Panama Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge is available at <http://www.wipo.int/wipolex/en/details.jsp?id=3400>.

<sup>7</sup> WIPO Publication No. 785 (E). It is available at [http://www.wipo.int/export/sites/www/tk/en/publications/785e\\_tce\\_background.pdf](http://www.wipo.int/export/sites/www/tk/en/publications/785e_tce_background.pdf).

## THE PURPOSE OF THE TOOLKIT

The Toolkit is designed to help conceptualize and plan a TK documentation process and understand its key IP dimensions, as a means to assist in safeguarding the interests and protecting the rights of TK holders, in particular, 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. The Toolkit may be used whether documentation implies reviewing and organizing existing TK in databases, books, studies, etc. or directly obtaining TK from indigenous peoples and local communities themselves, from *in situ* sources (in the field).



It is a source of information oriented to help in practical situations. The Toolkit **does not promote documentation as such nor does it provide, suggest or prefer any one approach** but, rather, offers a menu of alternatives to be taken into account by documentation projects and efforts. Often, it suggests questions which should be raised in each specific situation, according to indigenous peoples and local communities and other actors' needs and interests. Depending on how documentation is carried out, it can promote the interests of the TK holders or damage those interests.

**Potential users.** 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 and cultural institutions which work in the field and interact with indigenous peoples and local communities *in situ* (for example in ethno-botanical projects or museums, libraries and archives), among others.

**IP considerations throughout the TK documentation process.** IP, in its different forms, is one important issue to consider as part of a documentation process, since important IP rights may be lost or strengthened when documenting TK. Documentation inevitably comes across questions of ownership and rights over TK, as well as rights over resulting compilations, databases or registers. Classic IP instruments may determine the scope and coverage of certain rights, though in some cases *sui generis* or non-IP instruments may also serve this purpose.

**Using the Toolkit.** The Toolkit is a practice-oriented tool, which can also help to create and strengthen indigenous peoples, local communities and other actors' capacities to manage and protect TK. To help in using the Toolkit, TK documentation is broadly divided into three distinct phases: *before* documentation (planning, assessing options and setting objectives), *during* documentation (following planned actions and activities) and *after* documentation (managing access and use of documented TK).

The Toolkit should be read in its integrity to help documentation processes move along. However, each phase, section, or sub section may be also read independently, according to the plans and priorities set for documentation. Each phase entails different, often complementary, steps and within these, sets of activities, issues and problems which require attention. These steps can be followed in a logical sequence, though each situation may demand adjustments and tailoring to specific needs.

In some cases, TK may have already been collected and organized, so the "after documentation" section may be more appropriate to start with. If the documentation effort or

project is only just starting, “before”, “during” and “after” documentation phases may be equally relevant.



The Toolkit should not be used without customizing and adapting its content to specific case-by-case situations. Neither should it be used as the sole means to protect TK. This is not its purpose, though it may serve towards this goal. Finally, expert legal advice may be required before undertaking or advancing in different phases of and steps in the documentation process, for example, to determine applicable laws in force, the legal status of TK, applicable rules, define IP aspects, understand database protection if applicable, etc. Advice from indigenous lawyers, when possible, could serve to further consolidate the documentation process.

In terms of the broader set of activities which are essential to this process, *before documentation* implies planning (setting documentation targets or goal) and subsequent/parallel consultation with indigenous peoples and local communities and relevant stakeholders involved in the process; *during documentation*, on the other hand, implies a process during which TK is actually collected and organized in some coherent manner. Key issues and questions are suggested as to orient this effort. Finally, *after documentation* implies a series of post-collection and organization activities, more related to the management of the database, documentation system or register which may have been created.



The Toolkit:

- does not seek to promote documentation,
- is not *per se* an instrument for the protection of TK ,
- does not prejudge or suggest that TK should be placed in the public domain or made publicly available,
- does not promote the disclosure of non-disclosed or confidential TK,
- does not replace expert legal advice with regards to more case-specific and thornier issues,
- does not suggest or prefer any form of ownership rights over TK,
- does not provide information with regards to specific IP laws nor interpret IP in any particular way,
- does not provide any specific option to protect TK,
- does not offer advice with regards to whether and how to collect or research in biological and genetic resources which may be related to TK, and
- does not constitute the official view of any WIPO Member State nor that of WIPO.

The Toolkit also includes a series of small boxes with additional relevant information regarding documentation, based mostly on real cases involving indigenous peoples and local communities in different parts of the world. In some cases, additional commentaries and reflections are made in regard to some of the more complex issues and aspects involving documentation. Explanatory footnotes are also provided to expand on certain details. It is hoped that the Toolkit is an “easy to read” document which supports TK documentation processes if and when required.

## GETTING STARTED - SOME BASIC QUESTIONS AND CONCEPTS

*What is TK documentation?* Documentation is primarily a process by which TK is identified, collected, organized, registered or recorded in some way, as a means to dynamically maintain, manage, use, disseminate and/or protect TK (positively or defensively) according to specific goals. A simple photograph, or an isolated record of TK, or a written note, are not documentation *per se*, in the sense suggested in this Toolkit. These isolated acts (taking a photograph or jotting down a descriptive note) need to be part of a comprehensive, thought-through process in order to be regarded as ‘documentation’.

In contrast to traditional ways in which TK is managed and passed on within and among communities (mostly orally), documentation involves a planned, conscious and informed action of knowledge organization which may serve many purposes, including:

- Preserving, safeguarding or promoting TK and transmitting it to future generations,
- Establishing positive rights for TK,
- Helping in designing benefit-sharing schemes,
- Making TK available in a more systematized manner to a wider audience (researchers, students, entrepreneurs, etc.),
- Using TK for specific community-oriented objectives (education, awareness, cultural preservation, etc.),
- Broader awareness raising,
- Preventing IP rights being granted over TK, for example, those which do not fulfill the existing requirements of novelty and inventiveness in patent applications (also known as “defensive protection”), and/or
- Creating new IP rights through scientific validation of the TK and collaborative research and development.

Documentation may be a process mandated by a national law or regulation, or respond to a private initiative or an indigenous peoples’ or local communities’ led process (see Box No. 9 and Box No. 10, below).

In a number of countries, laws and regulations exist on protection of TK. Most of these recognize indigenous peoples and local communities’ rights over TK and/or determine the conditions and requirements under which TK may be obtained and used<sup>8</sup>. Since documenting TK implies obtaining and using it, any documentation exercise will have to comply with the laws or regulations in force.



Of all the conditions for undertaking the documentation of TK processes, three stand out as critically important: *consultation* (with and among indigenous peoples or local communities), *participation* (of indigenous peoples representatives or local communities) and *prior informed consent* (PIC) from

<sup>8</sup> Decision 391 of the Andean Community on ABS (1996), for example, establishes that Member States recognize indigenous peoples and communities rights over their TK. In the case of Brazil, the Provisional Measure 2.186-16 on ABS (2001) recognizes that indigenous peoples and communities have the right to decide who uses and how their TK can be used. The Decree DAJ- D- 020-2003-MINAE, which regulates ABS in Costa Rica (2003), recognizes that indigenous peoples and communities have the right to a cultural objection in regards to access and use of their TK in the context of bioprospecting projects. This type of recognition repeats itself in various others ABS laws and regulations.

indigenous peoples and local communities, before TK is even identified, selected, collected and organized.

*How is documentation expressed?* Documentation can take many shapes and forms, through written registries and files, video, images and audio; in traditional indigenous language or others, and using modern or more classical technologies (digital vs. written filing).

- Videotaping the preparation of a medicinal potage by *Quechua* communities in the Andes (Peru)
- Writing down medicinal preparations by *Shipibo* communities (Peru), or the *Mapuches* (Chile), or the *Maasai* (Kenya and Tanzania)
- Videotaping traditional agricultural practices and technologies of *Aymara* people (Bolivia), or the *Nahua* (Mexico), or the *Pashtun* (Afghanistan)
- Taking notes about herding traditions of the *Tuareg* peoples in the Sahel (Africa)
- Photographing land and agro-forestry management activities of the *Campas* peoples (Brazil) or medicinal practices of the *Shuar* (Ecuador)
- Writing down food potages and recipes of the *Maori* (New Zealand) or the *Kuna* (Panama)
- Writing down oral histories which include TK; or
- Digitizing an ancient manuscript such as a medical text.

#### **Box No. 2 Examples of documenting TK as part of a documentation process**

*Are there rights in recordings and databases of TK?* The recording and “fixation” of the TK into material form (a register, database, file, etc.) is often the point where IP rights come into existence and then there is a need to evaluate: rights in the TK itself (including rights in genetic/biological materials) and rights in the fixation itself, including the actual compilations, databases, translations and reproductions (see following section on IP and TK). In other words, the process of documentation may create new rights in the recorded material. For example, copyright will probably vest in a written version of a remedy that was previously only held and transmitted orally.

Moreover, copyright and *sui generis* database protection can protect databases as such (distinct from and regardless of whether the material in the database is itself protectable or not). For instance, TK may be protected indirectly by the copyright protection afforded to databases that are original by reason of the selection or arrangement of their contents. Note, however, that in these cases the copyright extends only to the ways in which the TK is expressed and not to the ideas or the content of the TK itself. And, as pointed out earlier in Box No. 1, it is generally the person or entity responsible for the fixation or recording of the TK (such as biologists or other researchers and collectors) that owns the copyright or related rights in the recording of the TK, no matter who the TK holders might be. Further, database rights may be available in some jurisdictions for non-original databases. This is the case with the EU Database Protection Directive (1996), which grants a *sui generis* right to developers of non-original databases (those which cannot be protected through classical copyright). Non-original databases are those which do not result from creative activities *per se*, but that represent an investment in time, effort and resources in compiling and organising the resulting data and information. The Directive provides the developers of the database with the rights to prevent the extraction and/or re-utilization of the whole or of a substantial part of the database’s contents, where such databases represent a substantial investment in obtaining, verifying or presenting the contents. This

protection applies irrespective of the eligibility of the contents for protection by copyright or by other rights. Therefore, it is possible that collections and databases of TK made by the communities could be protected under this kind of *sui generis* database protection, where available.

The protection accorded to databases may prove to be of interest for extending protection to TK in the “public domain”, especially TK that is compiled in new databases such as the Traditional Knowledge Digital Library in India (See Box No. 2). However, whether this protection could, in principle, extend to single TK entries included in such databases being “extracted and re-utilized” is doubtful.

An example of documenting previously-disclosed traditional medical knowledge is the Traditional Knowledge Digital Library (TKDL). The TKDL is a collaborative project between the Council of Scientific and Industrial Research (CSIR), Ministry of Science and Technology, and the Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homeopathy (AYUSH), Ministry of Health and Family Welfare, of India, and is being implemented at the CSIR. The TKDL has been created to prevent the misappropriation of India’s TK through intentional patenting activity. An inter-disciplinary team of traditional medicine (Ayurveda, Unani and Siddha) experts, patent examiners, IT experts, scientists and technical officers were involved in the creation of the TKDL. The TKDL project involves documentation of the codified Indian systems of medicine, which were publicly available in existing literature related to Ayurveda, Unani and Siddha, in digitized format in five international languages, namely English, German, French, Japanese and Spanish. The TKDL provides information on TK existing in the country, in languages and format understandable by patent examiners at International Patent Offices, so as to prevent the grant of wrong patents<sup>9</sup>.

Though the codified Indian systems of medicine was publicly available, since it existed in local languages, such as Sanskrit, Urdu, Arabic, Persian and Tamil, it was neither accessible to patent examiners at international patent offices nor could it be understood by them even in case of availability. In other words, there existed a language and format barrier. To break this language and format barrier, the TKDL was created. With the help of Information Technology tools and a novel classification system, i.e., Traditional Knowledge Resource Classification (TKRC), the TKDL makes the knowledge available to patent examiners in patent application format and in a language that can be understood by them.

The TKDL is not open to the public. Access to the TKDL database has been granted to some patent offices, which are allowed to utilize the TKDL for prior art searches and patent examinations. However, patent offices cannot reveal the contents of the TKDL to any third party, to protect India’s interest against any possible misuse.

## गदनिग्रहः

रसायनतन्त्रे औषधिकल्पाधिकारः २

३२६

श्रामलककल्पं

तद्वदामलकं शीतमम्लं पित्तकफापहम् ।

इसी प्रकार साधारण ( प्राकृत ) अँवला शीतल, अम्ल रसयुक्त तथा पित्त एवं कफ को नाश करने वाला है ।

9 <http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdl.asp?GL=Eng>

This is an example of the original text as available in Sanskrit book Gadanigraha.

RG2/1473¶

Title-of-Traditional-Knowledge-Resource → .....Knowledge-Known-Since←

Amalaki-Guna → .....500-Years¶

DETAILS-OF-PROCESS-/FORMULATION: → ¶

1. Amalaki-Guna is a therapeutic single-/compound formulation consisting of useful parts of following ingredient(s): Phyllanthus emblica Linn. Syn.: Emblica officinalis Gaertn. (emblic, Emblic-Myrobalan)¶

2. Therapeutic composition-/formulation is mentioned below: → ¶

1\* Phyllanthus emblica Linn. Syn.: Emblica officinalis Gaertn. (emblic, Emblic-Myrobalan)\* Fruit 1.....Part\* \* → \*

3. Taste indicating chemical composition- (Rasa)- Sour←

4. Potency or Dynamic property (Virya) - Cold←

5. It is Kapha-pitta-dosa pacifying-/alleviating-¶

LIST-OF-DOCUMENTS-WITH-DATE-OF-PUBLICATION-(PRIOR-ART):¶

So'hala\* Gadanigraha<sup>2</sup> ed, Ganga-Sahaya-Pandeya-& prior-art\* Page 629\* \* Com.-Indradeva-Tripathi, Part-3 (Salakya- -

This is the standard format containing description, formulation ID, Title, Year, time of origin, details of process, bibliography and date of publication.

### Box No. 3 Traditional Knowledge Digital Library

*Why is documentation important?* Documentation is important and may be useful, depending on specific contexts and objectives pursued by indigenous peoples, local communities and actors involved in the process. Some examples of objectives appear above. What may be critically important for an Andean “campesino” community in Peru, may not be so for the Kuna peoples in Panama. Likewise, a documentation objective sought by the Maori in New Zealand may not be as relevant to the Khoisan in Southern Africa. Specificities and differentiated needs will guide a TK documentation process and these may vary considerably depending on the interests at stake.

At the same time, efforts to document and systematize TK may also have an undesired impact and effect on communities and cultures, especially where oral tradition and more ancestral types of social practices and livelihoods prevail.<sup>10</sup> Moreover, there are concerns that if documentation makes TK more widely available to the general public, especially if it can be accessed on the internet, this can lead to misappropriation and use of it in ways which were not anticipated nor intended by its holders. Again, this will depend on specific circumstances and contexts and will need to be assessed as part of the “before” documentation phase.

### Intellectual Property and Traditional Knowledge: A Brief Primer

This Toolkit does not cover IP and the protection of TK in general terms. However, knowing something about the legal and practical dimensions and implications of IP mechanisms in relation to TK will enable all participants in a TK documentation effort to better define the viability and appropriateness of documentation processes and their connection, if any, with TK protection. For more information, users of this Toolkit are encouraged to consult the TK Division (grtkf@wipo.int).

<sup>10</sup> Sarah Laird, Biodiversity and Traditional Knowledge. Equitable Partnerships in Practice. People and Plants Conservation Series. WWF, UNESCO, Kew Botanical Gardens, Earthscan, London, Sterling, 2002.

In brief, however, TK is not so-called because of its antiquity. It is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. As such, it is not easily protected by the current IP system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Its living nature also means that “traditional” knowledge is not easy to define. Recognizing traditional forms of creativity and innovation as protectable IP would be an historic shift in international law, enabling indigenous and local communities, as well as governments, to have a say over the use of their TK by others. This would make it possible, for example, to protect traditional remedies and biodiversity-related knowledge against misappropriation, and enable indigenous peoples and local communities to control and benefit collectively from their commercial exploitation.

Although the negotiations underway in the WIPO IGC have been initiated and propelled mainly by developing countries, the discussions are not neatly divided along “North-South” lines. Indigenous peoples and local communities and governments do not necessarily share the same views, and some developed country governments, especially those with indigenous populations, are also active.

Two types of IP protection are being sought:

- **Defensive protection** aims to stop people outside the community from illegitimately acquiring IP rights over TK. For example, the India TKDL is a searchable database of traditional medicine that can be used as evidence of [prior art](#) by patent examiners when assessing patent applications. This followed a well-known case in which the US Patent and Trademark Office granted a patent (later revoked) for the use of turmeric to treat wounds, a property well known to traditional communities in India and documented in ancient Sanskrit texts.
- **Positive protection** is the granting of rights that empower communities to promote their TK, control its use and benefit from its commercial exploitation. Some uses of TK can be protected through the existing IP system, and a number of countries have also developed specific legislation. However, any specific protection afforded under national law may not apply to other countries; one reason why many indigenous peoples and local communities, as well as governments, are pressing for an international legal instrument.

When indigenous peoples and local communities, based on TK as such, innovate beyond a traditional context, they may use the patent system to protect their innovations. However, TK as such - knowledge that has ancient roots and is often informal and oral - is not protected by conventional IP systems. This has prompted some countries to develop their own *sui generis* (specific, special) systems for protecting TK.

In sum, the protection of TK in the IP sense refers to its protection against some form of unauthorized use by third parties. The objective of protection, in short, is to make sure that the TK is not used without authorization or misused. Two forms of IP protection may be encountered: positive and defensive protection. Documentation may play a role in both types.

The protection of TK and TCEs may take the shape of “conservation”, “preservation” or “safeguarding” initiatives. Broadly speaking, these consist in the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability. In short, the objective of protection is not to prevent unauthorized use by third

parties, but simply to make sure that the TK or TCEs do not disappear and are maintained and promoted and that they are preserved for the benefit of future generations. Safeguarding measures are defined in the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, as those “aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non formal education, as well as the revitalization of the various aspects of such heritage.” The notion of preservation consists of two main elements. The first is the preservation of the living cultural and social context of TCEs, so that the customary framework for developing, passing on and governing access to them is maintained. The second concerns the preservation of TCEs in a fixed form, such as when they are documented. Preservation may have two goals. It may aim to assist the survival of TCEs for future generations of the original community and ensure their continuity within a traditional or customary framework. Alternatively, it may aim to make the TCEs available to a wider public (including scholars and researchers), in recognition of their importance as part of the collective cultural heritage of humanity.<sup>11</sup>

Documentation does of course play an important role in strategies for the safeguarding of cultural heritage and traditional cultures. Examples of documentation initiatives conducted for safeguarding and/or preservation purposes include the 2003 UNESCO Convention and the 1972 World Heritage Convention. Cultural heritage programs at the international, regional and national levels frequently establish registers, lists and inventories of intangible and tangible cultural heritage as useful tools for identification, promotion and safeguarding. For example, Brazil has established a Registry of Intangible Heritage and the UNESCO *Convention on the Safeguarding of the Intangible Cultural Heritage* provides for the establishment at the national and international levels of registries, inventories and lists.

**Box No. 4 The difference between IP protection, preservation and safeguarding**

---

<sup>11</sup> Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12), para. 19.

## PHASE 1. BEFORE DOCUMENTATION OF TRADITIONAL KNOWLEDGE

### Check list:

- Plan carefully.
- Consult as widely as possible among indigenous peoples, local 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 local communities expectations and how best to respond to and reflect them.
- Identify customary laws applicable to sharing, collection and documentation of TK, as well as related to decision-making within indigenous peoples and local communities.
- 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.
- Consider the widest possible range of options to meet these objectives.
- Develop a monitoring and verification plan to provide assurances that documented TK will be used as determined in the documentation process.
- Consider that legal issues may arise in the contexts of existing access to genetic and biological resources policies, and legal frameworks and regulations (ABS).
- Distinguish between non-confidential TK and TK which may be secret (due perhaps to its sacredness) and which may require additional conditions and securities (if it were to be documented).

### STEP 1. Planning the documentation process

Prior to any effort which involves designing a TK documentation project, there needs to be an open and transparent interaction between proponents of these initiatives and indigenous peoples and local communities. This may include situations where TK is to be identified and systematised from existing records (i.e. monographs, thesis, journals, sound and audio-visual archives) or databases and where no immediate interaction takes place with indigenous peoples or local communities *per se*, but where a degree of acceptance and consent may be required from them.

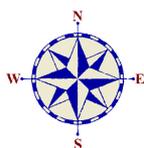
This initial interaction should determine and define the features of a first exploratory step which enables all participants (proponents and indigenous peoples and local communities alike) to understand each others’ specific interests and needs. The result of this initial process should at the very least:

- Create an environment of mutual confidence and trust - this may involve, depending on the circumstances, speaking to the right leader, representative or elder; using of casual (or typical) clothing for discussions if these are in communities; using of a translator to communicate; exchanging gifts; sharing family experiences or stories, etc.,<sup>12</sup>

<sup>12</sup> Depending on specific customs of indigenous peoples and communities, approaches will vary considerably. The *Pashtun* in Pakistan for example, consider sitting down in a circle and sharing local tea as a pre condition to doing

- Ensure there is a mutual and reciprocal understanding of the expectations of each actor involved (even if, at first, the exact scope and objectives of documentation are not totally defined),
- Ensure information is available and shared (in an appropriate format and presentation, i.e. using the indigenous language), and a critical baseline is established for informed discussions to take place,
- Enable indigenous peoples (through their representatives or legitimate leaders) to undertake their own assessment and analysis to decide whether the activities proposed and objectives sought are supportive of their own expectations and interests,
- Serve as a capacity-building process in which an understanding of the implications of what is being proposed is supported, and
- Determine whether or not there may be specific guidelines, laws, regulations or policies in place regarding access to and use of TK.

This last point is important, as it may serve as a start for subsequent and more detailed discussions on complex issues such as IP rights on TK in general, scientific research and development processes, policy and regulatory frameworks on access, etc.



A register is usually an official record of information which identifies the existence of rights in relation to the subject matter, such as a housing register, a register of automobiles, a land property register, etc. Registers are generally established by the State and serve as proof of a right. A register is not only a list or database designed to provide information to users. It is a list or database into which people put information in order to gain legal rights relating to that information. *"Registering" something in a registry "puts it on the record" and puts the public "on notice" that the registrant asserts a claim*<sup>13</sup>. Registers often create and recognize rights. In some cases, they serve to ensure publicity of rights and demonstrate their existence. The former are constitutive registers whilst the latter are declarative.

A register of TK could serve to identify the existence of certain elements of TK over which rights exist and identify the persons, indigenous peoples or local communities holding those rights. Although a number of so-called "registers of TK" have been established throughout the world, these do not grant any specific legal right over the knowledge they contain, above and beyond those defined in relevant national law (if such a law exists). Registers may be held in written format or may be held in a computer or other electronic data retention device.

Databases, on the other hand, may be established by individuals, indigenous peoples or local communities, research institutions, government bodies, NGO's, the private sector, etc. The inclusion of TK related information in a database does not in itself create or recognise any specific right over such information, except to the extent this is specifically set out in national law (including through recognition of Customary Law) or is part of a contractual agreement. The rights over the TK may not coincide with the rights of the holder or owner of the database (or material support, i.e. the book or document).

While the distinction in the legal status between databases and registers may be important with respect to the rights over knowledge, the increasing use of electronic and digital information systems

---

any type of business. The Andean Quechuas require small ceremonies of thanking the *Pachamama* (Mother Earth) before talks are held regarding agricultural practices. The *Aguaruna* peoples in Peru offer visitors *masato* (a local fermented drink) to celebrate initial contact and future friendship, and so forth.

<sup>13</sup> David Downes and Sarah Laird, *Community Registers of Biodiversity Related Knowledge – the Role of Intellectual Property in Managing Access and Benefit*. UNCTAD Biotrade Initiative, Geneva, 1999.

to maintain government registers means that, for the purposes of the TK Toolkit, both tools and their uses can be addressed simultaneously.

### **Box No. 5 Registers *vis a vis* databases<sup>14</sup>**

#### **Who leads the documentation process?**

Documentation initiatives can be proposed, very generally, by four sets of actors: indigenous peoples and local communities themselves (i.e. for the development of TK local registers or databases), organizations of civil society such as NGOs, academic and cultural institutions (at the local, national or international level), State/Governmental institutions and private sector organizations such as companies and associations.

The actual proponent will very early in the process need to address the issue of *why* documentation is being proposed (see STEP 3, below), *whom* it is intended to benefit and *how* these benefits will be generated and, especially, shared.

Documentation can also be classified in two broad categories which respond to the context under which it may take place:

- Documentation as part of a legal mandate which, for example, creates or recognizes TK databases and registers (as in the cases of Panama, the Philippines, Peru and Ecuador), and
- Documentation as private initiatives (including indigenous-led initiatives) which include development of databases and registers – perhaps complementary to but not necessarily based on a legal or regulatory mandate (as in the case of the Honey Bee Network, the Peoples Biodiversity Register and the Traditional Knowledge Digital Library in India, the Inuit TK database in Canada or the Potato Park Local Register in Peru).

#### **STEP 2. Broadly understanding indigenous peoples and local communities' interests and concerns**

Behind the objective of the documentation exercise is likely to be a set of broader interests and concerns on the part of indigenous peoples and local communities. Reflecting and consulting on these is likely to help in setting more defined objectives of the documentation exercise, as well as help determine which legal tools could be considered and used (i.e. IP, contracts, customary law<sup>15</sup>). These interests and concerns can be clarified by discussing a set of questions such as:

- What is the overall value of the documentation exercise?
- How will indigenous peoples, the community and its members benefit from this effort?
- How will a documentation effort support preservation of cultural integrity?
- How does documentation relate to every day life and mid-long term expectations?
- Are culture and TK protected if documentation takes place?

---

<sup>14</sup> For a detailed review of the role of registers and databases in TK protection, see Merle Alexander, K Chumundeewari, Alphonse Kambu, Manuel Ruiz and Brendan Tobin, *The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis*. UNU-IAS Report. January, 2004. It is available at: [http://www.ias.unu.edu/binaries/UNUIAS\\_TKRegistersReport.pdf](http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf). Also see *Considerations for Developing Technical Guidelines for Recording and Documenting Traditional Knowledge and the Potential Benefits and Threats of such Documentation* (UNEP/CBD/WG8J/6/2/Add.3).

<sup>15</sup> Customary laws may be described as *sui generis* regimes for protection and regulation of TK, incorporating legal and quasi-legal norms and principles, which have been developed to respond to specific territorial, environmental, cultural and spiritual realities of indigenous peoples and local communities.

- What are the existing practical capacities for indigenous peoples and local communities to engage in a documentation of TK effort?

In particular, it might be necessary to consider the interests that the indigenous people or local community wish to promote:

- Defending against misappropriation, misuse or unfair commercial use of their TK
- Restricting access to sacred/secret TK or for other cultural reasons
- Preserving the cultural integrity of the TK
- Exploring the potential economic, commercial or developmental implications of their TK
- Promoting traditional or community industries and commercial enterprises
- Supporting research partnerships or technology exchange partnerships related to technical aspects of their TK
- Ensuring recognition of traditional ownership of TK, and the attribution of the traditional origins of their TK when published or used by others
- Using the TK to help conserve the environment and manage natural resources
- Exchanging TK information between their community and other communities
- Documenting their ownership of TK as part of arrangements for giving prior informed consent for access to the TK
- Promoting the dissemination of their traditional culture to the public, nationally or internationally, to promote a wider understanding of their culture
- A combination of any of those, or other interests not mentioned here



TK usually means accumulated knowledge which, at the same time, provides indigenous peoples and local communities with a sense of identity. It is continuously evolving and dynamic, holistic in its conception and is a strong component of the cultural heritage of indigenous peoples and local communities. Women and men in traditional communities often hold different types of knowledge.

TK is often part of a community's spiritual and religious beliefs and can be deeply rooted in the natural environment. Documenting TK may therefore involve recording data and information about the environment, ecosystems and natural resources, including plants, animals and other biological resources.

Some elements of TK may only be revealed or disclosed to one part of a traditional community – for example, it may only be permitted to reveal TK to tribal elders or to community members who have been initiated. Alternatively, other elements of TK may be widely available, even beyond communities and their control, for example in books and the Internet.

Customary laws or protocols often control how TK should be held and passed down between generations.

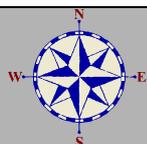
#### **Box No. 6 The nature of TK**

Meetings with indigenous peoples' representatives, workshops, direct talks with community leaders, continued dialogues, etc. are some of the ways these interests, and especially with regards to their interrelations with TK, can be appropriately identified and internalized by those planning the documentation project.

### STEP 3. Defining the objectives of the documentation process: What is sought?

Over the past ten years or so, a series of mechanisms have been proposed to protect TK and address and prevent its loss and erosion, including through IP tools.<sup>16</sup> In very general terms, legal protection of TK has been identified as a crucial component of a worldwide strategy to safeguard the moral, cultural, social and economic interests accruing to indigenous peoples and local communities with regards to their TK and, at the same time, preserve TK from the multiple forces which are affecting it. Many countries have developed *sui generis* laws and regulations to legally protect TK and most of these include references to registering TK.<sup>17</sup>

Though documentation does not in and of itself necessarily ensure legal protection for TK, TK registers and databases are one available tool in this overall protection strategy.<sup>18</sup>



#### The IP dimension and TK protection implications

IP tools such as copyright, collective marks, geographical indications, trade secrets and unfair competition principles are generally considered to be “friendlier” and better suited to safeguard indigenous peoples’ intellectual interests than other forms of protection. Basically, they allow for the granting to indigenous peoples and local communities of exclusive rights which prevent non-authorized parties from using their TK and, in some cases, its material expressions such as seeds or traditional products

However, in the context of TK, a “one size fits all protection” may be inadequate to fully consider indigenous peoples’ interests and needs, including maintaining or preserving TK over time in written, oral or visual form, ensuring a degree of control by holders and generators of TK, serving as a means to prevent third parties from invoking rights (through “defensive protection”) and disseminating TK to support state of the art reviews in patent applications/procedures. As a result, a combination of IP-related tools and non IP tools may be required to secure legal protection.

<sup>16</sup> What is a fact today is that TK is being lost and eroded continuously due to modernization, market forces, the “city lights” phenomenon, technology, displacement, etc. This is widespread and is of concern to many indigenous peoples and communities. Whereas “new” TK is constantly generated to adapt to changing circumstances, the rate of loss is greater than the generation of new forms of TK. See Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact Finding Mission on Intellectual Property and Traditional Knowledge (1998-1999), available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>.

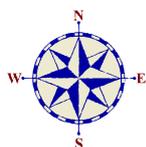
<sup>17</sup> For a summary of these laws and regulations, see Comparative Summary of Existing National Sui Generis Measures and Laws for the Protection of Traditional Knowledge. It is available at: [http://www.wipo.int/tk/en/laws/pdf/grtkf\\_ic\\_5\\_inf\\_4\\_annex.pdf](http://www.wipo.int/tk/en/laws/pdf/grtkf_ic_5_inf_4_annex.pdf).

<sup>18</sup> For further information on protection strategies, see: Background Brief N° 3 Developing a National Strategy on Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources at [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/background\\_briefs\\_n3.pdf](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/background_briefs_n3.pdf); and Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions at [http://www.wipo.int/export/sites/www/tk/en/publications/933e\\_booklet\\_1.pdf](http://www.wipo.int/export/sites/www/tk/en/publications/933e_booklet_1.pdf).

It is critically important for anyone seeking to undertake a documentation project or initiative to focus on at least four very basic, albeit often overlooked, questions:

- a) What is the specific problem being faced by TK, for example, misuse, misappropriation, or other kind of illicit exploitation?
- b) What exactly is being sought by documentation (the goal or objective of the project)?
- c) How does documentation specifically serve as a tool to enhance and revalue TK?
- d) What are the IP strategies sought to be advanced?

Sometimes, the sequence above may be changed. For example, if there is a degree of clarity regarding the actual problem and the exact scope of what documentation conceptually means, it may be possible to determine whether certain policy, legal, social, economic or other objectives may be feasible to attain and what IP instruments or *sui generis* approaches should be applied and developed, respectively.



Law 27811 for the Protection of Collective Knowledge of Indigenous Peoples Related to Biodiversity (2001) is an example of a legal framework which combines both classic IP tools with non IP instruments as a means to protect indigenous peoples' TK. These tools and instruments include:

- Contracts (know-how licences) – non IP
- Public domain definition – IP related
- Trade secrets – IP related
- Unfair competition principles – IP related
- Registers (a Public and a Confidential Register, both managed by the State authority, and a Local Register, which is managed by communities) – non IP, but useful for defensive purposes in particular
- Compensation fund – non IP

These tools and instruments operate as an integrated framework to ensure social, cultural, economic and IP interests of indigenous peoples are safeguarded.

**Box No. 7 An example of a *sui generis* approach to TK protection: The Peruvian Law 27811**

**The clients or users**

Consideration needs to be given to the possible clients of the documentation instrument. Are these to be indigenous peoples and local communities themselves, researchers, cultural institutions, IP offices, national authorities or the private sector and commercial actors? Deciding on the client/user may also define the nature of the information to be selected (i.e. confidential or publicly available TK) and the level of detail used in the documentation itself.

For example, if the recorded TK were to be used to prove the existence of prior art and for its sole use by patent authorities (for defensive purposes), a certain level of detail may be required which may not be necessary if documentation was pursued for educational or more general informational purposes only. In these circumstances, due consideration may be required for international classification systems and nomenclature.

The language used to collect the information may also depend on the intended clients or users, as well as on the objective(s) of the documentation project. If the recorded TK were to be used for specific community-oriented objectives, for instance, for preservation purposes, the information should be collected in the local language. However, if the recorded TK were to be collected for defensive purposes and be addressed to patent examiners, the information should be collected and arranged using globally understood names (for instance, using the scientific and common name of plants) and widely-used classification systems (such as the International Patent Classification (IPC)).

Resolving conflicts regarding rights over TK may require that documented TK includes certain elements and details (i.e. exact date of development, proof of ownership, specific use, etc.), that allow decisions to be made by an appropriate indigenous, communal or other judicial, administrative or arbitration body (if this was the case).

In general, identifying the needs of the client/user will help to provide those considering development of databases or registers with guidance on what TK they may want to collect or select, as well as on the degree of detail required in documentation.

#### **STEP 4. Participation and prior informed consent**

Participation and prior informed consent (PIC) are, to some extent, two sides of the same coin. Participation of indigenous peoples and local communities, during all phases of decision-making regarding the documentation process, is crucial to build trust and their sense of ownership of the project, especially when TK is to be collected directly, *in situ*, from indigenous peoples or local communities. It is also critical to enhance communications between parties and actors involved, ensure mutual understanding of interests, and prevent potential conflicts. Participation must be both transparent and free, engaging the key actors and stakeholders which may have an interest in the specific documentation project during the development and lifespan of the project. Participation mechanisms have been widely recognized in international law, including that as contained in *ILO Convention 169* and UNDRIP and in national policies and regulations.

Ultimately, participation will enhance the capacities of indigenous peoples and local communities to fully understand the nature of the TK documentation process, its implications, its possible outcomes and their chances to affect and influence these outcomes. Participation should also include building and/or strengthening the capacity of communities to engage actively in the documentation processes and either lead or complement collecting, systematization, review and overall management efforts. This could include, if there is the interest, very short and adapted modules (or even talks) relating to how the IP system operates, its pros and cons, its relevance in the context of documentation, etc.

Participation of indigenous peoples and local communities in documentation processes should be: continuous, informed, timely, balanced, reported, inclusive, facilitated, respectful, non-coercive (free) and based on an “intercultural dialogue approach” and good faith.

Indigenous peoples and local communities are entitled to say NO!

Although in IP discussions, including in the norm-building underway at WIPO, PIC is not uniformly agreed upon as an absolute requirement in all circumstances, PIC is a concept recognized in international law in other fields, including in the Basel Convention for the Transboundary Movement of Hazardous Waste and their Disposal (1989), ILO Convention 169,

the CBD and UNDRIP. Though with variations according to the objectives of each convention, it refers to interested parties providing timely and appropriate information to support decision-making processes by a person, authority or representative body.

In the context of a documentation process, PIC implies that indigenous peoples and local communities, through their legitimate representative bodies or persons, freely, beforehand and fully informed about the purposes, specific procedures, potential risks and implications of the proposed documentation project, decide on whether or not to participate in or support such an effort.

PIC is both a process and a positive act. It may manifest itself during two stages:

- Initially, when documentation is being planned, there may be the need to contact and engage in discussions with indigenous peoples and local communities to preliminarily inform them about the planned documentation process (how TK will be collected and managed, among others) – it implies providing information in advance, in a timely and accessible manner to them. At this stage, there may be the need for an express consent by appropriate community representatives in cases when visits or interviews are to be made in the field, in community lands and territories.
- Subsequently, when in the field and on-site, there may be need for more in depth discussions and negotiations to determine and define the specific terms and conditions under which TK can be obtained and used. These discussions need to be based on a series of principles (including most importantly good faith) which should guide the overall process of providing pertinent information.

PIC is the culmination of this process and implies a positive act of acceptance to the collecting of TK under certain conditions, such as:

- Monetary or in kind benefits should be provided to the community or communities.
- Collection of TK should be undertaken in a particular area or addressing certain individuals
- Kind of TK which can be collected (traditional medical knowledge, TK on irrigation systems, sacred TK, secret TK, etc.)
- Disclosure of the TK may not have been accepted or only with certain restrictions / to a certain extent (Third-party access to the documented TK)
- Access by community members to documented TK and to research conducted based upon it.

PIC may be reflected in a written agreement, a contract of some sort, or a traditional instrument or act (e.g. shaking of hands, sharing food, participating in a ceremony, etc.). Indeed, PIC may be expressed in many different forms, including agreements between the documenter and the indigenous peoples or local communities, or through agreed protocols, guidelines or less formal ways such as oral acceptance, but according to certain traditional practices, customs or even rituals. PIC may be granted by the elder, the community representative, the group of elders, the traditional authorities, an assembly or whatever community structure/actor who is entitled to do so by customary law, customs or maybe even national regulations. Traditional decision-making mechanisms should be utilized as much as possible.

Where PIC is applied, and to create legal certainty and clarity on the conditions under which PIC has been granted, it is advisable to formalize PIC somehow. The PIC and the conditions should be reflected in a written form and, if possible, be formalized or authenticated. For

instance, it is important not only to indicate whether documentation of TK has been agreed, but also to what extent can TK be disclosed, whether secret TK can be accessed to, who would be responsible for providing TK, the purpose of the documentation project, among other elements. In the framework of the Peruvian Law 27811, registration of license contracts is compulsory. There might be other ways of legally formalizing the written form of PIC, which could be useful later as a proof of the conditions under which PIC was granted.

TK is often shared among indigenous peoples and local communities, sometimes across countries. In this circumstance, efforts should be made in a documentation process to facilitate as broad a participation and consultation process as is possible and feasible. It would be advisable to ascertain the rights and interests of indigenous peoples and local communities who are not represented.

### **STEP 5. Assessing legal issues: the public domain and other intellectual property considerations**

As part of planning documentation, it is important to discuss which rights are formally recognized by the State with regard to TK, as not all countries acknowledge (at least expressly) indigenous peoples' or local communities' collective property or other rights over TK. Where rights over TK are recognised, communities (or individuals therein) will still need to ensure that they retain ownership when granting permission to third parties to collect TK or access TK *via* a database or a register.<sup>19</sup>

If national law does not recognise or establish clear rights in favour of indigenous peoples or local communities over their TK, consideration must be given to the potential benefits and drawbacks of documentation. This will require an analysis of the legal options available to ensure that TK is not appropriated by third parties. For example, communities may need to consider the possibilities of exercising control over a database and the information within it, once TK is documented. This relates to who owns the database itself under law and who exercises rights over the content of the database which may be protected, either through copyright laws or special database legislation, as exists in the European Union.<sup>20</sup>



#### **The Public Domain and Traditional Knowledge**

There is a distinction between documenting TK and its entry into the public domain. TK may be documented, but remain firmly withheld from the public domain.

On the other hand, it may be necessary to document TK that is already categorically in the public domain, but is at risk of erosion (i.e. weakening of ancestral customs, livelihoods and TK systems) or for academic purposes (i.e. social and anthropological research) or other needs (i.e. enhancing patent examinations). Information may be in the public domain but remain subject to physical/material restrictions on its use.

Accordingly, some communities have documented TK (in State managed or locally managed databases), with the intention of keeping it secret, so that they can be confident it will be maintained and preserved for future generations, but retained only for access by certain

<sup>19</sup> The United Nations Declaration on the Rights of Indigenous Peoples expressly recognizes the rights of indigenous peoples over their TK.

<sup>20</sup> This is the case of the EU Database Protection Directive (European Directive 96/9/EC), March 11, 1996.

approved parties, such as tribal elders, community members, women leaders or initiates (see Box No. 6).

This discussion leads on to some important distinctions: “publicly disclosed”, “public domain”, “publicly available”, and “publicly accessible” are often used as synonyms, though they are not exactly the same, especially in the case of “public domain” as used in an IP context. In simple terms, the “public domain” in IP terms refers to “... *intangible materials that are not subject to exclusive IP rights and are, therefore, freely available to be used or exploited by any person*”.<sup>21</sup> Publicly disclosed TK, which can be accessed through books and literature, the internet and other kinds of recording, is generally, already available to the public. Publicly disclosed TK is most of the time widely open to the public. However, some records on TK are only kept in a specific library, archive or other repository. Even though these records are publicly available, they can be accessed only by those with access to the repository. Disclosing more extensively that kind of TK (TK disclosed within a limited context) needs to be carefully considered. For instance, if TK available in a small library were to be put in the internet, freely available, it would become widely open to the public and would allow its access without any restrictions. From an IP perspective, publicly disclosed TK might not necessarily be easily accessible by patent examiners as part of the “prior art”. For this reason, some initiatives have sought to document TK as prior art to prevent subsequent inventions that build upon this knowledge from satisfying the novelty requirement of patent law.<sup>22</sup> It has to be noted that not all publicly disclosed TK is considered as prior art. In some jurisdictions, only written disclosed TK can be prior art, not the TK which is orally disclosed or disclosed by use. For example, prior art is defined by Rule 33.1 of the PCT Regulations as “everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations)”.

Furthermore, publicly disclosed TK might not be covered by existing IP protection<sup>23</sup> On the other hand, non-disclosed TK might be protected by international IP law as undisclosed information in general. However, there are no explicit standards on: (i) TK disclosed in the local communities and among the indigenous peoples; and (ii) disclosure of TK constrained by customary law.<sup>24</sup>

### **Intellectual property considerations**

It is during this phase of documentation that due consideration needs to be given to potential implications of IP on the documentation process. This may include reflecting on the type of rights that may be relevant to particular TK, IP-related mechanisms (i.e. database protection, copyright) which may be relevant in the development and management of a TK database, who will become a right holder for the purpose of IP, and whether creative commons or other licences may be required to support control and use of collected and organized TK.

Discussions of IP may also become more specific and detailed once TK is actually collected and systematised (see below the “During” and “After” documentation phases) and there is a better

---

<sup>21</sup> For a detailed discussion and analysis of these concepts, see Note on the Meanings of the Term “Public Domain” in the Intellectual property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions (WIPO/GRTKF/IC/17/INF/8).

<sup>22</sup> Elizabeth Longacre, *Advancing Science while Protecting Developing Countries from Exploitation of Their Resources and Knowledge*, 13 *Fordham Intell. Prop. Media & Ent. L. J.* 963, 1003 (2003).

<sup>23</sup> The Protection of Traditional Knowledge: Draft Gap Analysis: Revision (WIPO/GRTKF/IC/13/5(b) Rev.), page 5 of Annex II.

<sup>24</sup> The Protection of Traditional Knowledge: Draft Gap Analysis: Revision (WIPO/GRTKF/IC/13/5(b) Rev.), page 4 of Annex II.

idea of the content of the documentation process and whether or not all originally considered IP issues are as relevant as initially thought.

Consideration of IP issues may be part of a comprehensive and detailed “IP Assessment” process which may be based on three broad areas for reflection as suggested in Box No. 8, below.

<b>1) The subject matter (TK)</b>	The nature of TK	Is the TK: <ul style="list-style-type: none"> <li>• Secret and confidential?</li> <li>• Sacred?</li> <li>• Individually or communally held?</li> <li>• Orally transmitted?</li> <li>• Documented and systematised in some form (traditionally or otherwise)?</li> <li>• Codified?</li> <li>• Already partially documented?</li> <li>• Subject to customary restrictions for use or disclosure?</li> </ul>
	The content or expression of TK	Is the TK: <ul style="list-style-type: none"> <li>• Technical knowledge or <i>know how</i>?</li> <li>• Embodied in a tangible product?</li> <li>• Related to TCEs? (not covered in detail in this Toolkit)</li> </ul>
	TK and biological resources / genetic resources	<ul style="list-style-type: none"> <li>• Would/should specific biological or genetic resources be collected as part of the documentation project?</li> <li>• Would potages, mixtures or extracts be collected and documented?</li> <li>• Are the biological or genetic resources imbued with distinctive characteristics developed through traditional methods of selection, breeding or processing?</li> </ul>
	How extended is the TK use and dissemination?	<ul style="list-style-type: none"> <li>• Non-disclosed or disclosed to:             <ul style="list-style-type: none"> <li>○ The general public (publicly available)</li> <li>○ To individuals that do not belong to the community (such as researchers or students)?</li> </ul> </li> <li>• Known by a community individual or leader or elder, the community as a whole, a group, an indigenous nation ... other social actors?</li> </ul>

		<ul style="list-style-type: none"> <li>Is TK commercialized or traded in some form (whether as know-how or in a tangible expression)? Locally, regionally, internationally?</li> </ul>
<b>2) Applicable IP legislation</b>	Applicable national and international legislation	<ul style="list-style-type: none"> <li>What specific laws and regulations are applicable to the subject matter being considered? Specific TK laws?</li> <li>Who can provide specific IP advice in this regards? WIPO, pro bono services, local NGOs, the documentation proponents?</li> </ul>
<b>3) Other related legal regimes</b>	Other relevant legal regimes and instruments	<ul style="list-style-type: none"> <li>Customary laws and local traditions?</li> <li>Community protocols?</li> <li>Biodiversity laws and access and benefit sharing legislation?</li> </ul>

**Box No. 8 An IP assessment template**

In turn, in the light of ongoing discussion both nationally and internationally regarding how to protect TK, an IP management strategy may be required to organize and think through the documentation process in its three different phases (before, during and after documentation) and evaluate the appropriateness of IP instruments towards this end. This IP strategy may not be a very complex product or endeavour but, rather, a simple effort to organize how and at what point in time IP-related questions should be raised and reflected upon.

A crucial step in the documentation process is the recording, or ‘fixation’, of the TK in a material form or when TK is transferred from one medium to another. This occurs, for example, when:

- A spoken tradition is written down or taped;
- A traditional method is filmed; or
- An ancient manuscript is scanned or copied.

This step is critical, since it is often at this point when IP rights in the expression are determined.

As indicated earlier, there might be rights in the fixation, such as copyright or *sui generis* database protection in compilations, adaptations, and translations.

- Whoever writes down TK-related information may be entitled to a copyright in the way the TK has been put into words. In this case, the idea (the TK itself) would not be protected but its expression.
- Whoever wishes to translate that TK-related information expressed in words may need to ask for the authorization of the person who wrote down the TK. However, the translator may have his/her own rights in the translation.
- Whoever films someone explaining how to use TK may be entitled to rights in the recording.
- Whoever scans a manuscript and includes that information in a database may be entitled to rights in the selection and arrangement of its contents.

Legislation in force may allow these rights to exist, while not recognizing any rights of the indigenous peoples or local communities who developed and preserved the TK.

## Confidentiality

Accessing confidential, sacred or secret TK is an especially sensitive issue, which may affect moral, spiritual, religious and even economic interests of communities.

Revealing non-disclosed TK could result in losing rights that could help control its use.

Non-disclosed TK can be documented and still be kept confidential or its use restricted. Special measures should be taken when managing non-disclosed TK not to disclose it or make it publicly available inadvertently<sup>25</sup>.

Documentation can help protect TK, by providing a confidential or secret record of TK reserved for the relevant community only.

In the case of secret or confidential TK, specific confidentiality agreements or more explicit contractual clauses may be required to satisfy the interests of those participating in the documentation process, especially indigenous peoples and local communities. These may include provisions which limit who and under what circumstances (i.e. for patent search purposes only, by national IP authorities only, by selected institutions, etc.) TK may or may not be accessed. It would be advisable to include a clause specifying that the obligations for maintaining the secrecy and confidentiality of the database should remain even after the termination of the agreement.

This is the case, for example, of the Traditional Knowledge Digital Library (see Box No. 3), where the CSIR has signed specific non-disclosure and access agreements with the European Patent Office, the India Patent Office, the German Patent Office, the US Patent and Trademark Office, the United Kingdom Patent and Trademark Office, the Canadian Intellectual Property Office, the Australian Intellectual Property Office and the Japanese Patent Office.

According to these agreements, broadly speaking, the patent offices concerned have to abide by the following conditions:

- Not to disclose the content to third parties.
- To utilize the TKDL only for patent search and examination, pursuant to which they may give printouts to patent applicants for citation purposes.
- To give feedback to the Indian CSIR for enhancing the features of TKDL.

---

<sup>25</sup> It may be necessary to develop protocols of access and use to maintain non-disclosed TK under special and stronger access restrictions or committing to higher levels of secrecy through oaths, traditional rituals or a formal agreement. If the idea is to document non-disclosed TK in digital form or using electronic databases, security systems like passwords and codes would have to be put in place to protect the data related to non-disclosed TK.

## PHASE 2. DURING DOCUMENTATION OF TRADITIONAL KNOWLEDGE

### 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, unless a conscious decision is taken to do so and it is part of a strategy.
- Follow agreed guidelines or codes of conduct, obligations and legislation and regulations (including ABS) in place.
- Regularly inform stakeholders, especially indigenous peoples and local 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 local communities).
- Ensure appropriate disclaimers are developed and made visible.

### STEP 1. Obtaining, organizing, systematizing, maintaining and transmitting traditional knowledge

Considerations, immediately prior to the physical and material act of documenting TK, may involve:

- Having appropriate PIC from indigenous peoples and local communities (or their representative bodies),
- Choosing and using defined criteria and methods to identify and collect the TK to be documented,
- Reviewing existing rules and principles which regulate the conditions under which TK will be collected and obtained, and evaluating the best option and instrument (i.e. contract, general agreement, memorandum, guideline, protocol) which may be utilised to formalize activities,
- Obtaining the TK and using a material support which will allow for TK to be recorded and maintained, for instance, through the creation of a database (whether very sophisticated or a simple, physical assembly of files, images, sound recordings, etc.), and
- Defining access control policies or guidelines which establish categories of users and thereby access conditions/restrictions.

As has been mentioned earlier, two scenarios are possible with regards to the actual act of documentation:

- On one hand, data and TK are obtained directly, *in situ*, through interviews, communications, observations, taking images, recordings, etc. from indigenous peoples and local communities themselves – whether through the community or tribe chief, the elder, the shaman, an individual farmer, a community council, or whatever formal representative person or body is entitled to engage and transmit data and information in the form of TK. This is clearly the case for on-site fieldwork and continued interaction with members of communities.

- On the other hand, documentation may imply desktop work which involves going through documents, audio-visual archives, recordings, books, databases, research theses, ethno-botanical work, file archives, specialized journals, memoirs, specimens passport data, etc. and databasing specific TK and TK references.

In both these two cases, the considerations above may apply (to the extent possible). However, PIC may only be possible in as much as this is feasible in practice, there exists a legal obligation and appropriate procedure, and an institutional policy which defines specific PIC steps.

Biological sciences have developed standardized formats in which observations and on field records are registered by scientists.

A classical format may include, at a minimum, the following elements:

- Date, time
- Area and location where TK collection is being undertaken
- Information about the environment
- Indigenous peoples organizations or local communities involved
- Specific individuals involved
- Conditions or limitations imposed on the use of the collected TK (because of its sacred or secret nature, for instance)
- Specific site and place where TK is being recorded
- Uses of the TK (including traditional names of plants, animals, organisms and local taxonomies)
- Targeted species of plants (including wild species or cultivated, native varieties) or animals
- Forms of applications, or techniques
- History of use
- Expected results
- Forms of verification
- Current conservation conditions (*in vitro*, live cuttings, tissue cultures, seed banks, etc.)

It may be necessary to collect the plant, animal, insect or biological resource related to the TK. In that case, legislation and rules in force regarding their collection would have to be reviewed and complied with.

**Box No. 9 Key elements in a documentation format**

If TK is being documented for defensive purposes, it will be necessary to include details of publications, publisher and related bibliographic references, to allow patent examiners to consider that information as prior art with reference to a certain date.

Two aspects are critical during the actual documentation process.

- On one hand, adjustments along the way may be required (to collecting and data basing terms) as TK is collected, obtained and systematized. This may be the case, for example, if the process leads to TK which was originally not targeted.
- Secondly, adaptation of the documentation process may also be needed if shared TK is at stake and unforeseen actors (indigenous peoples or local communities) claim

interests in the documentation process. This could depend on national law. For example, legislation in some countries (for example, Peru) determines that in the case of shared TK, the interested party should make best efforts possible to include the widest range of indigenous peoples concerned or potentially affected in the consultation process and project. Additionally, it specifies that even if all indigenous peoples concerned cannot participate in specific benefits, they *are* entitled (as indigenous peoples) to participate in future benefits *via* an indigenous fund set for that purpose. This is a way to overcome - to some extent - the fact that involving each and all communities which share knowledge may be, in practice, very burdensome.

### **Customary Law and Practices**

As documentation takes place, due consideration is required for customary laws and traditional practices which may determine whether and how TK can be obtained and shared, how must it be presented, in what form, by whom, etc. Though this may have been considered in the planning phase of documentation (“Before Documentation”, see above), often on the field and on-site, documenters may need to respect a series of social conducts which are not written and could not have been foreseen, but are required if access to TK is to be obtained.

As a general rule, research institutions, NGOs, or other third parties undertaking documentation, need to ensure customary law and practices are fully respected at all stages of the TK documentation project. Whether expressed in written guidelines, codes of conduct, community protocols, formal agreements (written or oral) or even simple instructions given by TK custodians, communities or their representatives, efforts should be made to ensure this requirement is met. Customary law provisions or practices need to be considered as part of the pre-documentation stage but may also arise during the documentation effort itself.

Indeed, when documentation activities begin, this might bring to light conflicts with customary law and practice not envisaged at the date any agreement for documentation was made. There may also be cases where failure to abide by codes of conduct or to limit documentation to agreed TK causes concern for communities. Where this occurs, indigenous peoples and local communities might need to consider the potential impacts of continuance of the project, modalities for rectifying or mitigating any negative impacts, and, where necessary, the benefits and drawbacks of suspending further documentation.

### **Documentation through a Database or Register**

Documentation may well lead to the development of a database of some form and complexity. A database (or register) may be designed for a variety of purposes. These purposes should have been defined at an early stage in the documentation process (Before Documentation) but its purpose may also evolve as it is in the process of being created. Documentation through databases or registers may serve as:

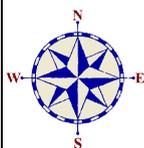
- A defensive tool to protect TK against unapproved use and to impede the granting of IP over TK related inventions,<sup>26</sup>
- A means to secure long term conservation of TK for the benefit of indigenous peoples and local communities themselves,
- A tool for demonstrating the existence of rights over TK itself or of land and resource rights,
- A tool for recording or supporting compliance with access and benefit-sharing agreements,
- A tool for asserting positive IP rights,

---

<sup>26</sup> The database or register may or may not be shared with a broader public. In terms of defensive protection, IP authorities must have access to ensure appropriate patent searches and examination of applications.

- A source of information for research and product development, and/or
- A repository of cultural or national patrimony.

As described earlier in the Toolkit, documentation may include accessing and managing a variety of TK, including secret and/or widely known knowledge, as well as knowledge already in the public domain.



### Registers established by law

**Collective Register for Intellectual Property- Panama.** Panama established this database by Law No. 20 of 2000, which created a Special Regime for Intellectual Property over Collective Knowledge of Indigenous Peoples, to protect indigenous cultural patrimony. The register provides indigenous peoples with positive protection over their TK in Panama, granting them property rights over this knowledge. In this case, the register *creates* the property right. In practice, the register applies mainly to TCEs (textile designs, sewing techniques, handicraft models, etc.).

**National Public Registers for Collective Knowledge- Peru.** Law No. 27811, which was adopted in 2002, establishes a Regime for the Protection of Collective TK Relating to Biological Resources. The law creates three type of registers: a National Public Register for TK which compiles documented TK which is already in the public domain (in books, articles, databases, etc.); a National Confidential Register, which cannot be accessed by third parties; and, Local Registers, which can be created and managed by indigenous peoples and communities with the support of the National Institute for the Protection of Competition and Intellectual Property (INDECOP). <http://www.indecopi.gob.pe/portal>

### Indigenous peoples and local community led databases and registers

**TK databases of Inuit of Nunavik - Canada.** This database contains information regarding: land use and planning; ecological, environmental and natural knowledge and includes a long term programme to apply the information in the database to resource management, planning, environmental impact assessment and economic development. The database is for the use of Inuit of Nunavik and to inform specific decisions of government agencies. Research activities are controlled by Inuit peoples.

**The Potato Park's Indigenous Biocultural Heritage Register – Peru.** This is a database created by communities with the support of ANDES Association, an NGO located in Cuzco. The database was developed using customary laws and is based on video recording practices (undertaken by women community members). Among its objectives are the protection of TK and associated resources from biopiracy, securing benefits for communities and the preservation and protection of their rights over their TK, as well as promotion of its use. The register is based on the ancient Andean system of khipus (a method to record information using knots on strings) used historically to document biological, cultural, economic and demographic information. Information is processed using the Yapana Matrix (based on rows and columns to quantify information according to the decimal and binary systems). The program for entering data into the register is web-based free/open source software (FOSS) which is compatible with the Quechua customary practices of free and open sharing of knowledge. The Register plays a key role in contributing to realization of the Potato Park's management objectives.

### Box No. 10 Examples of TK documentation through registers and databases

Creating a database may be the main purpose of a project for documentation of TK or it could be one activity within a much broader project or programme. The nature of the information to be documented can range from conservation practices to knowledge regarding traditional medicine (including human and animal health); agriculture (plants, animals, farming techniques, innovations to enhance agriculture, fisheries); lands uses; or other uses of biodiversity such as housing and clothing.

TK databases can be created and managed by private entities (such as research centres, universities, NGOs and cultural institutions), indigenous peoples and local communities, public institutions (government agencies which usually make information in their registers and databases public). Generally, TK documentation implies an interaction and complementary effort among these different actors. As a general rule and principle, the documented TK, and possibly the technology derived therein, must be made available to indigenous peoples and local communities. This may require parallel capacity building efforts to ensure continued access and use by communities, including training in information technologies.

The TK information held in a database may be either confidential or non-confidential or a combination of both, with different levels of access or restrictions applying to different categories of TK (and potential users). For example, strict restrictions might be applied to sacred TK or TK that communities may not want to allow to become publicly available. Lesser restrictions may apply to TK which is either non sacred or is considered less important by indigenous peoples and local communities. Access to TK may be subject to payment of fees, or be accessible free of charge. Rules for categorisation of TK to determine any restrictions on access can potentially be defined by customary laws. These restrictions may vary and be based on “green, yellow and red light” criteria,<sup>27</sup> which, respectively, refer to: freely accessible, certain restrictions apply and not accessible to third parties. Other forms of categorisation may be based on the potential commercial value of TK.

### **Maintaining the database or register: review by indigenous peoples or local communities**

One risk with documentation is that it may inadvertently or otherwise result in inaccuracies in recording of TK, which may have cultural, moral, spiritual and or economic consequences for TK custodians or holders. Indigenous peoples and local communities should have the right at all time to verify how their TK is being documented in order to ensure its veracity and compliance with access and use terms (however general these may be).<sup>28</sup>

They should also be entitled to require any documentation of TK to be modified and corrected in order to ensure it is properly recorded and attributed, as well as to exclude any information which should not have been incorporated.<sup>29</sup>

---

<sup>27</sup> This is the case of the Potato Park (Peru) Local Register. See Policies, Measures and Experiences Regarding Intellectual Property and Genetic Resources: Submission by the International Institute for Sustainable Development (IIED) (WIPO/GRTKF/IC/16/INF/13).

<sup>28</sup> This may be relatively simple when TK is being obtained and organized *in situ*, where indigenous peoples and communities participate actively in the documentation process. However, if the project or documentation efforts is seeking to organize and create a management system for TK which is in the public domain, readily available and furthermore shared among peoples and communities, exercising this right may be much more complex.

<sup>29</sup> To avoid the possibilities that any failure in the drafting of contracts or any form of agreement would limit rights to have TK removed from any database or other form of documentation, agreements for collection and documentation of TK should include a clause allowing indigenous peoples to require the removal or correction of documented TK, where necessary to protect their spiritual or cultural integrity, moral rights and or rights of attribution.

## **STEP 2. Continuously informing indigenous peoples and local communities about progress in the documentation process**

When documenting TK in *in situ* conditions, it may be advisable for documenters to regularly inform the community or selected members about the progress in the documentation process. This may involve short talks or periodic more detailed meetings where advances are presented (information collected, advances in documentation, reporting of findings, among others) and maybe demonstration of how TK databasing is progressing. Feedback possibilities and interaction with communities ensures continued engagement and support throughout the documentation process (and after).

It will be necessary to monitor documentation processes in order to identify any negative impacts on communities and individuals who have been approached to provide information. Meetings with indigenous peoples or local communities and their authorities can provide a means to identify negative impacts and bring to light any failures to comply with agreed codes of conduct.

### PHASE 3. AFTER DOCUMENTATION OF TRADITIONAL KNOWLEDGE

#### Check list:

- Verify that TK documentation planning objectives have been met.
- Verify that comments and inputs made by stakeholders (especially indigenous peoples and local communities) have been appropriately addressed.
- Check who is accessing and using TK (as the case may be).
- Check whether and how national IP offices are using the documented TK, especially if TK was documented for defensive purposes.
- Review periodically the extent to which documented TK is accessed
- Inform indigenous peoples and local communities about the progress and results of the TK documentation process.
- Carry out periodic reviews of compliance with requirements of storage, maintenance and control.
- 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).
- Take measures to ensure the continued secrecy of non-disclosed TK
- Review possibilities of protecting TK through IP and other mechanisms

#### STEP 1. Promoting the Traditional Knowledge documentation database or register

The TK documentation register or database (including books, journals, collections, etc.) could be presented to a wider public, according to the agreed objectives of the project and process. Indigenous peoples and local communities should participate actively in planning launching activities.

#### Documentation to assist Intellectual Property Offices in defensive protection

Some documentation processes may lead to registers or databases which only serve defensive protection purposes and thus are only available to IP authorities, as a tool to support novelty and non-obviousness analysis.<sup>30</sup> Non disclosure agreements<sup>31</sup> may be needed between the holder of the TK (or the provider through the register or database) and the IP authority to ensure only patent examiners to have access to TK for analysis of patent applications only. An example of such an approach is the TKDL of India (see Table No. 3).

In these cases, once the TK has been documented, it may be necessary to translate it to globally understood languages.

WIPO has also improved its own search tools and information systems: In relation to patent examinations, existing criteria in WIPO's International Patent Classification System<sup>32</sup> and PCT

<sup>30</sup> Recognition of Traditional Knowledge within the Patent System (WIPO/GRTKF/IC/11/7).

<sup>31</sup> The Non-disclosure Agreement (NDA), also known as a Confidentiality Agreement, Confidential Disclosure Agreement (CDA), Proprietary Information Agreement (PIA), or Secrecy Agreement, is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to third parties. It is a contract through which the parties agree not to disclose information covered by the agreement. Advantages of a NDA on providing access are significant and provide protection against any possible misuse of the content.

<sup>32</sup> In 2005, 200 sub-groups under A61K 36/00 were introduced in the International Patent Classification for traditional herbal medicines.

Minimum Documentation have been revised to incorporate published TK into this minimum documentation, so as to give TK greater recognition during critical international (and national) patent searches and analysis.<sup>33</sup>

## **STEP 2. Putting in place technological measures for establishing the ownership over the documentation**

Documentation is likely to result in the creation of electronic records due to the overriding influence of information and communication technologies (ICT). The documented TK might become extremely vulnerable in case adequate safeguards are not taken after documentation on protecting the documented TK and on regulating the access to documentation.

Technological measures required to be taken include:

- (i) Protecting the documentation against unauthorized access by third parties.

Access control is a technical measure to regulate access to the documentation<sup>34</sup>. Policies on access control would create formal user registration rules and procedures. In general, access control involves:

- (i) Providing user IDs with passwords.
- (ii) Granting different levels of access<sup>35</sup>.
- (iii) Formal records on registered users.
- (iv) Regular review of registered users.

If non-disclosed TK is documented for preservation purposes, for instance, access control of such documentation, including digital documentation, would have to remain with the identified member(s) of the communities. It would not be advisable to connect servers holding such documentations on network including public networks such as Internet.

For defensive documentation which is primarily targeted for International patent offices, the servers holding such documentation would need to be connected to the internet. The access would need to be regulated through Digital Signatures to ensure (i) *Authentication* (ii) *Non-Repudiation* and (iii) *Security of Contents*.

- (ii) Protecting and securing the content.

It is advisable to fully secure the content through encryption, which is the process of transforming information (referred to as plain text) using an algorithm (called cipher) to make it unreadable to anyone except those possessing special knowledge, usually referred to as a key. The result of the process is encrypted information. In other words, it is the conversion of data into a form, called a cipher text<sup>36</sup>.

---

<sup>33</sup> Defensive Protection Measures Relating to Intellectual Property, Genetic Resources and Traditional Knowledge: An Update (WIPO/GRTKF/IC/6/8).

<sup>34</sup> Technical measures might be complemented by practical mechanisms such as log on banners and warning notices against unauthorized access and use, which could deter intruders and could be a useful defence against prosecution for cyber offences.

<sup>35</sup> It is advisable to follow the principle of least privilege, grant no user greater access to the documentation than what is essentially needed.

<sup>36</sup> There are two basic techniques for encrypting information:

- a) Symmetric encryption (also called secret key encryption)
- b) Asymmetric encryption (also called public key encryption)

Symmetric Encryption (also known as symmetric-key encryption, single-key encryption, one-key encryption and private key encryption) is a type of encryption where the same secret key is used to encrypt and decrypt information. The length of the key determines the quality of encryption.

(iii) Protecting the database servers.

The database server having the contact has to be protected against authenticated misuse, malicious attacks or inadvertent errors made by *bona fide* owners and users. Therefore, technical measures and policies need to be in place for protecting the documentation from intentional or accidental misuse or destruction.

(iv) Server hosting at secured site.

A secured site or a data center which is a centralized repository, either physical or virtual, for the storage, management, and dissemination of data and information organized around a particular body of knowledge is required for hosting the server that contains the TK Documentation.

(v) Protecting and securing the website.

Documentation servers connected on internet may get attacked to gain access to sensitive documentation details. In order to reduce vulnerabilities, a documentation server must be properly secured at different levels:

- at the *physical level*
- at the *network level*
- at the *operating system level*
- *when installing and configuring the web server applications*
- *the website itself*
- *the continual act of administering the Web server once it is in place.*

### **STEP 3. Monitoring uses and users of documented Traditional Knowledge**

Following up and monitoring who accesses and uses documented TK can be a complex process. Assessing hits or web site traffic (depending on the type of technologies safeties and restrictions placed) offer initial guidance of who may be interested in TK. This initial information could subsequently lead to more specific monitoring (through direct contact of users or institutions), especially if, for example, it is companies or research institutions who are seeking TK data and information. There are relatively simple technological means to monitor electronic databases (log file analyses, HTML page requests, referrer analyses, etc.).

Reviewing periodically the extent to which documented TK is accessed and, specifically, which entries are the most accessed, could help identify types of TK which may have greater economic or scientific interest.

---

Asymmetric encryption uses different keys for encryption and decryption. The decryption key is very hard to derive from the encryption key. The encryption key is public so that anyone can encrypt a message. However, the decryption key is private, so that only the receiver is able to decrypt the message. Symmetric encryption is applicable to areas where users are pre-known i.e., documentation for preservation and intergenerational transmission; whereas asymmetric encryption is more applicable to the areas where users are undetermined such as documentation for defensive protection.



## NGO led databases

### **AAAS Science & Human Rights Program T.E.K.\* P.A.D. (Traditional Ecological Knowledge Prior Art Database) – USA.**

T.E.K.\* P.A.D. is an index and search engine of existing Internet-based, public domain documentation concerning indigenous knowledge and plant species uses. T.E.K.\* P.A.D. brings together and archives in a single location, various types of public domain data necessary to establish prior art. Data includes taxonomic and other species data, ethno-botanical uses, scientific and medical articles and abstracts, as well as patent applications themselves. It is meant to be used by anyone researching traditional ecological knowledge, including scientists, health professionals, and those involved in the patent application process itself. In addition to information already in the public domain, T.E.K.\* P.A.D. allows for the option of defensive disclosure, for TK holders who wish to place information in the public domain in order to pre-empt patenting by others. Establishment of the database has been subject to much criticism by many indigenous commentators who say it was developed contrary to their rights and interests, and without their consent.

<http://shr.aaas.org/tek/tecpad.htm>

**Farmers Rights Information System (FRIS) – India.** FRIS is a digital library, which forms part of the collection of the Scarascia Mugnozza Genetic Resources Centre of the MS Swaminathan Research Foundation–MSSRF. It contains samples of farmer's crop varieties. Its objectives are to preserve TK and farmer's practices and crops. With the intention of providing benefits to communities, it seeks to put farmers in contact with traders. FRIS researchers collect seed samples directly from farmers, who are photographed at the moment of collection and collection is dependent on farmers' PIC. Data is recorded using farmer's identity forms and passport data. <http://www.mssrf.org>

**Honey Bee Network – India.** Honey Bee is a knowledge network developed by the Society for Research Initiatives for Sustainable Technologies (SRISTI). It holds knowledge and innovations of TK holders, farmers, the research community and local communities in a common database. The database is managed by the National Innovation Foundation (NIF) and has several collaborative institutions around the country, each one of which holds its own register which is connected to the common database. The Honey Bee database does not function as a defensive tool. If TK is used for commercial purpose, benefits generated should be shared with the rights holders. <http://www.sristi.org/honeybee.html>

**Kaska Traditional Knowledge Network, British Columbia - Canada.** Developed in partnership with the ICT Development Group, the objective of this network is the management and sharing of TK among communities of the Kaska Dena Nation in northern British Columbia and the Yukon. Documentation uses modern technology; a web based portal, TK directory and geospatial data applications. Knowledge is collected in digital video format. The idea is that with the improvement of communication and tools for decision making regarding natural resource management, health and education, communities can receive benefits and at the same time protect their sacred knowledge. (<http://www.sristi.org>)

**People's Biodiversity Register (PBR) - India.** PBR documents community TK on medicinal plants with the aim of controlling biopiracy. This is a decentralized system, with several documentation units (mostly at village level, and in some cases at a community level). Since its creation in 1995 it has been developed in hundreds of villages across seven Indian states. <http://www.ces.iisc.ernet.in>

**Gene campaign – India.** The Gene Campaign, an Indian based NGO, has established a database to be used as a source of prior art to challenge patents and ensure fair and equitable sharing of benefits arising from the utilization of communities TK. Database development and management has been achieved through the efforts of the Department of Science and Technology, the Indian Government, Gene Campaign, and local communities. Information in the database remains the property of local communities, and is kept under the custody of the Department of Science and Technology. Healers, elders, and medical practitioners were consulted during the documentation process and community youth participated in the collection of TK. <http://www.genecampaign.org>

#### **Databases set for scientific research & development purposes with specific references to TK**

**Natural Products Alert Database (NAPRAALERT).** NAPRALERT<sup>sm</sup> is a private, relational database of all natural products, including ethnomedical information (TK), pharmacological/biochemical information of extracts of organisms *in vitro*, *in situ*, *in vivo*, in humans (case reports, non-clinical trials) and clinical studies. Similar information is available for secondary metabolites from natural sources. To date more than 200,000 scientific papers and reviews are included in NAPRALERT, representing organisms from all countries of the world, including marine organisms. <http://www.napraalert.com>

**Chemical Abstracts Plus Database (CAplus).** This database contains information on more than 50 million organic and inorganic substances, and more than 60 million protein and DNA sequences. The chemical and biochemical information is produced by CAS; the sequence information comes from CAS and GenBank, produced by the National Institutes of Health. It includes the archive of over 50,000 unique World Traditional Medicine patents. This collection is a body of scientific literature especially useful for the pharmaceutical and consumers products industries. The material from these basic and supplementary databases is searchable in many ways. CAS databases are available via two principal database systems, STN, and SciFinder. <http://www.cas.org/ASSETS/FF0487294CA54B788FFFBF1196D08FE4/caplus.pdf>

#### **Box No. 11 More examples of TK documentation through registers and databases**

Regularly checking the operation of electronic safeties and restrictions (in electronic web-based databases) will serve to maintain the database or register operational and, ultimately, safeguard indigenous peoples' and local communities' interests.

#### **STEP 4. Verifying whether initial planning objectives and milestones have been met**

At some point after the documentation process has concluded and the database or register are operational, managers should verify whether the originally planned documentation objectives have been met. This could include interviewing users of the TK, indigenous peoples and local communities themselves or taking note of partners experiences throughout the documentation process. These lessons should be shared with a broader audience to inform other TK documentation efforts.



Potential benefits	Potential disadvantages
<ul style="list-style-type: none"> <li>• Monetary or in kind benefits shared with indigenous peoples and local communities</li> <li>• TK organized and systematized (preserved) for future generations</li> <li>• Collaboration and partnerships among a broad range of actors</li> <li>• Co-authorship in scientific journals and papers</li> <li>• Identification and broader social recognition of indigenous peoples and local communities in relation to specific TK</li> <li>• Defensive protection (preventing illegal use of TK or misuse)</li> <li>• Access and use of TK is regulated and defined by certain rules and principles</li> <li>• Capacity building and educational uses of database or register</li> </ul>	<ul style="list-style-type: none"> <li>• No monetary nor non monetary benefits generated (because of closed documentation projects and processes)</li> <li>• TK becomes systematized in ways which are culturally foreign to indigenous peoples and disenfranchise them</li> <li>• Documentation process is informal, non planned, does not consider PIC and other relevant principles</li> <li>• Indigenous peoples lose certain degree of control over their TK, especially in the case of confidential or secret TK which may be subject to documentation</li> <li>• Uses of TK are difficult to monitor and can lead to misuses and misappropriations</li> </ul>

**Box No. 12 Evaluating the potential benefits and disadvantages generated by a documentation project**

**Possibilities of protecting TK through IP or other mechanisms**

After the TK has been documented, it might be worth conducting an assessment of the IP rights or other mechanisms that could be used to protect the documented TK or related elements.

For instance, trademarks, collective and certification marks, and geographical indications could be used to protect the reputation and special qualities of traditional products that make use of TK. Trade secrets or laws on confidentiality could be used to protect TK against unauthorized disclosure and use.

Protocols could be developed to establish clear rules on the use of and access to TK. Model contracts or other legal agreements setting conditions for the use of and access to TK could be put in place.

Furthermore, documented TK should be examined to identify any elements which should be deleted, restricted or otherwise given special protection, if that has not already been done.

## **CASE STUDY**

### **A documentation (imaginary) exercise: collecting TK from native communities in the Amazon**

#### **Before documentation**

University X from the UK enters into talks with University Y in Brazil, to undertake a project to collect biological samples for commercial research in the Amazon and collect and systematize indigenous peoples' (communities A, B, and C) TK related to medicinal properties of these samples.

University Y contacts representatives of communities A, B and C and explains the purpose and objectives of the planned activities. Details are provided in regard to the exact nature of the project and how TK will be collected, organized and managed.

Representatives of communities are invited to select community members to be trained in para-taxonomy and help TK collection and documentation activities.

University Y undertakes a prior informed consent procedure (PIC) with appropriate community bodies (in this case the local communal assembly). PIC involves *in situ* meetings and gatherings with community members to explain project methodology and purposes and engage in confidence building. University Y informs also about partners in the project (University X and Company Z – based in the UK too).

University Y obtains all necessary permits and authorizations from Brazilian authorities to undertake fieldwork with biological samples and subsequent export of these.

Benefits are discussed with community representatives (and reflected in written agreements) and include non-monetary benefits (training in para-taxonomy, recognition of communities contribution in publications, joint copyright given the case of research papers, joint patents if a viable product is generated in the research and development process, among others) and monetary benefits including up front and milestone payments, as well as participation in monies generated from commercialization of products.

#### **During documentation**

Universities X and Y create a working team in Brazil to undertake field work. The team travels to the selected sites in communities A, B and C.

Collecting of plants is undertaken with guidance of community-trained parataxonomists. The team is presented to each community in traditional rituals and greeting offerings. Fieldwork is only possible after a few days of introductions and interacting with community members.

Elders and women in each community are identified and interviewed to understand plant uses and applications. Plants are collected by the parataxonomists, displayed to community members and entered into a database using traditional forms and scientific formats. The register (database) is constructed locally in interaction with community members. Specimens are selected for further research in University X and Y and further transfer to Company Z.

The locally managed database (using hand written forms and photos) is designed and developed with support from community leaders. Electricity is not available in the area, so the local register is manually constructed and managed. It is maintained by the community's lead parataxonomist.

Meetings are held with community leaders to design TK use protocols applicable to the register/database developed. These will be part of University X (UK) and University Y (Brazil) commitments to further research and serve to guide potential access by third parties (including Company Z). They include a series of use conditions to share non-monetary and monetary benefits. These include: scientific training for young community members, sharing in research results, milestone payments and development of a locally managed fund, among others.

### **After documentation**

University X and Y publish a systematization of the research project in its integrity. Credits are given to communities A, B and C. Copies of documents are provided free to communities. Summarized audios in native languages are prepared and distributed among communities. Small, battery supplied, audio equipments are provided for free to communities.

The TK database managed by University X and Y is made available to the public. Restrictions are placed, depending on the type of TK which is sought. No confidential nor sacred TK is part of the database.

Community leaders are regularly informed about research advances and how well the TK database is operating.

The national IP authority in Brazil consults with University Y and with community leaders whether content of the database can be used to help Brazilian IP authorities in patent application reviews.

## **GLOSSARY**

### **Disclosed Traditional Knowledge**

“Disclosed traditional knowledge” refers to TK which is accessible to persons beyond the indigenous people or local community which is regarded as the ‘holder’ of the TK. TK might be disclosed to third parties or to non-members of the indigenous peoples or local communities from which TK originates, with or without the authorization of the indigenous peoples or local communities.” (See List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be found (WIPO/GRTKF/IC/17/INF/9), paras. 23 to 27 of the Annex.)

### **Expressions of Folklore**

In the WIPO-UNESCO Model Provisions, 1982, “expressions of folklore” are productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of a country or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) Verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) Musical expressions, such as folk songs and instrumental music;
- (iii) Expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) Tangible expressions. (Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, Section 2.)

In the context of the IGC, the terms “traditional cultural expressions” and “expressions of folklore” are synonyms and used alternatively.

### **Indigenous peoples**

The United Nations Environment Program (UNEP) List of Acronyms and Glossary Terms provide the following definition of “Indigenous people/s”: “No universal, standard definition. Usually considered to include cultural groups and their descendants who have a historical continuity or association with a given region, or parts of a region, and who currently inhabit or have formerly inhabited the region either before its subsequent colonization or annexation, or alongside other cultural groups during the formation of a nation-state, or independently or largely isolated from the influence of the claimed governance by a nation-state, and who furthermore have maintained, at least in part, their distinct linguistic, cultural and social / organizational characteristics, and in doing so remain differentiated in some degree from the surrounding populations and dominant culture of the nation-state. Also include people who are self-identified as indigenous, and those recognized as such by other groups.” (UNEP List of Acronyms and Glossary Terms, available at <http://www.unep.org/dec/onlinemanual/Resources/Glossary/tabid/69/Default.aspx>)

### **Intellectual Property**

Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. It refers to creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. Intellectual property is divided into two categories: Industrial Property and Copyright. Industrial Property includes patents for inventions, trademarks, industrial designs and geographical indications.

Copyright covers literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures) and architectural design. Rights related to copyright include those of performing artists in their performances, among others.

Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation. (See What is Intellectual Property? at:

[http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo\\_pub\\_450.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf) and WIPO Intellectual Property Handbook at <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf>)

## **Local communities**

Local communities may be defined as “the human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihood and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisherfolk, pastoralists, forest dwellers and others.” (See UNEP-CBD Sui generis workshop, UNEP/CBD/WG8J/4/INF/18, p.2.)

## **Patent**

A patent is an exclusive right granted for an invention – a product or process that provides a new way of doing something, or that offers a new technical solution to a problem.

A patent provides patent owners with protection for their inventions. Protection is granted for a limited period, generally 20 years. Once a patent expires, protection ends and the invention enters the public domain.

Patent protection means an invention cannot be commercially made, used, distributed or sold without the patent owner’s consent.

An invention must, in general, fulfill the following conditions to be protected by a patent. It must be of practical use; it must show an element of “novelty”, meaning some new characteristic that is not part of the body of existing knowledge in its particular technical field. That body of existing knowledge is called “prior art”. The invention must show an “inventive step” that could not be deduced by a person with average knowledge of the technical field. Its subject matter must be accepted as “patentable” under law. In many countries, scientific theories, mathematical methods, plant or animal varieties, discoveries of natural substances, commercial methods or methods of medical treatment (as opposed to medical products) are not generally patentable.

(See What is Intellectual Property? at:

[http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo\\_pub\\_450.pdf](http://www.wipo.int/export/sites/www/freepublications/en/intproperty/450/wipo_pub_450.pdf) and WIPO Intellectual Property Handbook at <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf>)

## **Prior Art**

Prior art is, in general, all the knowledge that existed prior to the relevant filing or priority date of a patent application, whether it existed by way of written and oral disclosure. In some legal instruments there is a differentiation between printed publications, oral disclosures and prior use and where the publications or disclosure occurred. (WIPO Intellectual Property Handbook, WIPO Publication No. 489 (E), 2008, p. 19)

For the purposes of the PCT, prior art is defined by Rule 33.1 of the PCT Regulations as “everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e. that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date.”

## Protection

“Protection” in the work of the IGC has tended to refer to protection of TK and TCEs against some form of unauthorized use by third parties. Two forms of protection have been developed and applied.

### Positive Protection

Two aspects of positive protection of TK and TCEs by IP rights are explored, one concerned with preventing unauthorized use and the other concerned with active exploitation of the TK and TCEs by the originating community itself. Besides, the use of non-IP approaches for the positive protection of TK and TCEs can be complementary and used in conjunction with IP protection. For instance, positive protection of TK and TCEs may prevent others from gaining illegitimate access to TK and TCEs or using them for commercial gain without equitably sharing the benefits, but it may also be used by TK and TCEs holders to build up their own enterprises based on their TK and TCEs.

### Defensive Protection

Defensive protection refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded IP rights over TCEs, TK subject matter and related genetic resources. Defensive protection of TK includes measures to preempt or to invalidate patents that illegitimately claim pre-existing TK as inventions.

(More information is available in “Overview of Activities and Outcomes of the Intergovernmental Committee” (WIPO/GRTKF/IC/5/12))

## Public Domain

Black’s Law Dictionary defines the public domain as “the universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the IP they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.” (Black’s Law Dictionary 1027 (8th ed. 2005))

The public domain in relation to patent law consists of knowledge, ideas and innovations over which no person or organization has any proprietary rights. Knowledge, ideas and innovations are in the public domain if there are no legal restrictions of use (varying in different legislations and forming, therefore, different public domains), after expiration of patents (regularly 20 years), in consequence of non renewal, after revocation and after invalidation of patents. (See document SCP/13/5.)

### ***Sui Generis***

Black’s Law Dictionary defines “*sui generis*” as “[Latin ‘of its own kind’] of its own kind or class; unique or peculiar. The term is used in IP law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a *sui generis* statute designed for that purpose.” A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. There are already several examples of *sui generis* IP rights such as plant breeders’ rights—as

reflected in the International Convention on the Protection of New Varieties of Plants, 1991 (“the UPOV Convention”)—and the IP protection of integrated circuits—as reflected in the Treaty on Intellectual Property in respect of Integrated circuits, 1989 (“The Washington Treaty”), among others. The Panama Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge is a sui generis regime. “The Protection of Traditional Knowledge: Draft Articles” and “The Protection of Traditional Cultural Expressions: Draft Articles”, as being negotiated in the IGC, embody sui generis approaches.

### **Traditional Cultural Expressions**

WIPO uses the terms “traditional cultural expressions” and “expressions of folklore” to refer to tangible and intangible forms in which TK and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “traditional cultural expressions,” often in its abbreviated forms “TCEs.” The use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

### **Traditional Knowledge**

There is as yet no accepted definition of traditional knowledge (TK) at the international level.

“TK,” as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (TK in a general sense or *lato sensu*). In other words, TK in a general sense embraces the content of knowledge itself as well as TCEs, including distinctive signs and symbols associated with TK.

In international debate, “TK” in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. TK can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc. (See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”, p. 25, available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>.)

For more information contact WIPO at [www.wipo.int](http://www.wipo.int)

**World Intellectual Property Organization**

34, chemin des Colombettes

P.O. Box 18

CH-1211 Geneva 20

Switzerland

**Telephone:**

+41 22 338 91 11

**Fax:**

+41 22 733 54 28