

Traditional Ecological Knowledge and Intellectual Property

The Pandora Box?

What are the **issues**?

Preservation of TEK as a **fundamental matrix**

- for traditional uses
- for living culture

= *All sorts of artistic creations, all sorts of knowledge, scientific, agricultural, technical, medical, related to biological and ecological diversity, including innovations based on cultural knowledge, remedies, medicines and fauna and flora uses. (UN HR Commission)*

What are the **issues**?

Preservation of TEK as a **fundamental matrix**

- for traditional uses
- for living culture
- for useful applications to share and progress

= *Content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the **know how, skills, innovations, practices and learning** that form part of **traditional knowledge systems**, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations.*

What are the issues?

Preservation of TEK as a **fundamental component**

- for traditional uses
- for living culture
- for sustainable development and Biodiversity protection

= *traditional ecological knowledge* means generations-old knowledge whether embodied in tangible form or not, gained over generations of living in close contact with nature regarding:

- *living things*, their constituent parts, their life cycles, behaviour and functions, their effects on and interactions with other living things (including humans) and with their physical environment;

- *the physical environment* including water, soils, corals, weather, solar and lunar effects, processes and cycles;

- *the obtaining and utilising of living or non-living things for the purpose of maintaining, facilitating or improving human life*. (Model Law, SPREP, Draft)

What are the **issues**?

Preservation of TK as a social function

- Preserving them against / loss and dissipation, illegitimate dissemination, misappropriation and misuse
 - Saving for future generations of the original community
 - Making available to a wider public
 - ! BUT on terms that are fair and appropriate
-

What is the state of the art in International law?

Some groping around developments

- A lot of reports and works (UN- CBD-WTO-WIPO-WHO-UNCTAD,FAO,.....)
- Numerous declarations (Kari Oca 1992, Cochabamba, 1994,Mataatua, 1997)
UN Declaration (2007)

*Indigenous Peoples have **right to maintain, control, protect and develop** their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, design, sports and traditional games and visual and performing arts. They have also right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and cultural expressions.*

- Few ethic codes
- Private contracts

What is the state of the art in international law?

A difficult dialectic TK system/ IP model

- **Collective**
- **Oral**
- **Traditional**
- **transmission**
- **Holistic**

- **Individual**
- **Writing**
- **New knowledge**
- **Innovation- Invention**
- **Specific**

What is the state of the art in International law?

A non suitable answer

■ IP system

- Recognizing innovation, creativity and distinctive reputation
- Creates legal measures against illegitimate or unauthorized use of subject matter by third parties
- Enables TK holders to assert authority over their knowledge; 'commoditization' only to the extent they choose that path
- ensures that expressions of cultural heritage, when safeguarded – documented, archived, recorded – are protected against misappropriation and misuse, such as unauthorized commercialization

Various and numerous International Instruments related to IP

- Tunis Model Law on Copyright (1976)
 - WIPO UNESCO Model Provisions (1982)
 - Bangui Agreement of OAPI
 - Pacific Model of Law, 2002
 -
 - *To be continued*
 - Ecological TK Pacific Model of Law (in process)
-

International Instruments related to IP in Pacific region

UNESCO Symposium : Call for an alternative mechanism (1999, Noumea)

■ **Pacific Model of Law, 2002**

- **Traditional Cultural Rights** including right to produce, publish, perform and to make available on line
- Cultural Authority
- A framework for exploiting TK through contract

■ **Model Law for the protection of traditional ecological knowledge, innovations, products and practices (draft, SPREP)**

- TEK whether in public model or not
- Nature of ownership, co-ownership, offence, amendments to law
- Commercial and non-commercial uses
- regulations

Various and numerous National Instruments related to IP

- Panama Law (Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge 2000)
- Indigenous Peoples Rights Act of 1997 of the Philippines
- Database of Official Insignia of Native American Tribes of the United States of America, established pursuant to section 2(a) of the Trademark Act, 1946, as amended (the US Native American Insignia Database’);
- New Zealand’s Trade Marks Act,
- Indian Arts and Crafts Act, 1990, USA
- Vanuatu Acts (copyright and related rights, 2000, Trademarks, 2003, Patents, 2003, designs, 2003)
- ...

To be continued...

- Philippines Community Intellectual Rights Protection Act (draft)

National Instruments related to IP in Pacific region

- **Vanuatu Acts** (copyright and related rights, 2000, environmental management and conservation act, 2002, Trademarks, 2003, Patents, 2003, designs, 2003)

Indigenous knowledge as :

Knowledge that is created, acquired or inspired for traditional economic, spiritual, narrative, decorative or recreational purposes; and whose nature or uses of which has been transmitted from generation to generation, and that is regarded as pertaining to a particular indigenous person or people in Vanuatu.

- Databases
- Statutory recognition still in the realm of legislators
- No moral rights attached to cultural rights
- Bio-prospecting permit

National Instruments related to IP in Asia region

- **Philippines Community Intellectual Property Protection Act (Draft)**

This bill therefore seeks to **re-define innovations to recognize both the collective and cumulative intellectual right** of the country's cultural communities over the same innovations. In addition, the bill's definition of innovation recognizes such indigenous knowledge howsoever recorded, whether formally or informally (oral, anecdotal, etc.). This is in consideration of the fact that many indigenous communities in the country **do not have a written tradition or culture.**

What is the state of the art in International law?

A non suitable answer

■ Convention on Biological Diversity (CBD)

- Conservation of biological diversity
- Sustainable use of its components
- Equitable sharing of benefits arising from its use
- Recognition of the role of traditional knowledge relating to biodiversity

the “common heritage principle” is being abandoned in favour of “sovereignty over natural resources” as enshrined in the Biodiversity Convention.

What is the state of the art in international law?

A step skipped

- **Convention on Biological Diversity (CBD)**
- A focus on Access and benefits sharing and how to prevent the **misappropriation** and **misuse** of traditional knowledge (TK)- traditional cultural expressions (TCEs)/folklore
- What about the status of TEK and their social function?

What is the state of the art in International law?

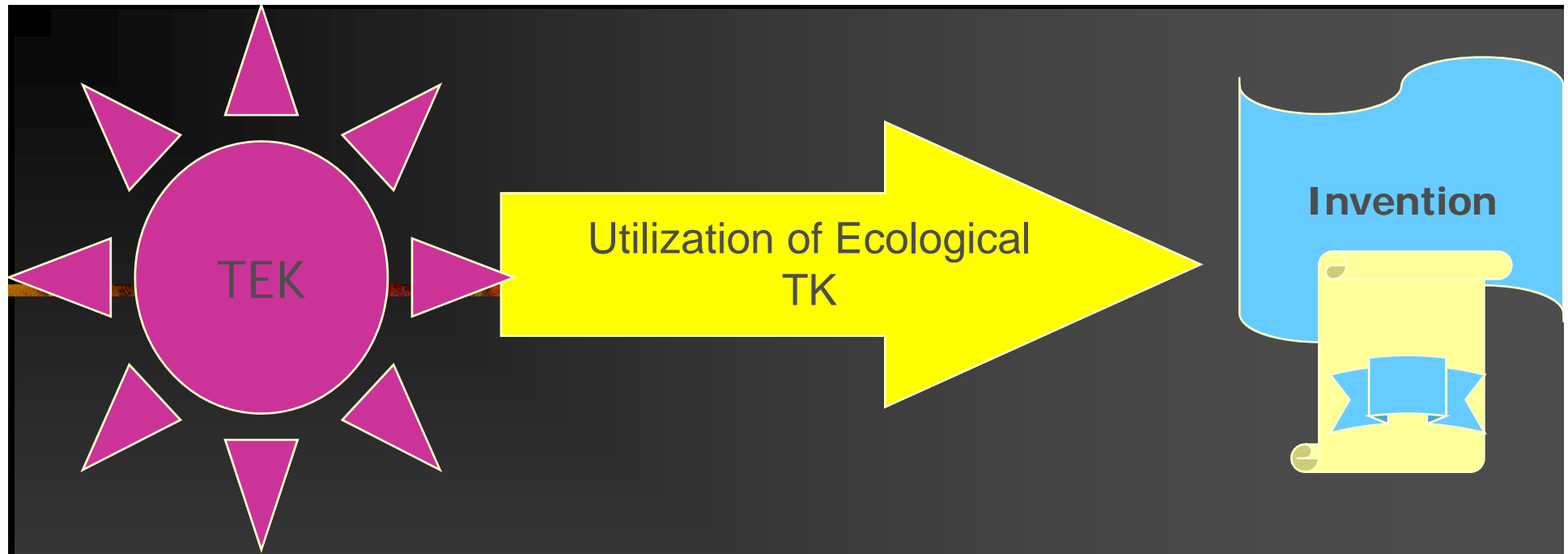
A non suitable answer

- **UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage**

- Safeguard the intangible cultural heritage;
 - Ensure respect for intangible cultural heritage;
 - Raise awareness of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
 - Provide for international cooperation and assistance.
-

Fundamental policy issues still remain !

- **collectivity** - what legal status or legal personality for traditional communities?
- **ownership** - what is the nature of custodianship? Who benefits?
- **misappropriation** - what is it to misappropriate TK/TCEs, what is the cause of action and the nature of the damage?
- **retroactivity** - is the existing public domain legitimate & inviolable?
- **localisation** - how to recognize and defer to a community's customary law?
- **subject matter** - what makes knowledge and cultural expressions 'traditional' ?



? What are the equities of sharing benefits from downstream innovation, as 'value addition' takes place?

? What share goes back to the source?

? What support for conservation and incentives for sharing?

WIPO works ...

- WIPO's and TK protection :
 - Several decades of work on folklore (strong basis in many OIC countries; sound legal underpinnings)
 - Recent work on traditional knowledge, genetic resources
 - Draft provisions on TK/TCE protection
 - Guidelines and other practical support
 - 98-99: Open dialogue with TK holders
 - Consultations in 60 locations around the world2000-01:
 - Creation of the Intergovernmental Committee (IGC)
 - Voluntary Fund, indigenous and local community input

WIPO ICG Outputs ...

- Draft international **provisions** for protection of traditional cultural expressions (TCEs) and TK
 - Analytical framework for analysing and negotiating policy choices
 - Creative Heritage project and TK toolkit – defending community interests when TCEs/TK is documented
-

What are the issues?

Numerous questions persist !

- ✓ What gaps in existing IP system exist and need to be filled?
- ✓ Definition of TK and TEK that should be protected.
- ✓ Who should benefit/hold the rights to protectable TK? Treatment of foreign rights holders/beneficiaries
- ✓ **What objective for protection** (economic, moral rights, social function)?
- ✓ What forms of behavior considered unacceptable/illegal? What is the strength of Ethic codes?
- ✓ What sanctions or penalties should apply?
- ✓ Division and articulation between international and national regulation
- ✓ ...

what 'protection'?

- Protection of TK : a range of legal measures :
 - special law on traditional knowledge;
 - laws on intellectual property
 - law of contracts;
 - civil liability, compensation;
 - criminal law;
 - laws concerning the interests of indigenous peoples;
 - environmental laws;
 - regimes governing access and benefit-sharing;
 - **adapted intellectual property rights systems**, in accordance with the needs and the choices of the holders of the knowledge, national laws and policies, and international obligations.

Process issues need attention

- **Alternative law** - what is the *sui generis* element of protection of TK?
 - **interface with other law** - access regimes for genetic resources, cultural policy,
 - **Consistency and coordination** – numerous international processes;
 - **legal form and status**
-



Thank you !

