The Protection of Traditional Knowledge:
International developments and *sui generis* options

World Bank Seminar
September 2005

David Vivas Eugui
ICTSD
dvivas@ictsd.ch
Road Map of the presentation

- Introduction
  - Why TK is so important in the developing countries agenda?
  - Main features of TK
- Main developments in the international arena
  - CBD
  - FAO
  - WTO
  - WIPO
- Some alternatives for a *sui generis* protection
- Some advantages and disadvantages of *sui generis systems*
- Some elements of potential *sui generis* systems identified in international debate
- Conclusions
Introduction

Why TK became part of the IP developing countries agenda
- Recognition of the diversity values, promotion of local development, potential economic value, impact of environmental and HRs lobbies and reaction to heavy IP agenda in IGOs

Main features of TK
- It is knowledge: “information and skills acquired through experience and education”;
- It is traditional: created by continuous evolution and increasing additions (not old);
- Orientated towards practical solutions and survival and
- Generated in close relationship with the habitat;
- Hold by collective and individuals active persons;
- In many cases there is a lack of material incorporation and oral transmission is used as a preservation rule;
- Not subject to scientific method;
- Holistic nature: combination of religious, cultural, political and commercial values;
- Regulated by customary law;
- Private vs public right?
Main developments in the international arena

CBD

- Art 8j) and 10 c)
- Ad Hoc Open Ended Intersessional Working Group for the Implementation of Article 8(j)
  - Advice on application and development of legal and other appropriate forms of protection for TK;
  - Recommend which of the work-plan objectives and activities should be referred to other international bodies or processes and identify opportunities for collaboration and coordination.

Approval of Bonn Guidelines

- Development of PIC and BS obligations including access to GR and associated TK
- Obligations of providers (to facilitate access) and of demandeurs (respect of PIC and MATs)

Results from the WSSD

- Call for increased participation of TK holders
- Encourage technical and financial support to implement national sui generis systems and traditional systems to protect TK
The Parties have the responsibility for realizing Farmers’ Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. Parties should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers’ Rights, including:

- (a) protection of traditional knowledge;
- (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic; and
- (c) the right to participate in making decisions, at the national level.

Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.
WTO
- Review of article 27.3b)
- Outstanding implementation issues (Tirett 88 and 95)
- Paragraphs 19 and 32 of the Doha Ministerial Declaration
  - Protection of TK and folklore
  - CTE agenda and relevant articles of the TRIPs Agreement
  - Proposals by various developing countries and the African Group

WIPO
- The IGC
  - Discussions on defensive and positive options for protecting TK
  - Some results:
    - Updating the PCT minimum periodical list for PA determination
    - Revise the PCT classification of Patents as to include patents based on TK
    - An open a door for civil society actors in WIPO
- The Substantive patent law treaty (SPLT)
  - Negotiations on a treaty that would regulate internationally substantive patent law
  - Proposals by some developing countries; Brazil and Switzerland
Some positive sui generis alternatives

- What is a sui generis system?
- Why do people tend to like this option?
- General classification of approaches on sui generis TK laws:
  - The holistic protection approach
  - Proposals derived form the ABS regimes
  - Proposals derived form the IPRs system
  - Sectorial options
  - Eclectic options
<table>
<thead>
<tr>
<th>Approach</th>
<th>Content</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Holistic</td>
<td>Human rights</td>
<td>● Law of indigenous peoples rights in Philippines</td>
</tr>
<tr>
<td></td>
<td>Customary law</td>
<td>● Cases of customary law protocols (Andes)</td>
</tr>
<tr>
<td></td>
<td>Land rights</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Self determination</td>
<td></td>
</tr>
<tr>
<td>Options derived from</td>
<td>PIC</td>
<td>● Biodiversity Law of Costa Rica</td>
</tr>
<tr>
<td>the CBD regimes</td>
<td>Benefit sharing</td>
<td>● Andean decision 391</td>
</tr>
<tr>
<td></td>
<td>Conservation measures</td>
<td>● OUA model Law (<em>also some development of farmers’ rights - FAO</em>)</td>
</tr>
<tr>
<td></td>
<td>Bilateral contracts or annexes</td>
<td></td>
</tr>
<tr>
<td>Options derived from</td>
<td>Structural thesis: patent/copyrighths</td>
<td>● No law has included the first two ideas</td>
</tr>
<tr>
<td>IP</td>
<td>“Sui generis” database</td>
<td>● The Andean PI decision 486</td>
</tr>
<tr>
<td></td>
<td>Some modification of existing IPRs</td>
<td>● The copyright law of Tunisia</td>
</tr>
<tr>
<td>Sectorial options</td>
<td>Tripartite systems:</td>
<td>● Plant variety law of Thailand/India</td>
</tr>
<tr>
<td></td>
<td>Agriculture, health, folklore</td>
<td>● TK law of Panama (<em>folklore</em>)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>● China patent law being applied traditional medicine</td>
</tr>
<tr>
<td>Eclectic options</td>
<td>Blending of some CBD and IP</td>
<td>● Medida provisoria de Brazil</td>
</tr>
<tr>
<td></td>
<td>principles: exclusive rights,</td>
<td>● Peruvian Law on indigenous knowledge (public domain)</td>
</tr>
<tr>
<td></td>
<td>registers, public/private domain</td>
<td></td>
</tr>
</tbody>
</table>
Advantages and disadvantages of sui generis systems

**Advantages**
- Flexibility in:
  - Definitions
  - Objectives,
  - Subject matter
  - Titleholders, etc.
- Might allow automatic recognition of titleholders without formalities
- Can mix different types of systems: CBD, FAO, IPRs, customary law, etc.
- Allows enforcement by varios actors: Indigenous groups and CSOs
- Allows national or regional taylor-made solutions

**Disadvantages**
- There are not a minimum internationally agreed principles (not even CBD ones)
- There is not a unique sui generis system
- There is not an international recognition
- There is not much experience on its practical application
- Enforcement mechanisms have not been developed
- There might be potential conflicts with multilateral IPRs agreements (TRIPS, PLT and future SPLT)
Some elements of positive *sui generis* systems identified by various actors

- Any system must recognize rights not create them
- TK is not necessarily in the public domain
- Objectives: protection (defensive and positive), conservation, promotion y del desarrollo local
- Subject matter: definition vs criteria
- Scope: comprehensive vs sectorial
- Titleholders
  - Depends on customary law: collective (total vs partial), individual
  - Need for automatic recognition
- Prior informed consent
  - Participatory process/transparency/inclusive
  - Authorization rights
  - Negative right (right to say no or/and withdraw
- Benefit sharing
  - Compensation vs patrimonial rights
- Other possible rights: exclusive rights
- Time of protection: permanent or long periods (i.e. 50 years)
- Existence of registers with different effects and purposes
- Enforcement:
  - ex officio vs private actions
  - wide active legitimacy
Some conclusions

- TK has a very particular nature that need to be addressed when designing protection systems.
- Participation of titleholders is essential for the success of any national-regional-international processes.
- National-regional experiences need to be encouraged and supported.
- At the international level it is difficult to find a holistic-comprehensive unless joint process are initiated.
- Policy spaces in international agreements for developing *sui generis* systems to protect TK should be enhanced and maintained.
- There is an increase number of national-regional TK laws and experience will increase with the time.
- Some elements are starting to be identified as possible minimum principles to protect TK.