

**AFRICAN REGIONAL INTELLECTUAL PROPERTY
ORGANIZATION (ARIPO)**

**ARIPO-EPO INTERNATIONAL SEMINAR ON
TRADITIONAL KNOWLEDGE IN AFRICA**

**ARIPO Headquarters, Harare, Zimbabwe
December 13 to 15, 2006**

Protection of Traditional Knowledge in ARIPO Member
States and its Perspectives

December 13, 2006

OUTLINE OF PRESENTATION

- | Conceptual issues
- | Global debate, initiatives and outcomes
- | Legal options for protecting Traditional knowledge (TK)
- | ARIPO's Road Map on the protection of TK and Expressions of Folklore
- | Way Forward

IMPORTANCE OF TK and FOLKLORE

- | TK plays a key role in the preservation and sustainability of biodiversity
- | Many activities based on TK are important sources of income, food and healthcare
- | The long term economic development of many indigenous and local communities depend on their ability to harness their TK for commercial benefits
- | TK is being rapidly lost as local ecosystems are degraded and traditional communities are integrated into the wider society
- | In spite of the need protect TK and to secure fair and equitable sharing derived from TK, no concrete agreement has been concluded

GROWING CONCERNS OF TK HOLDERS

- Equity considerations
- Conservation of biodiversity and sustainable development and sustainable use
- Preservation of traditional practices in culture
- Prevention of misappropriation by unauthorized parties or avoiding bio-piracy
- Consequences of Genetic Use Restriction Technologies (GURTs) on food security

CHARACTERISTICS OF TK AND TCEs

- | It is a body or sum total of knowledge, skills, practices, beliefs and experiences of indigenous people
- | It consists of innovations, creations and cultural expressions of a group of people
- | It encompasses most fields of technology ranging from traditional medicine, agricultural practices to music, designs and handicrafts

Characteristics of TK and TCEs continued

- | It is created for economic, spiritual, ritual, narrative, decorative or recreational purpose
- | It is directly linked to the genetic resources of the people
- | It has been developed over long period of time, remains in the informal sector and transmitted orally through generations

The question of public domain vrs publicly available nature of TK and Folklore

- | Public domain refers to the element of IP that are ineligible for private ownership and the contents of which are available for use by any member of public. Public domain in IP also does not recognise the private domain established by customary and indigenous laws.
- | Publicly available information on internet or elsewhere does not have similar restriction.

Legitimate concerns on IPRs

- | Two main schools of thoughts;
 - TK is culture specific, integrative and synergistic and therefore must be viewed holistically
 - TK can be de-cultured, segregated and its information can be isolated into identifiable and manageable pieces

The background is a blue gradient. A white arc starts from the top left and curves towards the bottom right. A dark blue rectangle is positioned in the top right corner.

CASES OF MISAPPROPRIATION

The Taumatin Case – Patent

- | Taumatin is a natural sweetener made from berries of a katemfe shrub that is traditionally used by Indigenous Peoples in Central Africa.
- | The protein is about 2,000 times sweeter than sucrose without any of the health risks.
- | In 1993, researchers from the Lucky Biotech Corporation and the University of California acquired a US patent on all transgenetic fruits, seeds, and vegetables containing the gene responsible to producing Taumatin.
- | Although taumatin has still not reached the US and other markets, with the high cost and low production scale of growing Taumatin on plantations in Africa, and a \$900 million per year low-calories sweetener market in the US, it is highly likely that African katemfe plantations will not be used; if so, the countries where katemfe is grown will not be able to benefit from exporting the berries.

The Aveda Case – Trademark



- | In 2000, The Aveda Corporation, introduced a cosmetic product line called “Indigenous”.
- | The products in the line are infused with cedar, sage and sweetgrass and the symbol of the line featured on all labeling and promotional material is the Medicine Wheel.
- | The trademark application No. 75/76,418 under the word “Indigenous” was filed with the US PO on September 9, 1999 and was granted November 15, 1999. The “Indigenous” trademark application was submitted to the Canadian PO on September 15, 1999 and granted on July, 16, 2003.

The Aveda Case ...



- | Indigenous lobbying efforts attempted to disseminate the message that the line was offensive to Indigenous Peoples because: the word “Indigenous” was trademarked by a non-Indigenous corporation; and, the Medicine Wheel symbol was being used in a culturally inappropriate manner.
- | In September 2003 Indigenous lobbyists from the US and Australia managed to get a meeting with Dominique Conseil, president of Aveda, in which he was persuaded to drop the line and the following was stated by Aveda in a press release dated November 4, 2003:
“Aveda Corporation today announced the discontinuation of its Indigenous product line as well as its intention to abandon the 'Indigenous' trademark... The decision was reached following a meeting among representatives of several indigenous nations of the Americas and Australia and representatives of Aveda... We are discontinuing the Indigenous product line to demonstrate our ongoing support and respect for indigenous peoples in their efforts to protect their traditional knowledge and resources.”

Summary of Granted Patent searched & examined for Misappropriation during Oct.2003 - Apr. 2004

Patent Offices		USPTO	UKPO	EPO	Total
No. of granted patent in Oct.2003-Dec.2003	Total Search	67	7	81	155
	Total Cited in Ayurvedic text	5	2	7	14
No. of granted patent in Jan.2004	Total Search	23	1	40	64
	Total Cited in Ayurvedic text	0	0	9	9
No. of granted patent Feb.2004	Total Search	19	2	20	41
	Total Cited in Ayurvedic text	2	0	5	7
No. of granted patent Mar.2004	Total Search	26	2	38	66
	Total Cited in Ayurvedic text	3	0	4	7
No. of granted patent Apr.2004	Total Search	11	2	28	41
	Total Cited in Ayurvedic text	0	0	3	3

GLOBAL INITIATIVES AND OUTCOMES

Initiatives made by WIPO

- **1998-9:** WIPO fact-finding missions to identify needs and expectations of new IP beneficiaries including TK
- **2000:** The establishment of IGC By General Assembly of WIPO
- **2001-6:** IGC carried out its work and achieved the following

- **Provided case studies on the impact of IPRs on access and benefit sharing**
- **Developed composite studies on approaches to the definition of TK and TCEs, existing models of protection and possible elements of a Sui generis system**
- **Established principles for the preparation of guidelines on contracts and licensing options related to access to genetic resources and benefit sharing**
- **Prepared a technical study on disclosure requirements of the origin of TK and Genetic Resources in claimed inventions**
- **Prepared draft toolkit for IP management of TK databases**
- **Drafted Policy Objectives and Principles for Int. instrument**

Doha Ministerial Declaration (Nov' 2001)

- | We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore.

Submission by Developing Countries to TRIPS Council

“TRIPS Agreement should be amended in order to provide that Members shall require that an applicant for a patent relating to biological materials or to traditional knowledge shall provide, as a condition to acquiring patent rights:

- disclosure of the source and country of origin of the biological resource and of the traditional knowledge used in the invention;**
- evidence of prior informed consent through approval of authorities under the relevant national regimes; and**
- evidence of fair and equitable benefit sharing under the national regime of the country of origin.”**

Review of Art. 27.3(b): Issues relating to the Patent Provisions of Art. 27.3(b)

- | Suggestions made for what action might be taken by the WTO
 - To **remove exceptions** to patentability provided for in Article 27.3(b)
 - To **leave** Article 27.3(b) **as it is**
 - To **clarify** certain **terms** in Article 27.3(b), i.e.
 - Plants, animals, microorganisms
 - Three criteria for patentability
 - Ethical exceptions
 - To amend or clarify Article 27.3(b) to **prohibit the patenting of life forms**

Review of Art. 27.3(b): Issues Relating to the *Sui Generis* Protection

While preserving the flexibility in Art. 27.3(b), clarification of the term “an effective *sui generis* system”

- | No reference to the UPOV Convention: Is UPOV 1978 considered to be effective or is it only UPOV 1991?
- | Farmers’ exceptions to plant breeders’ rights
- | Farmers’ rights (landraces)
 - Article 9 of FAO International Treaty on Plant Genetic Resources for Food and Agriculture
- | To spell out the detail of what is “effective”

Convention on Biological Diversity (CBD)

- | Was put in place as a counter-measure against the erosion of biodiversity
- | Abolished the concept of common heritage of biodiversity and recognised the sovereign rights of states over their biological resource
- | The convention focuses on conservation and sustainable use of biological resources and stipulates that access to biological resources can only occur with the “prior informed consent
- | It provides for an equitable sharing of benefits arising from the commercial use of communities biological resources and local knowledge

International Treaty of FAO

- | It was initially a non-binding undertaking adopted in 1983 with the aim of providing unrestricted access to all plant genetic resources for food and agriculture including industrial seeds
 - | Later became a treaty which was adopted on 3 Nov. 2001
 - | It formally recognised the achievements of farmers in preserving, developing and improving PGR throughout the millenia
 - | Recognises the rights of farmers to save, use, exchange and sell farm-saved seeds
- Is silent on the rights of farmers over their landraces or traditional varieties

II GLOBAL DEBATE AND OUTCOMES

INSTITUTION	MANDATE	TK PROCESS	OUTCOMES
WIPO	IP administration	IGC process	On-going negotiations
WTO	International trade	Art 27.3	On-going negotiations
UNEP (COP)	Environmental management	ABS, PIC, Disclosure requirements in patents	CBD Bonn guidelines
FAO	Food security	ABS, PIC, FR	IT-PGRFA MTA
UNCTAD	Trade development	Institutional mechanisms	On-going
AFRICAN UNION	Politico-economic development	TM development Community rights	OAU model Law AU PoA on TM Libreville initiative

INITIATIVES AT THE REGIONAL LEVEL

OAU/AU

- Heads of State declarations
 - Decade of African traditional medicine and the adopted Plan of Action
 - Development of OAU Model Law on community rights, farmers rights and regulation of access to biological resources - shortcomings
- NEPAD Objectives – Para 143; ...NEPAD will give special attention to the protection and nurturing of indigenous knowledge...

Legal options for the Protection of TK and TCEs

- I. Possible protection using the existing IP tools
- II. Possible creation of new IP standards or legislative instrument
- III. Hybrid of I and II
- IV. Possible protection under Customary Laws

Appraisal of policy options for TK protection

Approach	Examples	Merits	Demerits
Use of IPRs including adapted forms	<ul style="list-style-type: none"> - TK innovations - Compositions - Motifs - Handicrafts, etc - Indication of source of TK-based products 	<ul style="list-style-type: none"> - Legal standards in place - Complete disclosure - segregated subject matter 	<ul style="list-style-type: none"> - Incompatibility - Prohibitive cost - Utilitarian - Temporary rights - Lack of capacity
Distinct <i>sui generis</i> systems	<ul style="list-style-type: none"> - All forms of TK 	<ul style="list-style-type: none"> - Embrace holistic TK - Allow for collective ownership 	<ul style="list-style-type: none"> - Parameters and operational definitions not agreed upon - Effectiveness? - International instrument is yet to be established - Administrative cost?

Policy option	Examples	Merits	Demerits
Use of customary Laws and Protocols	<ul style="list-style-type: none"> - All forms of tangible and intangible TK 	<ul style="list-style-type: none"> - Compatible with oral TK - Less costly - Simple and easy to understand - Practical measures and mechanisms in existence 	<ul style="list-style-type: none"> - Lack of international practice - Difficult to enforce - Little economic gains and disincentive for creativity
Comprehensive approach		<ul style="list-style-type: none"> - Allow application of different models - Provide maximum flexibility 	<ul style="list-style-type: none"> - Administrative cost may be high

Customary Law Pre-dates IPR System

When Christopher Columbus landed in the Americas in 1492 hundreds of integrated Indigenous knowledge systems complete with Customary Laws had been functioning on the Continent for generations, while no such regulatory regimes were in existence in Europe.

ARIPO's INITIATIVES ON THE PROTECTION OF TK AND EoF

- | **New initiatives regarding the protection of indigenous knowledge - Seventh Session of Council of Ministers, Ezulwini, Swaziland, Aug 24 to 25, 2000**
- | **Extension of mandate to include genetic resources and expressions of folklore – Eighth Session of the Council of Ministers, Mangochi, Malawi, August 29 to 30, 2002**
- | **During the WIPO-ARIPO Round Table for Heads of Industrial Property Offices held concurrently with the Twenty-sixth Session of Admin Council in Windhoek, Namibia from Nov 25 to 29, 2002, the Council adopted a Joint Statement which identified the priority areas of focus on the protection and exploitation of TK**
 - **Need to develop legislation for TK protection**
 - **Need for National IPOs and ARIPO to become focal offices for the development of TK framework**

ARIPO Initiatives Continued

- | Amendment of the Harare Protocol to incorporate the protection of innovations based on traditional knowledge – Adopted by the Admin Council at its Twenty-seventh Session held in Dar es Salaam, United Republic of Tanzania, Nov 17 to 21, 2003
- | Development of Policy and legal framework – ARIPO's road map for implementing the mandate on the protection of genetic resources, traditional knowledge and expressions of folklore

ARIPO'S ROAD MAP FOR TK PROTECTION

Development of policy framework for TK protection

- Development of legislative instruments

- * Synthesis of shared core principles**
- * Draft substantive provisions**
- * Review of substantive provisions by Experts**

- Establishment of databases on TK

- * Study visits to China and India**
- * Implementation plan**
- * Prototype development**
- * Pilot phase**

- Sensitization and Training

- * National workshops and awareness campaigns**
- * Tailor-made courses for TK holders**

- Sources of funding [ARIPO, WIPO, EPO, WORLD BANK]

Basis for Developing ARIPO Legislative framework on the protection of TK and Folklore

- | African Proposal submitted to the Sixth Session of the IGC and outcomes
- | The OAU Model Law and Laws on the protection of TK and Folklore
- | Libreville initiatives on the protection of traditional medicine
- | Indigenous Knowledge Systems of South Africa

Decisions of the competent organs of ARIPO

1. Ninth Session of the Council of Ministers
 - Proposal to develop legislative framework adopted
2. Twenty-eighth Session of the Admin Council
 - Draft legislative framework adopted with recommendations
3. ARIPO Expert meeting convened to review the frameworks
 - Framework revised

Decisions cont'd

4. First ARIPO-OAPI Expert Meeting
 - First harmonized texts developed
5. Twenty-ninth Session of the Admin Council
 - Admin Council adopts harmonized texts and calls for regional consultation
6. Tenth Session of the Council of Ministers
 - Ministers notes with satisfaction the achievements made by ARIPO

Outcome of ARIPO's Regional Consultation, Victoria Falls, Zimbabwe

- | Engagement of a draftsman to formulate the frameworks into a regional legal instrument by
- | Harmonization of the substantive provisions of the instrument with that of OAPI
- | The draft regional legal instrument should be submitted for consideration and adoption by the Administrative Council at its 30th Session

Second ARIPO-OAPI Expert Meeting on the harmonization of the legal instrument, Dakar, Senegal

THE DRAFT REGIONAL LEGAL INSTRUMENT

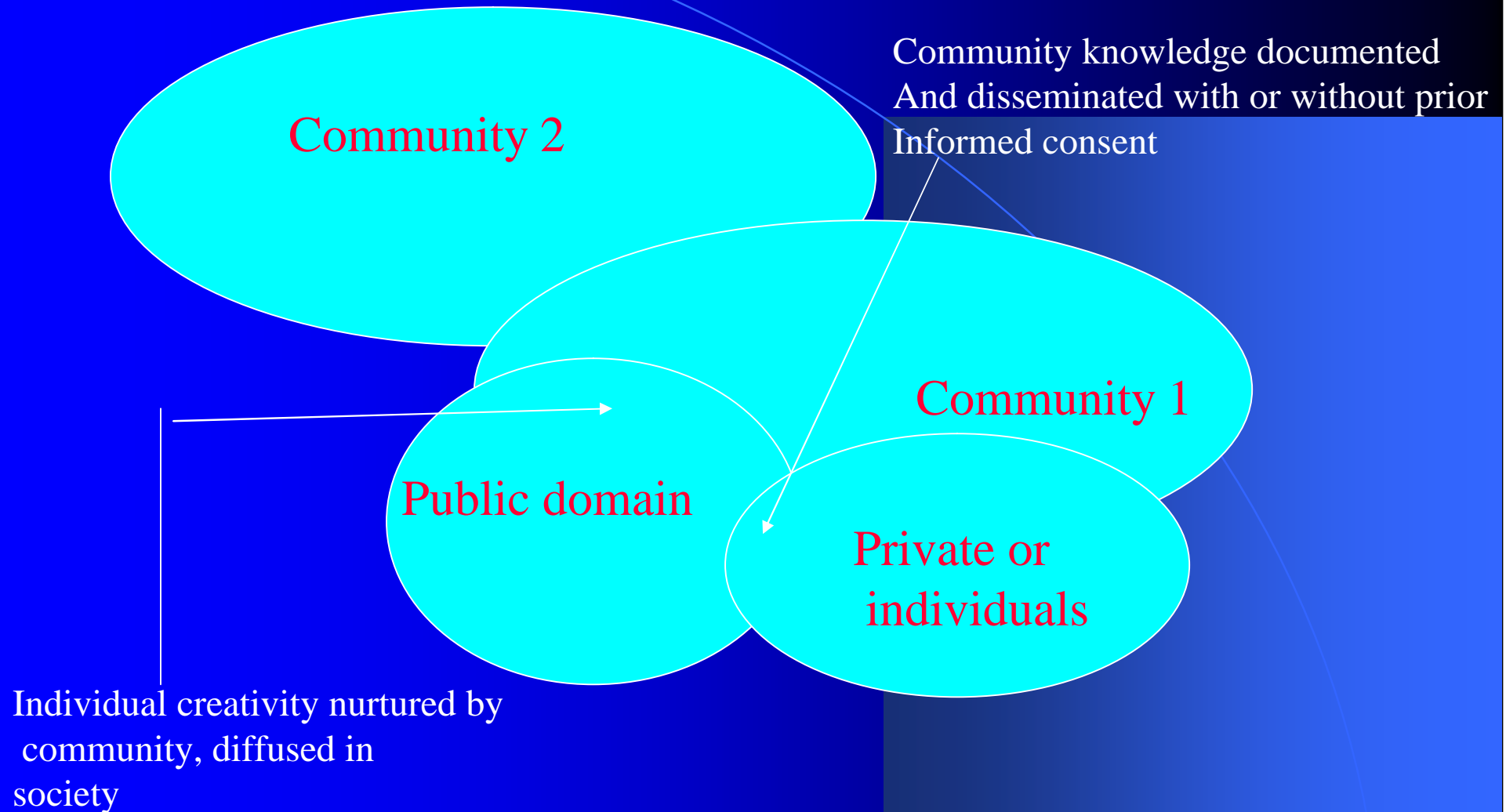
- | PART I: PRELIMINARY PROVISIONS
- | PART II: PROTECTION OF TRADITIONAL KNOWLEDGE
- | PART III: PROTECTION OF EXPRESSIONS OF FOLKLORE
- | PART IV: GENERAL PROVISIONS

DEVELOPMENT OF DATABASE AT ARIPO

Rationale for TK documentation initiative

- | To avoid granting of patents for TK –based inventions (Defensive protection)
- | To avoid the cost for TK holders and third parties of challenging such patents
- | For the management of IP Assets (Positive protection)
- | To safeguard against unintentional, unauthorised and undesirable public disclosure of TK
- | For the preservation and conservation of TK
- | For educational programs on TK

DOMAINS OF TRADITIONAL KNOWLEDGE



KINDS OF INVENTORY/DATABASE

- | Inventory of existing periodical, ethno-botanical pharmacopoeia, journals or gazette concerning traditional knowledge related issues.
- | Inventory of existing traditional knowledge related databases
- | Inventory of codified and un-codified traditional knowledge

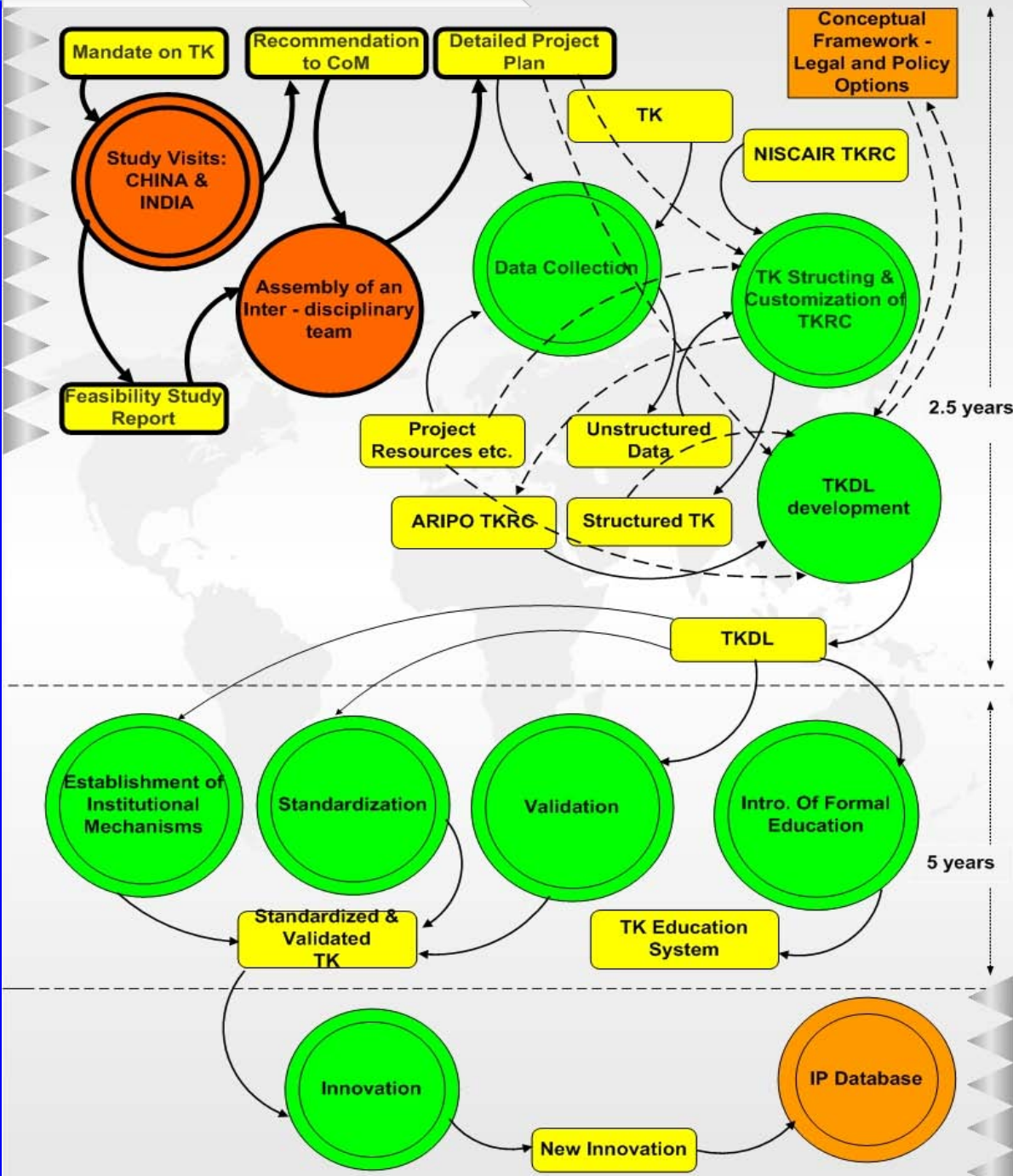
Oral Traditional Knowledge

Need for Documentation

- | **Erosion of TK with the death of Knowledge holder**
- | **Wider applicability of TK**
- | **Getting the TK registered / patented for the benefit of the knowledge holder / community**
- | **Commercialization of TK if applicable with Prior Informed Consent (PIC)**

ARIPO IMPLEMENTATION ROAD MAP

04 June 2004



CAPACITY BUILDING AND AWARENESS CREATION

- | Development of training modules on TK
- | Organization of Sensitization workshops and Seminars
- | Publication and Dissemination of IP information
- | Establishment of Centre of excellence on TK, Biodiversity and ABS

THE WAY FORWARD

- | Need to develop well-considered legislative instruments at the national and regional levels to protect all aspects of TK**
- | Establish institutional structures needed for effective implementation of the legislation**
- | Coordinate and develop partnerships among stakeholders and communities to present a united body of opinion**
- | African leadership will be critical in providing direction to the international debates and outcomes**

Thank you for your attention

