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## **Treading an Independent Course for Protecting Traditional Knowledge**

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Integrating the protection of Traditional Knowledge (TK) within the intellectual property system has been a thorny issue for some time. Part of the problem that has plagued the discussion of TK has been its very meaning. To bring clarity to this field, the World Intellectual Property Organization (WIPO) held a series of fact-finding missions throughout the world, and from these missions, composed a fairly comprehensive definition of TK. According to WIPO, TK includes “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”<sup>1</sup> While this definition may seem overly broad and present difficulties in establishing a clear picture of what TK is, an example such as the Hoodia cactus in South Africa provides an example of what may be included within realm of TK.

The San Tribe of South Africa has for thousands of years used the Hoodia cactus as an appetite suppressant. Over the course of this period of time, the San Tribe has acted as custodians for the preservation of the cactus. With knowledge of its traditional purpose, the National Council for Scientific and Industrial Research (CSIR) developed and patented the active ingredient in the cactus, known as P57. The ingredient eventually made its way into a commercially viable appetite suppressant drug manufactured by Pfizer, which could generate revenue in the millions.

Despite the CSIR’s reliance on the San’s TK of the Hoodia cactus, no agreement concerning compensation for this knowledge was ever established between the San Tribe and CSIR. Foreclosed from any benefits derived from the patented drug and realizing its potential commercial success, the San Tribe threatened to bring suit against the CSIR. Prior to any litigation however, a dialogue between the CSIR and the San Tribe was opened and on April 9<sup>th</sup>, 2002, the San Tribe and the CSIR announced that they had concluded a Memorandum Of Understanding (MOU), which would serve as the basis for benefit sharing negotiations.

This announcement comes at a time when developments in a number of international fora have brought the issue of TK to the forefront of intellectual property policy making. For instance, working groups within the Convention on Biological Diversity, the United Nation’s Food and Agriculture Organization and the World Intellectual Property Organization all have dealt with TK and the development of international norms handling TK within their respective

context. The final outcome of these norm-setting processes has significant economic implications for many large multinational corporations, especially pharmaceutical and biotechnology conglomerates, since the research and development of their products is often based on TK and genetic resources cultivated by indigenous populations.

Both in and outside these fora, most developed countries have resisted the establishment of *sui generis*<sup>2</sup> systems to protect TK, arguing instead that TK can be protected within the existing intellectual property system. Many developing countries however have explored the possibility of a *sui generis* system for TK, arguing that the current intellectual property system is ill suited for the particular needs of indigenous communities and other holders of traditional knowledge.

The MOU between the San Tribe and the CSIR presents a middle of the road option that may prove to be the most effective course of action for the protection of TK. Under the MOU, the CSIR recognised the San as the custodians of TK associated with the uses of a large variety of plant materials, including the Hoodia cactus plant. The San, in turn, acknowledge that it was necessary for the CSIR to protect the work that had been done in isolating the active ingredient in the plant and that the CSIR had a right to patent it.

The terms of the final benefit sharing agreement between the San and the CSIR have not yet been established, but the MOU is an encouraging step towards the recognition of the value of TK and the equitable distribution of benefits among all the parties that have contributed to the development of P57. It is important to point out though, that the MOU was reached despite the absence of national legislation governing the use of TK. In the context of the international debate over TK protection, the MOU thus demonstrates that national legislation implementing *sui generis* TK protection is not necessary to ensure that holders of TK are appropriately compensated for their contributions and that recourse to present legal mechanisms, including those beyond intellectual property, can serve the same objectives as a *sui generis* regime. Along these lines, IPI has advocated that developing countries explore various methods of protecting their traditional knowledge resources, including revision of their visa policies and the establishment of national clearinghouses to secure rights in traditional knowledge.

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<sup>1</sup> Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), 2001 at 25.

<sup>2</sup> *Sui generis* is Latin for “of its own kind”. A *sui generis* system thus is a system specifically designed to address the needs of a particular issue.