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# DIRITTO E PROCESSO

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TRANS-PACIFIC PARTNERSHIP:  
JURIDICAL INTEGRATION ON COOPERATION  
ABOUT TRADITIONAL KNOWLEDGE  
RELATED GENETIC RESOURCES

**ABSTRACT:** The Trans Pacific Partnership (TPP) is a new comercial agreement by many countries from Pacific area that aims to eliminate barriers about international commerce. However it contains a chapter on intellectual property rights. As matter of fact, valorization and protection of Traditional Knowledge (TK) is an opportunity for developing countries rich in knowledge elaborated by local communities and indigenous peoples (see Mexico, Peru, Chile, Australia or New Zealand). An Register on TK by databases like Digital Library permits access for researchers, academics, institutions and international communities, and it prevents misuse and misappropriation by non authorized persons. TPP is the first commercial international agreement that non directly, but taking into account indigenous peoples rights related intellectual property rights.

**SUMMARY:** 1. Introduction. — 2. Traditional Knowledge and genetic resources over TPP. — 3. Relevance of TK. — 4. Data Bases or Digital Library for preventive protection of TK. — 5. Legal Aspects of DL. — 6. Technological Aspects.

1. — *Introduction.*

TPP is a new commercial agreement started negotiation on March 2010 and finished recently at the end of 2015. Is was signed in Auckland, Australia in February 2016. TPP involves twelve countries from three continents (America, Asia and Oceania): Australia, Brunei Darussalam, Canada, Chile,

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Estados Unidos, Japan, Malasia, Mexico, New Zealand, Peru, Singapur and Vietnam, but not China. TPP includes a huge international PIL like 36%, because of huge size of the United States and Japan. TPP has still not entered into force because of national procedures for ratification or accession have not still accomplished.

The goals of TPP are “promote economic growth; support the creation and retention of jobs; enhance innovation, productivity and competitiveness; raise living standards; reduce poverty in our countries; and promote transparency, good governance, and enhanced labor and environmental protections”<sup>(1)</sup>.

TPP contains 30 chapters related trade and trade issues including one on intellectual property aspects, the Chapter 18. TPP is divided on sections<sup>(2)</sup>: Section A: General Provisions, Section B: Cooperation, Section C: Trademarks, Section D: Country Names, Section E: Geographical Indications, Section F: Patents and Undisclosed Test or Other Data, Section G: Industrial Designs, Section H: Copyrights and Related Rights, Section I: Enforcement, Section J: Internet Service Providers and Section J: Final Provisions.

Section B about Cooperation takes into consideration the TK.

## 2. — *Traditional Knowledge and genetic resources over TPP.*

The Section B, article 18.6 is one of positive aspect of TPP because concerning Cooperation in the Area of Traditional Knowledge.<sup>(3)</sup> TPP is first free trade agreement recognized relevance of TK in genetic resources: “The Parties recognize the relevance of intellectual property systems and traditional knowledge associated with genetic resources to each other, when that

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<sup>(1)</sup> Office of the United States of Trade Representative, [www.usptr.gov](http://www.usptr.gov), last date consulting February 15th 2016.

<sup>(2)</sup> The official version of TPP is available at the same web page.

<sup>(3)</sup> TPP is strongly reviewed from civil society because of globalization, imposition of norms from United States over other countries, less transparency, etc.

traditional knowledge is related to those intellectual property systems”<sup>(4)</sup>. In that way, TPP is in line with Convention on Biodiversity and their relation with intellectual property rights<sup>(5)</sup>.

The second number of article 18.16 to push for a institutional cooperation:

“2. The Parties shall endeavor to cooperate through their respective agencies responsible for intellectual property, or other relevant institutions, to enhance the understanding of issues connected with traditional knowledge associated with genetic resources, and genetic resources”.

Finally this article contains declarations looking for improve a system of property rights. Specially TPP promotes a strong revision of a prior art proposing measures like follow:

“(a) that in determining prior art, relevant publicly available documented information related to traditional knowledge associated with genetic resources may be taken into account;

(b) an opportunity for third parties to cite, in writing, to the competent examining authority prior art disclosures that may have a bearing on patentability, including prior art disclosures related to traditional knowledge associated with genetic resources;

(c) if applicable and appropriate, the use of databases or digital libraries containing traditional knowledge associated with genetic resources; and

(d) cooperation in the training of patent examiners in the examination of patent applications related to traditional knowledge associated with genetic resources”<sup>(6)</sup>.

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<sup>(4)</sup> Peru token a leadership on TK defense position.

<sup>(5)</sup> United Nations, Art. 8 J, Convention on Biodiversity (1992): TK were defined as “innovations and practices of indigenous and local peoples embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”.

<sup>(6)</sup> TPP, art. 18.6: 3.

### 3. — *Relevance of TK.*

TPP takes into account traditional knowledge related genetic resources and its relation with intellectual property rights, but not from a cultural or folklore expression point of view, that it means a trade aspect of TK.

TK is closely linked to biodiversity and genetic resources, especially in medicine and agriculture aspects. TK are considered a technological font of solution for ordinary questions and in order to preserve local identities and sustainable development for local communities and indigenous peoples<sup>(7)</sup>.

Valorization and protection of TK are an opportunity for developing countries, there are rich in knowledge from local communities and indigenous peoples like Peru, Mexico, Chile Australia and New Zealand.

TK protection is relevant also to prevent misappropriations and misuse from non authorized persons, against globalization and expansion of intellectual property rights mainly based in TK realized. One element of granted patent is the invention novelty, it is mean not publicity around the world.<sup>(8)</sup> However, if intellectual property rights have been granted thought genetic resources associated with TK, generally there is no evidence of their preliminary existence. The notorious experiences of ayahuasca in Peru or Neem in India, recall how the protection is need. For instance in the Neem experience, the nullity of patent declared after lawsuit, providing robust evidence that rise variety exist and the uses for many years by scientific publications and others, destroyed novelty. This case, pushed Indian government to create a DL on TK and this experience is useful for other countries with similar requirements.

The TPP perspective about TK is not protective and focused on prevent a wrong intellectual property rights granted and not looking benefit to local communities or indigenous peoples. TPP leave out all reference to TK from indigenous peoples, but obviously the concept of TK involved reference to them.

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<sup>(7)</sup> *Intellectual Property and Traditional Knowledge*, Geneva, Suisse, in [www.wipo.int/freepublications/en/tk/920/wipo\\_pub\\_920.pdf](http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf): last consultation, February 27, 2016.

<sup>(8)</sup> H. PACHECO, *La propiedad intelectual sobre los conocimientos tradicionales indígenas*, in J. AYLWIN, *Derechos Humanos y Pueblos Indígenas: Tendencias Internacionales y Contexto Chileno*, Instituto de Estudios Indígenas, Universidad de la Frontera, Temuco, Chile, 2004, pp. 55-71.

#### 4. — *Data Bases or Digital Library for preventive protection of TK.*

Data bases or Digital Library (DL) is a defensive protection and important source of prior art<sup>(9)</sup>. It is useful for generates a recorder of TK as testimony of their preexistence<sup>(10)</sup>.

The form of DL requires a prior assessment of technological alternative to make it. The solution must be able to support a high level of information, concurrency management, to offer security and Internet access and to permit an open availability of dates.

The experience of DL from India is a best practices in this materia. It shows a effective way to create a repository for prevent misappropriation against non authorized persons and patent register over TK<sup>(11)</sup>.

DL is useful for researches, technological centers, universities, bibliotheca, breeds producers, medicine practitioners, scientist, etc., but also local communities and indigenous peoples because it is recording TK for preserving their culture.

To create a DL is a effort needs to collect TK publications, register and classify by International Patent Classification and FAO thesaurus.

#### 5. — *Legal Aspects of DL.*

To create a DL should be considering a legal restrictions imposed by international and national laws on copyright. Anyway it is difficult to meet authors loosing in quite number of TK fonts formal and non formal.

Another restriction comes from International Labor Organization Convention 169 about Indigenous People Rights art. 6. Due to the fact that it suggests that any project relating to indigenous population should be under

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<sup>(9)</sup> *Technical Study on Disclosure Requirements in Patent Systems related to Genetic Resources and traditional Knowledge*, in [www.wipo.int/tk](http://www.wipo.int/tk): last consultation, February 25, 2016.

<sup>(10)</sup> UNU-IAS Report, *The Role of Registers and Databases in the Protection of Traditional Knowledge. A Comparative Analysis*, in [www.ias.unu.edu](http://www.ias.unu.edu).

<sup>(11)</sup> DL from India is available in [www.tkdl.res.in](http://www.tkdl.res.in).

a consultation by indigenous peoples. Thus, also in the case of DL indigenous TK must be under under the art. 6 procedure above mencionated.

A third legal aspect is to offer a TK classified made not only by International Patent Classification, but also under FAO Thesaurus. As matter of fact, not all countries grant patents related to TK or genetic resources, however many countries have a sui generis system of protection like certificates plant breeders.

#### 6. — *Technological Aspects.*

The technological alternative selected must be able to support a high data volume, concurrency management, security mechanisms and access to multiple users by INTERNET, in the respect of authors intellectual property rights of own publications by open data philosophy<sup>(12)</sup>. DL require researching on tools and methodologies that support and define architecture model.

The technology should be based on the use of free software, if is possible, and interface design should be friendly and consider the use of the structure of IPC and FAO Thesaurus.

A DL on TK requires a next activities minimum, but not only: a) building a multidisciplinary task force on TK; b) identifying the sources for collect publications related to TK and c) classifying by FAO thesaurus and IPC; d) designing of DL, based on detailed specification and information sources; e) selecting registry; f) achieving levels of functionality defined by technological platform; g) taking to account requirements and the degree of automation desired and h) developing of platform on TK, test and trial run, etc.<sup>(13)</sup>.

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<sup>(12)</sup> A. BARROS, *Open Data: nuevo paradigma en el manejo de datos*, in *Revista Bits de Ciencia*, Universidad de Chile, Santiago de Chile, 6, 2011, pp. 25-27.

<sup>(13)</sup> BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, *En camino hacia la Web Semántica: experiencias de la Biblioteca del Congreso Nacional de Chile*, in *Revista Bits de Ciencia*, Universidad de Chile, Santiago de Chile, 6, 2011, pp. 33-43.