

# Intellectual Property Rights Protection for Indigenous Knowledge

Using and Extending Existing Legal Protections



Recommendations of the Discussion Group convened under the aegis of the  
National Science Foundation Working Committee on Indigenous Knowledge

## Contents

<b>1. Introduction</b>	<b>1</b>
1.1 Understanding the term “IK” ( <i>deshiya daenuma</i> )	4
1.2 Scope of the Discussion Group	4
<b>2. Use of Intellectual Property Rights (IPR) for Protection of IK</b>	<b>5</b>
2.1 IPR protection options available for IK	5
2.1.1 Positive protection	5
2.1.2 Negative/defensive protection	5
2.2 Complementary use of both positive and negative/ Defensive IPR protection	5
2.3 Creating IP rights over IK	6
<b>3. Need for a Bundle of Mechanisms for IK Protection</b>	<b>7</b>
3.1 The <i>Sui Generis</i> protection systems	7
3.2 Indigenous knowledge registries	7
<b>4. Recommendations of the Discussion Group</b>	<b>8</b>
4.1 Protection of copyrightable materials ,performance ,design and undisclosed information relating to Indigenous knowledge	8
4.1.1 Multiple protections	8
4.1.2 Databases and compilations	8
4.2 Geographical indicators and trade secrets and unfair competition protection for products based on Indigenous Knowledge	9
4.2.1 GI, TS, and unfair competition protection	9
4.2.2 IK protection under trademarks and collective marks	9
4.3 Create new pathways for the protection of (domestic) small scale innovation inspired by IK	9
4.4 Consumer protection and standardization of quality, measures against counterfeiting	9
4.5 Use of relevant terms within the contextual understanding as well as with an English translation	10
4.6 Indigenous plant variety protection ( <i>deshiya shaka prabheda         saha arayan sandhahaa</i> )	11

4.7	Benefit sharing models – use of Trust Law	10
4.8	Awareness raising programmes	11
4.9	Establish research roundtables	11
4.10	Design a mechanism in the nature of a ‘Cell’ or ‘Platform’ or ‘Helpdesk’	11
<b>5.</b>	<b>Conclusion</b>	<b>12</b>

# 1. Introduction

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In so far as it is defined by the World Intellectual Property Organization (WIPO) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO), Intellectual Property (IP) is broadly described as ‘the rights given to persons over the creations of the mind’. These rights are exclusive rights afforded to the creators and inventors, usually for a limited period of time. Sri Lanka is a member of the WTO and is bound by the provisions of the TRIPS Agreement since its ratification in 1994.

The Intellectual Property Rights (IPR) regimes that are in place in different countries including Sri Lanka, are empowered to give legal recognition and rights to the inventors or holders of creations and inventions made through human intellect, and which have a commercial value or potential commercial value. It is seen that the modern IPR regime, with the exception of geographic indicators, acknowledges and give rights to new inventions, creations, products, and expressions. These rights are usually conferred on those who have made these, and also extends to those who hold rights acquired from those who made the product or the knowledge behind it.

The intention of this endeavor is to make recommendations to protect Indigenous Knowledge (IK) for an unlimited time period. It can be seen that the IPR regime as practiced in the world, with the exception of trade marks, trade secrets and geographic indicators, can neither help to protect IK nor provide any protection to the holders of such knowledge. Unfair competition may also be useful to a limited extent to confront certain specific issues in the context of commercial use of IK. The chart below offers a glimpse of the IP tools available in Sri Lanka under the Intellectual Property Act, No. 36 of 2003.

**Chart I : IP tools available in Sri Lanka under the Intellectual Property Act, No. 36 of 2003**

<i>Type of IP</i>	<i>Scope of Protection</i>	<i>Duration of Protection</i>
Copyright	Original Expression	Lifetime of author + 70 years since first publication
Neighboring or related rights	Performance	50 years since the first performance
Patents	Invention or Innovation	20 years from date of filing the patent application
Industrial Designs	New designs (aesthetic appearance of a product)	15 years maximum since filing the application (3 consecutive 5 year terms)
Trade Mark Service Mark Certification Mark Collective Marks	Distinctive features of the mark and reputation attached to it.	No limit – as long as it is renewed (eternal protection)
Undisclosed information/ Trade Secrets	The information	Unlimited/ eternal protection ( as long as the secret can be protected)
Geographical Indications	Origin-linked products	Unlimited
Unfair Competition	Any act of competition contrary to honest practices	Unlimited (but does not entail exclusive rights)

This Discussion Group is of the view that the IPR regime currently in place in SL as provided in the Intellectual Property Act, No. 36 of 2003, and certain other IPR tools which are not currently within the IPR rights in SL (such as petty patents, plant breeders rights) can be made use of to cover certain aspects of Indigenous Knowledge and/or, to extend protection to creation and invention based on Indigenous Knowledge.

Indigenous Knowledge (IK) is not a term that is defined either in the TRIPS Agreement or in the Intellectual Property Act No.36 of 2003 of Sri Lanka. This

is a term that is recommended by this Discussion Group, and the following definition is proposed.

‘In the Sri Lankan context indigenous knowledge (දේශීය දැනුම, *deshiya denuma*) may be defined as the sum total of indigenous practices, knowledge transmitted orally or in writing, indigenous cultural expressions and the use of biotic and biological resources in diverse fields of activity, prevalent among different groups and communities in Sri Lanka’.

It is seen IK is broad based and has been passed through generations to the present transmitted through different means such as oral knowledge, written knowledge, documentation and diagrams, by engaged in practices and performance learning practices. It is also seen that IK broad based shows differences according to different knowledge holders and there are no originators.

The Discussion Group decided to explore the possibilities of making use of the IPR tools available in SL to make suggestions and recommendations to make use of available tools for the protection of IK. This helps practitioners and potential users of IK to protect the identity of IK originating from SL and to help safeguard the IK and its holders and practitioners from any unauthorized users and other such abuses. Furthermore the Discussion Group explored the other options that can be made use of to make these measures more effective such as gathering and organizing of information.

The Discussion Group took the following approach in perusing these options which are

- Understanding the term IK (*deshiya daenuma*) for the purpose of this exercise
- Setting out the premises for the working of the Discussion Group
- Exploring the available legal tool on individual basis to protect IK
- Use of more than one IPR tool as complementary
- Using a bundle of IPR tools
- Amalgamating IPR tools with other types of protection
- Possibilities of using other IP tools that are currently not provided in legal system of Sri Lanka
- The provisions of the TRIPS agreement that are relevant
- The legal tools that can be made use of IP protection

The Discussion Group further acknowledge, and thereby recommend the value of having awareness raising programmes, identification of studies and research areas and the importance of having information databases to facilitate this process, and to make it available for a wider group of people.

### **1.1. Understanding the term “ Indigenous Knowledge” (*deshiya daenuma*):**

For the purposes of this proposal, Indigenous Knowledge (IK) will be defined as broadly as possible, encompassing indigenous knowledge, indigenous cultural expressions, genetic resources and other forms, in the light of the needs of social wellbeing and national development.

‘In the Sri Lankan context indigenous knowledge (දේශීය දැනුම, *deshiya denuma*) may be defined as the sum total of indigenous practices, knowledge transmitted orally or in writing, indigenous cultural expressions and the use of biotic and biological resources in diverse fields of activity, prevalent among different groups and communities in Sri Lanka’

### **1.2 Scope of the Discussion Group**

The scope of the Discussion Group comprise the following components

- 1.2 Indigenous Knowledge is an invaluable national heritage, and is an asset with immense potential.
- 1.3 The potential of IK should be explored with adequate safeguards including legal protection.
- 1.4 IK must be used for the betterment of the source community and of society at large.
- 1.5 The holders of the knowledge should have the rights over the IK, and such rights pertaining to the knowledge should be considered inalienable.
- 1.6 Some aspects of the existing legal regime can be effectively utilized to protect IK.
- 1.7 When using IP to protect IK, it should be borne in mind that there are aspects of IK which need new legal approaches
- 1.8 It is recognized that there are certain aspects of IK which cannot fit into the existing legal framework regarding intellectual property.
- 1.9 IK has to be looked at holistically, in its entirety, in its historical, social and cultural context.

## **2. Use of Intellectual Property Rights (IPR) for protection of Indigenous Knowledge**

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### **2.1. Intellectual Property Rights (IPR) Protection Options available for Indigenous Knowledge (IK)**

Broadly speaking, the legal protections of IPR can be classified as ‘Positive protection’ and/or ‘Negative/Defensive protection’.

#### ***2.1.1. Positive protection***

This refers to holders of IK acquiring IPRs or any other rights provided by a legal mechanism created to protect IK and the interest of IK holders. It means protection may be granted to ‘exclude’ the unauthorized use by third parties of the protected IK. It is aimed at creating positive rights in IK that empower IK holders to protect and promote their IK.

#### ***2.1.2. Negative/Defensive Protection***

This refers to the use of IPR as a shield against the acquisition by third parties of IPR over different aspects of the IK. Defensive protection means protection through legal or other means to prevent misappropriation or unauthorized use and claims to cultural expressions, knowledge associated with specific practices, products derived from IK, and enclosing the IK that is in the public domain through patents and other IPRs. This protection prevents other parties from acquiring IPR. For example Disclosure of origin, IK Prior-Art Databases, Indigenous Knowledge Registries can be viewed in defensive protection

### **2.2. Complementary use of both Positive and Negative/Defensive IPR protection:**

Both Positive Protection and Defensive IPR Protection dimensions can be used in a complementary manner. IPR can be used as both a positive protection for IK as well as a defensive/negative right against commercialization, misuse, bio-piracy etc.



### **2.3. Creating IP rights over IK:**

The possible IPR protection mechanisms include the following:

- Patents
- Petty Patent Models
- Plant Patents
- Plant Variety Certificates
- Trade Secrets
- Trademarks
- Geographical Indicators
- Protection against Unfair Competition (note this is included here because it is included in TRIPS Agreement)

### **3. Need for an integrated approach (a Bundle of Mechanisms) for IK protection**

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However, it should be noted that IPRs alone are not solutions for protection of IK - there must also be an integrated approach (bundle of mechanisms) which should include other non-IPR options for protection of IK.

#### **3.1. The *Sui Generis* Protection Systems**

The term *sui generis* means something that is unique, or in other words which does not have legal precedents. In the case of failure of the use of IPR protections, it is possible to develop *sui generis* systems to protect IK that would suit the specific characteristics and needs of the country concerned. In some countries, *sui generis* legislation has been developed specifically to address the positive protection of IK. This can include 'take-and-pay' systems, in other words, liability regimes instead of creating specific rights regimes.

#### **3.2. Indigenous Knowledge Registries**

This suggests documentation of Indigenous Knowledge with the intention of serving the following purposes;

- Correction of IK and its protection through documentation. Documentation could include written materials, photographs, pictures, diagrams, audio, video
- Organization of materials for helping targets groups
- Help identify research areas
- Help identify new innovations based on IK
- Help identify the prior art in patent applications
- Identify and take actions against misuse of IK
- To act as defensive publications against infringement

However, the Discussion Group is of the view that these registries should not be open to the public, nor open to patent databases as public data bases, and should only be considered accessible according to the access classification system for identified personnel.

## 4. Recommendations

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### 4.1. Protection of Indigenous Knowledge (දේශීය දැනුම , *deshiya denuma*) through an integrated application of Copyrightable materials, Performance Rights, Industrial Design and Undisclosed Information.

There are certain materials which can be protected through copyright if it has not been published before. Similarly, visual material that has not been published could be protected through industrial designs. There are also certain activities that can be protected as performance rights. Secret IK can be protected through trade secrets. These different aspects of protection are not mutually exclusive to each other but taken as a bundle of rights leading to a better protection.

#### 4.1.1. Multiple protections (concurrent tools)

The same IK could be protected using different IPR tools. It is possible to protect the same knowledge by making use of more than one IPR tools. For example, this includes giving protection to a new design based on IK under the copyright protection, and as a industrial design and the related rights.

That is:

*One Single Design = protected by (copyright + trade secrets + industrial design+ trademarks + neighboring rights or related rights (performance, broadcasting or recording) + unfair competition)*

For another example, there can be a bundle of rights concerning the same folklore, but separate IP tools can be used to accord protection for the writing (original expression in writing), visual depiction (artistic expression) and performance (dance, drama, puppetry etc.) of folklore.

#### 4.1.2. Databases and Compilations

Databases and Compilations should be protected by copyright (need to include proviso stating that: compilations must be quasi-public with an access classification system and only for non-patentable knowledge)

Identify areas that need to be protected beyond/outside of standard legal protection concepts and mechanisms (IP and other) – and unrelated to monetary gain and individual legal rights model.

## **4.2. Geographical Indicators (GI) and undisclosed information (Trade Secrets) and unfair competition protection for products based on Indigenous Knowledge**

### **4.2.1. GI, TS, and unfair competition protection**

The Term ‘Geographic Indications’(GI) as defined in Section 101 of the IP Act means “an indication which identifies any goods as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin”. Important GIs for Sri Lanka include Ceylon Tea, Ceylon Cinnamon, Hambantota Ja Dodol (හම්බන්තොට ජා දොදොළ) etc.

Trade secrets protection has become a key aspect in the creation of a favourable business environment in any country. Any information that is kept confidential in order to preserve competitive gains is considered a trade secret. Defining a trade secret is not easy; it may include customer lists, formulae, practices, business strategies, software programs, advertising strategies, marketing plans, manufacturing processes and information about R&D activities etc. Sri Lanka, being a state party to the TRIPS Agreement, has a TRIPS-compliant legal regime. Section 160 of the Intellectual Property Act of 2003 and the common law action for breach of confidence constitute the foremost legal means of trade secrets protection in Sri Lanka.

However, there are a number of risks involved in trade secret litigation. One major concern is the preservation of confidentiality of the trade secret during and after legal proceedings. A lawsuit against an infringement of a trade secret risks losing the confidentiality of that trade secret and its value.

### **4.2.2. IK protection under trademarks and collective marks**

Indigenous Knowledge can also be protected under trademarks and collective marks

## **4.3. New pathways for the protection of (domestic) small scale innovation inspired by IK**

### **4.3.1. Secondary Patent Scheme.**

New legal provisions for a secondary patent scheme (second tier patent system) for minor and incremental innovations must be introduced - including the incorporation of new legal provisions in the nature of Utility Model protection (‘Petty Patent System’ or ‘Small Patent System’) for IK inspired innovation.

### **4.3.2. A liability regime.**

Explore the possibility of introducing a 'liability regime' ('take and pay' system) for IK based innovations.

#### **4.4. Consumer protection and standardization of quality, measures against counterfeiting**

The quality of a product based on IK can be ensured under the provisions of the Consumers Affairs Authority Act and the quality of a food item can be maintain under the provisions of the food act.

The provisions of these two acts as well as the provisions of the Penal Cord (Article 265 of Chapter 14) can be used to protect from adulteration of products based on IK

Testing for deleterious substances and for maintaining quality of products can be done without revealing trade secrets but the law must clarify this. There should be adequate safeguards against disclosure of secret/confidential information (formula or methodology) in recipes (වට්ටෝරුව/*vattoru*) of medicinal products when such products are produced for seeking of approval to any approving authority.

Independent tests to determine efficacy and quality should be conducted (for human safety).

#### **4.5. Use of relevant terms within the contextual understanding as well as with an English translation**

It was seen by the Discussion Group that certain terms and expressions relating to IK needs to be verified and used in the same and similar manner throughout the processers to prevent ambiguities, confusions and misuse of terms. It was also seen that there may not be exact translation for such terms, and hence IK words should use as and when it is needed and appropriate.

E.g. *Sinhala vedakama* (සිංහල වෙදකම), *Ayurveda* (ආයුර්වේද), *Unani* (යුනානි), *Siddha* (සිද්ධ) – not over-reliance on all English terms of 'indigenous medicine'.

It is also seen that certain terms, and the usage of such terms need to be defined and clarified to a unified system.

#### **4.6. Indigenous plant variety protection (දෙශීය ශාක ප්‍රභේද සහ ආරයන් සඳහා)**

Plant breeders rights are not legally recognize in SL at present, however, a new act has been drafted (the bill of plant variety protection act) to give plant breeders rights as SL has opted for a *sui generis* law to provide protection to new plant varieties. This law is drafted to fulfill the obligations of Sri Lanka under article 27 (3) (b) of the TRIPS agreement.

Plant breeders rights (ශාක අභිජනක අයිතිවාසිකම් ) are conferred on new varieties. However, the Act to provide Plant Breeders Rights has to provide safeguards for the protection of indigenous varieties of plants and also provide for a system of providing benefits for the people and to the State when new varieties have been made using traditional varieties as parents. An act which safeguards new varieties made with indigenous knowledge should have a portion of benefits to the State or for the people of the country.

#### **4.7. Benefit sharing models – the use of Trust Law**

It is recommended to use the existing Trusts Ordinance for setting up benefit sharing mechanisms. The beneficiaries should be the relevant community of rights holders or IK holders – the trustee should be a designated authority of the State depending on the nature of the IK and products.

#### **4.8. Awareness raising programmes**

It is recommended to carry out awareness raising programmes for IK holders on IP related issues (grassroots outreach). This must be organized for the target groups based on the different forms of the IK.

#### **4.9. Establish research roundtables**

It is recommended identify and fund IK-related research projects for interested parties including postgraduate and doctoral students, and to guide them effectively.

**4.10. Design a mechanism in the nature of a ‘Cell’ or ‘Platform’ or ‘Helpdesk’** to gather and organize information – to provide information and advice - and to further identify and initiate research ( an incubation and maturation network).

## 5. Conclusion

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Taken together, the Discussion Group concludes that there is no ‘one single approach’ for protecting the different components of IK, but it is necessary to take an integrated approach to seek multiple avenues/different layers of protection. If one protection fails, another option will be available.

It is also important to consider the alternatives available outside the usual IPR arena, e.g. the concept of trusts, liability regimes, unfair competition regimes, schemes of rewards and privileges, to protect IK.

Broad-based campaigns to educate the different parties such as holders of rights, policy-makers, decision-making institutions, and enforcement agencies are necessary.

The Discussion Group is of the opinion that there is a need to conduct more research on the different types of IK held and practiced in Sri Lanka, and the application of the different legislation, in order to ascertain the most suitable type of legal protection.

Furthermore, it is imperative that different information pertaining to different types of IK needs to be documented and made available for research purposes through the aegis of the NSF Working Committee on Indigenous Knowledge. The mechanism, composition, powers as well as the functioning of this process has to be decided by the NSF Working Committee on Indigenous Knowledge.

**Prepared by the discussion group comprising**

Mr Jagath Gunawardena  
Member, NSF Working Committee on Indigenous Knowledge  
Expert in Environmental Law

Dr Sampath Punchihewa  
Senior Lecturer  
Department of Commercial Law  
University of Colombo

Dr Kokila Konasinghe  
Senior Lecturer  
Department of Public and International Law  
University of Colombo

Ms Nishara Mendis  
Department of Public and International Law  
University of Colombo

Dr Thusitha Abeyssekara  
Faculty of Law  
Kothalawala Defense University

Ms Bhagya Wickramasinghe  
Faculty of Law  
Kothalawala Defense University

**Prepared under the guidance of the NSF Working Committee on  
Indigenous Knowledge**

Coordinated by

Dr PRMP Dilrukshi /Head, Science Technology & Policy Research Division  
Ms Upuli Rathnayake /Committee Coordinator