Protecting TK Associated with Genetic Resources
IPRs and Beyond

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Outline

• History of aTK Protection
• Limitations of IPRs for Protecting aTK
• Other rights frameworks of protecting aTK
  • UNESCO
  • ILO
  • UNDRIP
  • CBD (8j, Nagoya Protocol)

• Other means of protecting aTK
  • Sui generis systems
  • Models and incentives behind protection of aTK
  • Community Protocols in the Context of ABS
History of aTK Protection

• Backdrop of movement:
  – 1980s/90s indigenous peoples rights movement surrounding resources, land & participation rights
  – ILO 169, UNDRIP etc

• Growing awareness on misappropriation of ‘intangible resources rights’ lead to calls for TK protection
  – Biopiracy Cases (Neem, Tumeric, Maca, etc)
  – Public domain vs. public availability
  – globalisation of IPRs (TRIPS), increasing value of GRs

• Initial focus on IPRs as means of protection
Limitations of Patents (and some other forms of IPRs)

Knowledge under Patents

- Clarity regarding owners
- ‘new’ from ‘old’ knowledge defined by inventive step
- Inventors motivated primarily by future rewards through licensing and monopoly
- IPRs offer reward through exclusive and time-bound monopoly rights in exchange for sharing the knowledge with society
- Time bound protection

aTK

- collective ownership
- TK perpetual → no distinction btw. ‘new’ and ‘old’
- TK is connected to a way of life - developed in response to the needs of the community
- The sharing and exchange is not based on ‘ownership rights’ but on ‘stewardship duties’
- Open ended protection
GIs for Protecting GRs and aTK?

Advantages:
- Quality/reputation built through tradition – no novelty / inventive step required
- Not time bound protection
- Natural factors as part of the quality: e.g. soil, climate
- Collective rights: any producer in indicated region = right holder

Challenges:
- Complex registration process
- Only for products with existing / expecting market
- strict cultivation/production harmonization criteria
- Possible creation of clubs
- Need for defensive protection (Rooibos)?
UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (1)

• Adopted in 2003, and entered into force in 2006
• “Intangible cultural heritage” means:
• practices, representations, expressions, knowledge, skills THAT communities recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

• Including:
• knowledge and practices concerning nature and the universe
UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2)

- Some African member countries: Botswana, Ethiopia, Gambia, Kenya, Malawi, Namibia, Nigeria, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe

- Ex: **Secret society of the Kôrêdugaw, the rite of wisdom in Mali**
  
  The Kôrêdugaw are herbalists and traditional therapists whose knowledge of plants is used to cure illnesses, ward off bad luck, treat childless women and impart blessings.
Convention 169, of the International Labour Organization (ILO)

- IPs: traditional life styles; culture and way of life different from the other segments of the national population, e.g. in their ways of making a living, language, customs, etc.; own social organization and political institutions.

- **Principles: Consultation, participation and representativity**

- Article 15: The rights of IP to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
- Only African country to ratify: Central African Republic
UN Declaration on the Rights of Indigenous Peoples

- Approved in 2007; non-legally binding instrument
- Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, *traditional knowledge*, ... and traditional cultural expressions, as well as the *manifestations of their sciences*, including *genetic resources*, seeds, medicines, *knowledge of the properties of fauna and flora*, etc. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, *traditional knowledge*, and traditional cultural expressions.
Convention on Biological Diversity (CBD)

- Signed in 1992 (during UNCED-Rio) and entered into force in 1993
- In relation to TK, the main article is 8(j). Parties must:

  - **Respect, preserve and maintain knowledge, innovations and practices** of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with **the approval and involvement of the holders of such knowledge, innovations and practices** and
  
  - **Encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices**;
Nagoya Protocol (to the CBD)

- **NP on Access to GR and the Fair and Equitable Sharing of Benefits Arising from their Utilization**, adopted on 29 October 2010.
- It will enter into force 90 days after the deposit of the 50th instrument of ratification, acceptance, approval or accession.
- It supports ABS provisions of CBD, but full implementation of the NP depends on national ABS laws.
- Some African countries that have signed NP: Botswana, Burkina Faso, Cape Verde, Ethiopia, Kenya, Nigeria, Rwanda, South Africa, Sudan, etc.
Nagoya Protocol (to the CBD)

• In relation to TK: (Preamble)

• *Recalling* the relevance of **Article 8(j) of CBD** as it relates to TK associated with GR and the fair and equitable sharing of benefits arising from the utilization of such knowledge,

• *Noting* the interrelationship between GR and TK, their inseparable nature for indigenous and local communities, the importance of the TK for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities,
Nagoya Protocol (to the CBD)

• In relation to TK: (Preamble)

• Recognizing the diversity of circumstances in which TK associated with GR is held or owned by indigenous and local communities,

• Mindful that it is the right of indigenous and local communities to identify the rightful holders of their TK associated with GR, within their communities,
Nagoya Protocol (to the CBD)

• In relation to TK: *(Preamble)*

• *Further recognizing* the unique circumstances where TK associated with GRs is held in countries, which may be oral, documented or in other forms, reflecting a rich cultural heritage relevant for conservation and sustainable use of biological diversity,

• *Noting* the United Nations Declaration on the Rights of Indigenous Peoples,

• *(Article 5)*

• Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of TK associated with GRs are shared in a *fair and equitable way* with indigenous and local communities holding such knowledge. Such sharing shall be upon *mutually agreed terms*. 
Nagoya Protocol (to the CBD)

• (article 7)
• In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.
Nagoya Protocol (to the CBD)

- Global Multilateral Benefit-Sharing Mechanism (art.10)

- Contracting parties must consider the need for a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of GR and TK associated with GR that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent.

- The benefits shared by users of GR and TK associated with GR through this mechanism must be used to support the conservation of biological diversity and the sustainable use of its components globally.

- Transboundary cooperation (art.11): when the same TK is shared by one or more Indigenous and local communities in several parties.
Nagoya Protocol (to the CBD)

• In relation to TK: (article 12)
  • Parties (in accordance with domestic law) must take into consideration indigenous and local communities’ customary laws, community protocols, and procedures, with respect to TK associated with GR;

• Parties, with the effective participation of the indigenous and local communities concerned, must establish mechanisms to inform potential users of TK associated with GR about their obligations;

• Parties must support the development, by indigenous and local communities, of:
  • community protocols, minimum requirements for mutually agreed terms, and model contractual clauses for benefit-sharing.
Nagoya Protocol (to the CBD)

• In relation to TK: (article 12)
  Parties must not restrict the customary use and exchange of GR and associated TK within and amongst indigenous and local communities.

• Compliance with domestic legislation (article 16)
  Each Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, to provide that TK associated with GR utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit-sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.
Other Forms of Protecting (Elements of) aTK

i) Integrating TK into existing laws (IPRs, env., constitutional law etc)
   – India, Andean Countries (IPRs)
   – Bolivia, Ecuador (Constitution)
   – National ABS legislation

ii) Stand alone/unique models / methodologies of protection (*Sui generis*)
   – Specific elements and/or full systems of protection
   – Defensive and/or aspiration motives
   – State centric or community rights based policy models
Full and partial sui generis systems

- Few full systems of overall TK protection
  - Swakopmund Protocol on the Protection of TK/Folklore

- Systems protecting TK associated with GRs
  - Pacific Island Model Law (TK/biological resources)
  - Peru: Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources
  - Portugal: Legal Regime for the Registration, Conservation, Legal Safeguarding and Transfer of Autochthonous Plant Material as well as aTK
  - National ABS laws

- Systems / Tools protecting certain elements of aTK
  - TK digital databases (India, China)
  - Community protocols (Nagoya Protocol)
Defensive Motives (I)

– Databases/registries
  • Indian / Chinese Traditional Knowledge Library
  • South African TK Database

→ creates prior art

– Disclosure requirements in patent files
  • South Africa, India, Brazil, Andean countries....

→ Allows for monitoring against misappropriation of TK/GRs and compliance

→ Lack of disclosure forfeits patent
Defensive motives II

• Regulation of access/use of TK in accordance with customary norms – acknowledgement cultural and geographical aspects of TK – control over its use
  – UNDRIP
  – ABS frameworks / Nagoya Protocol (PIC, MAT)
  – Certain *sui generis* models of protection
  – Community protocols
Aspirational Motives of TK Protection

• Ensure fair and equitable sharing of benefits arising from the use of TK
  – CBD Art. 8j
  – Nagoya Protocol
  – National ABS regimes

• Incentivize conservation / affirmation & protection of lifestyles that conserve and generate TK
  – Art. 8j / Nagoya Protocol / UNDRIP
  – Clear link between TK, communities & lifestyle acknowledged
  – Community protocols
Policy Models of TK Protection (1)

• State-centric based approach
  – State holds all TK in database to establish prior art by providing access to patent offices to prevent biopiracy
    • TKDL of India
    • China
  – State puts TK into database to prevent biopiracy and collects benefit for its use
    • Kerala
  ➔ Government acts on behalf of communities
  ➔ aTK may be delinked from community and customary use, state assumes power to control its use
  ➔ Community involvement at discretion of state
Policy Models of TK Protection (2)

• Community rights-based models
  – Communities have clear ownership over their TK (and sometimes GRs)
    • Sui generis: Costa Rica, Thailand;
    • ABS: SA, Brazil
    • Some IP laws, Andean model
  → communities in charge of their own TK
  → Use of TK remains linked to communities and customary procedures
  → could include incentive for conserving GRs / TK at community level
  → Use of community protocols to affirm rights and facilitate implementation
Community protocols to address challenges

- As defined in SA IP Amendment Bill:
  
  “community protocol” means a protocol developed by an indigenous community that establishes the right of an indigenous community to its indigenous cultural expressions and indigenous works and provides procedures for users of such expressions or works, to seek the community's prior informed consent, negotiate mutually agreed terms and benefit-sharing agreements;
Why community protocols in the context of aTK

- a) Rights to aTK are not implemented on the national level
- b) Rights exist but remain abstract / out of reach for many communities
- c) Concept of collective rights and customary laws and practices remains challenging for third parties
Example of possible protocol considerations & elements

Internal process:
• Legal empowerment on nat/intl rights frameworks
• Share TK/GRs? Under which conditions?
• Who represents community?
• Relate to broader community values, concerns and procedures
• Cultural, social, political and environmental impact
• Which benefits? How to share?

Protocol elements:
• What constitutes MAT for the community?
• Which customary procedures are to be respected and how
• What type of benefit sharing expectations?
• Conflict resolution
• Link to other relevant challenges / issues
Outcome: A tool of interface

- Declaration of intent and self determination
- Legal / negotiation empowerment
- Clear mandate to community leadership
- Clear articulation of expectations to users
- Clarity for government decision makers about customary laws
Thanks!