

Global Fora on the protection of IKS and examples of countries that have legislated IKS protection



A presentation to the
Portfolio Committee on
Science and Technology
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Presentation Outline

- International Landscape:
 - World Intellectual Property Organisation: WIPO
(Intergovernmental Committee: IGC)
 - Convention on Biodiversity: CBD
(Nagoya Protocol)
 - Food and Agriculture Organisation: FAO
(International Treaty on Plant Genetic Resources for Food and Agriculture)
 - World Trade Organisation: WTO
- National laws dealing with the protection of IK.



Organisation of work of the IGC

- The IGC held its first session in April 2000, which predominately focused on shaping and defining future work.
- The IGC further decided that the Member States should compile, compare and assess information on the availability and scope of IP protection for TK and folklore, as well as identify elements that require additional protection.
- This included a survey on whether existing forms of IP protection have been applied to protect TK and folklore, as well as a discussion on whether there is need for new legal standards - possibly in the form of sui generis mechanisms could protect TK.





Issues around the text on Genetic Resources (GR) and associated TK

Process issues:

- Developing countries proposed that the burden of providing information and other requirements is not placed on indigenous and local communities (mandatory disclosure).
- There is a tendency by developed countries to separate GR from the associated TK.
- Developed countries proposed to exclude derivatives from the text.
- A possibility of accepting a voluntary disclosure requirement as per proposals from Norway and Switzerland.
- Developed countries proposed the protection of databases- using databases to avoid granting of erroneous patents.
- Guidelines or recommendations on defensive protection.
- Differences on the sanctions, remedies and exercise of the rights.



Objectives of the CBD

- CBD is a global agreement addressing all aspects of biological diversity: genetic resources, species, and ecosystems.
- The objectives of the CBD are expressed in its Article 1:
 - *conservation* of biological diversity;
 - *sustainable* use of its components; and
 - the fair and equitable *sharing* of the benefits arising out of the utilisation of genetic resources, including by appropriate.
- South Africa is signatory to the treaty.



CBD and IP

- The most crucial CBD provision is Article 8(j), which requires countries to, “respect and protect indigenous and local community knowledge, ensure that such communities are asked before using their knowledge for wider societal benefits, and encourages the equitable sharing of benefits arising from such use”.
- Built into Article 15 are the seeds of a radically different vision of protecting knowledge and generating and sharing benefits.



Introduction to Nagoya Protocol

- The development of protocols is explicitly foreseen in Article 28 of the CBD. Its legal relationship with the CBD is regulated by Article 32 of the CBD.
- The Nagoya Protocol has 27 pre-ambular clauses, 36 articles containing operative provisions, and one annex containing a non-exhaustive list of monetary and non-monetary benefits.
- It establishes a framework for regulating how users of GR and/or TK associated with GR (for example, researchers and commercial companies) may obtain access to such resources and knowledge. It provides for general obligations on sharing the benefits arising from the utilisation of such resources and
- The Protocol came into force in October 2014 .



Objectives: Article 1

The objective of this Protocol is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.

Explanation:

The Nagoya Protocol puts forward the objective of fair and equitable benefit-sharing with the expectation that its implementation will contribute to the conservation of biological diversity and the sustainable use of its components.



Scope: Article 3

This Protocol shall apply to **genetic resources** within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources.

This Protocol shall also apply to **traditional knowledge** associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge.

Explanation:

The first sentence limits the scope of the Nagoya Protocol to genetic resources that fall within the scope of Article 15 of the CBD and the benefits arising from their utilization.

The second sentence refers to a subset of traditional knowledge innovations and practices, namely traditional knowledge associated with genetic resources.

Note:

The Protocol does not apply to pre-CBD acquisitions of genetic resources or traditional knowledge associated with such resources.





International Treaty on Plant Genetic Resources for Food and Agriculture: ITPGRFA

- ITPGRA popularly known as the International Seed Treaty, aims at guaranteeing food security through the conservation, exchange and sustainable use of the world's plant genetic resources for food and agriculture as well as the fair and equitable benefit sharing arising from its use.
- It also recognises farmers' rights, namely the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- The Treaty also establishes the Multilateral System of Access and Benefit-sharing to facilitate plant seed exchanges and benefit sharing through Standard Material Transfer Agreement.



World Trade Organisation

- A Disclosure Proposal was submitted in May 2006 by developing countries calling for an amendment of TRIPS Agreement by inserting a new article 29 bis. The disclosure requirements envisaged in the Proposal are:
 - Disclosure of source and **country of origin** of the biological resource and / or associated traditional knowledge used in the invention;
 - Disclosure of evidence of **prior informed consent** (PIC) under the relevant national regime;
 - Disclosure of **evidence of access and fair and equitable benefit** sharing under the relevant national regime.
- Legal effects envisaged in case of failure to comply with the above obligations include **revocation** or stopping of processing of the patent application.





Examples of countries having legal protection

Countries	Law
Indonesia	Has no specific legal protection for TK but some protection of TK is available through copyright (traditional works), distinctive signs (including geographical indications) and trade secret law.
Panama	Recently passed a law establishing the Special Regime for IP related to the Collective Knowledge of Indigenous Peoples and for the Protection and Defense of their Cultural Identity and TK.
Brazil	Law regulates Access to Genetic Heritage, Protection of and Access to associated TK, sharing of benefits, and access to and transfer of technology for their conservation and use. Indigenous communities, under the law, have the right to: the recognition of the origin of TK in all publications; a prohibition on the dissemination of TK-related data by non-authorised third parties; and economic compensation for any direct or indirect exploitation of TK.



Continued: Examples of countries having legal protection

Countries	Law
Costa Rica	The general biodiversity law of Costa Rica (Law 7788) includes a chapter specifically regarding access to genetic resources and the protection of TK. Prior informed consent is required for access and use of the TK of indigenous and local communities.
India	The Biological Diversity Act, 2002 No. 18 of 2003, provides for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.



Peru



- Peru's 'Regime for Protecting the Collective Knowledge of Indigenous Peoples related to Biological Resources' (Law 27811) recognises collective rights over traditional knowledge. It requires the prior informed consent from communities before accessing traditional knowledge, and benefits from using it are to be shared fairly and equitably. However, it only protects TK through commercial contracts, rather than protecting it for local livelihoods and wellbeing, and does not recognise communities' rights over associated biological resources.
- The Law of Biodiversity (Law 26839) recognises that the knowledge, practices and innovations of communities are part of their cultural heritage, and such innovations can include traditional crop varieties.