

Protecting Traditional Knowledge, Genetic Resources And Folklore: The Way Forward

Preeti Ramdasi, Sélim Louafi

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Role of Traditional Knowledge in the trade and development process

Science is not the only knowledge system. Others often referred to as traditional knowledge (TK), firmly rooted in a culture, constitute a rich and diverse intellectual heritage and sustain a broad spectrum of ways of life. The protection of such knowledge, innovations and practices of indigenous and local communities has been receiving significant attention on the international agenda in recent years.

This is due to the growing recognition of the considerable promise that such knowledge holds. TK plays a critical role in the preservation and sustainable use of biodiversity. Further, many TK-based activities and products yield income, food, and health-care for large parts of the populations.

TK is valuable not only to those who depend upon it for their survival but also to modern industry and agriculture, and to sustainable development more generally. Relevant industry sectors include pharmaceuticals, botanical medicines, major crops, horticulture, crop protection products, applications of biotechnology in fields other than health care and agriculture, and cosmetic and personal care products. A number of TK-derived products are also traded internationally: handicrafts, medicinal plants, traditional agricultural products, and non-wood forest products. Estimating the full value of TK in monetary terms is difficult if not impossible. Currently there is no authoritative estimate on the value of TK. However, according to estimates from studies conducted so far figures mentioned on the world market for herbal medicines, including herbal products and raw materials, has been estimated to reach US\$43 billion with an annual growth rate of between 5 and 15%¹ (WHO, 2001) and the commercial value of TK based products is expected to reach US\$5 trillion by 2020 (Suman Sahai, 2002).

Traditional knowledge has a bearing on debates in several international *fora*. The debate over the protection of folklore, traditional knowledge, and indigenous practices has an impact on numerous policy areas, including agricultural productivity, biological diversity, cultural patrimony, food security, environmental sustainability, business ethics, global competition, human rights, international trade, public health, scientific research, sustainable development, and wealth distribution.

Before discussing the means of protecting TK, it is important to mention that dealing with TK of any kind is essentially dealing with information – information contained in the knowledge itself, or for instance the genetic information contained in the seeds of plant varieties or in domesticated animals. As a result, the creation of adequate protection mechanisms presents similar challenges as creation of protection tools for new technologies such as information and communication technologies. For instance, TK undergoes incremental innovation process during long periods of transmission, the linkage of knowledge with social groups and identity, collective custodianship.

While discussing tools for protection of TK, there is often a compartmentalization of different tools and an either/or approach to affording IP (intellectual property) and non-IP protection to traditional knowledge. However with the recent developments in the international decisions on the issue, it has come to be recognized that considering the holistic nature of TK it will be most appropriately protected by a bundle of different instruments including non-IP tools.² Therefore it has now come to be accepted that IP mechanisms are

1. WHO, 2001, Report of the Inter-Regional Workshop on Intellectual Property Rights in the Context of Traditional Medicine. <http://www.who.int/medicines/library/trm/who-edm-trm-2001-1/who-edm-trm-2001-1.pdf>

2. COP6 –paragraph 33 of decision 6/10/A in The Hague– Art 8j decision and paragraph 2 of document WIPO/GRTKF/IC/6/4 of WIPO

necessary tools to protect TK along with other traditional protocols which regulate the creation and transmission of TK.

Developments in international fora

In that context of growing significance of TK, it is only natural that the issue of TK protection has been increasingly discussed in national and international *fora*. In this section, we will discuss the work carried out at the national and international levels on protection of TK.

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TK is at the crossroad of many global issues linked to international norm building. Amongst the international institutions working on protection of TK, foremost are those related to the conservation and sustainable use of biodiversity, namely the CBD and the FAO International Treaty. TK is also addressed in arenas related to the rights of indigenous peoples such as the ILO, the United Nations Commission on Human Rights and the United Nations Permanent Forum on Indigenous Issues, to culture such as the UNESCO. As the appropriate use and the role of intellectual property tools for TK protection arose, the WIPO has played an active role in this area. More recently, TK has become a topic of discussion in trade-related *fora* such as the WTO and UNCTAD.

The IGC process at WIPO

Instituted in 2000, the IGC is a platform within WIPO where governments discuss intellectual property aspects of the access to genetic resources and benefit-sharing and the protection of traditional knowledge, innovations and creativity, and expressions of folklore.

The IGC source lies in a discussion which originated out of negotiations of the Patent Law Treaty. The IGC follows a comprehensive and bottom-up approach with emphasis on regional dialogue and participation of indigenous and local communities in WIPO activities supporting the formal procedures. At this juncture, it is important to state that at present, the IGC is the only international forum dealing with the protection of TK that has wide participation from indigenous representatives as well as from civil societies.

The committee has held 8 sessions from 2001 to 2005. The IGC seeks to achieve, amongst others, the following aims:

- Evaluating the relevance of existing IP tools for TK protection (defensive as well as positive) and examining the best mechanisms to protect TK.
- Discussing appropriate national and international patent measures, including disclosure of origin and evidence of prior informed consent (PIC) that will facilitate access to genetic resources and benefit-sharing.
- Identifying elements of the agreed sub-matter which require additional protection.³

Characterizing the outputs

Acknowledging the fact that TK protection is a very new issue in the IPR (intellectual property rights) realm, IGC has undertaken a wide variety of activities to provide a hospitable forum for inter-state cooperation on TK. For this, the WIPO Secretariat has followed a bottom-up approach with an emphasis on information exchanges based on surveys on existing experiences of country states and communities, and a participatory process including the TK holders as well.

The IGC is also engaged in a collaborative process with international agencies – for instance with UNEP on publications or CBD and FAO on preparation of special analysis and inputs.

This method has encouraged shared learning regarding a very new intellectual property issue and has provided new knowledge and expert advice to officials (see box 1). It is true that the IGC has offered an opportunity to use WIPO's technical expertise to gather information and develop concrete proposals (Helfer, 2004). Moreover, by growing awareness on TK issues at the international level, it has legitimized developing countries' concerns in a forum known for its lack of considerations on development matters. Finally, it has offered a safe space to discuss and work out some substantial disagreements between different subjects well compartmented at the international level: environment, development and IPR.

However, this process currently suffers from a lack of clear vision of possible outcomes leading to a dramatic rise of strategic considerations at the expense of substantive matters. The IGC negotiation process appears not to evolve on its own dynamic anymore: other linked issues at WIPO (i.e. PCT, SPLT), at CBD or at WTO (i.e. TRIPs) have dramatically affected the initial cooperative approach. This should lead to a new debate on the right format of the process to reach concrete output based on the different outcomes that have been already produced.

Existing principles and tools for protection of TK

As enumerated above one of the aims of the IGC is to evaluate the relevance of existing IP tools for TK protection and examine the best mechanisms to

3. WIPO/GRTKF/IC/1/3

protect TK. Further, Article 2 of the policy on TK and Article 4 of the policy on folklore set out by the IGC give full flexibility to member states to use any or all of these tools to protect TK, folklore and genetic resources in their jurisdictions in order to customize to local and national needs and requirements. These tools are discussed hereunder.

- *Use of existing IP tools for protection of TK.* Various existing IPR have been used in national measures to protect TK or TK-related subject matters. The European Community and the United States of America are the best illustrations for such a form of protection. Geographical indications or collective certification marks are used to protect products made with traditional technologies, including products that are associated with a particular region or community. The patent system has been used by practitioners of traditional medicine to protect their innovations, for example, in China.⁴

The systems have been developed to ensure that illegitimate patent rights are not granted over non-novel TK subject matter (defensive protection).

Trademarks and copyright related laws are also used to safeguard against third parties' claims of trade mark rights and to protect TK in form of copyrights when it is recorded in a fixed form, or protecting against the illicit recording of TK, for instance when it may be passed on by the performance of a traditional chant, song or story.

- *The law of confidentiality and trade secrets.* Non-disclosed TK, including secret and sacred TK, has been protected as confidential or undisclosed information, and remedies have been awarded for breach of confidence in contravention of customary laws as in Costa Rica.

- *Prior informed consent (PIC) principle.* This is to confirm that TK which is held by a traditional community is not accessed, recorded, used or commercialized without the prior informed consent of traditional knowledge holders. This broad principle is implemented in a number of national TK protection measures such as African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000) (OAU Model), laws of Brazil (Provisional Measure N.2186-16 of August 23, 2001), Costa Rica (Biodiversity Law No. 7788), Peru (Law N. 27,811 of 2002), India (Biodiversity Act, 2002), Portugal (Decree-Law No.118, of April 20, 2002), etc.

- *Equitable access and benefit-sharing.* An extension of PIC is the issue of access to TK and benefit-sharing. This entails that the commercial use of

TK should benefit the social and economic welfare of the right holders, keeping in mind the principle of equity. Such a principle of equity has been incorporated by countries that have included PIC in the aforementioned legislations.

- *Recognition of customary uses and laws.* Customary uses of TK are encouraged in almost all national legislations and customary law is recognized. For example, the African Model Law and the *sui generis* laws of Peru and the Philippines incorporate by reference certain elements of customary laws into the *sui generis* protection of TK.

- *The use of Unfair Competition Law principle to protect TK: the significance of Article 10bis of the Paris Convention.*⁵ This tool is used to control any false, misleading or culturally offensive references to TK in the commercial arena, and any false or misleading indications or linkages with or endorsement by TK holders. Unfair competition principles have been utilized in various national measures such as that of Costa Rica, Peru, Portugal, and the United States of America. Such a tool often supplements the grant of exclusive rights and the application of PIC for TK subject matter.

- *Cohesion of policies.* This concept helps acknowledge that a comprehensive use of TK protection measures sometimes needs to reflect on distinct policy objectives in specific sectors, and may need to be integrated with different sectoral regulatory systems at the national level. For instance, distinct measures have been developed at the national level to regulate traditional medicine, traditional agricultural practices, TK associated with genetic resources and tradition-based industries (such as handicraft production). TK protection may need to be tailored and adapted according to the policy needs of these areas of regulation, as well as the characteristics of TK in these sectors. Such distinctions are apparent in existing *sui generis* laws which focus on a particular sector, rather than on TK across all sectors. Regulations on the Protection of Varieties of Chinese Traditional Medicine is also a good example of homogenization of such policies.

- *Protection of Farmers Rights.* It is now recognized that for centuries indigenous people and peasants have developed their own systems, practices, and knowledge regarding agriculture disease control, natural resource management, and medicine. Such traditional knowledge is useful and of great value to social sectors other than those that created and developed it. The OAU Law in Africa and the legislation in India on Plant Varieties and Breeders Rights Protection indicate the growing awareness of nations to protect such knowledge of the farmers. The OAU Law is an effort to develop appropriate *sui generis* legislation to protect the rights of local communities, farmers, breeders their knowledge, innovations, technologies and practices and to regu-

4. Patent Law of the People's Republic of China of 2000 and Regulations on the Protection of Varieties of Chinese Traditional Medicine. In 2002 China granted 4 479 patents for Traditional Chinese Medicine, GRTKF/IC/6/4/REV.

5. See also WIPO Model Provisions on Protection against Unfair Competition (1996).

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List of acronyms

CBD Convention on Biological Diversity

FAO United Nations Food and Agriculture Organization

IGC Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore

ILO International Labor Organization

OAU Organization of African Unit

PCT Patents Cooperation Treaty

PIC Prior informed consent

SPLT Substantive Patent Law Harmonization

TRIPs Trade-Related Aspects of Intellectual Property Rights

UNCTAD United Nations Conference for Trade and Development

UNEP United Nations Environment Program

UNESCO United Nations Educational, Scientific and Cultural Organization

WHO World Health Organization

WIPO World Intellectual Property Organization

WTO World Trade Organization

late access to biological resources in compliance with Article 27.3 (b) of the Agreement on TRIPs. In the Indian context, under the Plant Varieties and Breeders Rights Protection Act, 2001, the breeders have rights to protect new varieties of plant/crop either in person or through any one he designates. It includes moreover the right to produce, sell, market, directly or export a variety.

Applying for plant variety protection (PVP) is relatively simple and is normally completed by applicants themselves without the help of legal specialists. As a result, the transaction costs incurred in applying and registering for PVP are reasonably low, which facilitates applications from small plant breeders, individual farmers and local communities. This system could, therefore, be used as a tool for promoting plant variety innovations by indigenous and local communities and could thus contribute to the commercialization of their TK. Especially in a agriculturally-based country like India and also very rich in traditional agricultural products and practices, such a form of protection goes a long way in protecting traditional knowledge.

- *The use of compensatory liability regime.* Such a regime entitles TK holders to acquire compensatory contributions from TK users who borrowed traditional know-how for industrial applications of their own during a specified period of time. In a *sui generis* regime as in Peru such rules have been utilized to reward TK holders for the conservation and development costs invested by the communities in certain elements of TK, without endowing exclusive property rights to control such uses. They would combine the equitable reallocation of benefits without constraining open access to know-how, and avoid the division or atomization of the community's shared TK base into ever-smaller parcels that are withdrawn from the TK holding community's own intellectual commons through the vehicle of private property rights. In some cases, there is concern that a web of exclusive rights over pre-existing TK, overlaying communal customary laws, could stand in tension with collective transmission and custodianship. The compensatory liability approach has also been used in cases where TK has already been published and publicly available for some time, so as to balance equitable benefit-sharing with prior use of TK undertaken in good faith as in Peru (Article 13 of Peruvian law).

The way forward

The protection of TK raises a lot of issues connected with the objectives and modalities of such protection. These issues arise out of the broad differences about the delimitation of the subject matter, the rationale for protection, and the means for achieving its purposes. The development of any regime for the protection of traditional knowledge should therefore be grounded on a sound definition of the objectives sought, and on the appropriateness of the instrument selected to achieve them.

Considering the contribution of TK to the economic, social and developmental process, the interface between TK and IP has already assumed significant importance in the developed countries along with the developing countries. However, within the framework of intellectual property mechanisms, some important challenges remain: for instance how to draw links between some of the systems of protection? How to define which system should be used for what type of TK and for which beneficiaries? Moreover, some tools such as geographical indications have not yet achieved the desired significance (see Berard & al., 2005) and could well be taken up as a topic of discussion at the upcoming IGCs at WIPO.

Furthermore, there is a lesson that could be learnt from the experiences of the working of other international organizations such as UNESCO and the working groups at CBD regarding the independence of the member states to draft and redraft policy proposals. This process has proven to be very successful and has been welcomed by member states and it would be worthy at the IGC to consider replicating such an experience within their system.

But it should also be mentioned that support to the work of the IGC in the future will mainly depend upon external (strategic) considerations. Significant differences remain between developing and developed countries and inside developing countries on the possible outcome(s) of this forum. The two following years will be crucial to see to what extent IGC's works will result in new internationally recognized IP standards. However, whatever the result will be, the IGC process itself has already led to important outcomes, in term of substance as well as cross-dialogue between different perspectives.

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institut du
développement
durable

6, rue du
Général Clergerie
75116 Paris
France
www.iddri.org

et des
relations
internationales

Téléphone :
01 53 70 22 35
Télécopie :
01 53 70 21 45
iddri@iddri.org

www.iddri.org

Box 1: What do we get from the IGC process?

From these inputs, the IGC over the 8 IGC sessions were able to generate a diverse set of outputs that have been herewith discussed.

Amendment of existing IP systems to recognize TK

- The crucial amendment was made in the existing international patent systems. This included a change in the Patent Cooperation Treaty in the minimum documentation list.¹
- Another change that was brought about was to include classes of traditional medicines in the international patent classification system.

Norm building procedures

- A new international standard for TK registries and Databases came to be adopted. This standard was first proposed by the Asian group and subsequently adopted by other member states of the IGC.
- A draft instrument on protection of GRTKF² submitted by the African group was also welcomed by other committee members and thereby accepted by the IGC.
- A process for the elaboration of the core elements of *sui generis* protection for TK and folklore respectively was started in the 2nd session and it continued till the 8th IGC in June, 2005. At the 4th session of the IGC, a conceptual and legal approach for development of appropriate *sui generis* protection was proposed by Norway and supported by the committee.³
- During the 6th, 7th, 8th and 9th Sessions of the IGC, there were 2 draft texts on policy objectives for the protection of TK and Folklore that were proposed and accepted.

Capacity building outcome

- IP toolkit for management of TK.
- Guide on protection of folklore prepared.⁴
- Document on options and elements of TK protection⁵.

Creation of specialized information resources for TK and GR stakeholders

- Includes the online database of ABS contracts for GR/TK that was prepared and
- The portal for TK registries and databases

Exchange of National Experiences with TK

- (Informal) panels on *sui generis* protection of TK and folklore instituted.⁶
- Extensive Surveys conducted on various points such as the use of existing IP tools for protection of TK.
- Use of a questionnaire of TK and creation of databases and registries-on GR.⁷
- Questionnaire on recognition of TK in the patent system.⁸
- Questionnaire on various requirements for disclosure relating to GR and TK in patent application.⁹
- Production of case studies on folklore and TK.¹⁰

Participation of local and indigenous communities

- For the first time indigenous panels were constituted at the 8th Session.¹¹

1. Through this process an obligation is cast on the major patent offices in the world to review the minimum documentation list before they submit a preliminary search report on their decision. The minimum documentation list of PCT was amended after the 1st IGC in 2001 when literature on TK came to be included in this list as a part of non patent literature. Until the IGC initiative this list included only scientific literature. Now several additional journals have been included like those such as the Indian journal of TK which publishes previously disclosed TK.

2. Refer to document WIPO/GRTKF/IC/6/12

3. Refer to the Chairman's conclusion at the 4th Session, WIPO/GRTKF/IC/4/15

4. Refer to document WIPO/GRTKF/IC/6/3

5. WIPO/GRTKF/IC/6/4

6. These panels reported on the experiences of numerous countries with *sui generis* including African Union, Costa Rica, India, Brazil, Philippines, Thailand, Portugal and USA at the 4th and 5th sessions respectively.

7. WIPO/GRTKF/IC/Q.4

8. WIPO/GRTKF/IC/Q.5

9. WIPO/GRTKF/IC/Q.3

10. For instance by Mr Terry Jenkin from Australia and a comparative study of National *sui generis* systems for protection of folklore by Ms. Vatsala Kutty.

11. Including reports from Kechua (Peru), Tulalip from USA, Kaska Dena Council from Canada- WIPO/GRTKF/IC/Q.1