Traditional Knowledge Protection: An African Perspective

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The quest to realise effective standards for the protection of traditional knowledge (TK) has generated controversies and difficult debates in recent times. According to the Swakopmund Protocol – an African regional protocol addressing the protection of TK – TK may be understood as the knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context [Article 2.1]. It includes know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community or contained in the codified knowledge systems passed on from one generation to another. Whether the knowledge relates to Kente weaving know-how by the Asante of Ghana, or the knowledge of the San peoples necessary for survival within the Kalahari Desert in Southern Africa, or the colourful traditions and cultural practices of the Maasai of Kenya, TK is interwoven in the very fabric of African life. According to the World Health Organization (WHO), up to 80 percent of Africans rely on traditional medicines for their primary healthcare. TK also plays a significant role in the subsistence farming practices and ecological practices which are central to the livelihoods

of most of Africa's rural population.

Although there is no internationally agreed definition of TK, a broad common understanding of what is embodied within the above description continues to unite stakeholders within the debates. Vibrant debates around TK came to the fore at the international level since the early 1900s. The Convention on Biological Diversity (CBD) adopted in 1992 provides a framework for the conservation and sustainable use of biodiversity. As part of its strategy, it pursues the equitable sharing of benefits arising from the uses of genetic resources and associated traditional knowledge. Significantly, its Nagoya Protocol – which entered into force in 2014 and presently has 117 ratifications– anchors an international regime on access and benefit sharing (ABS) to promote equitable benefit sharing arising from uses of genetic resources and traditional knowledge associated with such resources. This international regime comprises the CBD, its Nagoya Protocol, the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the Bonn Guidelines and other complementary instruments.

Another notable international development on TK is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007. This human rights-based Declaration, though often discussed as a soft law instrument, has been potent in shaping and reframing domestic and international engagements on Indigenous peoples in line with the foundational rights of Indigenous peoples as contained within the Declaration. It provides for the right of Indigenous peoples to maintain, control, protect and develop their traditional knowledge as well as their intellectual property (IP) over such knowledge [Article 31].

Recognising the historical exclusion of Indigenous peoples and TK from the formal systems of IP protection, the World Intellectual Property Organization (WIPO) established in 2000 an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to serve as a policy forum for discussions on the relationship between IP, TK, traditional cultural expressions and genetic resources. The IGC is currently in advanced text-based negotiations for a *sui generis* international IP instrument(s) that will ensure the effective protection of traditional knowledge,

traditional cultural expressions and genetic resources.

The World Trade Organization (WTO) has also been involved in discussions relating to the protection of TK within the context of its TRIPS Council. Developing countries have pushed for amendments to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) with a specific focus on inserting provisions for the protection of traditional knowledge. The TRIPS Council, pursuant to the 2001 Doha Ministerial Declaration continues to explore the complex relationship between the CBD and the TRIPS Agreement including the protection of traditional knowledge and folklore.

At least two key factors account for this growing interest around TK at the international level. First is the increasing appreciation of the value and significance of TK in the light of rapid innovations within the biotechnology industry. Knowledge systems that seemed commonplace, outdated, uncivilised and unimportant quickly became an essential part of commercial efforts to exploit the commons. Indeed, TK is a crucial resource for saving the time and resources of bioprospectors, as well as offering leads to inventors involved in natural product research. It has been estimated, that a hit-rate of 80 percent or more can be achieved in developing medical drugs where the screening of plants is limited to species used by Indigenous communities. Second is the increased efforts to design effective frameworks for protection. With the concerted efforts at domestic and international levels to implement national and international mechanisms for the effective protection of TK from misappropriation and misuse, heightened attention has been focused on questions of how emerging systems interact with existing systems for reward and recognition of innovation. Furthermore, the emphasis remains on how such emerging protection systems reinforce or detract from the established rights of Indigenous peoples over their knowledge systems.

Africa remains an active *demandeur* for an effective international system that protects TK. Recent work within the African Union on the implementation of the Nagoya Protocol resulted in the adoption of a set of strategic and practical guidelines for the implementation of Protocol within Africa. This underscores an expressed interest by Africa to utilise a coordinated approach to implement the Protocol as a means to ensure maximal gains. The African Group is also actively

involved in ongoing traditional knowledge-related WTO and WIPO negotiations to push for outcomes which reinforce regional efforts, such as ARIPO's Swakopmund Protocol. For African policymakers, there are strong economic, social and cultural justifications underlying efforts to develop mechanisms to protect TK.

Several African countries, in line with international developments, have actively pursued the development or reform of national frameworks for the protection of traditional knowledge. Kenya, South Africa, and Uganda are examples of this trend. At the regional level, the Africa Regional Intellectual Property Office (ARIPO) adopted the Swakopmund Protocol in 2010 to protect traditional knowledge and traditional cultural expressions in Africa. About a decade before this, in 2000, the Organisation of African Unity (now African Union) adopted the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources , to *inter alia* support national efforts to design frameworks for protecting TK.

One of the main reasons TK protection is sought is to prevent biopiracy – a rhetorical term that references the discontent that ensues where providers of TK and genetic resources associated with such knowledge are not accorded the rights, recognition and reward that draws from external uses of their associated knowledge and resource base. 'Biopiracy' was coined by Canadian activist Pat Mooney in 1993 as a retort to the perceived hypocrisy prevalent in developed country efforts to export stronger minimum standards for IP, given the failure to acknowledge the 'piracy' inherent in the misappropriation and misuse of TK and/or genetic resources of Indigenous peoples within innovation chains. Prof. Ikechi Mgbeoji notes that biopiracy highlights an established institutional system of appropriation, enabled by regime protection for IP rights, which victimises and ignores the contributions of indigenous peoples and the countries of the South.

To capture the rate of biopiracy in Africa, the Edmonds Institute commissioned a study on biopiracy in Africa. The report, prepared by Jay McGown, was published in 2006 and reported over 35 active cases of biopiracy across the continent. In 2013, Edward Hammond compiled an extensive series of biopiracy cases in which again he demonstrated that some of the 2006 cases reported by

McGown had continued. In a 2014 study commissioned by the United Nations Permanent Forum on Indigenous Issues (UNPFII), the former Chair of the UNPFII, Kanyinke Sena, similarly identified a range of biopiracy cases on the African continent. A prominent example he cites is the case of the use of genetic resources from the Lake Bogoria in Kenya by university researchers at the University of Leicester. Genencor International Inc. cloned the microbes on an industrial scale for textile companies and detergent manufacturers after securing a patent over microbes. Estimates place the total value of the resource (now popularly used to bleach jeans) at USD 600 million annually with no economic returns being made to the Endorois people in Kenya.

Given the central relevance of TK to African countries, it is necessary to design effective mechanisms for its protection. One key rising trend in TK lawmaking is its incorporation in bilateral and free trade agreements. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) for instance incorporates reference to cooperation in the area of TK as does the updated Canada-United States-Mexico Agreement (CUSMA). The rise in such references, typically included within the environment and IP chapters, is reflective of the contemporary difficulties with ongoing multilateral efforts in this regard. As the negotiations for the IP aspects of the African Continental Free Trade Agreement progress, it is crucial for Africa to consider the strategic opportunities that exist for addressing challenges such as biopiracy through such provisions which address TK within the final text of the agreement.

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