

# Implications of the WIPO Draft Articles for the Protection of Traditional Knowledge

Natalie Stoianoff

Professor of Law & Director, Intellectual Property Program, Faculty of Law, University of Technology, Sydney.

<http://www.indigenousknowledgeforum.org>





# Introduction

- Aspirations under key International Instruments
- What are the issues regarding Indigenous Knowledge?
- WIPO Draft Articles for the Protection of Traditional Knowledge and their Implications.
- Workshop Discussion Points & Draft Statement
- Conclusions



# Key International Instruments

- Convention on Biological Diversity 1992
- International Treaty on Plant Genetic Resources for Food and Agriculture 2001 (PGR)
- United Nations Declaration on the Rights of Indigenous Peoples 2007



# Convention on Biological Diversity

- Objectives Art 1:
- The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of 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.



## 3<sup>rd</sup> objective: all rights

- The third objective of the CBD specifically requires that all rights over the genetic resources be taken into account when determining the fair and equitable sharing of benefits arising from the use of those resources.
- The question of 'all rights' requires the identification of whose rights.
- Might be the sovereign nations themselves, landowners including native title holders, Indigenous peoples more generally, bioprospectors, pharmaceutical or biotechnology companies or holders of intellectual property over such resources.



# Specific obligations

- Obligations under articles 8(j), 10(c) and 18(4) of the CBD.
- Article 8(j) provides for the recognition of and the equitable sharing of benefits in relation to the use of traditional knowledge,
- while 10(c) is concerned with the protection of customary uses of biological resources and
- 18(4) requires contracting parties to ‘encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies’.



# CBD Article 8(j)

- Subject to its national legislation, 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;



# International Treaty on PGRFA

- Objectives:
  - Conservation & sustainable use of plant genetic resources for food and agriculture
  - Fair & equitable sharing of the benefits arising out of their use
  - Harmony with the CBD for sustainable agriculture and food security





# PGR Part III

- Recognition of the contribution of local and Indigenous communities and farmers (Art. 9,1)
- Obligation to take measures to protect and promote farmers' rights including protection of traditional knowledge relevant to PGRFA, right to share in the benefits and participate in decision-making (Art. 9,2)



# UNDRIP

- Preamble:
  - *Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment



# UNDRIP: *Article 11*

- 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
- 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.



# UNDRIP: *Article 24*

- 1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals...



# UNDRIP: *Article 31*

1. 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, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with Indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.



# Summary of International Obligations

- Maintain. Control, Protect & Develop traditional/Indigenous knowledge
- In conjunction with Indigenous laws, traditions and customs
- Prior Informed Consent (PIC)
- Engagement on mutually agreed terms
- With an appropriate benefit sharing arrangement in place (Bonn Guidelines, Nagoya Protocol).



# What are the issues?

- Intergenerational loss of knowledge
- The interest in documenting, recording and recovering knowledge, to make it available for future generations of community members and the importance of an holistic approach to ensure integrity of the knowledge is maintained.
- The need for funding to achieve such goals
- Use of such knowledge in environmental resource management, health practices and medicinal uses needs to be respectful of Indigenous values , custodianship needs to be recognised and with that the issue of prior informed consent is essential



# WIPO Draft Articles for TK

- Article 1: Subject Matter Of Protection; Definition Of Traditional Knowledge
- Article 2: Beneficiaries Of Protection
- Article 3: Scope Of Protection
- Article 3 Bis: Scope Of Protection And Sanctions
- Article 4: Sanctions, Remedies And Exercise Of Rights/Application
- Article 4 Bis: Disclosure Requirement
- Article 5: Administration [Of Rights]





# WIPO Draft Articles for TK

- Article 5 Bis: Application Of Collective Rights
- Article 6: Exceptions And Limitations
- Article 7: Term Of Protection
- Article 8: Formalities
- Article 9: Transitional Measures
- Article 10: Consistency With The General Legal Framework
- Article 11: National Treatment And Other Means Of Recognizing Foreign Rights And Interests
- Article 12: Trans-boundary Cooperation



# Draft provisions for protection of traditional knowledge: Art 1.1

- Decisions need to be made about the breadth of what is meant by TK
- Facilitators' Option (Convergent Text)

1.1 For the purposes of this instrument, “traditional knowledge” [refers to] includes know-how, skills, innovations, practices, teachings and learnings [developed within a traditional context]/[developed with an indigenous people or local community]/[and that is intergenerational]/[and that is passed on from generation to generation].



# Art 1.1 continued

## Optional Additions to the Facilitators' Text

- (a) [is knowledge that is dynamic and evolving and]
- (b) [resulting from intellectual activity]
- (c) [and which may be associated with agricultural, environmental, healthcare and medical knowledge, biodiversity, traditional lifestyles and natural and genetic resources, and knowhow of traditional architecture and construction technologies]
- (d) [and which may subsist in codified, oral or other forms]
- (e) [traditional knowledge is part of the collective, ancestral, territorial, cultural, intellectual and material heritage of [indigenous peoples and local communities] beneficiaries as defined in Article 2.]
- (f) [and are inalienable, indivisible and imprescriptible.]



# Art 1.1 continued

- Alternative

For the purposes of this instrument, traditional knowledge includes [collectively] generated and preserved from generation to generation or intergenerational know-how, skills, innovations, practices, teachings. [They exist or develop inter alia by indigenous or local communities.]

- Art 2.1 TK protection to extend to that which is associated with beneficiaries defined in Art 2



# Article 2

- Beneficiaries of protection:
- Indigenous peoples & communities;
- Local communities
- [and similar categories as defined by national law]



# Scope of Protection: Art. 3

- Confidentiality rules applied to secret TK
- More of a moral rights protection over non-secret TK knowingly used outside the traditional context.

## *Option 1*

*3.1 [[Member States]/[Contracting Parties] should provide] [a]dequate and effective legal, policy or administrative measures [should be provided], as appropriate and in accordance with national law, to:*

- *(a) prevent the unauthorized disclosure, use or other exploitation of [secret] [protected] traditional knowledge;*
- *(b) where [protected] traditional knowledge is knowingly used outside the traditional context:*
  - *(i) acknowledge the source of traditional knowledge and attribute its holders/owners where known unless they decide otherwise;*



## Scope of Protection: Art. 3

- (ii) encourage use of traditional knowledge in a manner that does not disrespect the cultural norms and practices of its holders/owners;
- (iii) [encourage]/[ensure, where the traditional knowledge] [is secret]/[is not widely known] traditional knowledge holders and users to establish mutually agreed terms with prior informed consent addressing approval requirements and the sharing of benefits [arising from the commercial use of that traditional knowledge] in compliance with the right of local communities to decide to grant access to that knowledge or not.



# Article 3 continued

- Second Option confers rights/power on Beneficiaries to control use maintain protect preserve etc
- Able to authorise or deny access
- Fair & equitable sharing of benefits
- Respect, acknowledgement, prior informed consent
- Mandatory disclosure of identity of TK holders and country of origin when TK used in IPR applications: eg patents, PBR





# Art 3 BIS Scope of Protection & Sanctions

- Access & use of TK requires prior informed consent and use in accordance with terms of beneficiary including benefit sharing.
- Obligations on users to acknowledge source and respect culture & practices.
- Ability for injunctions and compensation when TK access or use infringes beneficiary's rights.
- Nation to provide adequate measures for enforcement.
- Protection not to impact independent invention or prevent generation, sharing, preservation, transmission and customary use of TK by beneficiaries in traditional and customary context.



# Art 4 Sanctions Remedies & Exercise of Rights/Application

- Obligation on Nation to adopt appropriate legal policy or administrative measure to effect the instrument.
- The language here is similar to what you might find in the TRIPS agreement regarding enforcement – both civil and criminal, border control, dispute resolution etc.
- Dispute resolution mechanism for disputes between beneficiaries – national, regional, international



# Art 4BIS Disclosure Requirement

- Would require amendment to the patent legislation and plant breeder's rights legislation
- Need for applicants to disclose from where they obtained the TK used in their invention including whether prior informed consent for access and use was obtained.
- Have to determine what the consequences are for non-compliance if at the time of application the authorities were unaware.



# Art 5 Administration of Rights

- One option is to establish a competent authority with the free, prior informed consent/in consultation with the TK holders/beneficiaries.
- Another is to place obligations on researchers and others to seek PIC etc but perhaps have the Nation establish a database collecting information about such arrangements – this still requires some form of competent authority



# Art 6 Exceptions & Limitations

- Importing intellectual property type concepts such as fair use/dealing, independent development, public domain exceptions
- But subject to a moral rights style of protection



# Article 7 - Duration

## *Option 1*

[Member States]/[Contracting Parties] may determine the appropriate term of protection of traditional knowledge [which may] [should]/[shall] last as long as the traditional knowledge fulfils/satisfies the criteria of eligibility for protection according to Article 1.



# Art. 7 Duration

## Optional additions to Option 1

- (a) traditional knowledge is transmitted from generation to generation and thus is imprescriptible
- (b) the protection [should]/[shall] applied and last for the life of indigenous peoples and local communities
- (c) the protection [should]/[shall] remain while the immaterial cultural heritage is not accessible to the public domain
- (d) the protection of secret, spiritual and sacred traditional knowledge [should]/[shall] last forever
- (e) the protection against biopiracy or any other infringement carried out with the intention of destroying wholly or partially the memory, the history and the image of indigenous peoples and communities.



# Art 7 Duration

- Option 2
- Duration of protection of traditional knowledge varies based upon the characteristics and value of traditional knowledge





# Art 8 Formalities

- Preference against formalities
- Exception in the interests of transparency, certainty and conservation of TK
- How – through the maintenance of registers of records of TK by national/regional authorities



# Article 9 Transitional Measures

- There seems to be a lack of agreement on how such an instrument would affect acts that have taken place prior to regulation.



# Article 11 National Treatment

- An intellectual property concept
- Foreign beneficiaries should enjoy the same rights as the beneficiaries who are nationals in the country of protection.



# Article 12 Trans-boundary Co-operation

- Encourages co-operation between member states
- Databases once again become important to create and maintain and share, for example, between intellectual property offices.
- The need for codification of the information to facilitate access etc.



# TK related legislation/guidelines

- *Patents Act 1990, Plant Breeder's Rights Act 1994*
- *Environment Protection and Biodiversity Conservation Act 1999 & Regulations* specifically regarding access to biological materials and associated knowledge – requiring PIC & bsa
- Queensland Code of Ethical Practice for Biotechnology 2001 voluntary - require PIC & bsa
- AIATSIS (Aus Inst of ATSI Studies): Guidelines for Ethical Research in Australian Indigenous Studies



# Conclusions

- Intergenerational loss of knowledge
- The interest in documenting, recording and recovering knowledge, to make it available for future generations of community members and the importance of an holistic approach to ensure integrity of the knowledge is maintained.
- The need for funding to achieve such goals
- Use of such knowledge in environmental resource management, health practices and medicinal uses needs to be respectful of Indigenous values , custodianship needs to be recognised and with that the issue of prior informed consent is essential