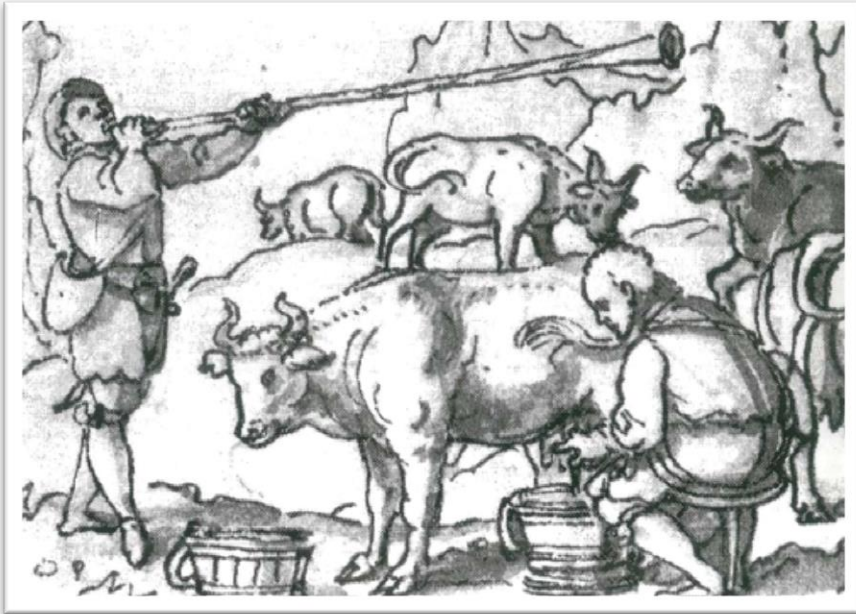


Roundtable 4:

What can the IGC learn from the Nagoya Protocol ?

Dr. Marco D'Alessandro

Swiss Federal Institute of Intellectual Property



Alphorn blowing – a living Swiss tradition

IGC – Draft Instruments	Nagoya Protocol	
TCE and TK Drafts:		
<ul style="list-style-type: none">• indigenous [peoples] and local communities• additionally: other beneficiaries as may be determined under national law ?		

IGC – Draft Instruments	Nagoya Protocol	
TCE and TK Drafts:	GR	TK associated with GR
<ul style="list-style-type: none"> • indigenous [peoples] and local communities • additionally: other beneficiaries as may be determined under national law ? 	<ul style="list-style-type: none"> • Party providing GR that is the country of origin ... • indigenous and local communities for GR held by such communities, in accordance with domestic legislation ... 	<ul style="list-style-type: none"> • indigenous and local communities holding the knowledge
<p>COP-MOP 2 Decision: Use of the term “indigenous <u>peoples</u> and local communities”</p>		

Inspirations for the IGC:

- Beneficiaries in the TCE/TK context: «indigenous peoples and local communities»
- «Local communities» → possible flexibility, where at national level no notion «indigenous peoples» ?

IGC – Draft Instruments	Nagoya Protocol	
TCE/TK/GR Drafts: Various terms & concepts		
<ul style="list-style-type: none"> • misappropriation <ul style="list-style-type: none"> › unlawful appropriation › violation of national or customary law › access without PIC or MAT • misuse: <ul style="list-style-type: none"> › unauthorised, unfair, inequitable use › use without benefit-sharing › false, offensive, derogatory, misleading use › use beyond traditional/customary context 		

IGC – Draft Instruments	Nagoya Protocol	
TCE/TK/GR Drafts: Various terms & concepts	GR	TK associated with GR
<ul style="list-style-type: none"> • misappropriation <ul style="list-style-type: none"> ➢ unlawful appropriation ➢ violation of national or customary law ➢ access without PIC or MAT • misuse: <ul style="list-style-type: none"> ➢ unauthorised, unfair, inequitable use ➢ use without benefit-sharing ➢ false, offensive, derogatory, misleading use ➢ use beyond traditional/customary context 	<ul style="list-style-type: none"> • compliance with ABS legislation of other Party: <ul style="list-style-type: none"> ➢ access with PIC ➢ establishment of MAT • Additional provisions: such as checkpoints, compliance with MAT, codes of conduct, etc. 	<ul style="list-style-type: none"> • similar as for GR, but: <ul style="list-style-type: none"> ➢ access with <u>PIC or approval and involvement</u> of indigenous and local communities ➢ customary laws and community protocols

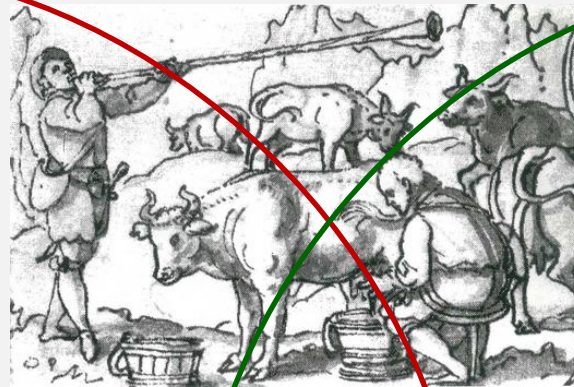
Inspirations for the IGC:

- “Positive approach”: Appropriate use of TK/TCE within the IP system instead of misappropriation/misuse ?
- Alt 3 Policy Objectives TK/TCE Drafts:
“The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, recognizing the rights of [beneficiaries] [indigenous peoples and local communities]”.

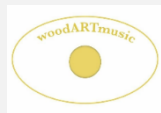
New int. instrument for the protection of TCE

Existing rights (IPRs)

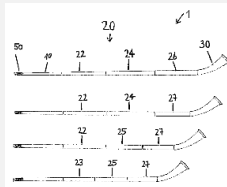
Existing int. instruments



Copy Right



Trade Marks



Patents



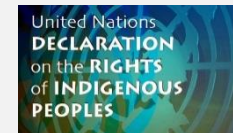
Designs



Geographical Indications



IP Conventions & Treaties



UNDRIP



UNESCO Conventions



CBD – 8j Tools



Nagoya Protocol

others !

Nagoya Protocol

Rights

- Recognizes existing rights in preamble, objectives, and operational provisions
- Measure-based approach

Nagoya Protocol

Rights

- Recognizes existing rights in preamble, objectives, and operational provisions
- Measure-based approach

International Instruments

- Recognizes other instruments in preamble
- Relationship with International Agreements and Instruments (Art. 4):
 - E.g. not applicable to specialized int. ABS instruments
- “International Regime on ABS”: CBD, Nagoya Protocol, Int. Treaty Plant GR for Food and Agriculture, and other complementary instruments

Inspirations for the IGC:

- Measure-based approach that recognizes existing rights ?
 - Legislative measures can include rights

- **Mutually supportive with existing international instruments !**

....

1992 Adoption of **Convention on Biological Diversity** → general ABS provisions

....

1998 COP 4 Expert Panel on ABS

2000 COP 5 Ad-hoc Working Group on ABS

2002 COP 6 Adoption of **voluntary Bonn Guidelines on ABS**

2004 COP 7 Mandate to elaborate & negotiate international Regime on ABS

2006 COP 8 Permanent Co-Chairs, Expert Group on Certificate on Compliance

2008 COP 9 “Road map” to finalize international Regime on ABS until 2010:

- additional meetings of the **Working Group on ABS** (total 9 meetings)
- **technical and legal expert group meetings**
- **technical studies**
- Interregional Negotiation Group



2010 COP 10 Adoption of **Nagoya Protocol**

(b) **International understanding of misappropriation/misuse**

Option 1

[1. Misappropriating genetic resources means to acquire, either intentionally or negligently, genetic resources in violation of applicable domestic legislation of a Party that requires prior informed consent and mutually agreed terms for access to its genetic resources.]

[2. Each Party [shall][should]:

(a) Require natural or legal persons who use [genetic resources][biological resources][, their derivatives][and products] [and/or associated traditional knowledge] on its [territory] [jurisdiction] to take, [to the best of their ability], appropriate actions to prevent the acquisition or utilisation of misappropriated [genetic resources][biological resources][, their derivatives][and products] [and/or associated traditional knowledge]; and

(b) Provide for measures where users fail to apply such actions.]

[3. Each Party [shall][should] [, *inter alia*,] apply [legal, administrative and policy] measures [as well as customary laws, community level procedures and/or community protocols of indigenous and local communities] [, including [disclosure requirements] as specified in {...}], to [prevent [and address] the misappropriation of [genetic resources][biological resources][, their derivatives][and products] [and/or associated traditional knowledge] to]:

(a) Natural or legal persons [having the nationality [of] [or a permanent place of business in] [within the jurisdiction of] that Party, who misappropriated a [genetic resource][biological resource][, its derivatives][and products] [in the jurisdiction of another Party] [in violation of the international regime on access and benefit-sharing, laws and/or administrative measures of [the country of origin or the country that has acquired the genetic resource in accordance with the Convention] [the country providing genetic resources [within the meaning of the Convention]] [a third party which is of the country of origin];

(b) Natural or legal persons who, [on its territory] [within its jurisdiction], [acquire] [access] or use a [genetic resource][biological resource][, its derivatives][and products] [knowing] that [it] has been misappropriated [in the jurisdiction of another Party] [in violation of the international regime on access and benefit-sharing, laws and/or administrative measures of [the country of origin or the country that has acquired the genetic resources in accordance with the Convention] [the country providing genetic resources [within the meaning of the Convention]]];

[(c) Natural or legal persons who, on its territory, [acquire][access] or use a [genetic resource][biological resource][, its derivatives][and products] and who should have known, based on available information, that the [genetic resource][biological resource][, its derivatives][and products] has been misappropriated [in the jurisdiction of another Party] [in violation of the International Regime on Access Benefit-sharing, laws and/or administrative measures of [the country of origin or the country that has acquired the genetic resource in accordance with the Convention] [the country providing genetic resources [within the meaning of the Convention]]].]

[4. Parties may refrain from taking such measures if the domestic access and benefit sharing framework of another Party providing a misappropriated [genetic resource][biological resource][, its derivatives][and products], at the time of misappropriation, [was] [deemed by the Parties to be] not in conformity with [the international standards set out in { ... }] [the access provisions set out in the international regime on access benefit-sharing].]

[5. Measures taken by Parties in accordance with paragraphs 2 and 3 above [shall][should] provide for remedies and effective[, proportionate and dissuasive] sanctions.]

[5. Each Party [shall][should] cooperate with other Parties' inquiries into possible instances of misappropriation of [genetic resources][biological resources][, their derivatives][and products].]

In 2009 still more than 3000 brackets

Inspirations for the IGC:

- Text-based negotiations not always successful:
 - Focus on key issues and conceptual discussions
 - Fact-based discussions, including national experiences

- Work on technical level is crucial:
 - Technical and legal expert groups and/or studies, informal discussions, capacity building workshops, etc.

- Instrument(s) to provide benefits for all:
 - Indigenous peoples and local communities: E.g. rights and interests
 - Users: E.g. legal certainty and support innovation
 - Governments: E.g. flexibility for national implementation

Thank You for Your Attention

