WHY AND HOW TO PROTECT TRADITIONAL KNOWLEDGE AT THE INTERNATIONAL LEVEL

KEYNOTE ADDRESS

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MARISELLA OUMA PH.D

INTELLECTUAL PROPERTY CONSULTANT

mwarsie@justice.com

www.marisellaouma.co.ke

Introduction

There is an increasing interest in matters of law and policy in relation to traditional knowledge at international level, particularly in biological resources and cultural goods. This may be attributed to among other things evidence of increased commercial use of traditional knowledge in agriculture, the pharmaceutical industry and creative industries. There are numerous examples of third parties misappropriating traditional knowledge and in some instances to the detriment of the peoples from whom the knowledge originates.

Several efforts at national, regional and international level to come up with legal instruments to ensure protection of traditional knowledge are ongoing. At national level, several countries have come up with specific laws such as Law 27811 of Peru enacted in 2002 which was the first national law for protection of Indigenous Peoples' collective knowledge associated with biodiversity and the more Traditional Knowledge Act 2016 in Kenya. Law 27811 established a *sui generis* regime for protection of traditional knowledge, innovations and practices as they relate to biodiversity for indigenous peoples.

At regional level, a good example is the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Traditional Cultural Expressions 2010. Policy objectives of national and regional laws are similar and mainly seek to ensure that traditional knowledge is protected against misappropriation by third parties for commercial purposes and to ensure that indigenous/local communities have control over their traditional knowledge. Although national regimes offer protection, it is limited to the national level and does not address protection of traditional knowledge beyond borders save for instances where there are bilateral agreements between countries who have national laws on traditional knowledge. Another challenge with national law is that very few countries have specific laws on protection of traditional knowledge.

So would national and regional protection of traditional knowledge be enough? Unfortunately, this is not the case mainly due to globalisation and thus the need to

have an international regime on protection of traditional knowledge. This brings us to the main question; Why and how should we protect traditional knowledge at international level?

Why should we protect traditional knowledge at international level?

Looking at the history and development of intellectual property laws and norms at the international level, one notes that they draw from existing national laws. The international dimension provides the framework within which protection can be extended beyond national borders and provides for international cooperation.

Discussions on protection of traditional knowledge at international level have been going on for a while at different international *fora* including WIPO through the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional knowledge and Folklore since 2000. Proposed protection under the IGC is within the context of intellectual property albeit a *sui generis* system of protection. To help us contextualise this discussion, it is important to look at other international regimes especially in the area of intellectual property.

The Paris Convention mainly sought to avoid unwanted loss of eligibility for patentability through publication of patent applications and participation in international exhibitions in prior to filing national applications and to harmonise the different national patent laws in existence. The Berne Convention was to introduce mutual recognition of copyright between different nation states, promote development of national standards on copyright protection and deal with the issue of unauthorised use of copyright works in other countries. It was to provide an international codification, which currently provides for minimum standards of protection. The WIPO Copyright took into account the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions in the digital environment.

More recent treaties, like the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, has a social and humanitarian dimension. The main purpose is to provide international

standards on exceptions and limitations to facilitate access to published works by beneficiary persons. It is important to note that exceptions and limitations at the national and regional level were not enough to ensure access by all beneficiaries in Member States thus the need for the international regime. This provides a good example of an international treaty that deals with substance.

Having briefly looked at some of the international norms in the area of intellectual property, there are certain points to note that necessitated these laws; the first is the issue of recognition of foreign rights holders within the national jurisdiction. This gave rise to what is now known as the principle of national treatment found in most IP treaties. Article 5(1) Berne Convention states that "*Authors shall enjoy, in respect of works which they are protected under this convention in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their national, as well as rights specially granted by this Convention."*

This is similar to Article 2(1) of the Paris Convention which states that *"Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with."*

Article 3(1) of the TRIPS Agreement requires that "*Each Member State shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16*

of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS."

The principle of national treatment only applies where national laws provide for protection. So in the case of traditional knowledge, the traditional knowledge of an indigenous community in Peru will be protected in Kenya and vice versa under the principle of national treatment.

In addition to the principle of national treatment, other approaches to protect the works of foreign nationals include the principle of reciprocity and mutual recognition. The latter is based on bilateral agreements between two countries while under the former, protection granted to nationals of a foreign country depends on whether or not that country in turn extends protection to nationals of the first country. The other is the most favoured nation principle as set out in Article 4 of the TRIPs Agreement whereby any advantage, favour, privilege or immunity by a Member to nationals of any other country shall be accorded immediately and unconditionally to nationals of other Members.

International laws also provide for minimum acceptable standards as well as offer some degree of harmonisation of national law and certainty. The international regime provides for interactions between national systems. For instance the Berne Convention provides minimum acceptable standards of protection of copyright for Member States. Article 5 (2) of the Berne Convention provides for independence of copyright protection. A Similar provision exists in Article 6 of the Paris Convention.

International standards also provide some forms of linkage between protection in the country of origin, and protection in other jurisdictions. Article 1(2) of the Madrid Agreement and Article 2(1) of the Madrid Protocol make the international registration of a trademark under the Madrid system for the International Registration of Marks dependent on the existence of a national registration or application for exactly the same mark and the same goods or services in the name of the applicant for the international registration. The Lisbon Agreement (Article 2) requires, among other conditions, protection of appellations of origin "recognized and protected as such in the country of origin," and the TRIPS Agreement (Article 24.9) specifies that there is

"no obligation … to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country."

The development of international laws gradually moved from policy to substantive law. With time, substantive issues such as eligibility, subject matter for protection, criteria for protection and nature and scope of rights, exceptions and limitations were included in the international regime. However, not every detail has to be included in the international treaty leaving some flexibility for the national legislation thus the need for minimum standards. It is important to note that there are certain areas where the international law merely provides a policy direction.

What are the policy objectives for protection of Traditional knowledge at international level?

Over the last few years, we have not been able to agree on the aim of the international instrument for protection of traditional knowledge. So far at the IGC there are three alternatives as to the purpose of the international instrument. Alternative 1 states that the instrument seeks to prevent misappropriation, misuse and unauthorised use of TK, control of use of TK beyond the traditional and customary context, fair and equitable benefit sharing, and encouragement of tradition based innovation. Alternative 2 seeks to prevent misuse/unlawful appropriation of protected traditional knowledge and encourage tradition-based creation/innovation. Alternative 3 seeks to have an instrument that contributes to protection of innovation and to the transfer and dissemination of knowledge to the mutual benefit of holders and users of protected TK in a manner conducive to the social and economic welfare and to balance the rights and obligations. It seeks to recognise the value of a vibrant public domain and to protect and preserve the public domain.

Taking into account the policy objectives and brief rationale for protection of intellectual property at international level, it is important to see if any lessons or parallels can be drawn in the case of protection of traditional knowledge. The nature of Traditional knowledge is such that it might not necessarily fit into the sphere of intellectual property but might be guided by existing intellectual property laws. As stated before, were several attempts to protect traditional knowledge at international

level but the most profound is under the CBD. Article 8(j) of the CBD requires parties, subject to national laws to respect, preserve, and maintain the knowledge, innovations and practices of indigenous and local communities, especially those that embody traditional lifestyles relevant to the conservation and sustainable use of biodiversity. Parties must promote the wider application of these standards (with the approval and involvement of knowledge-holders) and encourage equitable benefit sharing arising from utilization of such knowledge, innovation and practices.

Article 10(c) requires parties to protect and encourage customary use of biological resources and in accordance with traditional practices. Article 17(2) recognises indigenous and traditional knowledge as one of the elements of information to be exchanged while 18(4) requires parties to encourage and develop methods of cooperation for development and use of indigenous and traditional technologies pursuant to CBD objectives. The CBD seeks to preserve, respect and maintain the traditional knowledge, encourage sustainable use, encourage benefit sharing, and protect the traditional knowledge.

The Nagoya Protocol addresses traditional knowledge associated with genetic resources with provisions on access, benefit sharing and compliance. It also addresses genetic resources where indigenous and local communities have the established right to grant access to them. Contracting Parties are to take measures to ensure these communities' prior informed consent, and fair and equitable benefit sharing, keeping in mind community laws and procedures as well as customary use and exchange. (See Article 7, 11 and 16)

If we take the human rights approach as we did in the case of the WIPO Marrakesh treaty, we could draw some of the policy objectives from Article 31 of the UN Declaration on the Rights of Indigenous Peoples, which states: *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. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The ARIPO Swakopmund protocol has the following policy objectives; Preserve and conserve traditional knowledge; Enable communities to continue using traditional knowledge in the context of their traditional lifestyle; Safeguard against third party claims of IP rights over traditional knowledge subject matter; Protect distinctive traditional knowledge related commercial products; Encourage and promote traditional-knowledge-based innovations; Encourage sustainable use of traditional-knowledge related biodiversity and equitably share the benefits arising from the commercial use of traditional knowledge, etc.

At the national front, the Costa Rica Law 7788, the objectives include control of access and benefit sharing, protect against use that may be contrary to their interests and provide defensive protection. In Peru, the objectives of the law include protection, preservation and development of collective knowledge; fair and equitable distribution of benefits derived from the use of collective knowledge; use of collective knowledge to benefit indigenous peoples and the community; assurance that prior informed consent of indigenous peoples is obtained for use of their collective knowledge; access and benefit sharing; and prevention of patents for inventions based on collective knowledge of Peruvian indigenous peoples without proper acknowledgement.

The Indigenous Knowledge Systems Bill 2016 in South Africa has the following objectives; protect the indigenous knowledge of indigenous communities from unauthorised use and misappropriation; promote public awareness and understanding of indigenous knowledge for the wider application and development thereof; develop and enhance the potential of indigenous communities to protect their indigenous knowledge; regulate the equitable distribution of benefits of the use of indigenous knowledge; promote the commercial use of indigenous knowledge in the development of new products, services and processes; provide for registration, cataloguing, documentation and recording of indigenous knowledge held by indigenous communities; establish mechanisms for the accreditation of indigenous knowledge

practitioners; and recognise indigenous knowledge as prior art in the determination of, and eligibility for, protection of subject matter under intellectual property laws.

The Traditional Knowledge Act of 2016 in Kenya mainly seeks to protect and enhance intellectual property in and indigenous knowledge of biodiversity and genetic resources, ensure that communities receive compensation or royalties for use of their TK.

There are some policy objectives that are common in existing national and regional laws namely control over traditional knowledge by indigenous/local communities and protection against misappropriation by third parties outside the context of the community from which the traditional knowledge originates and equitable sharing of benefits that arise from the use of the traditional knowledge.

The history of international law shows that the international law draws from exiting national and regional laws and basically creates a system to allow for interaction of national laws to ensure protection beyond national borders. (Save for two of the original signatories to the Paris Convention who did not have the patent laws at the time of signing). One of the biggest challenges at the IGC is that not many countries have national laws on protection of traditional knowledge but that does not prevent Member States from drawing from the few existing national and regional laws.

It is important to learn from these national laws what the key provisions are such as what is to be protected, for whose benefits and how. It is important to note that protection goes beyond intellectual property aspects (such as protection against acquisition on intellectual property from traditional knowledge). It should also be used for technological innovations for instance traditional knowledge in construction of houses, architectural designs among others.

It is imperative that in formulating the policy objectives, to start by identifying the points of convergence at national level and at the IGC especially in defining the subject and object of protection and what needs to be protected in relation to the mandate of the IGC.

How to Protect Traditional Knowledge at International Level

As we all know, with various examples from the world over, the appropriation and use of traditional knowledge especially as it relates to genetic resources has caused problems especially when intellectual property rights are acquired based on the traditional knowledge. Well-known examples are the *Neem, Tumeric, Hoodia, Maca* among others. The knowledge from the indigenous and local communities was crucial in subsequent use of these plants in the pharmaceutical field and it is important to acknowledge the same. The panellist in round table 2 also gave examples from their different countries in relation to food, agriculture, and architecture. The existing intellectual property regime may not be the appropriate mechanism for protection but a *sui generis* system of protection should work for traditional knowledge.

The protection sought may be defensive which aims at stopping third parties from acquiring intellectual property rights over traditional knowledge. This may be through a database such as the TKDL in India. Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words from being registered as trademarks.

Positive protection seeks to grant rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation. Several national laws have adopted this approach but are limited to the country in which the law is passed thus the need for an international instrument.

The international instrument needs to take into account the diversity of realities of the existing traditional knowledge ecosystems. For instance, what laws or systems of protection exist and who benefits from the protection? A case in point is the case of the *Kaya* among the Miji Kenda people in Kenya. They had a system of taboos and customary law, which restricted access to the *Kaya* and regulated access to the medicinal plants that were found in the forest. It is only designated elders and healers who could access the *kaya.* In India, the setting up of the TKDL provides a defensive protection especially in relation to patents derived from traditional knowledge. The national laws attempt to provide protection for the collective knowledge.

During the course of the IGC negotiations, there have been several proposals as to how to protect traditional knowledge at international level

(i) a binding international instrument ;
(ii) authoritative or persuasive interpretations or elaborations of existing legal instruments;
(iii) a non-binding normative international instrument;
(iv) a high level political resolution, declaration or decision, such as an international political declaration espousing core principles, stating a norm against misappropriation and misuse, and establishing the needs and expectations ofTK holders as a political priority;
(v) strengthened international coordination through guidelines or model laws; and
(vi) coordination of national legislative developments.

In drafting the instrument, it is important to keep in mind the mandate of the IGC;
"The Committee will, during the next budgetary biennium 2016/2017, continue to "expedite its work, with a focus on narrowing existing gaps, with open and full engagement, including text-based negotiations, with the objective of reaching an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property which will ensure the balanced and effective protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs). It is also important to look at the existing protection systems at national level and what they seek to protect; control over their traditional knowledge and prevention on acquisition of intellectual property rights over their TK."

The joint recommendation being a soft law approach is not binding in nature and provides guidelines usually in implementation of international law as in the case with the joint recommendations on well known marks, and trademark licences.

The Joint Recommendation concerning trademark licences aims at harmonizing and simplifying the formal requirements for the recordal of trademark licenses and therefore supplements the Trademark Law Treaty (TLT) of October 27, 1994, which is designed to streamline and harmonize formal requirements set by national or regional Offices for the

filing of national or regional trademark applications, the recordal of changes, and the renewal of trademark registrations.[1]

For the joint recommendation on well-known marks; "Given the practical imperative for accelerated development and implementation of certain international harmonized common principles and rules in industrial property law, the future strategy for this main program includes consideration of ways to complement the treaty-based approach [...]. If Member States judge it to be in their interests so to proceed, a more flexible approach may be taken towards the harmonization of industrial property principles and rules, and coordination of administration, so that results can be achieved and applied more rapidly, ensuring earlier practical benefits for administrators and users of the industrial property system."

Taking into account the state of protection of traditional knowledge at international level, it may not be practical to have the joint recommendation as it is also based on pre existing international regimes as illustrated in the two WIPO joint recommendations were done within the framework of the Paris Union and dealt with accelerating implementation procedures and provide further clarification on implementation. In the case of traditional knowledge, the international framework is yet to the put in place.

Inclusion of provisions on traditional knowledge and interpretation in existing international laws has its limitations, as is the case with the Nagoya Protocol, The CBD which only cover protection of traditional knowledge as it relates to genetic/biological resources is another option. However, as stated above, this options has its limitations as it is narrow and likely to deal with specific aspects of traditional knowledge to the exclusion of others. Protection should be in context taking into account the nature of traditional knowledge as it exists today.

As we proceed with the discussion on international protection of TK, it is important to carefully consider substantive issues, which are intrinsically tied to the overall policy objectives. TK may be found amongst communities that are in different geographical

[1] http://www.wipo.int/edocs/pubdocs/en/marks/835/pub835.pdf

areas and there is need to address the issue of trans-boundary protection. These are issues that will be discussed in greater detail in roundtable 4.

The international instrument should not be prescriptive due to the diverse nature of TK and the different types of protection within each country be it national codified law or the traditional ecosystem of protection such as customary law. The tiered/differentiated approach recognizes these differences and is a good starting point. The instrument should provide the policy objectives. An international regime that has a legally binding effects on the parties to the treaty is more desirable as it will provide protection beyond national borders/protection of foreign works in countries other than countries of origin, provide a basis for harmonization of national laws and also provides linkages between the national laws.

Conclusion

As we work on the international instrument, we need to consider the main reasons why protection is required especially by holders/custodians of traditional knowledge and what they seek to protect. It is important to consider both positive and defensive protection and take into account the traditional knowledge ecosystems, including both codified and non-codified systems, and existing national laws. The process could also draw from the previous processes in defining other intellectual property laws in the past.

THANK YOU.