

Traditional Knowledge Associated with Genetic Resources

Article 12 of the Nagoya Protocol on Access and Benefit-Sharing

Introduction

Traditional knowledge, innovations and practices on animals, plants, insects or ecosystems can provide interesting leads to and an initial screen for isolating particular properties of genetic resources found in nature. Consequently, traditional knowledge (TK) has guided a number of companies in the development of new products from genetic resources, which makes it relevant for the access and benefit-sharing (ABS) concept.¹

While Article 15 of the Convention on Biological Diversity (CBD) does not address the issue of TK, Article 8(j) of the CBD requires each Party, subject to its national legislation, to:

- Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities (ILCs) embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity;
- Promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices; and
- Encourage equitable sharing of benefits derived from their utilization.

The link between genetic resources and TK in the context of ABS is based on the second and third obligations under Article 8(j) of the CBD. Accordingly, the CBD acknowledges the value of TK to modern society, and recognizes that holders of such knowledge, innovations and practices are to be involved and provide their approval, subject to national laws, when it gets to the wider application of those knowledge, innovations and practices. Furthermore, States are encouraged to equitably share the benefits arising out of the utilization of ILCs' knowledge, innovations and practices.

Understanding Article 12

Until the very end of the negotiations on the Nagoya Protocol, opinions differed on whether the Protocol's provisions on TK associated with genetic resources should be confined to one article or, instead, TK should be dealt with as a cross-cutting issue. When it was still open which position would prevail, Article 12 was thought of as *the* traditional knowledge provision in the Nagoya Protocol by those favoring the former approach. When eventually delegations opted for dealing with TK as a cross-cutting issue, the major regulations on TK associated with genetic resources ended up in Articles 5(5), 7, and 16. But the heading of Article 12 was not amended to reflect this change and is thus misleading. What remains in Article 12 is a number of provisions addressing various issues of tangential relevance to the core provisions on access, benefit-sharing, and compliance.

Article 12(1) of the Nagoya Protocol calls on Parties to consider the customary laws, community

protocols, and procedures of ILCs. Customary laws and community protocols are two quite different normative systems. What is implied by “procedures” is somewhat less clear.

Customary laws are non-codified norms that have evolved in ILC societies over centuries, constantly responding to changes in these societies and to the surrounding environment.



Customary norms continue to develop in these societies. The non-codified aspect of customary norms is essential, as it allows customary laws to gradually and instantly adapt in response to amended societal interests. This is a key feature of customary laws, despite the fact that in more recent times some ILCs have codified their customary laws and may have gained constitutional recognition of such.

The concept of community protocols, on the other hand, is a more recent invention. The idea of community protocols was introduced relatively late in the negotiations by one group of negotiators and quickly caught many negotiators’ interest. It is important to recognize that “community protocols” is neither defined by the Nagoya Protocol nor is it a term of art. Consequently, while the concept of community protocols might be understood as explained during the negotiations on the Nagoya Protocol, other understandings are also possible.

Generally speaking, community protocols can be described as written documents adopted by a community holding traditional knowledge where the community internally codifies the terms in which it will agree for access to its TK associated with genetic resources. Community protocols can hence in one way be compared with formalized legislative acts enacted by national parliaments, although their origin of course affects their legal status. Furthermore, it is worth noting that community protocols can be, and presumably often are, based on or at least respectful to customary laws of the ILC.

A Closer Look at Bio-cultural Community Protocols

A bio-cultural community protocol (BCP) is a protocol that is developed after a community undertakes a consultative process to outline their core ecological, cultural, and spiritual values and customary laws relating to their TK and resources, based on which they provide clear terms and conditions to regulate access to their knowledge and natural resources. The process of developing a BCP involves reflection about the interconnectedness of various aspects of ILCs’ ways of life (such as between culture, customary laws, practices relating to natural resources management, and TK) and may involve resource mapping, evaluating governance systems, and reviewing community development plans. It also involves legal empowerment so that community members can better understand the international and national legal regimes that regulate various aspects of their lives, such as those linked to ABS.

Within the ABS framework, for example, a community may want to evaluate what the community's research priorities are, on what terms it would engage with potential commercial and non-commercial researchers wanting access to their TK, what the procedures relating to prior informed consent must be, and what types of benefits the community may want to secure.

Article 12(2) calls on Parties, in co-operation with concerned ILCs, to establish mechanisms to inform potential users of TK associated with genetic resources of their obligations. It also identifies the ABS Clearing-House as potentially having a particular role in this regard.

The obligation of each Party to establish such mechanisms in co-operation with any concerned ILC is mandatory. However, it does not go beyond informing potential users of TK associated with genetic resources of their obligations under the Nagoya Protocol. Indeed, if the user, thus informed, still fails to comply with its obligations, such non-compliance must be addressed through Article 16 of the Protocol.

Article 12(3) calls on Parties to endeavor to support ILCs in developing various instruments in order to better deal with access procedures with regard to their TK associated with genetic resources, and to ensure that they receive a fair share in benefits when such knowledge is being used. Particular attention shall be given to women within the communities in this regard. The instruments referred to are of different nature, but with similar functions.

ILCs have used genetic resources and developed TK for centuries, and they continue to do so. Article 12(4) of the Protocol assumes that this use may at times involve exchange of genetic resources and TK associated with genetic resources within and among ILCs. Based on this assumption, it confirms that the Protocol does not intend to restrict such use and exchange.

However, Article 12(4) includes two qualifiers. First, the use must be "customary" for the provision to apply. This presumably simply implies that the practice must have been ongoing for a considerable period of time before the Nagoya Protocol entered into force. Second, the provision only applies "as far as possible". It is difficult to imagine what situations could occur that suddenly renders it impossible not to restrict use and/or exchange of genetic resources and TK associated with genetic resources within ILCs when such use/exchange have been ongoing for a considerable period of time. But should such a situation occur, the Party is entitled to restrict continued use and/or exchange.

Food for thought

There are several issues to further consider in relation to TK associated with genetic resources. One is the fact that no country has taken measures – legislative or otherwise – to create a system that ensures effective benefit-sharing with ILCs when their TK associated with genetic resources is being used by "non-members". There is thus no model law or measures to draw from in this respect and presumably the most appropriate domestic measures to implement Article 5(5) of the Protocol (which contains the benefit-sharing obligations related to TK associated with genetic resources) will depend to a great extent on how effectively the access provision in Article 7 – Access to Traditional Knowledge Associated with Genetic Resources – can be implemented.

Another challenge is that the Protocol does not define the term "utilization of traditional knowledge" and TK associated with genetic resources is used in a variety of ways. Many laws and stakeholders have in practice different perceptions and approaches. For instance, there might be cases in which the use of a plant in traditional medicine generated a researcher's interest in its biochemical composition but maybe the properties found and commercialized do not relate to its traditional uses.

Finally, questions also arise when TK is shared among several communities and/or these communities are located across national boundaries. For example, how can one avoid that one community receives all the benefits when TK associated with a particular genetic resource is also held by other communities?

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ⁱ Laird, S. and Wynberg, R. *Access and Benefits-Sharing in Practice: Trends in partnerships Across Sectors* (Secretariat of the Convention on Biological Diversity: Montreal, 2008). P. 20.

