

Access to GRs and associated TK in the Caribbean and Update on Draft Regional CARICOM Framework

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Outline

- What is TK?
- What are TCEs?
- Problems confronting TK holders
- Regional TK Agenda Development
- Draft Caribbean Regional Model Law

What is Traditional Knowledge? (I)

- No internationally accepted definition.
- Historically includes all aspects of plant and animal knowledge and resources, cultural heritage, folklore and other traditional cultural expressions.
- WIPO distinction between Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs).

What is Traditional Knowledge? (2)

- A Working Definition of TK—

*“The content or substance of knowledge resulting from **intellectual activity in a traditional context**, and includes the **know-how, skills, innovation, practices and learning that forms part of traditional knowledge systems**, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations.”*

What are Traditional Cultural Expressions? (I)

- A Working Definition of TCEs :
 - *Traditional cultural forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:*
 - **verbal expressions**, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
 - **musical expressions**, such as songs and instrumental music;

What are Traditional Cultural Expressions? (2)

- **expressions by action**, such as dances, plays, ceremonies, rituals and other performances,
- **tangible expressions**, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

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Problems Confronting TK Holders

- **Lack of respect and appreciation for TK**
- **Decline of traditional knowledge and practices;**
- **Ignorance of the invaluable contribution of local knowledge systems.**
- **The unauthorized, commercial exploitation (misappropriation) of the knowledge of TK holders by others**
- **Registration of IP rights over TK / TK derivatives**
- **Inadequate / no benefit sharing**

Core Principles

1. Responsiveness to needs & expectations of TK holders
2. Recognition of rights of TK holders
3. Recognition of the specific characteristics of TK
4. Respect for customary use of TK
5. Effectiveness and accessibility of protection
6. Free, Prior and Informed Consent (FPIC)
7. Full and Effective Participation (F&EP)
8. Fair and Equitable Benefit-Sharing (F&EBS) of monetary and non-monetary benefits on Mutually Agreed Terms (MATs)
9. Consistency with existing national legal systems
10. Respect for and cooperation with other international and regional instruments and processes

Revised Treaty of Chaguaramas

- **Art. 64.6:**
- **COTED shall co-operate with the Member States and competent organisations to devise means of protecting, developing and commercialising local knowledge about the value and use of the Region's biodiversity for the benefit of their populations, especially their Indigenous Peoples.**

Revised Treaty of Chaguaramas

Art. 66: Protection of Intellectual Property Rights

- ***COTED shall promote the protection of IPR within the Community by:***
- ***(iii) the legal protection of Expressions of Folklore, other TK and national heritage, particularly of indigenous populations in the Community***

CARICOM Charter of Civil Society

- Art. XI

CARICOM member states undertake to *protect the historical rights* of Indigenous Peoples and *respect their culture and way of life*.

Regional TK Agenda development

- 1999 – WIPO Fact Finding Missions – T&T, Jamaica, Guyana
- Nov. 2006 - Ministers of CARICOM states with responsibility for IP passed Resolution to request WIPO's assistance to develop an appropriate regional framework for the protection of GRs, TK & TCEs in the Caribbean

Caribbean TK Working Group

- Nov. 2006 - Facilitated by WIPO at the request of CARICOM Ministers responsible for IP
- March 2008 - Working Group established at Regional expert meeting in Jamaica
- To gather information, undertake consultations and prepare draft materials for review, consideration and policy and political decisions by Caribbean states.
- Comprised reps. from Trinidad & Tobago, Jamaica, Suriname, St. Lucia
- Included reps. of regional govts, Indigenous communities, IPOs, academia

Regional Consultations

- March to Oct. 2009 - Consultations held in Belize, Dominica, Jamaica, Saint Lucia, Saint Vincent & the Grenadines, Suriname and Trinidad & Tobago
- TK & TCEs Policy Paper & GRs Policy Paper and Status Report prepared by regional expert
- Circulated to Member States in early 2012 and formed the core of a second round of stakeholder consultations Jan. to July 2013 in Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Jamaica, Saint Lucia and Saint Vincent & the Grenadines.
- Consultations with IPs&LCs, govt representatives, academics, researchers, involved in culture, biodiversity, TK & TCEs.

Policy Objectives

- To protect:
 - The rights of IPs&LCs over their GRs, TK & TCEs
 - The rights of States over their GRs
 - TK and TCEs not attributable to any IPs&LCs.
- To encourage tradition-based creativity and innovation, including commercialisation thereof, subject to the FPIC and F&EP of and F&EBS with the beneficiaries, on MATs.

Referenced International Frameworks

- CBD
- Nagoya Protocol
- UN Dec. on the Rights of Indigenous Peoples
- WIPO IGC Consolidated Document relating to IP & GRs
- WIPO IGC Draft Articles on the Protection of TK
- WIPO IGC Draft Articles on the Protection of TCEs

Referenced Regional Frameworks

- Andean Community Decision 391 (Common Regime on Access to Genetic Resources, 1996)
- Andean Community Decision 486 (Common Intellectual Property Regime, 2000),
- African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (2000)
- Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002)
- Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (2010)

Referenced National Frameworks

- Guyana - Environmental Protection (Bioprospecting) Draft Regulations 2001
- Guyana - National Policy on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilisation
- Guyana - Amerindian Act 2006
- Dominica - Carib Reserve Act
- ABS laws - Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Ethiopia, India, Kenya, Panama, Peru, the Philippines and South Africa.

Draft Caribbean Regional Model Law

- A new legal regime for the Protection of GRs, TK & TCEs consistent with intl law, best practices & WIPO Draft Articles
- Integration of GRs, TK & TCEs in one ABS Framework
- Outlines rights for traditional owners of GRs, TK & TCEs and improves procedures to access GRs, TK & TCEs
- Requires FPIC of the State and/or IPs&LCs (called beneficiaries in the Model Law) upon MATs, to access GRs, TK & TCEs

Draft Caribbean Regional Model Law

- Seeks to ensure that IPs&LCs and other traditional holders enjoy F&EP in all decisions concerning their GRs, TK & TCEs.
- Ensures F&EBS with the traditional owners.
- A basis for Caribbean countries to enact ABS legislation for the protection of GRs, TK & TCEs.

Draft Caribbean Regional Model Law

- Access and use of GRs, TK & TCEs in the traditional and customary context by IPs&LCs is exempt
- Such access to be governed by customary laws, protocols and procedures of IPs&LCs where applicable.
- Access to GRs, TK and TCEs outside of the traditional context requires conformity with the Act.
- Access to GRs outside of the traditional context for purposes other than biodiscovery, for example for the commodities trade, will continue to be governed by existing applicable legislation.

KEY PROVISIONS

- Beneficiaries – IPs&LCs, not individuals (individual rights subject to customary laws and IP laws)
- State rights over nationally-owned GRs recognised
- State rights over national TK recognised, where the TK is not attributable to any IPs or LCs
- Exclusive rights – economic & moral, incl. right to challenge or oppose the application for or registration of any IPRs that use, utilize, concern, involve or otherwise rely on or benefit from their GRs, TK &/or TCEs

KEY PROVISIONS

- Term of protection - *as long as the resource, knowledge or expression fulfils the criteria of eligibility for protection; unlimited for secret/Sacred TK & TCEs & Cultural Identifiers*
- Protection of GRs, TK & TCEs not subject to formalities.
- Exceptions & Limitations - Not applicable to ‘moral’ rights and secret/sacred TK&TCEs

KEY PROVISIONS

- Access and use of GRs, TK & TCEs in the traditional &/or customary context, governed by customary laws, protocols and procedures of the relevant IPs&LCs
- Access to, utilization &/or use of GRs, TK & TCEs outside of the customary and traditional context requires an ABS contract (and relevant ancillary contracts, permits & licences)
- An applicant shall submit an application for access to the CNA and, where it involves GRs, TK &/or TCEs of IPs or LCs, to the competent authority of the relevant IP or LC

KEY PROVISIONS

- Mandatory Disclosure in IP applications which *use, utilize, concern, involve or otherwise rely on or benefit from* GR, TK &/or TCEs
- Competent authorities incl. IPOs may maintain registers, databases or other records of GRs, TK & TCEs, with the FPIC & F&EP of IPs&LCs
- Govt assistance for IPs&LCs with negotiation of contracts
- Shared TK issues to be resolved through mediation, with access to CCJ

Mandatory Disclosure Requirement in IP Applications

- IP applications which “*use, utilize, concern, involve or otherwise rely on or benefit from*” GR, TK & TCEs shall disclose:
 - the relevant GRs, TK &/or TCEs
 - written & oral information regarding the GRs, TK &/or TCEs, derivatives & by-products
 - country of origin
 - certificate of origin
 - country of source
 - resource provider, incl. relevant IPs or LCs
 - details of the resource owner &/or holder

Mandatory Disclosure Requirement in IP Applications

- Applicant shall:
 - certify relevant FPIC obtained
 - provide proof of FPIC & F&EBS on MATs
- If the applicant fails to comply with the obligations of mandatory disclosure or provides false, fraudulent, insufficient or incomplete information related thereto, application may be refused & any IPR arising from a grant may be revoked, invalidated & rendered unenforceable

Update on Draft Regional Framework

- Draft Regional Framework completed in 2014
- Submitted to CARICOM COTED in 2016
- Has not yet been approved by CARICOM.

Options for the legal protection of TK & TCEs

- **Community** – instituting &/or enforcing customary laws, policies & protocols to ensure (1) disclosure of origin; (2) free, prior & informed consent; and (3) fair & equitable benefit-sharing.
- **National** – Amending existing IP laws to (a) prohibit access to, or registration of IPR re:TK & TCEs without (1) disclosure of origin; (2) free, prior & informed consent; and (3) fair & equitable benefit-sharing; and (b) allow communities to protect aspects of TK via IPR.
- **Regional** – OECS, CARICOM & CARIFORUM
- **International** – WIPO IGC

Conclusions

- Need for *sui generis* GRTK laws to be implemented and IP laws to be amended to recognise value of TK and rights of TK holders and to prevent unauthorised registration of IPR without due process and safeguards.
- Need to accelerate regional processes including Draft Regional Framework to ensure regional protection, access and benefit sharing, in respect of GRs, TK and TCEs.

THANK YOU



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