

Reinforcing The Nagoya Protocol through a Coherent Global Intellectual Property Framework: Effective Protection for Traditional Knowledge Associated with Genetic Resources in Biodiverse African States

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Abstract : On October 12, 2014, the Nagoya Protocol, negotiated by Parties to the Convention on Biological Diversity (CBD), entered into force. The Protocol was negotiated to implement the third objective of the CBD which relates to the fair and equitable sharing of benefits arising from the utilization of genetic resources (GRs). The Protocol aims to 'protect' GRs and traditional knowledge (TK) associated with GRs from 'biopiracy', through the establishment of a binding international regime on access and benefit sharing (ABS). In reflecting on the question of 'effectiveness' in the Protocol's implementation, this paper argues that the underlying problem of 'biopiracy', which the Protocol seeks to address, is one which goes beyond the ABS regime. It rather thrives due to indispensable factors emanating from the global intellectual property (IP) regime. It contends that biopiracy therefore constitutes an international problem of 'borders' as much as of 'regimes' and, therefore, while the implementation of the Protocol may effectively address the 'trans-border' issues which have hitherto troubled African provider countries in their establishment of regulatory mechanisms, it remains unable to address the 'trans-regime' issues related to the eradication of biopiracy, especially those issues which involve the IP regime. This is due to the glaring incoherence in the Nagoya Protocol's implementation and the existing global IP system. In arriving at conclusions, the paper examines the ongoing related discussions within the IP regime, specifically those within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) and the WTO TRIPS Council. It concludes that the Protocol's effectiveness in protecting TK associated with GRs is conditional on the attainment of outcomes, within the ongoing negotiations of the IP regime, which could be implemented in a coherent manner with the Nagoya Protocol. It proposes specific ways to achieve this coherence. Three main methodological steps have been incorporated in the paper's development. First, a review of data accumulated over a two year period arising from the coordination of six important negotiating sessions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. In this respect, the research benefits from reflections on the political, institutional and substantive nuances which have coloured the IP negotiations and which provide both the context and subtext to emerging texts. Second, a desktop review of the history, nature and significance of the Nagoya Protocol, using relevant primary and secondary literature from international and national sources. Third, a comparative analysis of selected biopiracy cases is undertaken for the purpose of establishing the inseparability of the IP regime and the ABS regime in the conceptualization and development of solutions to biopiracy. A comparative analysis of select African regulatory mechanisms (Kenya, South Africa and Ethiopia and the ARIPO Swakopmund Protocol) for the protection of TK is also undertaken.

Keywords : biopiracy, intellectual property, Nagoya protocol, traditional knowledge

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