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On the Far End of the Trail of Tears was a Promise: Africa and Traditional Knowledge Protection

Abayomi Okubote (Queen's University) · Sunday, April 18th, 2021

Many will recall the historic ruling of Justice Neil Gorsuch in *McGirt v. Oklahoma* (2020), where the United States Supreme Court upheld an 1866 treaty between the United States and the Muscogee (Creek) Nation, which established the Muscogee Nation's geographic borders. The Court decided that much of current Eastern Oklahoma is to remain Indian land and prevented State authorities from prosecuting First Nations individuals within the Muscogee Nation's boundaries. Justice Gorsuch's seminal ruling in *McGirt* affirmed the indigenous communities' inherent right to protect their lands and resources.

In the context of international investment law, the debate concerns not only indigenous peoples' sovereignty over land; but the importance of developing a conceptual framework for the protection of traditional knowledge against incursion by investors and States. Traditional knowledge is the knowledge, innovations, and practices of indigenous communities, developed from experience gained over a long period and adapted to the local culture and environment.

The questions are to what extent does international investment law protect indigenous communities' resource rights (particularly, in relation to traditional knowledge), and what recourse, if any, do indigenous communities have to arbitration under bilateral investment treaties (BITs) or international investment agreements (IIAs) for infringements of such rights? Particularly for the African indigenous communities whose traditional knowledge rights have been constantly infringed, should a body of norms develop within the investment law framework to protect those rights? This post answers these questions by analyzing (a) the international legal framework for the protection of indigenous peoples' resource rights, (b) the issues implicated by the current traditional knowledge systems in Africa, and then proffering (c) recommendations on the effective protection of traditional knowledge in Africa.

Protection of Indigenous Peoples' Resource Rights

Indigenous peoples' rights to land and other resources, have been articulated under international law through, *inter alia*, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Convention on Biological Diversity (CBD). At the regional level in Africa, the African human rights system has played an essential role in the protection of indigenous peoples' rights. Notably, indigenous peoples' rights to lands and resources are inextricably linked to

traditional knowledge – which falls within the broader framework of intangible indigenous rights.

Article 31 of the UNDRIP recognises indigenous peoples' 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".

The protection of traditional knowledge involves taking measures to ensure that unauthorised parties do not unfairly acquire intellectual property rights over indigenous peoples' knowledge, innovations, and practices. The UNDRIP also recognises that indigenous people have the right to arbitration against infringement of their traditional knowledge rights.

Article 40 of the UNDRIP provides:

> "Indigenous peoples have the right to access and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."

Despite the protection of traditional knowledge existing at the international level, this right is often violated by States and the private sector by creating intellectual property rights over indigenous peoples' knowledge, innovations, and practices without equitably sharing the benefits. Thus, indigenous peoples have sought greater protections to ensure that traditional knowledge is used equitably, according to restrictions set by their traditions, or requiring benefit sharing for its exploitation according to the benefits they define. Three broad methods have been advanced for the protection of traditional knowledge:

- protecting traditional knowledge as a form of indigenous cultural heritage;
- recognizing traditional knowledge as a collective human right; and
- using existing or novel *sui generis* measures to protect traditional knowledge, which is the approach adopted by the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO).

India, for example, has established a traditional knowledge digital library and compiled a searchable database of traditional medicine that can be used as evidence of prior art by patent examiners when assessing patent applications. This followed a prominent case in which the US Patent and Trademark Office (USPTO) granted a patent to the University of Mississippi Medical Center for the oral and topical use of turmeric powder to heal surgical wounds and ulcers (U.S. Patent No. 5,401,504). The patent was later revoked by the USPTO given objection by the Indian Council for Scientific and Industrial Research that turmeric is a tropical herb well known to traditional communities in India and documented in ancient Sanskrit texts.

The UN Special Rapporteur on the Rights of Indigenous Peoples issued a report in 2016, noting the negative impact of the current IIA regime on indigenous peoples, given that projects under most IIAs can infringe upon indigenous peoples' land and resources. Some States attempt to accommodate indigenous rights and interests in their free trade agreements. For example, New Zealand includes in its Free Trade Agreements (FTAs) a Treaty of Waitangi exclusion, which enables the government to take measures to give effect to its obligations to M?ori under the Treaty of Waitangi, even if the measures are incompatible with New Zealand's obligations under the FTAs. Many Canadian treaties also include similar provisions. The Canada-U.S.-Mexico Agreement (CUSMA) includes protections of indigenous rights. While there is no substantive Chapter in CUSMA on indigenous rights, the inclusion of an exception, which carves out measures adopted or maintained by states to fulfil the State's legal obligations to indigenous peoples, is a significant development. There is also a recognition of the importance of indigenous rights and traditional knowledge in the preamble to the Comprehensive & Progressive Agreement for Trans-Pacific Partnership (CPTPP) – a free trade agreement between Canada and 10 other countries in the Asia-Pacific.

Africa and Protection of Traditional Knowledge

African BITs and dispute settlement mechanisms in FTAs have no standard clauses providing protection for traditional knowledge. This has meant that such agreements have on occasion been used to support the appropriation of indigenous knowledge, innovations, and practices about medicinal, cultural, cosmetic, domestic, or other value and use of bioresources without attribution or compensation. The University of California and Lucky Biotech (a Japanese corporation), for example, was granted patents for the sweetening proteins naturally derived from katempfe and serendipity berries. Thaumatin, the substance that makes katempfe sweet, is 2000 times sweeter than sugar, yet calorie free. The patent covers any transgenic plant containing the derived sweetening proteins; however, no attempt has been made to share benefits deriving from these patents with the indigenous communities which had long used these plants for their sweetening properties.

In recognition of the significance of the protection of traditional knowledge in the investment law context, Article 25(3) of the Pan African Investment Code (PAIC) provides that:

> "Member States and investors shall, in accordance with generally accepted international legal standards and best practices, protect traditional knowledge systems and expressions of culture as well as genetic resources that are sought, used or exploited by investors, or are otherwise relevant to their contracts, practices and other operations in such Member States."

Article 25(4) provides that:

> "Member States shall provide, within national laws, principles for the patenting of biological materials or of traditional knowledge systems and expressions of culture for the protection of local communities in such Member States."

The notions of traditional knowledge systems and expressions of culture in the PAIC were taken from the UNESCO Convention on the Diversity of Cultural Expression. However, the PAIC has no binding force, so indigenous communities in Africa are unable to take direct benefit from its provisions.

The Way Forward for Africa

One means of better protecting traditional knowledge in the trade and investment context would be to develop a body of norms in such agreements which protect traditional knowledge and balance the tension between liberalizing trade and indigenous communities' inclusivity. The protection and promotion of traditional knowledge systems under international investment law should be considered a *sui generis* measure and ethically imperative during the negotiation and execution of BITs and FTAs. One opportunity to develop such a body of norms is presented by the African Continental Free Trade Area (AfCFTA). As Phase II negotiation is delayed due to the COVID-19 pandemic, a draft legal text of the AfCFTA Investment Protocol (Investment Protocol) has not been submitted to the Assembly of the African Union. Thus, the Investment Protocol should create a refreshing spring from the historical misuse of the traditional knowledge systems and impose standard obligations on States and investors alike to recognize and protect traditional knowledge rights.

Indigenous communities should be empowered to enjoy the appropriate intellectual property rights on their innovations or traditional knowledge and may negotiate with potential investors by establishing Societies or Trusts to protect their interest. Future BITs involving African States should protect the sustainable use of access to traditional knowledge developed by indigenous peoples and local communities while recognizing fair and equitable participation in the benefits derived from the access to the traditional knowledge.

African countries should provide within their national laws general principles for the registration of traditional folklore, historical or traditional designs, native objects, and all other indigenous resources that are sought, used or exploited by Investors. These countries can find guidance in the African Model Law on the Protection of the Rights of Local Communities, Farmers, Breeders and the Regulation of Access to Biological Resources (AML), which was adopted by the 68th Ordinary Session of the Council of Ministers of Organistion of the African Union held in Ouagadougou, Burkina Faso, in June 1998. The AML provides African countries with a framework for the formulation of laws to protect traditional knowledge in accordance with their economic development objectives, political orientations and national interests.

The WIPO Arbitration and Mediation Centre already has a structured ADR mechanism and rules for resolving disputes between Indigenous people and private parties. The WIPO ADR structure can be incorporated into the Investment Protocol and future bilateral investment treaties involving the African States. ADR is appropriate as the first step of dispute resolution mechanism because the issues that arise regarding traditional knowledge often involve complex layering of interests and responsibilities within traditional and local communities.

ADR can therefore allow for a comprehensive understanding of the intricate relationships and enhance the efficacy of arbitration under future international investment instruments. Article 27 of the Convention on Biological Diversity recognizes ADR as an important precursor to arbitration in

disputes involving indigenous and local communities.

Investment arbitration tribunals should recognize indigenous communities' rights to file *amicus curiae* briefs in arbitrations that impact traditional knowledge. This will mitigate the concern that the current ISDS framework unfairly allows investors to make a claim for the loss of opportunities when a state protects or advances indigenous rights. New Zealand has made headway with its draft ISDS Protocol which is to address the impact of investor- State disputes on the rights of the Maori people.

It is imperative that African countries develop a concrete plan of action and investment standards that will (a) protect and preserve knowledge, innovations and practices of indigenous communities (b) promote the wider application, with the approval and involvement of the holders of such knowledge, innovations and practices, and (c) encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

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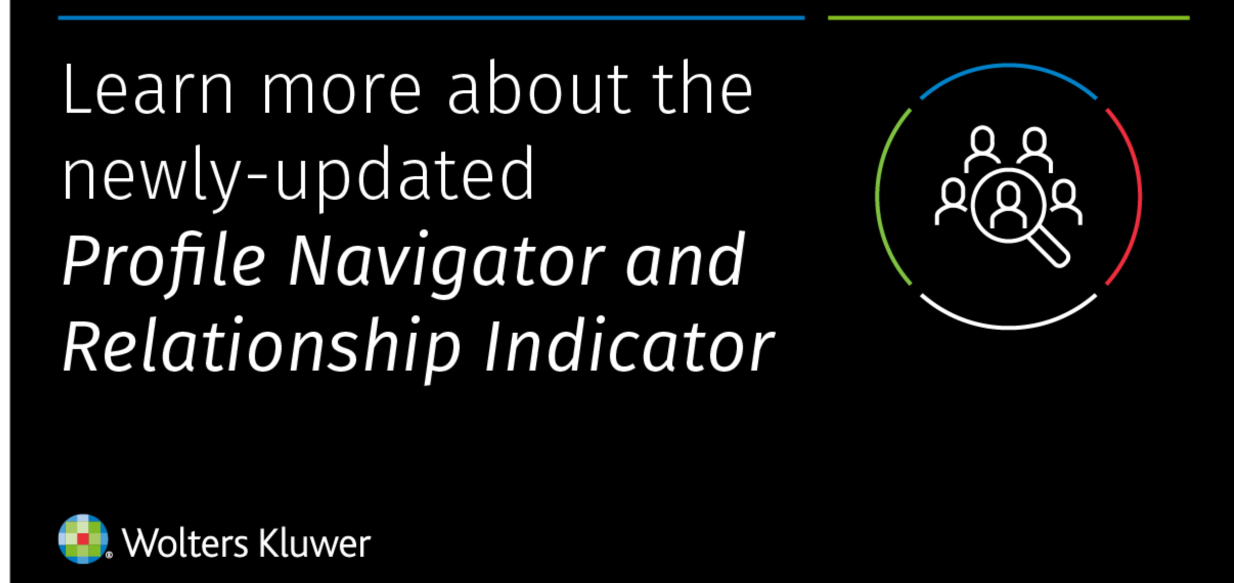

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