

Intellectual property rights and traditional knowledge



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Traditional knowledge encompasses the beliefs, knowledge, practices, innovations, arts, spirituality, and other forms of cultural practices that belong to indigenous communities worldwide. The intergovernmental board on rational property and inherent resources, customary awareness and tradition has met ten times since 2001 and the Tenth Session took place in Geneva, 30 November-8 December 2006. The committee has been discussing intellectual property issues as they arise in relation to the protection of traditional knowledge and traditional cultural expressions and access to hereditary resources and profit sharing.

1) What is Indigenous/traditional Knowledge?

Traditional Knowledge is the knowledge usually related to the environment. This knowledge is owned by the whole community. Holders of traditional knowledge want to be protected against publication of culturally sensitive information.

A holder of traditional knowledge wants a system which can contribute to the preservation and safeguarding of traditional knowledge and the customary means for their development, preservation and transmission, and promote the conservation, maintenance, application and wider use of traditional knowledge, for the direct benefit of traditional knowledge holders in particular, and for the benefit of humanity in general. WIPO (1999)

For example in Australia the case of Dr. Mountford, who undertook an expedition to the Northern Territory outback in 1940. Local Aboriginal people revealed to him tribal sites and objects possessing deep religious and cultural significance for them. The publication was held by the court as it

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could disclose information of deep religious and cultural significance to the Aborigines.

The system should recognize the intrinsic value of traditional knowledge, including its social, spiritual, economic, intellectual, scientific, ecological, technological, commercial and educational value.

Intellectual Property law:

Intellectual property law covers a wide range of rights and privileges and in the UK is defined by s. 72(5) of the Supreme Court Act 1981 (amended by Copyright, Designs and Patents Act 1988) to include;

There are some serious concerns about the suitability of the existing IPR system to the indigenous people's traditional knowledge. The indigenous communities generate and possess their traditional knowledge collectively. The difficulty experienced by indigenous peoples in trying to protect their traditional knowledge under intellectual property (IP) rights law stems mainly from its failure to satisfy the requirements for protection under existing IP law. Reference

Chapter 2

WIPO (1999) " Intellectual Property Needs and Expectations of traditional knowledge Holders", WIPO Report on Fact-Finding Missions 1998-1999, WIPO, Geneva (Publication Number 768E). Source: <http://www.wipo.int/globalissues/tk/report/final/index.html> 9/05/2008

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Paragraph 19 of Doha WTO Ministerial Declaration (WTO Document No. WT/MIN(01)/DEC/1) adopted on 14 November 2001, calls for the TRIPS Council to examine the issue of protection of traditional knowledge and folklore. Source: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.doc

Chapter Three

Safety Of Sui-Generis Protection Of Traditional Knowledge And Genetic Resources 3. 1. Introduction

Traditional knowledge holders are concerned about loss of traditional lifestyles and knowledge because the young ones of the community cannot carry forward traditional practices. They also want their traditional knowledge to be respected together with the holders. They are against misappropriation of traditional knowledge including use of traditional knowledge without any benefit sharing, or use in a derogatory manner. Lack of recognition of the need to preserve and promote the further use of traditional knowledge is also their concern. They also advocate for equity considerations in the sense that the custodians of traditional knowledge to be fairly compensated if traditional knowledge leads to commercial gain.

A single solution can hardly be expected to meet such a wide range of concerns and objectives. To address these concerns two options can be put in place namely:

- Intellectual property rights (IP) system
- Sui Generis Protection

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Intellectual property rights (IP) system

Intellectual property system can be utilised to commercialize traditional knowledge or prevent its misuse. For example, Aboriginal and Torres Strait Islander artists in Australia have obtained a national certification trademark. The intellectual property system is useful to universities and R&D organizations first as a source of information from where further knowledge can be created and can be used to plan for further studies in the area of concern and as literature. It can be used as a source for products and services when their industrial or commercial exploitation is used for social, cultural or economic gains. Correa, C. (2001)

However hindrances for effective management of intellectual property rights are those associated with the lack of abundance in reference materials, necessary to create confidence. Often, the institutional policy will not cover all the areas associated with the different areas of intellectual property. Lack of a dynamic and rewarding policy, which is fully communicated to members, will also be of some hindrance. It is important that stakeholders are involved in its evolution and review process. Finally, the difficulty of enforcement due to infrastructural shortcomings should be expected. This would be viewed as a result of funding, cultural issues and weak economics and industries

Sui generic system

Sui generis is a Latin phrase which means “ of its own kind.” It is a system which has been designed specifically to address the needs and concerns of a particular issue.

Prior Informed Consent

Countries have already decided that the existing intellectual property system is not, on its own, adequate to protect traditional knowledge. A number of them have enacted or are in the process of enacting sui generis systems of protection. Access by other parties will be based on the prior informed consent (PIC) of the community obtained according to customary laws. Any benefits arising from genetic resources or associated knowledge will be equitably shared.

The Philippines has enacted legislation, and is considering further provisions, giving indigenous communities rights over their traditional knowledge. Access by other parties will be based on the prior informed consent (PIC) of the community obtained according to customary laws. Any benefits arising from genetic resources or associated knowledge will be equitably shared.

Costa Rica has not yet fulfilled the participatory process to determine the nature and extent of the sui generis community intellectual rights.

With this system apart from sharing the benefits, if tangible returns are generated it can attract greater involvement of younger members of the community.

However with such a wide range of material to protect and such diverse reasons for “protecting it”, it may be that a single all-encompassing sui generis system of protection for traditional knowledge. The system would allow all plant genetic resources to be monopolised. Plant breeding would thus come to a standstill.

Convention on Biological Diversity (CBD)

The Convention, which was agreed in 1992, seeks to promote the conservation of biodiversity and the equitable sharing of benefits arising out of the utilisation of genetic resources.

It asserts the sovereign rights of nations over their national resources, the right to determine access according to national legislation with the aim of facilitating the sustainable use of these resources, promoting access and their common use. To date about more than fifty countries have developed national access and benefit sharing legislation. Some of the examples are mention below.

a) “ Pakistan (Draft Legislation on Entry to Biological and Community privileges, 2004 whose one of its major aims is to protect and encourage cultural diversity, valuing creativity, practices and knowledge of local communities.

b) Bangladesh (Draft Biodiversity and Community Protection Act of Bangladesh, 1998). whose number one general objectives is to safeguard the sovereign rights of the Communities that have understanding of biodiversity, and have managed, maintained , preserved, reproduced and improved biodiversity

c) India (Biological Diversity Act, 2002; Biodiversity Rules, 2004). Authority is given to the implementation sanction grants-in-aid and grants to the State Bio-diversity Board and Biodiversity Management Committees for specific

purposes and also undertakes physical inspection of any area in connection with the implementation of the Act.

d) Malaysia (Sarawak Biodiversity Center Ordinance, 1997; Sarawak Biodiversity (Access, Collection and Research) Regulations, 1998; Sabah Biodiversity Enactment, 2000). One of its penalty states that any person who, without a permit from the Council, collects or takes away any protected resources from their habitat or place where they are found or grown or take such resources out of the State, shall be guilty of an offence: Penalty, a fine not exceeding fifty thousand ringgit or imprisonment for a term not exceeding three years or both.

e) Philippines (Executive Order No. 247, 1995; Department of Environment and Natural Resources Administrative Orders 96-20, 1996; Wildlife Resources Conservation and Protection Act; Republic Act No. 9147, 2001)" [26]. Article 3 of CBD recognizes the sovereign right of nations.

In spite of all these efforts, while entering into ABS contracts the current access and benefit mechanism has failed to effectively resolve the major problems faced by the local communities and countries.

Reference

Correa, C. (2001) " *Traditional Knowledge and Intellectual Property* ", QUNO, Geneva. Source: <http://hostings.diplomacy.edu/quaker/new/doc/tkcol3.pdf>
09/05/2008

Sui generis system of protection is a distinct system tailored or modified to accommodate the special characteristics of traditional knowledge or folklore. <https://assignbuster.com/intellectual-property-rights-and-traditional-knowledge/>

Sui generis systems of protection are already provided in areas such as the protection of plant varieties (UPOV system) and protection of databases (EC Directive 96/9/EC, 11 March 1996. Source: http://www.eurogeographics.org/WorkGroups/WG1/eu_directive.pdf). 09/05/2008

Chapter 4

Overview Of The Ipr And Traditional Knowledge Debate In International Negotiations The importance of protecting and preserving indigenous traditional knowledge has been recognized in several international instruments, including the WIPO, CBD and the TRIPS Council of the WTO.

4. 2. Convention on Biological Diversity

The convention was drafted at the 1992 “ Earth Summit” in Rio de Janeiro, Brazil [30] and it came into force in 1993 [31]. The convention emphasized what is depicted in article 8(j) the most important provision of CBD on indigenous knowledge, it reads: “ Each Agreeing Party shall, as far as likelihood and correctness: focus to its national law, protect, value, and maintain understanding , innovations and of local and practices of local and native group. It implies that local communities embodying traditional life styles possess an equal status to indigenous peoples.

4. 2. The Conference of the Parties (COP)

COP is a decision making body of the convention whose function is to regularly review implementation of the convention [41]. In 6th convention of Parties, the Working group of Entry and profit sharing adopted Bonn Guidelines [20] under decision VI/24. The ABS Decision of the seventh <https://assignbuster.com/intellectual-property-rights-and-traditional-knowledge/>

conference mandated the operational group on ABS and Article 8(j) to expound and bargain an intercontinental regime on access to genetic resources and profit sharing with the objective to efficiently implement the provision in Article 15 aimed Article 8(j) [49].

Comments

The COP had failed to take any considerable action at the international level.

4. 3. The Bonn Guidelines

They were officially adopted to provide for a set of rules that will facilitate the drafting and further development of national biodiversity legislation. The Guidelines encourage parties to “ adopt measures to reveal the source country of the genetic resources and traditional understanding, innovations, , benefit sharing, and norms of local and native group in application for intellectual property privileges. • Criticism

The guidelines were criticized by several environmental NGO', arguing that voluntary non binding Guidelines can never replace legally binding instruments. The voluntary position of the Guidelines will provide member states with an excuse for non- action.

Analysis

Despite of criticisms, they are a vital step towards the harmonization of the regime of access and benefit sharing. The CBD help foster bilateral agreements between the providers and users of resources.

4. 4. TRIPS, Traditional Knowledge and Genetic Resources

The relevant provisions in this regard could be Article 39 (protection of undisclosed information), if the TK is kept as secret knowledge, and Article 22 (protection of geographical indications).

The developing countries also argued that the exclusions in Article 27(3) (b) should be clarified. In November 2001, the widely published “ Doha Declaration” was issued at the fourth WTO Ministerial Conference held in Doha, Qatar. The protection of traditional knowledge and folklore was given particular attention.

As a contribution to this examination, several developing countries in together with other groups of developing countries, submitted a paper to the Council for TRIPS in June 2002. The paper proposed that WTO Member States to meet the following requirement:

- (i) Original disclosure of the country and source of the biological resource traditional understanding used in the invention;
- (ii) Proof of well knowledgeable consent through approval of authorities under Evidence of prior informed consent through approval of authorities under significant national regimes.
- (iii) Proof of just and equitable profit sharing under the national regime of the original country.” [63].

The United States and Japan have raised the primary objections to the above. These countries have argued that:

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(i) Such corrections would not be constant with TRIPs Agreement and would be in violation of the rule of non-discrimination amongst field of technology;

(ii) Expanding the norms of disclosure would amount to a legal and administrative “ nightmare” and an unnecessary burden on the patent applicant and the Patent office [64].

Analysis

Countries avoid the misappropriation of traditional knowledge and with the implementation of the sharing of benefits principle, than with the development of an intellectual property rights regime for traditional knowledge (most notably U. S. and Japan).

4. 5. WIPO's Inter-Governmental board on rational possessions and inherent Resource, customary Knowledge and Tradition. The IGC is very much concerned about enhancing the protection of Traditional Knowledge and has therefore focused on understanding the needs and expectations of traditional communities. Also at the IGC third session, World Intellectual Property Organization produced a paper called “ Elements of Sui Generic System for the Protection of Traditional Knowledge”. [45] In Autumn 2005, the WIPO's General Assembly extended the mandate of IGC to continue its work on achieving feasible solutions to the protection of Traditional Knowledge In July 2007 meeting of the WIPO's Intergovernmental Committee (IGC), the developing countries were demanding an international legally binding instrument to protect their resources, while developed countries such as United States, Japan, want a non-binding recommendation.

Indigenous people's organizations expressed frustration, that both genetic
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resources and traditional knowledge are open to misappropriation.

Organization (WIPO) as to whether there should be a binding International treaty to protect genetic resources, [73].

4. 6. Discussion

Winding up the discussion, determination of positive synergies between various international regimes in the context of IPR, vis a vis, protection of GRs and related TK is a politically and technically intricate and challenging endeavor. However it has been shown that addressing some of the cases under conversation and the most significant international forums where this discussion takes place, in regard to TK protection and profit sharing, still remains far from achieved [53].

Law and policy needs to check the following:

- a) Nations of origin assert their rights over their genetics resources,
- b) Assured benefits of the use these resources are shared equally.
- c) Native people's intellectual efforts well protected [53].

4. 7. Summary

Compared to the situation that existed a decade ago, currently WIPO, CBD, Council of TRIPs and several other national and regional process are involved in finding decision to establish constructive synergies among IPR and biodiversity related issues, which in itself is an important development [53].

The author is of the view that one of the effective strategies for developing countries, in the wake of heightened debates over TK protection and monopolization attempts of industrialized nations.

Nations exercise sovereignty in the safeguarding of hereditary resources and similar traditional understanding with the kind of measures they put in place.

The wealth of genetic resources and related traditional knowledge plays an important part in the general well being, food security and health care of the indigenous communities.

Reference

Pires de Carvalho, N. (2000) “ *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications without Infringing the Trips Agreement: The Problem and the Solution* ”, Washington University Journal of Law and Policy, vol. 2, pp. 371-401

McDonald, S. (2001) “ *Exploring the hidden costs of Patents - notes of a talk given at Quakers House Geneva 16 May 2001* ”, QUNO Occasional Paper 4, QUNO, Geneva.

The Indigenous Peoples Rights Act of 1997, Republican Act No. 8371. Source: <http://www.grain.org/docs/philippines-ipra-2008-en.pdf>, and The Community Intellectual Rights Protection Act 1994 Senate Bill No. 1841 (still pending). Source: <http://www.grain.org/docs/philippines-cirpa-2008-en.pdf>

Chapter 5

The Philippines Experience

Philippines have vast variety of traditional knowledge concentrated in health care, agriculture and forestry just to mention a few.

The Philippines was the first country to introduced legislation on access to genetic resources, with the signing of Executive Order 247 (EO 247), “ Prescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, their By-Products and Derivatives, for Scientific and Commercial Purposes, and for Other Purposes”, on May 18, 1995 [6]. Because of the wide scope and the procedure required for the prior informed consent, certain problems were experienced in implementing EO 247. The law stipulates that indigenous societies are owners of their knowledge of traditional medicine and when outsiders use the information they must acknowledge the source and demand a share of any financial return coming from commercial use.

The legislation however seeks to maintain the free exchange of biodiversity among local communities.

This prevents exploitation of the community’s resources by foreigners with no benefits to the actual owners of the resources.

In the context of compliance with the International regimes, TRIPS Agreement, the Philippines has an Intellectual Property Code of the Philippines, i. e. Republic Act No. 829300. This code covers economic rights of the country [32]. which shows the government commitment towards

protecting the rights of indigenous communities to ownership of their resources

Analysis

Law regulating access to genetic and biological resources (IPRA and EO 247) have both tried to pave the way for mutual research efforts.

The use Genetic Resources in safeguarding Traditional Knowledge Vietnam:

In spite of the importance hereditary resources and traditional understanding in the lives of Vietnamese people, the results of the survey conducted by WIPO in accordance to test out the legislative steps taken by the Vietnamese government, unfortunately shows that hardly any efforts have been taken by the law makers for the protection of traditional knowledge.

However, the Government Decree No. 7-CP of February 1996 elaborates the following measures taken.

a) “ Article 4: The overall policy of the Government is to invest for building national capacity in conserving, selecting, producing and carrying on the business of developing seed varieties”. This means greater biodiversity in the country

b) Article 8: Genetic resources are to be considered as national property and managed by the State. All organizations and individuals are encouraged to prospect for, collect, preserve, utilize and enrich genetic resources for the benefit of the national economy and social welfare. In this regard, the Ministry of Agriculture and Rural Development (MARD) is the main

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government body responsible for the management of development of seed varieties by the State. This prevents exploitation of national resources for selfish gains.

Vietnam and International Regimes

Vietnam needs to elaborate a national structure for the safety of heritable resources and customary knowledge. In this regard, MARD is drafting legislation guard of generic resources and similar traditional norms.

Protection of Traditional Knowledge in Indonesia

The existing Indonesian intellectual property provides little legal protection for traditional knowledge. Some sort of protection is given under the existing “ copyright, distinctive signs and trade secret law” [40]. Some of these laws were further amended

In addition, the intention to provide protection to traditional knowledge is also clear from the media report on copyright, Law No 19/2002. And also an informal version of the said law, indicate that “ Article 10 vests in the State the copyright to, inter alia, prehistoric remains, historical and other national cultural objects, stories, legends, folk tales, epics, songs, handicrafts, choreography and dances”[40]. Moreover, the publication by the Indonesian National News Agency shows the government willingness in preventing the outsiders from illegally accessing and patenting other people’s knowledge. [40]. The importance of Intellectual property Rights is visible from submission of the draft of new IPR regulations to the people’s Consultative Assembly.

The Indian Experience

India formally established under the National Biodiversity Act, Traditional Knowledge Digital Library (TKDL). It was considered as a great step forward for preventing misappropriation of traditional knowledge and help in identifying the real traditional knowledge rights holders. The Biodiversity Act 2002 is the first attempt of the Indian legislators attains the aim of CBD. In practice the protection mechanisms are not very effective and are regarded as greatly biased against the safety of the native communities.

Guarding of Genetic Resources and Customary Understanding in Pakistan is blessed with enormous amount of natural resources and also is rich in bio wealth. Due to a range of climate zones and various environmental conditions, the country has got a great capability for producing all sorts of food products.

A Biodiversity Action Plan for Pakistan (BAP)

The increasing environmental problems led to the Biodiversity Action Plan in 1999, which is the most important step taken by the government of Pakistan to prevent biodiversity loss. In collaboration with World Conservation Union, Pakistan (IUCN) and World Wide Fund for Nature, the Government of Pakistan, Ministry of Environment, Local Government and Rural Development, put forward the Biodiversity Action Plan [47].

Draft law on entry to Biological Resources and Community privileges 2004

In order to established fundamental grounds for an ABS mechanism, the Pakistani Ministry of food, Agriculture and livestock is working on draft <https://assignbuster.com/intellectual-property-rights-and-traditional-knowledge/>

legislation [49]. This draft is in accordance to the international Convention on Biological Diversity, which will help in providing protection to the rights of indigenous communities of the country.

The Way Forward

Pakistan has accomplished little so far, due to lack of implementation of the new policies due to lack of funds, skilled personnel and infrastructure. The government should use the sovereign rights stipulated in the CBD to put in place measures to protect biodiversity. In addition, there is a need to address the institutional flaws, which includes the deficiency of monitoring and enforcement mechanisms.

Claims regarding unfulfilled requirements of patentability.

Here we will discuss the well-known cases of Turmeric and Basmati rice, which send a signal to biotech companies or organizations, not to treat the developing countries resources as a free good.

1. The Turmeric Case

This has been a milestone success for a developing country like India to protect the traditional knowledge of its indigenous communities and discourages the illegal obtaining of patent over their knowledge.

2. The Basmati Case

It was concerned with protection of traditional knowledge and geographical indications. It involved new strains of rice which were to be sold under the

name Basmati by a Texas based company, but protests emerged from India and Pakistan over the repercussions the name could have on their communities. The case showed that it is expensive to challenge biopiracy cases.

CONCLUSION

Effectively protecting the genetic resources, traditional knowledge, and folklore is very important for the developing countries and the most undeveloped countries against the background of the international trade, and concerned with the interests of the developing countries and the most undeveloped countries. If we can find some useful solutions to effectively protect genetic resources, traditional knowledge, and folklore, the position of the developing and most undeveloped countries in the international trade will be strengthened.

The issue of protecting of genetic resources and associated traditional knowledge is a global issue and still receives attention it deserves. Generally speaking, WTO agreements, including TRIPS Agreement, are a deal between the developed countries and the developing countries, and the whole agreements of WTO are balanced in the interests of the developed countries and the developing countries. On the one hand, the developing countries accepted the standards or criteria for the protection of intellectual property set up by the developed countries. This is good for developed countries, and helped them to strengthen their position in the international trade. On the other hand, the developing countries participated in the new world trade

system, and benefited from this trade system. Some of them even since then have enjoyed MFN from some of the developed countries.

There have been championing for the formation of new intercontinental lawful protections for these resources, but questions remained unanswered. Who would benefit from the safety measures created for heritable resources, traditional knowledge, or myths? No country, person or worldwide organization has been able to identify the particular beneficiaries of these sought after security measures. None also has determined to what extent of such safeguarding might be what would involve "fair use" or additional exceptions of restrictions, or even what enforcement mechanisms could be functional.

A few countries want to stop others from using their customs while others want to make or commercialize from such use. How could any one structure include these benefits? And to complicate the matter, there is no contract as to what exact damage would be solved by new means of protection.

One step taken to react to customary know how holders, said Linda Lourie, makes sure that patents are not approved on recognized process or products, including those that are measured in customary information.

A patent is a funding by a national government to an author for the right to exclude others from producing, using, or selling his or her innovation. To qualify for patent safeguarding in many nations, a discovery must needs to be new, useful and not to be minor addition of what is already known. A few customary understanding the rest will seek Patent regarding greater understanding and reap the profit from it.

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Though considerable work has been done for the protection of such knowledge and resources, a challenging agenda of research and policy still lingers in the minds of many. How extensive are genetic resources and indigenous knowledge of countries, and to what uses can they be utilized. The activities in this regard can be observed, not only in the framework of international organizations, but as several developing countries have also made tremendous efforts for introducing effective legislations for promoting and conserving genetic resources and traditional knowledge.

The significance of publishing customary knowledge and making that information accessible to patent examiners worldwide cannot be overemphasized, said Lourie. "If customary understanding is documented, that understanding may not be topic of patent, even if it is not broadly known in a developed country."

The United States is encouraging other nations to create digital databases to record their customary understanding and guard it from patent attempts. Digital databases would permit patent examiners globally to search and scrutinize customary knowledge. In the US, few Native-American tribes are cataloguing their tribal values in a way that fulfils the need for recording and the need to deny strangers entry to information. Eric Wilson, the Tulalip ethnic in the dialects in the state of Washington in the US, for instant, have determines who is to have way in to what customary information about their familiarity, culture, history, or practices. Some users have unrestricted entry, while the rest, like US. Patent examiners, may have restricted access.

Some holders of customary understanding want to be exact that new technologies original from their customary knowledge include a fair distribution of benefits. These communities may want to bargain contractual benefit-sharing agreements about new processes or products produced through study using their customary understanding. Lourie warned, that it could be a blunder to anticipate from such contracts; to present; few economic repayments have accrued from commercialization of customary knowledge.

Factors contributing to this include recognizing that TK's significance in the lives of the popular world and in the preservation of biodiversity, concerns about the massive loss of TK, little or no sharing of resulting payback with the original holders of TK, interest in capturing the potential of TK for local sustainable growth, and increasing concern to native rights.

Most importantly, how do providing countries tackle the misappropriation of such knowledge and resources? In all these areas, the developing countries can build a credible international negotiating position.

Developing Countries in Asia: The Concerns

As far as the smooth and successful adoption of international provisions and regimes into domestic laws