PROTECTION OF TRADITIONAL KNOWLEDGE: INTERNATIONAL INITIATIVES AND SUI-GENERIS OPTIONS

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Abstract : Traditional Knowledge is that area in the modern IP regime which offers a lot for research. The very nature of TK poses a challenge to the traditional IP thinking. There are some inherent characteristics of traditional knowledge which makes it incompatible with existing IPR regime. They are not considered to be a protectable subject matter under TRIPs, but still TK deserves protection through a sui-generis model of protection. This paper aims to discuss various *sui-generis* models adopted by most bio-diverse countries of the world for protection of traditional knowledge.

IndexTerms **– indigenous people, collective knowledge, biological resources, benefit sharing.**

I. INTRODUCTION

Commercialization of genetic resources and traditional knowledge (TK) of indigenous communities has emerged as a mainstream issue in international negotiations on the conservation of biological diversity, international trade, and intellectual property rights including the TRIPS Agreement. It has been argued that TRIPs does not offer adequate protection to the indigenous communities and their traditional knowledge. Hence, the formal IPR system is often criticized for legitimizing its misappropriation. Solutions to the protection of traditional knowledge in IPR law may be sought in terms of 'positive protection' and 'defensive protection'. Positive protection refers to the acquisition by the TK holders themselves of an IPR such as a patent or an alternative right provided in a *sui-generis* system. Defensive protection refers to provisions adopted in the law or by the regulatory authorities to prevent IPR claims to knowledge, a cultural expression or a product being granted to unauthorized persons or organizations.[1]

Sui generis rights are alternate models created outside the prevailing intellectual property regime. Protection by such *sui generis rights has* been considered as an option to protect plant variety and traditional knowledge, though very little has evolved on account of the nature of the property sought to be protected. Article 27.3 of TRIPS allows countries to exclude plants and animals from patenting. This clause also provides protection by *sui-generis* systems. The issue, however, is that the contours of *sui generis* rights are unclear and the mechanism for enforcement uncertain.[2]

II. INTERNATIONAL INITIATIVES

Although there is no specific convention or treaty dealing with the same but there have been certain provisions in various conventions emphasizing on the need of protection of traditional knowledge. In 1992, in Rio de Janeiro, the Rio Declaration on Environment and Development establishing the **Convention on Biological Diversity (CBD)** was adopted to promote the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilization of genetic resources. Provisions on the respect and recognition of traditional knowledge are a key element of the CBD, and important work is underway within the CBD framework to implement these provisions. Likewise, IP protection of TK is deeply linked to the objectives of the CBD. It recognizes the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.[3]

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established in 2001 and it began to study the issues related to providing an international dimension to protection of TK associated with the use of genetic resources. IGC made a series of discussions and debates on TK related issues with other international instruments such as CBD and WTO-TRIPs. The ongoing discussions and negotiations helped to develop two main approaches to IP protection to ensure the protection of TK: 1. Positive protection i.e. establishing legal entitlements for TK holders, 2. Defensive protection- i.e. safeguarding against illegitimate acquisition of IPR over TK or associated genetic resources.[4]

The WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge suggests that "traditional Knowledge is a horizontal, cross-cutting issue, the approach adopted by the different organizations takes a specific character, which is naturally a reflection of each organization's particular mandate and objectives. Differences in perspective have helped enrich the debate and, more importantly, have stressed the need for collaborative and cooperative approaches – respecting each institutions respective mandate and areas of expertise – to finding operative and efficient ways of protecting TK, by using existing IP mechanisms, or by developing a new, sui generis one, or by adopting a combination of both."[5]

In 2007, the United Nations General Assembly adopted the **United Nations Declaration on the Rights of Indigenous People**. The Declaration recognizes that "indigenous people and individuals are free and equal to all other people and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity" (Article 2). Article 31 provides that indigenous people "have the right to maintain, control, protect and develop their Intellectual Property over such cultural heritage, traditional knowledge and traditional cultural expressions. The declaration is frequently referred by WIPO.

Further the **Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization** (ABS) to the Convention on Biological Diversity is a supplementary agreement to the Convention on Biological Diversity. It provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources.

III. NATIONAL INITIATIVES- SUI-GENERIS SYSTEMS OF PROTECTION

In furtherance of the efforts of the international community towards protection of traditional knowledge at global level, several initiatives have been taken at the national and regional level by various bio-diverse countries in order to prevent misappropriation of genetic resources and related knowledge. This paper highlights the African, the Brazilian, the Peruvian, the Panama and the Costa-Rican models for protection of traditional knowledge followed by the Indian law.

1. **Africa:** The African Union introduced the **"African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources"** in 2000 as guidelines for its fifty-three member states. Its objective is to recognize, protect and support the inalienable rights of local communities, including farming communities, over their knowledge and technologies; to provide an appropriate system for access to community knowledge and technologies. The legislation aims to protect biological resources, their derivatives, 'community knowledge and technologies' as recognized subject matter. It is relevant to mention that this model considers traditional knowledge to be a 'community knowledge or collective knowledge' and accordingly, the whole community is considered to be the holder of the knowledge. It also recognizes the access and benefit sharing mechanism which implies that local communities have the right to refuse access to their TK where such access will be detrimental to the integrity of their natural or cultural heritage. The model provides for 'National Information System' which shall include documentation of information on Community Intellectual Rights, Farmers Rights, community innovations, practices, knowledge and technologies. It further states that local communities may also establish databases on the knowledge and technologies of those communities. The law also provides for sanctions and penalties in case of non-compliance. "National Competent Authority" (NCA) is the regulatory body entrusted with the powers to implement the provisions in true letter and spirit.[6]

2. **Brazil:** The law **"Brazil Provisional Measure No. 2186-16 of 2001- Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge"** is intended to cover "traditional knowledge of indigenous and local communities relating to the genetic heritage" which it defines as "information or individual or collective practices of an indigenous or local community having real or potential value and associated with the genetic heritage. The Provisional Measure establishes a Management Council to administer it by establishing: (a) technical standards, (b) criteria for authorization of access and dispatch; (c) directives for drafting the Contract for Use of the Genetic Heritage and Benefit-Sharing; (d) criteria for the creation of a database for recording information on associated TK. The Provisional Measure protects TK associated to the genetic heritage "against illicit use and exploitation and other actions that are harmful or have not been authorized" by the Management Council or an accredited institution. Further the communities that create, develop, hold or preserve TK associated to the genetic heritage are guaranteed the right "to have the origin of the access to TK mentioned in all publications, uses, exploitation and disclosures"; to "derive profit from economic exploitation by third parties of associated TK the rights in which are owned by the community". Article 8 states that TK protection "shall not affect, prejudice, or limit rights pertaining to intellectual property" and that protection shall not impede "preservation, use and development of TK." Article 4 also states that "customary uses by communities should be preserved in all cases." The Management Council can deliberate on "authorization of access to associated TK, subject to the prior consent of the owner". Under Article 16, access to associated traditional knowledge, shall be had by collection of information respectively, and authorization shall only be given to a national research institution in the biological and related fields by prior authorization. Access to TK associated with the national heritage shall be had by collection of information and authorization shall be given to a national institution that research in the biological or related fields by prior authorization. Article 9 also guarantees the rights to the Indigenous or local communities on the condition that they created, developed, held or preserved the TK.[7]

3. **Costa Rica:** The "**Costa Rica Law No. 7788 of 1998 on Biodiversity"** applies to the components of biodiversity that are found under the sovereignty of the State as well as to the processes and activities carried out under its jurisdiction or control, independently from those effects which manifest themselves inside or outside the zones subject to national jurisdiction. This law regulates specifically the use, management, associated knowledge and equitable distribution of the benefits and derived costs of the use of the components of biodiversity. The Law includes TK as an intangible component within the term "biodiversity." Article 7 defines that "intangible components, which are: the knowledge, innovations and practices, be they traditional, individual or collective, with real or potential value associated with biochemical or genetic resources, whether these are protected or not by systems of intellectual property or by *Sui Generis* registration systems." The National Commission for the Management of Biodiversity (NCMB) is an administrative authority established to formulate and co-ordinate policies for access to biodiversity and associated knowledge. The scope of *Sui Generis* community intellectual rights shall be determined by a participatory process with indigenous and small farmer communities to be defined by the National Commission for the Management of Biodiversity in Article 83 which says, "the Right Holder Who will be the title holder of *Sui Generis* community intellectual rights shall be determined by a participatory process with indigenous and small farmer communities to be defined by the National Commission for the Management of Biodiversity." Conditions of access are included in the regulation of access to biodiversity: "Access" is defined as "Action to obtain samples of components of Biodiversity or to obtain associated knowledge". The law recognizes the right of local communities

and indigenous people to oppose access to their resources and associated knowledge. The access policies proposed by the National Commission on the Management of Biodiversity constitute the general rules for access and for the protection of intellectual rights concerning biodiversity. Under Article 14, the NCMB Technical Office has the function to negotiate and approve access applications, and to co-ordinate anything related to access with the private sector, indigenous people and peasant communities.[8]

4. **Peru:** The "**Peru Law No. 27811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous People Derived from Biological Resources"** aims to promote respect for and the protection, preservation, wider application and development of the collective knowledge of indigenous people; and to promote the use of the knowledge for the benefit of the indigenous people and mankind in general. It affords protection to "collective knowledge of Indigenous people that is connected with biological resources." Protection is conferred to collective knowledge that is not in the public domain. The term "collective knowledge" is defined as "the accumulated, trans-generational knowledge evolved by indigenous people and communities concerning the properties, uses and characteristics of biological diversity. Article 1 recognizes "indigenous people and communities" as the persons whose rights and power to dispose of their collective knowledge are recognized. The Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI) is given the responsibility to administer the Law. (National Institute for the Defense of Competition and Intellectual Property). The collective knowledge of indigenous people may be entered in three types of register: (a) Public National Register of Collective Knowledge of Indigenous People; (b) Confidential National Register of Collective Knowledge of Indigenous People; (c) Local Registers of Collective Knowledge of Indigenous People. Article 25 to 33 deal with the provisions relating to licensing. According to which the representative organization of indigenous people in possession of collective knowledge may license third parties to use the said collective knowledge only by written contract, in the native language and in Spanish, for a renewable period of not less than one year or more than three years. Sub-licensing shall be allowed only with the express permission of the representative organization of the indigenous people that granted the license. The Peruvian Law stipulates that Indigenous people may bring infringement actions against whoever violates their rights under Article 42. Under Article 45, Indigenous people may also bring actions claiming ownership and indemnification against the third party that uses their collective knowledge in a manner contrary to the provisions of the regime.[9]

5. **Panama:** Although the Panama law is not dealing with biological resources or genetic resources and its related knowledge but still it is significant so as to address the issue of protection of traditional cultural expressions (T.C.Es) and folklore. The purpose of the **"Panama Law No. 20 of June 26, 2000, on Special System for the Collective Intellectual Property Rights of Indigenous People for the Protection and Defense of their Cultural Identity and their Traditional Knowledge"** is to protect the collective intellectual property rights and traditional knowledge of indigenous people in their creations, such as inventions, models, drawings and designs, innovations contained in the images, figures, symbols, graphics, stone carvings and other details; as well as the cultural elements of their history, music, art and traditional forms of artistic expression suitable for commercial use, via a special system to register, promote and market their rights, in order to highlight the social and cultural values of indigenous cultures and guarantee social justice for them. Article 2 states that the customs, traditions, beliefs, spirituality, religion, worldview, expressions of folklore, artistic expressions, traditional knowledge and all other traditional forms of expression of indigenous people are part of their cultural heritage; they may not therefore, be the subject of exclusive rights of any kind on the part of third parties that have not been authorized via the intellectual property system, such as copyright, industrial designs, marks, geographical indications and other indications, unless expressly requested by the indigenous people. The Law recognizes the collective rights of indigenous people in their musical instruments, music, dances or performances, the oral and written expressions that are part of their traditions and make up their historical, cosmological and cultural expression under Article 4. Requests for registration of these collective rights shall be made by the respective Congresses or traditional indigenous authorities to the Directorate General of Registration of Industrial Property of the Ministry of Commerce and Industry, hereinafter DIGERPI, or to the National Copyright Directorate of the Ministry of Education, as appropriate, for approval and registration. Under Article 9, the DIGERPI shall create the position of collective indigenous rights examiner, to protect the intellectual property and other traditional rights of indigenous people. This public servant shall be empowered to examine all applications made to DIGERPI in relation to the collective rights of indigenous people and to prevent registrations in violation of this Act. Article 15 and 16 deals with use and marketing rights. Article 17 to 23 deal with prohibitions and sanctions.[10]

IV. THE INDIAN STANDPOINT

The objective of the Indian Biological Diversity Act of 2002 is to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge. The Act does not define right holders, but defines in Section 2 the term "benefit claimers" to include "creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application." Section 8(1) of India's Biological Diversity Act, 2002 establishes the National Biodiversity Authority (NBA). Section 36 of the Act maintains that the scope of rights granted by measures for protection, including *Sui Generis* systems, shall be "as recommended by the National Biodiversity Authority. The Act provides that measures to protect TK "may include registration of the knowledge at the local, state and national levels," but does not expressly define registration as the required procedure for the acquisition of the legal protection foreseen in the Act. Section 3 of the Act states "the obtaining of any knowledge associated to biological resources occurring in India is subject to previous approval of the NBA for certain persons for purposes of research, commercial utilization, bio-survey or bio-utilization" and, further, that "any person who intends to be obtaining of any knowledge associated to biological resources occurring in India is subject to previous approval of the NBA for certain persons for

purposes of research, commercial utilization, bio-survey or bio-utilization." Section 36 of the Act provides that measures to protect TK "may include registration of the knowledge at the local, State and national levels." Section 41 further provides that "every local body shall constitute a Biodiversity Management Committee for conservation and documentation of biological diversity including … the chronicling of knowledge relating to biological diversity." The Act provides that: (1) sanctions may extend to ten lakh rupees and where the damage caused exceeds ten lakh rupees such fine may commensurate with the damage caused, or with both; (2) whoever contravenes the provisions of Section 7 [Prior Intimation to State Biodiversity Board] or any order made under Section 24(2) [Power of State Biodiversity Board to Restrict Certain Activities] shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both. Section 56 regulates the penalty for contravention of directions or orders of Central Government, State Government, National Biodiversity Authority and State Biodiversity Boards.[11]

V. CONCLUDING REMARKS

The *Sui Generis* models analyzed in this paper constitute a wide range of policy choices made by the countries with regard to the protection of TK. Most *Sui Generis* measures combine two basic legal concepts to govern the use of Traditional Knowledge: (1) the regulation of access to TK, and (2) the grant of exclusive rights for TK. This combination reflects the two major legal frameworks within which most measures are adopted and implemented: intellectual property frameworks and access and benefit-sharing arrangements. In many cases, access regulation for TK is part of larger access and benefit-sharing frameworks that apply also to genetic or biological resources.

The African Union Model Legislation is the only model that is intended to be broad enough to allow the different nation states in the Union to adapt the model to suit their needs, but does maintain that PIC must be respected. Brazil's Provisional Measure is the only model that pertains specifically to Genetic Resources; therefore only concerning TK as it related to Genetic Resources; but also specifically states that any TK protection should not limit IPR laws. The Costa Rican, Indian and Peruvian Laws are all limited to TK protection as it is associated with biological resources and all draw heavily from CBD provisions. However, they differ in that as Costa Rica's Law has strong provisions for farmers rights; while India uses strong enforcements of fines and jail terms for unauthorized use; and Peru's complex Law contains Prior Informed Consent (PIC) provisions, but is intended only for TK not in the Public Domain (therefore, no retroactive protection for already expropriated TK); and royalty provisions for payments to Indigenous groups and/or an Indigenous fund.

Many of the above countries are analysing the effectiveness of these models in terms of their practical implementation. However, these countries deserve applause by the international community for their commendable momentous work on the issue. These legislations are being closely observed by international forums as models for the development of international instruments for the protection of Traditional Knowledge which is concomitant in order to safeguard the interests of the knowledge holders.

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[8] Costa Rica Law No. 7788 of 1998 on Biodiversity (Refer Article- 7, Article 7.1, Article 14, Article 66 and Article 83).

[9] Peru Law No. 27811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous People Derived from Biological Resources (Refer Article- 1, Article 2(b), Article 26, Article 33, Article 42 and 45).

[10] Panama Law No. 20 of June 26, 2000, on Special System for the Collective Intellectual Property Rights of Indigenous People for the Protection and Defense of their Cultural Identity and their Traditional Knowledge (Refer Article- 2, Article 9, Article 13, Article 15, Article 16 and Article 17 to 23).

[11] Biological Diversity Act of 2002.