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An Analysis Of Sui Generis System For The Protection Of Traditional Knowledge

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Abstract

Indigenous knowledge, both at the national and international level, is increasingly being exploited and commercialised by non indigenous people. Despite high commercial value of traditional knowledge indigenous people often derive little or no benefit from the market consumption of their traditional knowledge. The main problem of enforcing rights for contemporary indigenous groups stems from the dichotomy between the values systems of western and indigenous culture. The values of indigenous culture do not fit within the western concept of the egocentric individual that is the current focus of the legal regime today. Current intellectual property rights such as copyright, patent and trademark laws for protection of traditional knowledge are either insufficient, ad-hoc, or uncertain. However, other difficulties for protection of traditional knowledge include desire for perpetual protection, which is not available given the limited terms of western intellectual property laws and notion of communal ownership of traditional knowledge which has not been accepted in the intellectual property law. This article discusses the role of sue generis system for the protection of traditional.

Keywords: Traditional, Indigenous, Knowledge, Sui-generis, Protection, Exploitation, Intellectual Property.

Introduction

Indigenous people have also been quite vocal in their complaints about the lack of compensation, loss of community rights, misrepresentation of products and practices as indigenous, and the unauthorised public disclosure and use of secret knowledge, images and other sensitive information pertaining to indigenous communities. An improvement in the regulatory environment, arguably, would provide indigenous groups greater control over the use of traditional knowledge and ensure that access to traditional knowledge would be on terms that are mutually acceptable and respect indigenous culture. Traditional knowledge is the

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fundamental to indigenous people's cultural identity. Rights vested in traditional knowledge are more than mere property rights and accordingly, require specific sui generis protection.

Intellectual property type solution may meet some objectives but at the same time, frustrate others. This is why sui generis laws based on indigenous customary laws are, more appropriate form of protection of traditional knowledge as well as biological resources. As part of this there is much demand for the development of sue generis regime to complement or supplement the intellectual property system to the extent that the proposed schemes are premised on the protection of traditional knowledge in accordance with the customs of indigenous groups.

Defining the Words 'Sue generis' and 'Sui generis System'

Sui generis literally means "of its own kind."¹ There is no universally acceptable definition for the word sui generis system. TRIPS itself does not define what a sui generis system is² or should be. Sui generis system might consist of some standard forms of intellectual property protections combined with other forms of protections or none at all, for genetic resources.³ Potentially, a sui generis system could be defined and implemented differently from one country to another.⁴ In addition, a sui generis system might be defined to create legal rights that recognize any associated traditional knowledge relating to genetic resources and promote access and benefit sharing.⁵

The government may choose to extend protections to genetic resources and/or knowledge to a community in the form of patents, trade secrets, copyrights, farmers and breeder's rights or another creative form not currently established in the intellectual property regime. Sui generis can be further defined as a unique one⁶ and a system specifically designated to address the needs and concerns of a particular issue.⁷

According to WIPO Report on Fact- Finding Missions on Intellectual Property and Traditional Knowledge sui generis is a Latin phrase meaning "of its own kind". A sui generis, for example, is a system

¹ John R. Thomas, Intellectual Property in Industrial Designs: Issues in Innovation and Competition, Congressional Research Service Report for Congress, <http://books.google.co.in/books?id=AgAVahHIIYC&pg=PA2&lpg=PA2&dq=Sui+generis+literally+means+%E2%80%9Cof+its+own+kind.%E2%80%9D&source=bl&ots=ZVHQd1hkqq&sig=dWDVZKKiyXDzCjB0tDnZG26ifG8&hl=en&sa=X&ei=P6l2UL2EBIjrAefkoDADw&ved=0CDAQ6AEwAA#v=onepage&q=Sui%20generis%20literally%20means%20%E2%80%9Cof%20its%20own%20kind.%E2%80%9D&f=false> and also see Matthew Cousins, Architect's Legal Pocket Book, Elsevier Ltd, USA, 2011, p 82.

² Thomas Cottier and Petros C. Mavroidis, (Ed.), Intellectual Property, Trade, Competition and Sustainable Development, University of Michigan, United States America, 2003, p. 445.

³ There is demand from the indigenous people side for the inclusion of customary law and rules while framing sui generis system.

⁴ Stephen A. Hansen and Justin W. Van Fleet, Traditional Knowledge and Intellectual Property : Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity, AAAS publication, Washington, 2005.

⁵ Ibid

⁶ Ricardo Meléndez-Ortiz, Pedro Roffe, Intellectual Property and Sustainable Development: Development Agendas in a Changing World, Edward Elgar Publishing Limited, UK, 2009 p. 237.

⁷ Remigius N. Nwabuenze, Biotechnology and the Challenge of Property: Property Rights in Dead Bodies, Body Parts, and Genetic Information, Ashgate Publishing Limited, England, 2007, p. 269.

specifically designated to address the needs and concerns of a particular issue.⁸ Definition of the concept of sui generis system implies that states have a considerable degree of flexibility to determine how their legislation should meet the standard of effectiveness, which allows them to design a protection regime that is appropriate to their specific national situation.⁹ According to Suman Sahai Sui generis means “unique” or “special”, leaving the sui generis system open to interpretation. Sui generis offers a unique type of intellectual property right (IPR),¹⁰ which is different from the classical IPR, as is the case with the patent. All sui generis models that could be tailored to the specific needs and circumstances of the Members of legally recognized systems.¹¹ Since the traditional knowledge have different characteristics it is obvious that a sui generis system of protection appropriate for a developing country may require certain modifications in another developing country and these systems may not be even relevant to a developed country.¹²

Conceptualisation of Sui generis

The idea of sui generis conceptualised through the Article 27(3) of the TRIPS Agreement, which provides for a patent or an alternative sui generis protection, or a combination of both in relation to plant varieties.¹³ There is little or no reliable jurisprudence or drafting history to shed light on the meaning of the term effective sui generis system as used under the TRIPS Agreement. The connection of the term to the CBD is explained in part by Article 8 (j),¹⁴ which provides for the protection of traditional knowledge. ¹⁵Generally Sui generis can be conceptualised in two principal ways. First, it is perceived as a legal system for the protection of knowledge. Strictly, however, such a system does not, and need not, fit into mainstream intellectual property; it derives its framework or basic elements there from.¹⁶ The second notion of sui generis contemplates an independent knowledge protection regime specifically focusing on traditional knowledge. It may not necessarily be based on existing or mainstream intellectual property regimes; nor does it have to be

⁸ See Intellectual Property Needs and Expectations of Traditional Knowledge Holder: WIPO Report on Fact- Finding Missions on Intellectual property and Traditional Knowledge, Geneva, April 2001, p. 24.

⁹ Daniel Wuger and Thomas Cottier (Ed...), Genetic Engineering and the World Trade System: World Trade Forum, Cambridge University Press, p. 141.

¹⁰ See generally Brian Harvey , Blue Genes: Sharing and Conserving the World's Aquatic Biodiversity, Earthscan and the International Development Research Centre, UK and USA, 2004.

¹¹ Dr. Suman Sahai, Why India should have Sui generis IPR Protection on Plant Varieties, http://www.genecampaign.org/Publication/Article/IPR/whyIndia_have_suigeneris_iprprotection.pdf

¹² Ibid.

¹³ Article 27 (3) of the TRIPS Agreement states that Members may also exclude from patentability: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

¹⁴ Article 89(J) of the CBD states each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

¹⁵ Chidi Oguamanam, International Law and Indigenous Knowledge: Intellectual Property Rights, Plant Biodiversity and Traditional Medicine, University of Toronto Press, Canada, 2005, p. 216.

¹⁶ Ibid.

‘legally’ recognised, where legality is referenced to the norms of the dominant Western or formal legal systems as opposed to indigenous customary norms or protocols.¹⁷

Since the traditional knowledge is unique in nature the existing laws and conventions are inadequate. Apart from that, existing intellectual property also inadequate for the protection of traditional knowledge. Hence there is need to develop sui-generis law, which should include the customary law for the protection of traditional knowledge. Now let us discuss the quite essentials of such sui-generis laws.

Essential Elements of Sui-generis Laws

1. Sui-generis laws include elements of benefit sharing.¹⁸
2. Sui-generis laws include provisions of prior informed consent (PIC).
3. Sui-generis laws include elements of disclosure of the country of origin of genetic resources/biological resources.
4. Sui-generis system includes elements of co-ownership of the patents where applicable.
5. Sui-generis system includes disclosure of traditional knowledge.
6. Sui-generis system includes provisions for contractual agreements.
7. Sui-generis system may include provisions of customary law.¹⁹
8. Sui-generis law including the provisions of, rights of farmers and breeders²⁰
9. A Sui-generis law may be a combination of intellectual property law²¹ and any one or more of the above provisions.²²

Need of Sui generis System for Protection of Traditional Knowledge

Question may arise in our mind that when there is intellectual property and other laws exist for the protection of traditional knowledge why we need separate form of sui generis system for the protection of traditional knowledge. As explained in the previous chapter the existing intellectual property rights are inadequate to protect traditional knowledge having unique nature.²³ Intellectual property system is inadequate for so many reasons explained therein. Hence, there is a need for separate sui generis system. Traditional

¹⁷Ibid

¹⁸One of the objectives of the Convention on Biological Diversity is benefit sharing. See preamble of the CBD.

¹⁹ See generally Remigius N. Nwabueze, *Biotechnology and the Challenge of Property: Property Rights in Dead Bodies Parts and Genetic Information*, Ashgate Publishing Limited, England, 2007, p 279.

²⁰Example Indian Plant varieties Act includes Farmers Rights with Respect to Plant Varieties.

²¹Peter W.B. Phillips, Chika B. Onwuekwe, *Accessing and Sharing the Benefits of the Genomics Revolution*, Springer, Netherland, 2007, p. 93.

²²Balavanth S Kalaskar, *Traditional Knowledge And Sui-Generis Law*, International Journal Of Scientific & Engineering Research Volume 3, Issue 7, July-2012 1 ISSN 2229-5518 IJSER, available at <http://www.ijser.org/researchpaper%5CTRADITIONAL-KNOWLEDGE-AND-SUI-GENERIS-LAW.pdf>.

²³See Genarlly Dan Leskien, Michael Flitner *Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System*, Issues in Genetic Resources No. 6 June 199, International Plant Genetic Resources Institute, Rome Italy, p. 42.

knowledge plays a critical role in the livelihoods of millions of people,²⁴ including the society, and is the basis of traditional culture. There is need to preserve traditional knowledge of relevance to the biodiversity and of importance to livelihoods. The need for sui generis system has also been recognized in literature.²⁵ One of the main arguments was the inadequacy of the traditional intellectual property rights paradigm to accommodate the specificities and interests of traditional knowledge holders.²⁶ Many countries including India, Philippines and Peru have passed laws to protect traditional knowledge and established sui generis systems in this connection.

Sui generis systems are advocated and developed with many objectives in mind and hence they are more ambitious in nature.²⁷ They are more than law(s) conferring intellectual property protection. They are often interlinked with access and benefit sharing regimes or access and benefit sharing regimes form part of the sui generis systems. According to UNEP: In order for sui generis systems for the protection of traditional knowledge to be effectively situated within a broader policy and legal environment, they may need to draw on legal concepts and non-Intellectual property, for instance:

- (a) Unfair competition, unjust enrichment, misappropriation of reputation and goodwill;
- (b) Recognition of equitable interests and expressions of collective interests such as those relating to natural resources;
- (c) Moral rights, in particular the rights of integrity and attribution;
- (d) Human rights, and in particular economic, cultural and social rights;
- (e) Conceptions of ownership and custodianship associated with traditional cultures;
- (f) Preservation of cultures and cultural materials;
- (g) Environmental protection, including the conservation of biodiversity;
- (h) Conceptions of morality and public order in legal systems; and
- (i) Approaches to defining and recognizing farmers' rights.²⁸

Such suggestions make the sui generis systems too unwieldy and it has to meet too many objectives, and, protect too many rights/interests.²⁹ Although contracts and agreements offer flexibility, and the potential for including negotiated terms, they are ultimately limited.³⁰ These kinds of arrangements may tend to be ad

²⁴Krystyna Swiderska, Stake Holders Participatory Approaches in Policy on Access to Genetic Resources, Traditional Knowledge and Benefit Sharing: Case Studies and Recommendations, International Institute for Environment and Develop, p 12.

²⁵Daniel Wüger, Thomas Cottier, Genetic Engineering and the World Trade System: World Trade Forum, Cambridge University Press, UK, 2008, p. 83.

²⁶Krishna Ravi Srinivas, Traditional Knowledge and Intellectual Property Rights: A Note on Issues, Some Solutions and Some Suggestions, Hein Online -- 3 Asian J. WTO & Int'l Health L & Pol'y 81 2008.

²⁷Ibid

²⁸Ibid .

²⁹Supra note 17.

³⁰Michael Davis, Indigenous Rights In Traditional Knowledge And Biological Diversity: Approaches To Protection, HeinOnline -- 4 Austl. Indigenous L. Rep. 1 1999.

hoc, lacking in consistency, and without adequate mechanisms for implementation and monitoring. They generally do not have the sanction of any state or national laws.³¹ Potentially more effective, longer term solutions which ensure protection for indigenous knowledge, innovations and practices, and provide for equitable benefit sharing may be achieved through the development of sui generis systems such as national laws.

Ideally, these kinds of laws would provide institutional recognition and protection for fundamental indigenous rights, while also regulating conservation and sustainable use of biological diversity and bio-prospecting. Although many advocate sui generis systems as the preferred solution to effective recognition and protection for indigenous rights to traditional knowledge, these approaches should also be approached with some degree of caution. Ideally, sui generis systems would be developed to provide for beneficial recognition and protection of indigenous rights.³² Traditional knowledge managed and owned in accordance with customary rules and code of practice,³³ and are usually cannot be sold or alienated in ways that conventional intellectual property rights can be. Intellectual property rights are the commercial rights.³⁴ On the other hand traditional knowledge is based on ancient and enduring tradition linked to spirituality on which there cannot be commercial rights. Hence existing intellectual property rights are not suitable to protect traditional knowledge and associated rights.³⁵ Because of all these reasons the establishment of sui generis system for the protection of traditional knowledge is essential. Let us discuss the steps taken for the sui generis protection of traditional knowledge at the international level as well as national level in the next part.

Sui Generis Protection of Traditional knowledge under International Level

At the outset it seems that traditional knowledge protection is the subject matter of the regional level but the traditional knowledge also need to be protected under the international level as well. Because traditional knowledge is being misappropriated by the multinational companies and developed countries largely at the international level. This part of the chapter discusses about the steps taken at the international level for the protection of traditional knowledge under the sui generis system. The development of sui generis approaches would ideally be based on new forms of legislation that provide specifically for the recognition and protection of indigenous forms of intellectual property. These may provide for recognition of the particular features, such as collective rights, that distinguish indigenous knowledge and intellectual property from conventional systems.

³¹Ibid.

³²Ibid .

³³The Republic of the Philippines Recognizes the ownership of traditional knowledge by the communities and empowers them to manage it in accordance with their customary laws, see S. Biber-Klemm, T. Cottier (Ed), Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives, Swiss Agency for Development and Cooperation, UK, 2006, p. 215.

³⁴Tatiana Lopez Romero, Sui Generis System for the Protection of Traditional Knowledge, Red de Revistas Cientificas de America Latina y el Caribe, Espana Portugal, sources: <http://redalyc.uaemex.mx>.

³⁵ Ibid.

There are many examples of sui generis systems, but these vary considerably in terms of the extent to which they incorporate indigenous rights, including benefit sharing and community forms of ownership. There is much planning and activity across the world at national and sub-national levels to devise various legislative, policy and administrative schemes to regulate access to genetic resources.³⁶ The Educational Scientific and Cultural Organization (UNESCO)³⁷ and the World Intellectual Property Organization (WIPO), are currently reviewing its 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore. This Recommendation was the focus for discussions during a UNESCO/Smithsonian conference held in Washington DC on 27-30 June 1999, with a view to revising it in the light of developments in the decade since its adoption.³⁸ Among the recommendations resulting from that conference was a decision to reconsider the term 'folklore' and to determine a more appropriate terminology on the basis of further studies and consultations with indigenous and local people.³⁹ Since 2000-2001, the IGC⁴⁰ had several meetings which addressed the protection of traditional knowledge both through conventional intellectual property rights systems and through distinct sui generis systems of protection.⁴¹

The IGC has been working on the steps that need to be taken to safeguard the interests of the communities who have developed and preserved traditional knowledge and cultures. In July 2003, the IGC Secretariat produced a composite study which included approaches to definitions of traditional knowledge, national experiences in its protection and an analysis of elements of a sui generis system.⁴² In the same year, the WIPO General Assembly extended the mandate of the IGC for a further two years and the IGC was requested to accelerate its work and to focus on the international dimension of intellectual property and genetic resources, traditional knowledge and folklore.⁴³ The IGC has focused on ten core issues that need to be addressed in any agreement on international sui generis protection of traditional knowledge.⁴⁴

³⁶ Michael Davis, *Indigenous Rights in Traditional Knowledge And Biological Diversity: Approaches To Protection*, HeinOnline -- 4 Austl. Indigenous L. Rep. 1 1999.

³⁷ UNESCO's Mission is to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information. The Organization focuses, in particular, on two global priorities.

³⁸ Michael Davis, *Indigenous Rights In Traditional Knowledge And Biological Diversity: Approaches To Protection*, HeinOnline -- 4 Austl. Indigenous L. Rep. 1 1999.

³⁹ Ibid.

⁴⁰ IGC was Established by the WIPO General Assembly in October 2000 the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is undertaking text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs)/folklore and genetic resources (document WO/GA/26/6),

⁴¹ Since 2001, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) of the World Intellectual Property Organization (WIPO) has been one of the arenas where indigenous peoples have sought to obtain protection of their traditional knowledge, genetic resources and traditional cultural expressions, as well as compliance with free prior and informed consent for access and the fair sharing of benefits arising from these resources.

⁴² Carolina Lasen Diaz, *Intellectual Property and Biological Resources: An Overview of Key Issues and Current Debates.*, Wuppertal Institute for Climate, Environment and Energy, http://www.wupperinst.org/globalisierung/pdf_global/intellectual_property.pdf last visited on 05/05/2014.

⁴³ Jona Razzaque And Manisuli Ssenyonjo, *Protection Of Traditional Knowledge And Human Rights Obligations: The Status Of Discussion In International Organisations*, HeinOnline -- 25 Neth. Q. Hum. Rts. 402 2007.

⁴⁴ Silke Von Lewinski, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, Wolter Kluwer, New York, 2008, p. 141.

1. Definition of traditional knowledge that should be protected.
2. Who should benefit from any such protection or who hold the rights to protectable TK?.
3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?⁴⁵
4. What forms of behaviour in relation to the protectable traditional knowledge should be considered unacceptable/illegal?
5. Should there be any exceptions or limitations to rights attaching to protectable TK?
6. For how long should protection be afforded?
7. To what extent do existing IPR's already afford protection? What gaps need to be filled?
8. What sanctions or penalties should apply to behaviour or acts considered to unacceptable/illegal?
9. Which issues be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
10. How foreign rights holders / beneficiaries should be treated.⁴⁶

WIPO's international statement providing a sui generis approach to protecting intangible cultural heritage is a study on legal option for sui generis protection⁴⁷ which identifies five main doctrinal approaches that had been employed;

1. The grant of exclusive rights for traditional knowledge, including (i) use of existing intellectual property rights;(ii) modified, adopted or extended forms of conventional intellectual property rights; or (iii) sui generis measures granting newly defined exclusive property rights;⁴⁸
2. The principle of prior informed consent applied to traditional knowledge;
3. A compensatory liability or domain public payant approach⁴⁹
4. An unfair compensation approach;
5. The recognition of customary law.

These doctrines are mutually exclusive, and two or more elements may be linked together in the one legal measure: for instance, customary law may provide the procedural framework for the grant of prior informed consent, or for determining ownership or other entitlements such as equitable compensation. As well as this cluster of intellectual property related doctrines, sui generis traditional also commonly provide for the complementary objectives of preservation and promotion (policy measures to foster the maintenance and application of traditional knowledge for social welfare in relation to health, the environment and the

⁴⁵Ibid.

⁴⁶See Annex II, Report of the Tenth Session of the IGC, WIPO? GRTKF/IC/10/7.

⁴⁷WIPO/GRTKF/IC/3/10, at page 38-39.

⁴⁸Silke Von Lewinski, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, Wolter Kluwer, New York, 2008, p. 141.

⁴⁹Ibid

protection of cultural heritage, addressing either the interests of society as a whole or of designated communities of beneficiaries).⁵⁰

Further, steps taken for the protection of traditional knowledge under sui generis system at the international level has been done by the Convention on Biological Diversity. Conference of the Parties requested the Executive Secretary⁵¹ to continue gathering and analysing information, in consultation with Parties, Governments, indigenous and local communities, to further develop as a priority issue, the possible elements⁵² for consideration by the Ad Hoc Open-Ended Intergovernmental Working Group on Article 8(j) and Related Provisions at its fifth meeting and further requests the Working Group on Article 8(j) to identify priority elements of sui generis systems. Views regarding sui generis systems, as well as definitions, were received from Argentina, the European Union, the United Nations Permanent Forum on Indigenous Issues and members of the International Indigenous Forum on Biodiversity and those views have informed the further development of the elements to be considered in the development of sui generis system for the protection of traditional knowledge, innovations and practices of indigenous and local communities.⁵³ Conference of the Parties (COP)⁵⁴ requested⁵⁵ the Working group on Article 8(J)⁵⁶ to identify priority elements of sui generis system. According to report The overall purpose of sui generis systems could be to put in place a set of measures that would respect, preserve and promote the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity including biological and related genetic and to ensure that they derive fair and equitable benefits from its utilization and that such utilization is based on their prior informed consent.⁵⁷

This purpose would ensure the system to be established is within the mandate of the Convention. More particularly, sui generis systems could provide the means for Indigenous and local communities to: (a) Control access to, disclosure and use of traditional knowledge; (b) Exercise their prior informed consent for any access to or disclosure and use of traditional knowledge; (c) Ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices; (d) Ensure continued customary use of traditional knowledge, innovations and practices and avoid negative effects thereon. According to this meeting sui generis system are based on recognition that the knowledge and related resources are collective property and hence sui generis systems could provide safeguards against claims of

⁵⁰Ibid.

⁵¹See Paragraph 4 of Decision VIII/5.

⁵²Possible elements have been listed in the annex to decision VII/16 H.

⁵³ Available in UNEP/CBD/WG8J/5/INF/15.

⁵⁴ The Conference of the Parties is the governing body of the Convention, and advances implementation of the Convention through the decisions it takes at its periodic meetings. For more detail see <http://www.cbd.int/cop/>

⁵⁵ In paragraph 4 of decision VIII/5 E,

⁵⁶Article 8 (J) of the Convention on Biological Diversity speaks about the protection of traditional knowledge which relevant for the conservation and sustainable use of biological resources.

⁵⁷For detail about the benefit sharing, prior informed consent see earlier chapter.

third parties to intellectual property rights over traditional knowledge.⁵⁸ Exceptions to this general protection would be clearly defined and any consent to use would follow principles of prior informed consent, benefit-sharing, mutually agreed terms and other principles of customary law of the affected communities.

The safeguarding of knowledge from intellectual property claims from third parties could extend to protection against unauthorized disclosure, culturally offensive or unauthorized use of traditional knowledge.⁵⁹ Sustainable development and poverty alleviation are also both possible subsidiary purposes of sui generis systems. In particular, a system could work to increase access to capital for indigenous and local communities, thus facilitating the establishment of commercial ventures within traditional communities. While promoting sustainable development, if they so choose, sui generis systems would need to carefully balance the goal of protection of traditional knowledge as against the goal of promotion of use, particular as it related to conservation and sustainable use.⁶⁰ According to this meeting Sui generis systems could: (a) Recognize and register, as appropriate, the ownership of traditional knowledge by the indigenous and local community that is the holder of said knowledge; (b) Control access to, disclosure and use of traditional knowledge; (c) Exercise the right to require free prior informed consent for any use of traditional knowledge; (d) Exclude improper use by third parties; (e) Ensure that they derive fair and equitable benefits from the wider application of their knowledge; (f) Generate protection mechanisms at the international and national government levels, and within relevant customary law. Finally the conference of the parties gave recommendations for the future work regarding sui generis systems. Recommendations of the meeting are as follows;

1. Invites Parties and Governments to consider that the development of effective sui generis systems for the purposes of the Convention, be local in nature and based on the relevant customary law of the appropriate indigenous and local communities concerned, and recognized and/or created with the prior informed consent and the full and effective participation of those communities for the purposes of respect, preservation, maintenance and promotion of the knowledge, innovations and practices of indigenous and local communities;⁶¹
2. Further invites Parties and Governments to recognize, support and/or develop sui generis systems through national guidelines and requests the Executive Secretary to continue gathering and analysing information, in consultation with Parties, Governments, international entities and indigenous and local communities, to provide information regarding the development of guidelines for the consideration of the sixth meeting of the Working Group on Article 8(j) and related provisions;⁶²

⁵⁸ Ad Hoc Open-Ended Inter-Sessional Working Group On Article 8(J) And Related Provisions Of The Convention On Biological Diversity Fifth Meeting Montreal, 15-19 October 2007.

⁵⁹ Ibid.

⁶⁰ See UNEP/CBD/WG8J/5/6 20 September 2007.

⁶¹ <http://www.cbd.int/doc/meetings/tk/wg8j-05/official/wg8j-05-06-en.pdf>

⁶² Ibid.

3. Requests the Executive Secretary to continue gathering and analysing information, in consultation with Parties, Governments, international entities and indigenous and local communities, on the possible development of proposals for an international framework to set minimum standards and ensure protection of all stakeholders involved for the consideration of the sixth meeting of the Working Group on Article 8(j), fully taking into account and collaborating with, the work of other bodies concerning sui generis systems and customary law, and in particular the WIPO and the United Nations Permanent Forum on Indigenous Issues. (UNPFII).⁶³
4. Takes note of the draft glossary of terms relevant for Article 8(j)⁶⁴ taking into account the views compiled on definitions provided and also considering the ongoing work concerning the development of an international regime on access and benefit sharing of genetic resources.

Further The Working Group of Convention on Biological diversity on access and benefit sharing⁶⁵ was given the mandate to start negotiations with the purpose of elaborating an international regime on access and benefit sharing. Moreover, the Working Group on Article 8(j) was requested to collaborate with the Working Group on Access and Benefit Sharing to ensure that sui generis measures for the protection of traditional knowledge are included in the international regime on access and benefit sharing.⁶⁶

During the third Working Group on Access and Benefit Sharing meeting in 2005, disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights' is mentioned as one of the elements for the international regime on access and benefit sharing.⁶⁷ During this meeting, a general agreement was reached with respect to the need to create synergies between the international regimes on access and benefit sharing and the protection of traditional knowledge.⁶⁸ Two issues were of particular importance in the fourth meeting of the Working Group on Access and Benefit Sharing:⁶⁹

Recognition and protection of the rights of indigenous and local communities to their traditional knowledge and genetic resources; and development of elements of sui generis systems for the protection of traditional knowledge, innovations and practices. This is an important development from a human rights point of view as it opens up the scope of protection of vulnerable groups. Negotiation on the final version of the 'international regime on the access and benefit sharing' is still ongoing. Further one of the main tasks of the ad hoc open-ended Inter-seasonal Working Group on Article 8(j) is to develop guidelines which ensure

⁶³Ibid.

⁶⁴Listed in in annex I of UNEP/CBD/WG8J/5/INF/15.

⁶⁵ Decision VII/19D.

⁶⁶ Decision VII/16.

⁶⁷ Report of the Ad Hoc Open-Ended Working Group on Access and Benefit Sharing on the Work of its Third Meeting', UNEP/CBD/COP/8/5, 18 January 2006, at: www.biodiv.org/doc/meetings/cop/cop-08/official/cop-08-05-en.pdf,

⁶⁸Jona Razzaque and Manisuli Ssenyonjo, Protection Of Traditional Knowledge And Human Rights Obligations: The Status Of Discussion In International Organisations, HeinOnline -- 25 Neth. Q. Hum. Rts. 402 2007.

⁶⁹UNEP/CBD/COP/8/6.

that indigenous and local communities obtain a fair and equitable share of the benefits arising from the use and application of their traditional knowledge. During the third meeting of the Working Group (2003), parties recognised the importance of the concept of communities' prior informed consent. It was agreed that local communities and indigenous groups should be empowered in order to determine whether or not access should be granted to their knowledge and in which measure such access should be granted. Parties requested the Working Group to elaborate mechanisms for the protection of traditional knowledge by identifying appropriate elements of a sui generis system for protection of traditional knowledge and exploring how conventional intellectual property rights systems may serve the implementation of Article 8(j). During the fourth meeting in 2006, the Working Group recognised five measures for inclusion in the international regime on ABS which are closely linked to Article 8(j).

These measures will ensure: compliance with prior informed consent of indigenous and local communities holding traditional knowledge; disclosure of origin of genetic resources and associated traditional knowledge in intellectual property rights applications; recognition and protection of the rights of indigenous and local communities over their traditional knowledge; protection of customary law and traditional cultural practices; and benefit-sharing with indigenous and local communities. It is essential for the Working Group to ensure that there is smooth and effective coordination, cooperation and collaboration between the various actors in the field of intellectual property, traditional knowledge and the right to health.

According to United Nations Conference on Trade and Development ('UNCTAD') meeting of experts in held 2000, national sui generis systems by themselves will not be sufficient to protect traditional knowledge adequately. There is therefore a need to explore an international mechanism that might explore minimum standards of an international sui generis system for traditional knowledge protection.⁷⁰ At the international level the TRIPS Agreement is silent about the sui generis protection about the traditional knowledge. However under Article 27(3)⁷¹ Agreement speaks about the sui generis system for the protection of new plant varieties. This provision could be used to some extent for the protection of traditional knowledge relating to new plant varieties developed by the indigenous people.

Conclusion

It seems that establishment of sui generis system for the protection of unique characteristic of traditional knowledge is better compare to other form of protection. Establishment of sui generis system only at the national level would not protect the traditional knowledge effectively. Because the act of bio-piracy is existed not only at the regional level but also at the international level as well. While drafting sui generis

⁷⁰UNCTAD, 'Outcome of the Expert Meeting', Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices (30 October-1 November 2000) <<http://www.unctad.org/en/docs/cleml311.en.pdf>

⁷¹ Members may also exclude from patentability: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

system one has to consider the customary law developed by the indigenous people. Because if traditional knowledge is protected, without the inclusion of the customary law developed by them, may not accept new form of rule.

Hence there is need for inclusion of customary law while drafting sui generis system. At the international level there is need for establishment of Agreement which fix minimum standards for the protection of traditional knowledge like TRIPS agreement does. Sui-generis law may be a combination of Intellectual Property law and customary law. It is the best system of law for the protection of traditional knowledge. Sui-generis law better protects the rights and interests of traditional knowledge holders. Sui-generis law intends for the wider application of the knowledge, innovations and practices of indigenous and local communities with the involvement of holders of such knowledge, innovations and practices. At present as explained international recognition is needed for the effective implementation of Sui-generis laws at national level.

