IS A SUI GENERIS LAW NEEDED TO PROTECT IK OF BIODIVERSITY IN INDIA?

A Discussion Paper - I

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Gene Campaign, through its research project "Protection of Indigenous Knowledge of Biodiversity", has tried to work towards developing a system that would effectively protect the indigenous knowledge (IK) of biodiversity in India in the interest of local communities. It has tried to take stock of the informal (customary) mechanisms that local and indigenous communities employ to protect biodiversity and the associated IK; and analyse existing domestic laws and international agreements, including Intellectual Property Rights (IPR) tools that tend to protect IK. This exercise has given rise to several questions (which this discussion paper tries to address) which need to be considered while designing a suitable regime for protection of IK and its effective implementation. The main issues are whether existing mechanisms (customary laws, IPR and other legislation) effectively protect IK? If not, what can be done to make them more effective; are amendments and changes to existing mechanisms sufficient or do we still need to think in terms of a specifically designed regime to protect IK? If yes, then what should ideally be the components and features of such a sui generis regime?

In an attempt to address the above questions, this discussion paper first defines what exactly is meant by sui generis, examines the need for a sui generis regime in India, looks into existing sui generis initiatives across countries and that of India itself and then, identifies the probable elements of a sui generis legislation that would give adequate protection to IK of biodiversity and ensure rights of indigenous people.

MEANING OF SUI GENERIS

As per Black's Law Dictionary[1], the term sui generis is derived from Latin which means 'of its own kind', thus also meaning of its own class, unique or peculiar. It further says that the term is used in intellectual-property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright and trade secret doctrines. Thus, a sui generis system of protection is a special system adapted to a particular subject matter, as opposed to protection provided by one of the main systems of intellectual property protection, e.g. the patent or copyright system. It means that countries can make their own rules to protect a subject matter entitled to IPR protection with some form of protection adapted to that particular subject matter provided that such protection is effective.

NEED FOR A SUI GENERIS LEGISLATION IN INDIA

As already mentioned, Gene Campaign has tried to look into the customary practices, conventions and social arrangements that exist in India, which enable the protection of IK in the interest of local communities. Primary research findings, illustrated through case and field studies, bring home the point that customary laws and practices in India are attuned to IK protection and conservation of biodiversity. However, despite the demonstrated ability of customs and customary norms in protecting the knowledge as well as the resource, customary practices and norms governing these practices are now clearly on a decline. This could, in large part, be attributed to the modern legal and judicial system. In spite of specific constitutional and several statutory provisions granting recognition to customary laws and practices (including indigenous knowledge), most sectoral statutory laws, policies and government schemes and programmes do not provide space to them. For customs to contribute effectively to IK protection, they need to be accepted as law per se and to be recorded as state- sanctioned formal rights, which are at par with statutory laws. Also, most statutes like the Indian Forest Act, 1927 reduce customary rights to the level of concessions or privileges, which need to be recognized as legal rights. There is also need for judicial bodies to recognize and internalize components of customary law, while it is necessary to ensure more effective participation of local people and for assimilating people's knowledge, customary laws and strengths of traditional institutions into formal structures. It is thus obvious that while customs and customary practices are of great

1 Black, H.C., 1968, Black's Law Dictionary, St. Paul, MN: West Publications, p.1475.

importance in the context of IK protection, a number of changes need to be brought into the current legal regime for them to be effective, which is a difficult task.

Gene campaign had also looked into the national legislation of India, which includes the IPR legislation put in place by India to honour international commitments as well other legislation, containing provisions that may be construed as protecting IK of biodiversity. A study of their provisions reveals that they suffer from numerous weaknesses, contradictions and ambiguities. Numerous amendments have been recommended (in the project report); however, it needs to be admitted that getting such amendments through is easier said than done.

Thus, a study of customary mechanisms as well analysis of domestic legislation brings one to the conclusion that they alone are not sufficient to protect IK of biodiversity. And that there is need for a system specifically designed to protect IK. There are divergent views on the methods of protecting the intellectual properties of indigenous communities. Some favour the use of the existing intellectual property tools like patents, trade secrets, copyrights, geographical indications etc. However, it is felt that there will be difficulties in adapting most of the existing IPR tools because of the inherent mismatch between an intellectual property protection system that was created for finite, inanimate objects resulting from industrial activity and flowing, mutable and variable properties of biological materials.[2] Though there is one school of thought that holds the view that any kind of legal regime protecting the intellectual property contained in IK would be inadequate as well as difficult to implement, the more prevailing view worldwide is that control over and use of IK resulting in rewards to indigenous people is desirable and possible through appropriate (and yet to evolve) sui generis intellectual property legislation.[3] In the context of protecting IK under a sui generis system, Brazil has suggested that only a system of protection of IK that provides proprietary rights can ensure that market forces will operate to generate fairness and equity.[4] A proprietary protection approach could provide protection erga omnes, in the sense that, even if the knowledge is in some way publicly disclosed, there could be mechanisms available to prevent its use by all third parties.[5] Realizing the inadequacy of the existing intellectual property system in protecting IK, many countries have enacted or are in the process of enacting sui generis systems for protection of IK.[6]

SUI GENERIS INITATIVES ACROSS COUNTRIES

Sui generis systems have generally been most associated with the protection of plant varieties, with Article 27.3 (b) of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) requiring all countries to protect intellectual property over plant varieties by patent law or by 'effective sui generis system' or by a combination of both. With respect to the protection of plant varieties, many governments in the developing world especially have drafted sui generis laws which ensure the protection and implementation of Farmers' Rights, community rights and other provisions stemming from or related to the Convention on Biological Diversity (CBD). In recent times, several countries have tried to develop sui generis systems to protect IK. In response to questions posed to its Committee Members by the Inter- Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore[7], eight members had provided information regarding the putting in place of sui generis systems for protection of IK, these being Brazil, Costa Rica, Guatemala, Panama, the Phillipines, Samoa, Sweden and Venezuela. Ten Members informed about their plans to adopt a sui generis system in the future: Ecuador, New Zealand, Papua New Guinea, Peru, the Phillipines, Solomon Islands, Tanzania, Tonga, Trinidad and Tobago and Viet Nam.[8] Moreover, although it has not indicated the intention of pursing a sui generis route, France had noted that "intellectual property, relating to the protection of concrete means of operating, needs formalization and cannot apply to pure knowledge. Therefore, protection of traditional knowledge requires a sui generis system which will need the establishment of inventories in which they will be compiled".[9] These apart, other countries like Thailand, Malaysia and others have also designed sui generis systems for protection of their rich IK.

Some of the noteworthy sui generis systems developed for protection of IK by various countries have been discussed below:

2 Report of the Civil Society Consultation on Indigenous Knowledge held by Gene Campaign on 4th April, 2002 at New Delhi.

3 ibid.

4 TRIPS Secretariat, 2002, "The Protection of Traditional Knowledge and Folklore: Summary of Issues Raised and Points Made", IP/C/W/370.

5 ibid.

6 Commission on Intellectual Property Rights, 2004, Integrating IPRs and Development Policy, p.79. Source: www.iprcommission.org/graphic/documents/final report.htm

7 WIPO Secretariat, 2002, "Review of Existing Intellectual Property Protection of Traditional Knowledge", WIPO/ GRTKF/ IC/ 3/ 7.

8 ibid.

9 ibid.

(i) Thailand

Thailand has developed a comprehensive sui generis regime for traditional medicines. The "Thai Traditional Medicinal Intelligence Act" distinguishes different categories of "traditional formulation": (a) "national formulae" which are formulations given to the Nation which are crucial for human health and the rights over which belong to the state; (b) "private formulae" over which the private owner has exclusive rights and to use which third parties must obtain permission; and (c) "general formulae", which are well known traditional formulae that remain free to use by anybody. One of the main objectives of this sui generis protection is that the exclusive monopoly granted by the State should enable the owners of indigenous knowledge to be adequately compensated for their contribution. One important feature of this law is that all the three types of formula can continue to be used free domestically by traditional healers or Thai communities in a limited quantity. The law also provides for measures aimed at the conservation and sustainable utilization of the medicinal plants, especially those at high risk of extinction. In addition, the Institute of Thai Traditional Medicine was formally established (after having been in operation for seven years), and a "Thai Traditional Knowledge Developing Fund" was created.

(ii) Philippines

The Philippines has developed a comprehensive sui generis regime for development of Traditional and Alternative Health Care, which is pursuant to the State's Policy to develop a legal basis by which indigenous societies would own their knowledge of traditional medicine. It also provides for the establishment of the Philippine Institute of Traditional and Alternative Health Care (PITAHC).

The Philippines has enacted the Indigenous Peoples Rights Act, 1997, which recognizes and promotes the rights of Indigenous Cultural Communities/ Indigenous Peoples (ICCs/ IPs). It recognizes the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain. An important provision of this law is section 34 dealing with the Right to Indigenous Knowledge Systems and Practices and to develop own Sciences and Technologies. It says that ICCs/ IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. The provision also confers them the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts. The legislation also lays down conditions governing access to biological and genetic resources within the ancestral lands and domains of the ICCs/ IPs, subject to free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community.

(iii) Brazil

The Brazilian sui generis system was established by Provisional Measure 2.186-16 of August 23, 2001 and covers IK associated with biodiversity. Protection is obtained mainly by a bilateral approach, that is, through contracts of access, the purpose of which is to ensure the sharing of benefits arising from the use of genetic resources and associated IK. Article 9 of the law, however, seems to establish a "proprietary regime of traditional knowledge rights", because it recognizes indigenous and local communities' right to prevent unauthorized third parties from using, exploiting, experimenting, disclosing, transmitting and re-transmitting data and information that integrate or constitute associated IK. The law has also provisions on benefit sharing, including compensation, access to and transfer of technology, licensing and capacity building. IK is not the subject of a predetermined term of protection. The grant of industrial property rights in processes or products obtained from national genetic resources depends upon compliance with the provisions of the Provisional Measure (that is, industrial property registration applicants must provide information on the origins of genetic resources and of associated IK, whenever applicable). The Brazilian law provides for sanctions, which comprises fines, the seizure of illegal material and products embodying unlawful material, prohibition of distribution, invalidations of patents or registrations, loss of government incentives, etc.

(iv) Costa Rica

The Law on Biodiversity of Costa Rica does not deal specifically with a sui generis system of protection, but establishes certain general criteria concerning community rights in IK and calls for local and indigenous communities, through a participatory process, to establish the mechanism for the protection and registration of biodiversity-associated IK.

(v) Guatemala

Guatemalan law (Cultural Heritage Protection National Law No. 26-97, as amended in 1998) provides protection of IK from a national cultural heritage approach. This means that expressions of national culture (which comprises all intangible expressions of cultural heritage, including traditions, medicinal knowledge, music, performances, and

culinary art) included in the "Culture Goods Registry" are under the protection of the State and thus cannot be disposed of by means of contractual arrangements; they cannot be sold and there is no right for remuneration. The system, which is managed by the Ministry of Cultural Affairs, seems to follow a public good approach, in the sense that IK is to be identified, recorded and preserved by the State for the benefit of the entire society.[10]

(vi) Peru

The proposed Peruvian sui generis legislation, as amended on August 31, 2000, seeks to protect knowledge developed by indigenous peoples about properties, uses and characteristics of components of biological diversity. Holders have the right to give consent to the access (and use) of their knowledge. Where the intended use is of a commercial or industrial nature, a license agreement must be entered into. The license shall provide for an equitable share of the benefits. The law provides for enforcement measures, including injunctions, seizures and criminal sanctions, such as fines. It also provides that where an application for a utility patent or a plant variety breeders' certificate is related to products or processes obtained or developed from collective knowledge, the applicant must present a copy of the licensing agreement as a pre- requisite for the concession of the respective right, unless the collective knowledge is in the public domain. The breach of this obligation will cause the denial or, eventually, the revocation of the utility patent or the plant variety breeder's certificate in question.

SUI GENERIS EFFORTS IN INDIA

In India, the Protection of Plant Varieties and Farmers' Rights Act, 2001, was enacted to fulfill the conditions of the TRIPS Agreement. With this Act, India had opted for the sui generis option offered by Article 27.3(b) of TRIPS, while incorporating some principles of the Convention on Biological Diversity (CBD), like prior informed consent and sharing of benefits with farmers. The Indian law, which has been hailed as progressive, pro-developing country legislation, has some notable features. It is the first in the world to grant formal rights to farmers in a way that their self-reliance is not jeopardized. Apart from strong and proactive Farmers' Rights, it has a well-defined Breeder's Right. In fact the Indian legislation succeeds in balancing the rights of Farmers and Breeders and exploits the flexibility granted in TRIPS, in an intelligent manner. There are clauses to protect the rights of Researchers and provisions to protect the public interest.

Another sui generis initiative of India has been the Biological Diversity Act, 2002 which deals with access to, and collection and utilization of biological resources and associated indigenous knowledge by foreigners and sharing of benefits arising out of such access, as mandated by the CBD. While the Act in general has been criticized to be "a weak and confusing document", it is apprehended that the section on Intellectual Property Rights is going to do the greatest damage[11]. All that is stipulated is that IPR applications will have to go through the National Biodiversity Authority. There is no thought given to what kind of IPR will be permissible and what not. The Biodiversity Act having no clear position on IPRs is particularly unfortunate, especially when IPRs on biological materials are the single most vexed issue in the overall IPR debate today. Related to its confused position on IPRs, is the issue of benefit sharing accruing from commercialisation. There is no system for deciding the nature and extent of benefit sharing. The Authority and the Central and State governments will decide that arbitrarily. Local communities seem to have little say in the implementation of the Act. They cannot for example, oppose the grant of a patent or other IPR on biological material taken from them, nor do they have a say in what will be 'equitable' sharing of benefits.

While the Protection of Plant Varieties and Farmers' Rights Act is restricted to the protection of the indigenous knowledge of farmers (and does not cover non- agricultural biodiversity), the Biological Diversity Act is woefully inadequate in protecting IK and the rights of local and indigenous communities. This has resulted in some thinking on a draft bill for indigenous knowledge independent of government. A Traditional Knowledge (Preservation and Protection) Bill has been drafted by NS Gopalakrishnan, which provides for a Community Traditional Knowledge Trust to be established at the Panchayat, District, State and National level. Ownership of IK will vest with the respective Trust. The functions of the Trusts are to preserve, promote, document, and conduct research on IK, as also to create units for commercial exploitation.

Also, civil society has been considering the formation of a National Body for Traditional Knowledge. It is believed that the concept of a National Gene Fund or the National Biodiversity Authority, as contained in the Protection of Plant Varieties and Farmers' Rights Act and the Biodiversity Act respectively, can be expanded to include functions that will protect the rights of communities still further and facilitate income generation for them. There had been discussions between Gene Campaign and legal experts, to craft the structure of a kind of 'National Body' to which

10 WIPO Secretariat, 2002, "Review of Existing Intellectual Property Protection of Traditional Knowledge", WIPO/ GRTKF/ IC/ 3/ 7.

11 Sahai, S., (undated), "Biodiversity Act Falls Short of National Needs"

communities will assign their rights[12]. This Body will have the functions of monitoring use of IK and collecting revenues on behalf of the communities and implementing the rights of communities, to enforce compliance with guidelines and to chase and prosecute violators. Since local communities are unprepared to deal with the new developments relating to their resources and their knowledge, such a structure would act on their behalf and secure their interests. An added advantage of such a National Body would be to provide a kind of 'single window ' system with which outsiders can deal if they want to access IK and bioresources from a community or country. This would help to regulate access to bioresources and cut down biopiracy and make the system of access and benefit sharing transparent.

PROBABLE ELEMENTS OF A SUI GENERIS LEGISLATION

Despite the drawbacks evident in national sui generis systems and the pessimism expressed in certain circles of the inadequacy of such systems in protecting IK, the general consensus is that there is a need to develop sui generis national legislation specifically to protect IK and rights of indigenous peoples. There have been lots of debates and discussions in different fora regarding the probable elements of such a sui generis system, which would be effective in achieving its desired objectives, some of which are detailed below:

The WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGRTKF), in its 3rd session deliberated in meticulous detail on what a sui generis system for the protection of IK should ideally contain. WIPO[13] has pointed out that there are already elements available in existing mechanisms of intellectual property protection, both in IK context, and outside it, that could be transported into a sui generis system for the protection of IK and any reference to a sui generis system does not mean that a legal mechanism must be entirely construed from scratch. Given its holistic nature and the need to respond to the cultural context, the sui generis system should not require the separation and isolation of the different elements of IK but rather take a comprehensive approach. It has suggested that in order to identify those elements which a sui generis system must contain in order to be effective, a country has to provide responses to the following essential questions[14]:

(i) What is the policy objective of the protection?

Is it essentially defensive, in that it seeks to prevent misappropriation or culturally offensive misuse of IK, or is it analogous to laws for the protection of cultural heritage? Does it have a broader policy goal, such as a system established in response to Article 8(j) of the CBD? Is it focussed on appropriate commercialisation of IK or preserving it within a specific cultural context?

(ii) What is the subject matter?

As regards the subject matter, two options need to be considered. One option would be to include all IK, without any restriction or limitation as to subject matter thus including cultural expressions such as artistic, musical, scientific works, performances, technical creations, inventions, designs etc. The other option is to confine protection to technical biodiversity- associated IK, leaving handicrafts and expressions of folklore to be covered by separate provisions.

(iii) What additional criteria for protection?

It may be necessary to clarify that even if some IK fits into a broader definition, it may need to meet distinct criteria to be protected under a sui generis system. This may apply, for instance, to IK which has already entered the public domain. IK holders should be aware that IK that is in the public domain cannot be recaptured without affecting legitimate expectations and vested rights of third parties. The preparation of databases or inventory to document IK to prevent its misappropriation by third parties could contribute to aggravating this problem. Member States can, however, resort to the concept of commercial novelty and establish that all elements of IK which have not been commercially exploited prior to the date of the filing of the database are protected.

(iv) Who owns the rights?

As IK is the result of creation and innovation by the community, the rights in IK should be vested in the community, rather than individuals. It may then become necessary to establish a system of geographical and administrative definition of communities. Although IK protection is generally perceived as a matter of collective rights, it may nonetheless be vested in individuals. The solution for that must be found in customary law. There is, thus, need to integrate the customary laws of communities into a sui generis system of IK protection. Again, IK can be held by two or more neighbouring communities that share the same environment, the same genetic resources and the

12 Sahai, S., (undated), " Possible Systems of Protection Traditional Knowledge in India".

13 World Intellectual Property Organisation, 2002, "Elements of a Sui Generis System for the Protection of Traditional Knowledge" (WIPO/GRTKF/IC/3/8).

14 ibid.

same traditions. In such an instance, lawmakers have a choice: they can establish co- ownership of rights or they can leave for the communities to separately apply for and obtain rights in jointly held IK. An alternative to the attribution of rights to communities is the designation of the State as the custodian of the interests and rights of IK holders.

(v) What are the rights?

The various elements that comprise IK belong both to the artistic/ cultural and the technical/ commercial/ industrial fields. A sui generis system for IK protection should therefore combine both features of copyright and related rights with features of industrial property. So IK rights should comprise both moral and material rights. Strong moral rights may be crucial for the protection and preservation of the cultural identities of the communities, including those elements of IK that are not to be commercially exploited. The rights in IK could also comprise the right to assign, transfer and license those contents of IK databases with a commercial or industrial nature.

(vi) How are the rights acquired?

One option could be total lack of legal formalities, that is, protection is available as of the date the element of IK in question was created, irrespective of any formality. The second option could be to establish the right upon the filing of the compilation of IK data with a government agency.

(vii) How to administer and enforce the rights?

The possibility of administration of rights through a distinct mechanism, possibly a collective or reciprocal system of administration may be considered or a specific role for government agencies in monitoring and pursuing infringement of rights.

(viii) How are the rights lost or how do they expire?

One approach would be to establish protection for an indefinite period. This approach recognizes the intergenerational and incremental nature of IK and that its commercial application, once the protection is secured, may take an extremely long time. But if the protection of IK is to be established upon an initial act of commercial exploitation (for example, a period of fifty years counted from the first commercial act involving the protected element of IK, which could be renewable for a certain number of successive periods), then it might make sense to establish a predefined expiration, provided it would apply exclusively to those elements of IK with a commercial/ industrial application and which could be isolated from the whole of the contents of the database without prejudice to its integrity.

Apart from WIPO, the Crucible Group too, in its second report[15], has come out with certain recommendations with respect to national laws for protection of indigenous knowledge regarding biological resources. It says that no single policy option is sufficiently comprehensive to protect, promote and conserve knowledge. Thus, it is essential for the Government to develop integrated policy options – principles of coordination, consultation and representation. It further suggests that there should be stocktaking of existing policies and regulatory bodies that affect indigenous and local knowledge holders, review of existing customs and practices of indigenous communities that affect their knowledge and networking of existing relevant regulatory bodies to create indigenous and local knowledge. Regarding the purpose and scope of a sui generis legislation to protect knowledge of communities, it should be characterized by the following:

(i) Vest property rights in indigenous and local knowledge holders.

(ii) Provide means to the indigenous and local knowledge holders to prevent unwarranted reproduction

(iii) Ensure equitable distribution of the benefits

(iv) Prevent loss of indigenous and local knowledge

(v) Self determination

(vi) Conserve biological diversity

In 1981-82, one of the earliest attempts was made for the protection of IK when the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Model Provisions on Folklore. A salient attribute of the Model Provisions is consideration of the possibilities of a sui generis protection recognizing the inadequacies of the current intellectual property regime in protecting folklore (applicable to the wider IK debate). There are many distinguishing features and principles of the Model Provisions which are worth replicating in sui generis legislation and policy pertaining to protection of IK on a general plane. First one is the acceptance that typical intellectual property tools like copyright (in the instance of folklore) or for that matter, patent (in the context of a

15 IDRC, the International Plant Genetic Resources Institute and the Dag Hammarskjold Foundation, 2001, Seeding Solutions, Vol. 2., Options for National Laws Governing Control over Genetic Resources and Biological Innovations.

biotechnological product derived from indigenous knowledge) is inadequate or do not fit the context when it comes to the protection of folklore or indigenous knowledge respectively and thus, needs sui generis protection. The next principle which deserves mention is that the Model provisions try to create an atmosphere where folklore can flourish by not imposing too severe restrictions on the community. It has been expressed in many circles of the urgent need to protect IK which is fast eroding; thus, it falls on any law to protect IK to create conditions where it can thrive with the adequate involvement of the community. Another remarkable aspect of the Model provisions is the impetus they give to individual creativity and innovation and the way in which the Provisions have strived to strike a balance between these and the rights of the community. Again, the Model Provisions give ample scope for regional and national variations and the unique requirements of each situation to prevail and influence the protection of expressions of folklore.

The African Model Law for Protection of Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources is another effort to create a sui generis system to regulate access to biological resources and protect the related rights of local communities, farmers and breeders. Its provisions are worth emulating considering the fact that while ensuring the conservation, evaluation and sustainable use of biological resources; it aims at protecting the rights of communities over their biodiversity and the knowledge therein. Its salient features relating to food security, community rights, state sovereignty, community knowledge and technology, participation in decision making, regulation of access to bio resources, prior informed consent and fair and equitable sharing of benefits could be probable elements of an ideal sui generis legislation designed to protect IK.

The Civil Society Consultation on Indigenous Knowledge held by Gene Campaign on 4th April, 2002 at New Delhi acknowledged that the WTO is no bar for India to enact a sui generis national legislation for protecting IK. It recommended that a model sui generis law on IK should inter alia include provisions related to:

(i) Definition of subject matter of protection

(ii) Requirement for protection

(iii) Extent of rights (to exclude others, obtain remuneration and ensure sustainability etc.)

(iv) Title holders

(v) Modes of acquisition, including registration

(vi) Disclosure of origin of materials or knowledge used. (For example, the use of a farmer variety in breeding a new variety, use of a medicinal or aromatic plant to make products, extracting vegetable dyes from minerals and plants etc.)

(vii) Prior informed consent (PIC) from the IK holder or the owner of the bio-resources.

(viii) Evidence of the nature, mode and method by which benefits will be shared with community.

(ix) Severe penalty for infringement so that it acts as an effective deterrent for violation.

It has been felt that the sui generis legislation will also have to address the following aspects so that transparency and equity is ensured and misappropriation of IK prevented:

(i) The applications for the use of IK should be published in all major newspapers, specially the vernacular press.

(ii) Proof of IK should be entertained in both written and oral form.

(iii) In cases of bio-piracy, once a prima facie case has been established, the onus of proof should shift on the defendant to prove beyond doubt that no lead was taken from the IK in question.

(iv) The regime itself should be people friendly in its process and contents. The procedure followed should not be complex. The law should be drafted in simple terms. The regime should be easily accessible. A de-centralized registration system should be developed.

(v) Adequate guidelines, protocols and rules might also be needed to support the main legislation for its implementation in spirit.

CONCLUSION

The Civil Society Consulation has conceded that while it is crucial to put in place national sui generis systems for protection of IK, such efforts would amount to nothing in the absence of an international regime to protect IK. At times domestic regime in itself might not be able to deliver goods. For instance, the ability of competent authority in a national jurisdiction to prevent bio-piracy as well as to install prior informed consent and benefit-sharing mechanism to ensure reward to IK holders, would not by itself lead to similar action on patent (and other IPR) application in other countries. Initiatives to develop a suitable international

framework to protect IK have been taken by a number of inter-governmental organisations, but no satisfactory proposals, let alone solutions, have come forward so far. Though around 75% of the 143 Members of the World Trade Organisation (WTO) want some sort of protection for their IK, the negative attitude of the developed countries have stalled this. The US, which is not a signatory to CBD, still questions the possibility or desirability of establishing a comprehensive and uniform set of rules at the international level to govern the use of genetic resources and IK.[16]

The Commission on Intellectual Property Rights (CIPR) has expressed doubts that with a wide range of material to protect and diverse reasons for 'protecting it', it may be that a single all- encompassing sui generic system of protection for IK may be too specific and not flexible enough to accommodate local needs.[17] It points out that bringing together, for example, local innovators and entrepreneurs may be much more relevant. Whatever measures are put in place or whatever tools are utilized, exploitation is likely to raise the profile of IK and local innovation within communities and encourage greater involvement by younger members of the community. However, the CIPR cautions that it is important to remember that not all holders of IK would want to see their knowledge exploited in this way. The report of the CIPR cites the opinion expressed by a participant in one of its expert workshops, a Kechuan Indian from Peru, who explained that for their community, the imperative is to be able to ensure that their indigenous knowledge and the customary laws governing it are preserved and respected, rather than to obtain monetary compensation.[18] The same may hold true also in certain cases in India where large numbers of IK holders are guided by superior ethics and are generous enough to freely share their knowledge.[19] Again, there may also be an unrealistic expectation among IK holders of the possible economic value of their knowledge. These are but few of the hurdles which a national and international sui generis system for IK protection must overcome or circumvent, in order to achieve its desired objectives.

16 Report of the Civil Society Consultation on Indigenous Knowledge held by Gene Campaign on 4th April, 2002 at New Delhi.

17 Commission on Intellectual Property Rights, 2004, Integrating IPRs and Development Policy, p.79. Source: www.iprcommission.org/graphic/documents/final report.htm

18 ibid.

19 Excerpts from a presentation by Prof. Anil Gupta at the Project Launch Meeting of the Project "Protection of IK of Biodiversity" organized by Gene Campaign at New Delhi in July 2004.