

Biodiversity Protection, Farmers and Breeders Right

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Lecture 21 : Interrelationship and New Developments

Welcome to the course on Biodiversity Protection, Farmers and Breeders Right. This lecture will be about Interrelationship of CBD with other agreements as well as the new developments in this area. The concepts covered in this lecture will be WIPO IGC that is the World Intellectual Property Organization and its Intergovernmental Committee, the upcoming diplomatic conference on genetic resource, traditional knowledge and possibly traditional cultural expressions as well. And the recently concluded international agreement on regional comprehensive economic partnership and another important development in the recent times is biodiversity beyond national jurisdiction. So, these concepts will be covered in this lecture. The keywords you can see here.

The bilateral, multilateral and regional agreements form the overarching legal basis for global efforts to address biodiversity issues. So, there are several international agreements related to biodiversity and other aspects. The role of these international agreements is to achieve sustainable development. The multilateral agreements guide the global, regional and national action on environmental issues and are the result of long term processes which make them key elements of environmental, legal and governance regimes.

The role and relevance of biodiversity and ecosystems in securing well being of current and future generations cannot be overstated. The laws of biodiversity and ecosystems warrant serious consideration at governmental as well as intergovernmental level. So, this requires active involvement of various stakeholders including the government, industry, common citizens as well as intergovernmental organizations to develop policies to conserve biodiversity. So, this also requires legal policy and regulatory measures in order to ensure biodiversity conservation. The genetic resources and associated traditional knowledge is also subject to various legal and regulatory measures.

So, apart from the conservation aspects the genetic resources and associated traditional knowledge also becomes subject of misappropriation by various industries. So, this requires adequate measures at international level to protect the interests of holders of genetic resource and associated traditional knowledge. So, because of this reason there are various legal and regulatory measures relating to genetic resource and associated traditional knowledge. So, the major concerns related to biodiversity are listed here. The biopiracy and misappropriation of genetic resource and traditional knowledge and the need

for

legal

measures.

So, the genetic resources and traditional knowledge which is predominantly existing in the global south is subject of misappropriation by industries that are existing in the global north. So, this has actually led to a tension between the global south and the global north and developing countries have always been arguing for development of adequate measures at international level to prevent the biopiracy and misappropriation of genetic resource and associated traditional knowledge. The ensuring of complete disclosure of source and origin of genetic resource while acquiring intellectual property rights is another major concern. The patent laws requires complete disclosure of the invention while filing for a patent. So, the in the complete specification the complete details regarding the invention has to be clearly specified.

So, if a genetic resource is used as an ingredient for the development of an invention, the details of that genetic resource also has to be mentioned in the specification. So, some countries in their national legislation related to patents require that the source and origin of the genetic resource has to be clearly mentioned in the complete specification. So, India is an example of having this legal provision. So, this requires that the source and geographical origin of the genetic resource will be mentioned in the specification. So, without mentioning this the patent will not be considered for grant.

So, developing countries have been arguing that the patent law in all major jurisdictions should have this requirement in their law. So, this means that the developing countries should change their patent law in order to accommodate that the disclosure of source and origin of genetic resource will be made as a mandatory requirement for the grant of the patent. Some countries also require compliance with access and benefit sharing obligations as a prerequisite for the grant and enjoyment of intellectual property rights. So, when an application for patent is filed, the first thing is that the source and geographical origin of the genetic material used in the invention has to be mentioned. The second part is that the patentee has to comply with the access and benefit sharing regulations.

So, while filing for the patent application, the patentee will have to inform that he has already complied with the access and benefit sharing regulations of the country from where he has taken the genetic resource. So, some countries require compliance with access and benefit sharing regulations as a prerequisite for grant and enjoyment of intellectual property rights. So, in India also there is a similar requirement. Some countries are also arguing for recognizing the rights of indigenous people and local communities and states over genetic resource, traditional knowledge and cultural expressions. So, this has this is also a long standing demand from the global south including the developing countries.

So, these countries have been arguing that the rights of indigenous people and local communities as well as the governments over the genetic resource and traditional knowledge has to be legally recognized. So, in this lecture, I will be covering the recent developments with regard to these aspects. So, one of the important developments in the recent times is happening in the World Intellectual Property Organizations, Intergovernmental Committee on Intellectual Property, Genetic Resource, Traditional Knowledge and folklore. So, this is a intergovernmental committee under the World Intellectual Property Organization which has been functioning from 2000 onwards. So, over the period of two decades, this intergovernmental committee has been negotiating for the development of a legal framework at international level for the protection of genetic resource, traditional knowledge and folklore.

The traditional knowledge and traditional cultural expression have intrinsic social, cultural, spiritual, economic, scientific, intellectual and educational value. So, the traditional knowledge and traditional cultural expression have immense value for the holders of such knowledge or culture. The traditional culture and knowledge systems are not static, but constitute diverse framework of ongoing innovation and creativity that benefit indigenous and local communities as well as the society. The relationship between intellectual property and the protection, promotion, preservation and safeguarding of traditional knowledge and traditional cultural expression has given rise to complex and ongoing debate. Active discussions on the subject are being held in several international, regional and national platforms including the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

So, the main agenda of this discussion was to develop a legal framework within the patent system or within the intellectual property system to protect the genetic resources, traditional knowledge and folklore. So, there is lot of misappropriation happening at international level including through application of patent. So, when a patent application is filed some countries require that the source and geographical origin has to be disclosed as well as there is a mandatory requirement to comply with the access and benefit sharing regulations. But many of the countries especially the developed countries does not have this requirement in their patent law. So, because of this reason there is lot of misappropriation that is happening at global level.

So, the developing countries have been arguing for development of a legal framework in order to resolve this crisis. So, the World Intellectual Property Organisations Intergovernmental Committee has been negotiating for the development of such an international framework. So, established in 2000 the WIPO Intergovernmental Committee was negotiating to discuss the intellectual property issues that arise in the context of access to genetic resource and benefit sharing as well as the protection of traditional knowledge

and traditional cultural expressions. The IGC holds formal negotiations with the objective of reaching an agreement on one or more legal instruments that would ensure the effective protection of genetic resources. Such instrument or instruments could range from recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it.

So, at the time of forming IGC in 2000 these issues related to traditional knowledge, traditional cultural expressions and genetic resource were completely new to WIPO and at this stage IGC was described merely as a form of discussion, but subsequently in 2009 the IGC worked towards adoption of an international legal instrument. So, in order to provide on the IP aspects of mutually agreed terms for fair and equitable sharing of benefits and related aspects related to traditional knowledge and traditional cultural expressions the WIPO IGC has developed several documents including an online database. So, under the auspicious of IGC WIPO has carried out many studies and developed other resources like glossaries, surveys of national experience and database of legal framework in several countries and this has been useful tool for the negotiations. So, these resources developed by the WIPO IGC has been very useful in aiding the negotiation process. So, now, the WIPO IGC has moved forward and now it undertakes the text based negotiations to finalize an agreement on international legal instrument for the protection of traditional knowledge, traditional cultural expression and genetic resources.

From 2018 to 2023 the WIPO IGC has been discussing text based proposals for a legal instrument. So, at present there are two texts in circulation before the WIPO IGC. So, one text proposes separate instruments for traditional knowledge and traditional cultural expression and there is another text which is being circulated as the chairs draft which covers traditional cultural expression as well as traditional knowledge in a single instrument. So, the negotiations has been ongoing for a long while and this is expected to continue for another year and 2024 the WIPO has proposed for a diplomatic conference which is expected to adopt an international legal instrument. So, this may be in the form of a international agreement for traditional knowledge, traditional cultural expressions and genetic resource.

So, the discussions that has been going on in WIPO IGC has been primarily looking at one linkages with the patent system. So, as I told there is lot of misappropriation happening at global level. So, that means, there has to be some provisions within the patent system to prevent such misappropriation. So, the considerations about genetic resource, traditional knowledge and traditional cultural expressions has to be linked with the patent system. So, this is an important argument being raised by the developing countries.

The establishing of disclosure of source requirement is another major issue. Disclosure of

invention in the complete specification is a requirement in the patent law, but this requirement does not extend to disclosure of the source of genetic material, but some countries as I stated earlier have this requirement in their patent law. So, India is an example for this. So, developing countries have been demanding that this disclosure of source requirement has to be made an international mandate. So, that all the countries who are part of the WIPO framework all the TRIPS will have to include this requirement in their patent legislations.

The third issue that is undergoing negotiation is defensive protection to traditional knowledge, genetic resource and traditional cultural expressions. So, this also is a long standing demand of developing countries to accommodate a defensive protection for traditional knowledge, genetic resource and traditional cultural expressions in the IP framework. So, this can extend to patent laws, copyright laws as well as geographical indication laws. Another major development that has happened in the recent times is the conclusion of regional comprehensive economic partnership. So, RCEP is a comprehensive free trade agreement between Asia Pacific nations like Australia, Brunei, Cambodia, China, Indonesia, Japan, South Korea, Laos, Malaysia, Myanmar, New Zealand, Philippines, Singapore, Thailand, Vietnam.

So, RCEP reflects the emerging trade and economic architecture at the global level. So, there are 15 member countries in the RCEP and this accounts for about 30 percentage of world's population and 30 percentage of global GDP making it the largest trade bloc in the history. So, the RCEP is a recently concluded international agreement for the formation of a Regional Comprehensive Economic Partnership. So, there are 15 member countries in RCEP which includes countries like Australia, China, Japan, South Korea and most of the other countries are from the ASEAN region. So, this is considered as the largest trade bloc in the world.

India was also an active member during the negotiation process, but subsequently India decided to not to become part of the RCEP. So, the RCEP aims at broader and deeper engagement with significant improvements over existing FTAs while recognizing the individual and diverse circumstances of the countries. It facilitates countries engagement in global and regional supply chains taking into account the different levels of development of the participating countries. RCEP covers areas like goods and services, investment, economic and technical cooperation, intellectual property rights, competition, dispute settlement etcetera. So, the RCEP agreement in its finally, concluded form has several chapters.

Chapter 11 of RCEP deals with intellectual property rights. So, the chapter 11 has 14 sections which deal with various aspects like basic principles, copyright, trademark,

geographical indications, patents, industrial designs, unfair competitions etcetera. The section G of this chapter is on genetic resources, traditional knowledge and folklore. So, this is an important international agreement because it is one of the rarest international agreements in which there is a separate section for genetic resource, traditional knowledge and folklore. Even though there are several multilateral agreements related to genetic resource and traditional cultural expressions and traditional knowledge and on various other aspects of biodiversity, very few trade agreements have covered these aspects.

So, RCEP is in effect a free trade agreement which has a specific provision on genetic resource, traditional knowledge and traditional cultural expressions. There is a provision in RCEP which facilitates the member countries to have in their national legislation requirements like prior informed consent or evidence of access and benefit sharing before the grant of intellectual property rights. So, before the grant of intellectual property rights, the member states in the RCEP can require for evidence of prior informed consent or evidence of compliance with access and benefit sharing regulations. So, even though this is not included as a mandatory requirement under the RCEP, this provision gives the freedom to member countries to have such a provision in their national legislations. Another important development that has happened in the recent times is the conclusion of international agreement related to biodiversity beyond national jurisdiction which is popularly called as BB&J.

On 19 June 2023, the United Nations has adopted a new oceans treaty on sustainable use of marine biological diversity of areas beyond national jurisdiction. So, as we have seen in one of the earlier lectures, the biodiversity within the national jurisdiction is covered under the convention on biological diversity. So, the CBD recognizes the sovereign rights of countries over their biological diversity. So, CBD in effect covers only biodiversity within the national jurisdiction of the member countries, but in some parts it does cover other areas. But the recently concluded international agreement related to biodiversity beyond national jurisdiction specifically covers areas that are beyond the national jurisdiction which is the high seas.

The BBNJ treaty is an international agreement on conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. So, this instrument was developed within the framework of United Nations convention on law of the sea which is the main international agreement governing the human activities in the high seas. So, this agreement is expected to achieve a holistic management of high seas activities which should better balance the conservation and sustainable use of marine resources. This treaty will govern the high seas beyond the exclusive economic zones or the national territorial waters of the countries. The agreement under the United Nations convention on law of the sea on the conservation and sustainable use sorry I am starting this slide again.

So, this agreement is known as the agreement under the United Nations convention on law of the sea on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. So, this recently concluded agreement has 12 parts and 76 articles. The objective of this agreement is to ensure conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction for the present and in the long term. One of the key principle of this agreement is fair and equitable sharing of benefits arising from the activities with respect to marine genetic resource and digital sequence information on marine genetic resource of areas beyond national jurisdiction for the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction. So, as you can see this agreement covers both the marine genetic resource which is a physical material and the digital sequence information on marine genetic resource which is of intangible nature.

So, this agreement in its text itself covers both the physical material as well as the intangible material in the form of digital sequence information. In this background you may recall the decision taken in the COP 15 of CBD to include digital sequence information as a subject matter within the CBD framework. The areas beyond national jurisdiction which is mentioned in this agreement essentially means the high seas. The marine genetic resource means any material of marine, plant, animal, microbial or other origin containing functional units of aridity of actual or potential value. So, something which is not having any value now and if it is having a potential value in the future then still it is considered as a marine genetic resource.

The utilization of marine genetic resource is also defined in the text of the convention. So, the utilization means to conduct research and development on genetic or biochemical composition of marine genetic resources including through application of biotechnology. So, this means that the other uses of marine genetic resource for example, for the purpose of consumption does not cover sorry. So, this means that the other uses of marine genetic resources like the use for consumption is not covered under this agreement. So, the activities with regard to marine genetic resource and the digital sequence information on marine genetic resource can be carried out by the state parties who are the countries which are the countries irrespective of their geographic location and by natural or juridical persons under the jurisdiction of such person such parties.

So, such activities shall be carried out in accordance with this agreement. So, this means that the countries as well as the natural or juridical persons within the member countries are free to do any research on marine genetic resource or digital sequence information on marine genetic resource, but the research or the activities undertaken shall be in accordance with the provisions of this agreement. The activities with respect to marine genetic

resource and digital sequence information of areas beyond national jurisdiction are in the interest of all states and for the benefit of all humanity particularly for the benefit of advancing scientific knowledge of the humanity and promoting the conservation sustainable use of marine biodiversity taking into particular consideration the interest and the needs of developing states. So, this essentially means that all the member countries will have freedom to do research on marine genetic resource as well as the digital sequence information on marine genetic resource, but the only requirement is that the activities undertaken shall be in accordance with the provisions of this convention. Article 15 of this agreement provides for establishing a access and benefit sharing committee.

This committee will have 15 members who are nominated by the parties and elected by the conference of parties. So, the access and benefit sharing committee will determine the various aspects related to ABS when a marine scientific research is undertaken. The article 51 of this agreement provides for establishing a clearinghouse mechanism. The information about any activity undertaken with regard to marine genetic resource or digital sequence information shall be notified to the clearinghouse mechanism within 6 months or as early as possible prior to collection inside to of the genetic resource of areas beyond national jurisdiction.

So, before the collection of the resource sorry. So, before the collection of the resource the information regarding the proposed activity has to be notified to the clearinghouse mechanism. The benefits arising from the activities with respect to marine genetic resource and the digital sequence information shall be shared in a fair and equitable manner and contribute to the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction. So, to conclude the last decade has seen significant developments in the formulation of governance framework for biodiversity. The development in the WIPO IGC which is leading to the diplomatic conference indicate the increasing relevance of biodiversity governance. The diplomatic conference under the auspicious of world intellectual property organization is expected to adopt a legal framework to prevent the misappropriation of genetic resource and associated traditional knowledge.

The agreement on biodiversity beyond national jurisdiction is another significant development in the recent times that has resulted in the adoption of a regulatory framework for marine biodiversity. The references for this lecture is given below. Thank you very much for listening to the lecture. I hope you enjoyed the lecture.