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A STUDY ON BIODIVERSITY AND INTELLECTUAL PROPERT RIGHTS RELATED REGIMES: AN ANALYTICAL STUDY

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ABSTRACT

There is a constant debate going on between the relationship the Convention on Biological Diversity and Intellectual Property Rights. On the other hand, Agreement on Trade Related Aspect of Intellectual Property (TRIPS Agreement) is equally controversial, this is one of the agreement which legal binds the members of World Trade Organization(WTO) for achieving the CBD's objectives and sustainable development generally.

The progress has been really slow in solving these complex and integrated issues. In this paper, it is discussed the introduction of IPR, relation of Biodiversity and Intellectual Property and its relation with the existing regimes.

KEYWORDS

Intellectual Property Rights(IPR), Convention on Biological Diversity(CBD), Biodiversity, TRIPs agreement, World Trade Organization(WTO).



What is intellectual property ?

Intellectual Property Right (IPR) is commonly defined as the right to protect the creation of human mind. Intellectual Property Rights are legal rights governing the use of such creation Word Intellect has roots in Latin words intellectus –perception. May be termed as a facility of knowing and reasoning. Measurement of one understands of persons or things of events and concepts. Basic meaning of Property is generally, what one has. What one possesses to the exclusion of all others becomes his property. That is way, property is known as a bundle of exclusive rights. Thus intellect can be termed as the source of ideas, the Intellectual Property becomes the property over the Ideas. Human Being or homo sapiens is described as a social animal. He has a personality of his own, which remains absent is the animals¹. Thus, only human beings are supposed to have the Intellect So, intellect is regarded as the exclusive possession of man against all the animals, it can be said the property of a human being in the sense that it is only they who are thought of as possessing it. In fact, it is the quality that distinguishes the man from animal. These all discussion, the property of the intellect is the property of the holder of the

¹<https://www.managementstudyguide.com/intellectual-property-rights.htm>

intellect i.e. A human being. Therefore, Intellectual Property refers to some particular activity of human from man intellect. Intellect or Idea – A wide concept. The Universe is the expression of the idea of the Supreme Being. Similarly, every object has an idea behind its existence. Everything whether it is material or abstract in nature, owes its existence to ideas and hence, to the faculty of ideas – Intellect. Same concept may be discussed with reference to the theory of Labor. The earth and everything on it is common to all men, yet every man has his property over two things: His Person and what he has carved out of nature for him by his labour and skill. Therefore, naturally, a person should have the right to own which his intellect has produced².

Biodiversity and Intellectual Property Rights.

The previous few years have seen a spread of serious developments involving property rights (IPRs) and biodiversity. a minimum of 2 major international agreements, each lawfully binding, wear down this issue: the Convention on Biological Diversity (CBD) and therefore the Agreement on Trade-Related Aspects of property Rights (TRIPs) of the World Trade Organisation (WTO)³. In addition, the World Intellectual Property Organisation (WIPO) and different international establishments are progressively turning active on the subject. At national levels, too, there's hefty activity. many countries (Costa Rica, Eritrea, Fiji, India, Mexico, Peru, Philippines) are turning out with legislation, or different measures, that reply to the on top of treaties or in other ways in which wear down the connection between IPRs and diverseness of Biodiversity (Glowka 1998). Of explicit interest to several countries, particularly within the 'developing' world, are the following:

- protective endemic information (traditional and modern) from being "pirated" and employed in IPR claims by industrial/commercial interests;
- control access to biological resources so historical "theft" of those resources by the a lot of powerful sections of the world society are often stopped, and communities/countries are ready to gain management and edges from their use.

These issues relate not simply to IPR regimes however conjointly to the new provisions of Access and Benefit-sharing that the CBD contains, and which are being followed up by many countries with applicable domestic legislation. Propellant the spurt in activity on this front are the IPR-related scandals that sporadically shock the world, such as: The patenting of ancient seasoner remedies, for instance the U.S. Patent (No. 5,401,504) given to the healing properties of turmeric, famous for hundreds of years to Indians; or the US plant patent (No. 5,751) on the 'ayahuasca' plant, thought-about sacred and used for medicative purposes by Amazon' endemic peoples; The patenting of crop varieties that are almost like those fully grown for hundreds of years in sure geographical areas, for instance for sorts of Basmati rice by Rice-Tec Corporation within the U.S. (Patent No. 5,663,484); Rice-Tec even uses the term Basmati, long wont to see aromatic rice grown in northern Asian country and Pakistan, to explain its rice varieties; The

²<https://www.upcounsel.com/introduction-of-intellectual-property-rights>

³https://www.researchgate.net/publication/28805051_The_impact_of_IPR_on_biodiversity

patenting of human genetic material, e.g. on the human cell line of a Hagahai member from Papua New Guinea (US Patent No. 5,397,696) Plant breeders' rights or patents on entire taxa instead of specific varieties or breeds, for instance on all transgenic cotton or soybean granted to the corporate Agracetus; and Patents on technologies that threaten farming systems worldwide, similar to U.S. Patent No. 5,723,765 granted to Delta and Pine Land Co., nick-named the killer Technology for its potential of stopping plant regeneration when the primary generation. All countries are currently needed to retort to the current issue, particularly given the subsequent specific selections taken at international forums: selections (II/12, III/17, and IV/15) at serial Conferences of the Parties to the CBD, asking for a lot of in-depth understanding, case studies, and different follow-up on the connection between IPRs and diverseness in general, and visits and CBD in particular; The approaching review of the relevant clause (27(3b) of the visits agreement, in late 1999 or early 2000; selections (III/17 and IV/9) at the Conferences of Parties to the CBD, and at other forums, to figure towards the protection of endemic and native community knowledge, if would like be through various IPR regimes.

A Brief History of IPR's and Biodiversity

IPRs, because the time period suggests, are intended to be rights to thoughts and information, which can be utilized in new innovations or strategies. These rights permit the holder to exclude imitators from advertising such innovations or strategies for a targeted time; in exchange, the holder is needed to reveal the system or concept at the back of the product/process. The impact of IPRs is consequently monopoly over business exploitation of the concept/information, for a restrained period⁴. The said motive of IPRs is to stimulate innovation, through presenting better financial returns than the marketplace in any other case may provide. While IPRs which include copyrights, patents, and logos are centuries old, the extension of IPRs to residing beings and understanding/technology associated with them is notably recent. In 1930, the U.S. Plant Patent Act changed into passed, which gave IPRs to asexually reproduced plant sorts. Several different countries eventually prolonged such or different types of safety to plant sorts, till in 1961, an International Convention for the Protection of New Varieties of Plants changed and signed. Most signatories have been industrialised international regions, who had additionally fashioned a Union for the Protection of New Varieties of Plants (UPOV). This treaty got here signed in 1968. Plant varieties or breeders' rights (PVRs/PBRs), supply the right-holder restrained regulatory powers over the advertising of 'their' sorts⁵. Till recently, maximum international regions allowed farmers and different breeders to be exempted from the provisions of such rights, so long as they did now no longer bask in branded business transactions of the sorts. Now, however, after an change in 1991, UPOV itself has tightened the monopolistic nature of PVRs/PBRs, and a few nations have drastically eliminated the exemptions to farmers and breeders. In addition, in lots of countries, patents with complete monopolistic regulations at the moment are relevant to plant sorts, micro-organisms, and genetically changed animals. In 1972, the U.S. Supreme Court

⁴https://www.iatp.org/sites/default/files/Intellectual_Property_Biodiversity_and_the_Rig.htm

⁵<https://grain.org/>

dominated that microbiologist Ananda Chakrabarty's patent declare for a genetically engineered bacterial strain, changed into permissible. This legitimized the view that whatever made through people and now no longer observed in nature changed into patentable. Genetically altered animals, which include the infamous 'onco-mouse' of Harvard University (bred for most cancers research), have been additionally quickly given patents. Finally, numerous patent claims were made, and a few granted, on human genetic material, such as on strain that has rarely been altered from its original state. Till very recently, those tendencies have been restrained to a few international locations, which couldn't impose them on others. However, with the signing of the TRIPs agreement, this has changed. TRIPs calls for that every one signatory country accept: Patenting of micro-organisms and "microbiological strategies"; and Some "effective" shape of IPRs on plant sorts, both patents and a few sui generis (new) version. TRIPs lets in different countries to exclude animals and flora in step with se from patentability. However, the provisions above have severe sufficient implications, for not are different regions allowed to exclude patenting of existence bureaucracy altogether (micro-organisms must be open for patenting). Nor is there possibly to be a amazing quantity of flexibleness in evolving sui generis structures of plant range safety, for the time period "effective" may be interpreted through commercial international locations to intend a UPOV-like model. Indeed, a chain of activities in 1999, which include conferences in Africa (February 1999) and Asia (March 1999) hosted through UPOV, WTO or different agencies, have proven that this interpretation is already being imposed on 'developing' international locations. The African Intellectual Property Organisation (OAPI), representing 15 Francophone international locations, has determined to enroll in UPOV 1991. The records of IPRs indicate that the monopolistic keep of governments, companies and a few people over organic sources and associated understanding is constantly increasing. As the examples referred to withinside the Introduction indicates, a sizable quantity of this monopolisation is constructed upon, and thru the appropriation of, the sources conserved and understanding generated through indigenous and nearby communities⁶.

TRIPS V. CBD

The TRIPs agreement is handiest in all likelihood to significantly accentuate the influences mentioned above. In particular, its try to homogenize IPR regimes militates towards a country's or network's freedom to select the manner wherein it desires to cope with the use and safety of know-how. Equally important, it consists of no provision for the safety of indigenous and nearby network know-how. Such know-how, due to its nature, might not be amenable to safety beneath modern-day IPR regimes. Finally, it has no reputation of the want to equitably percentage within side the advantages of know-how associated with biodiversity. Indeed, it legitimizes the traditional inequities which have characterized the interactions among the industrial-industrial use of biodiversity-associated know-how, and the network/citizen use of such know-how⁷. The bad influences of TRIPs at the 3 targets of the CBD are already starting to be felt, or threatened,

⁶<https://enb.iisd.org/journal/kothari.html>

⁷https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403000

in a few countries (see country wide critiques with the aid of using Dhar 1999 and Anuradha 1999; see additionally field below). There is a pressing want to discover anything areas are to be had inside present regimes, to counter those threats, and to look at opportunity regimes that have conservation, sustainable use, and equitable benefit-sharing constructed into them.

TRIPs vs. CBD in India: India is presently thinking about legal guidelines to observe the TRIPs and CBD: the Plant Varieties and Farmers' Rights Bill (PVFRB) and the Biological Diversity Act (BDA), respectively. The PVFRB is meant to be India's sui generis plant range safety regime (as according to Article 27(3)b of TRIPs). However, in numerous methods those aren't in concord: Whereas the BDA affords for the safety of nearby network rights in a large sense, the PVFRB consists of handiest a slender definition of farmers' rights (the proper to reuse, exchange, and sell (besides as branded product) covered plant varieties; it does now no longer offer for the safety of farmers' very own varieties (which might be not likely to byskip the stringent assessments of novelty, distinctiveness, etc.) however instead makes a speciality of reaping rewards formal zone plant breeders; Whereas the BDA explicitly affords for benefit-sharing measures with nearby communities, the PVRFB has no such provision; Whereas the BDA tries to consist of nearby network representatives at numerous tiers of decision-making, the PVRFB nearly absolutely excludes them, giving decision-making powers in large part to bureaucracies; Whereas the BDA calls for effect exams to make certain that each one developmental sports are in concord with biodiversity conservation and sustainable use, the PVRFB does now no longer require the sort of exams for plant range safety applications; The contradictions among the 2 proposed legal guidelines are but to be resolved, even though they had been talked about with the aid of using NGOs and activists (Kothari 1999)⁸. Interestingly, India isn't always even required to move in right now for a plant range safety law; the haste with which the PVFRB has been drafted, factors to the impact of the an increasing number of effective seed industry (domestic and foreign).

Space within existing regimes

Space inside TRIPs: Though basically favouring the similarly growth of modern-day IPR regimes, there are a few provisions in TRIPs that may be exploited with the aid of using groups and international locations inquisitive about protective their pursuits in opposition to the ones of dominant industrial-business forces: Article eight lets in for criminal measures to guard public health/nutrition, and public hobby; al even though environmental safety isn't always explicitly constructed into this, it can be justified as being in "public hobby". Unfortunately, this clause is situation to "the provisions of TRIPs", which leaves huge open the translation of its applicability; Article 27(2) lets in for exclusion, from patentability, innovations whose business use wishes to be avoided to shield in opposition to "extreme prejudice" to the environment. This is incredibly convoluted, due to the fact a rustic will first want to decide such extreme prejudice, justify the prevention of business use, after which best be capable of justify non-granting of patents; Article

⁸<https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1196&context=mji>

27(3) lets in international locations to exclude plant life and animals from patentability, and additionally plant varieties, as long as there's a few other "effective" shape of IPR to such varieties. As stated above, what is "effective" is possibly to be decided with the aid of using effective international locations, wherein case the nearly patent-like regime being recommended with the aid of using UPOV ought to nicely be pushed. However, an incredibly ambitious us of a ought to nicely test with absolutely exclusive sui generis systems (see alternatives, below), and resist any costs which might be introduced in opposition to it at WTO. Article 22 lets in for the safety of merchandise that are geographically described through "geographical indications". This ought to assist guard a few merchandise that are regarded with the aid of using the unique places wherein they have got originated (as has been done, for instance, with champagne). It is controversial whether, for instance, Basmati rice might have been covered on this manner (the call does now no longer derive from any location, however the range is thought to return back from a specific geographical area). Countries like India are already thinking about home rules on this. Space inside CBD: As stated above, each Article 16(5) and Article 22 offer international locations with a few maneuverability with reference to IPRs. If certainly a rustic can set up that IPRs run counter to conservation, sustainable use, and/or equitable benefit-sharing, it have to be justified in except such IPRs. However, the caveat "situation to countrywide rules and global law" might also additionally nicely make this difficult, on account that TRIPs is additionally "global law". Between TRIPs and the CBD, which holds criminal priority? Legal opinion might possibly be that TRIPs, being the later treaty, might supercede CBD in case of a conflict. However, for the reason that CBD offers a lot greater with the safety of public hobby and morality, which TRIPs recognizes as legitimate grounds for any measures that international locations need to take, it can be argued that CBD's provisions have to supercede the ones of TRIPs. This interface has now no longer but been examined in any energetic case withinside the global arena; best while it does, can we recognize what intepretation is possibly to hold. The CBD, unfortunately, is at a extreme downside because it does now no longer but have a dispute decision mechanism of its own, not like the WTO. Perhaps the maximum vital provision inside CBD can be Article 8j, which calls for international locations to recognize and guard indigenous and nearby network information, make certain that such groups are requested earlier than the usage of their information for wider society, and similarly make certain the equitable sharing of blessings springing up from such use⁹. Built into this provision are the seeds of a greatly exclusive imaginative and prescient of protective information and producing and sharing blessings from it. Discussions withinside the CBD boards, inclusive of at successive Conferences of Parties, have tested this potential, specially on account that a huge variety of indigenous and nearby network organizations have used the boards to push their case. In this connection, an thrilling query might be: can a rustic mission any other us of a's IPR regime at the floor that it fails to provide good enough safety to casual improvements of indigenous or nearby groups, and consequently violates Article 8j of the CBD? Can India mission the United States patent regime as a whole, bringing up examples along with the turmeric patent? The Indian delegation to

⁹<https://www.cbd.int/doc/articles/2002-/A-00308.pdf>

WTO's Committee on Trade and Environment posed this query in a June 1995 meeting, however reportedly were given no unique response. It might be thrilling to look how the CBD boards might cope with a rate like this, if introduced with the aid of using one us of a in opposition to any other. Changing IPR Regimes: A mixture of the applicable clauses in TRIPs and the CBD, may be used to argue for adjustments in present IPR regimes that could assist to shield public hobby. Many human beings have argued, for instance, that other than the standard standards of novelty, etc. which might be required of an IPR applicant, the subsequent have to additionally be sought as a part of the application: Source (us of a/network/person) of the fabric or facts that has long gone into the produce/technique for which an IPR is claimed; Proof of previous knowledgeable consent from the us of a and network of origin (as consistent with Articles 15(5) and 8j of the CBD); Details of the benefit-sharing preparations entered into with the network of origin, anywhere applicable (as consistent with Article 8j of the CBD). Countries like India have additionally counseled that each one IPR applications, that are associated with biodiversity and biodiversity-associated information, have to be published at the Clearing House Mechanism (installation below the CBD), giving worried international locations and groups/people an possibility to item in the event that they sense that their rights were violated. These guidelines have, of course, now no longer but been customary at an global level, however are being constructed into a few home rules.

CONCLUSION

There is need to substantially review the international regimes which are having relevance with IPR and Biodiversity. An attempt should be made to use the spaces available with them and create a new space with the existing regimes so that the biodiversity is protected and rights can be preserved. Especially with the TRIPs agreement at the level of WTO, certain measure with the relevance to CBD and international process relevant to IPRs and Biodiversity need to be taken.