Sui Generis Protection of Genetic Resources and Associated Traditional Knowledge

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At the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity (CBD), the Parties adopted decisions on ABS and Article 8(j) which can be interpreted as supporting the development of *sui generis* regimes under the CBD.

COP7 Decision 19 mandated the Working Group on ABS, in collaboration with the Working Group on Article 8(j), to elaborate and negotiate an international regime on ABS "with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention."

COP7 Decision 16 is of interest to this discussion in that it requests the WG8(j) "to explore.. the potential of, and conditions under which, the use of existing as well as new forms of intellectual property rights can contribute to achieving the objectives of Article 8(j) and related provisions of the Convention."

COP7 Decision 16 on Article 8(j) and related provisions includes an activity to develop elements of *sui generis* systems for the protection of traditional knowledge, innovations and practices which would recognize elements of customary law relevant to the conservation and sustainable use of biological diversity, traditional knowledge and biological resources.

This paper will consider the issue of *sui generis* protection of genetic resources and associated traditional knowledge from the three perspectives reflected in the above paragraphs:

- *Sui generis* protection of genetic resources and associated traditional knowledge under national access and benefit-sharing laws;
- *Sui generis* intellectual property protection of genetic resources and traditional knowledge; and
- *Sui generis* protection of genetic resources and traditional knowledge which is outside the scope of IP rights.

National ABS Laws

National-Level Access to Genetic Resources
Under national ABS laws, new forms of *sui generis* protection of genetic resources and traditional knowledge are evolving. My view is that national access laws can be comprised of two distinct and separate *sui generis* regimes. Under the CBD, States have sovereign rights

[1] The views expressed are solely those of the author.

over their own biological/genetic resources and the implementation of Article 15 (Access to Genetic Resources) at the national level is in effect creating new national-level *sui generis* property rights based on the principles of prior informed consent and mutually-agreed terms. Many countries enacting national ABS laws broadened the scope of this to include traditional knowledge associated with genetic resources and this expansion was reflected in both the scope of the Bonn Guidelines and the COP7 decision to negotiate an international regime. The second *sui generis* regime that is evolving under national ABS laws is one of community-level *sui generis* rights based on indigenous and local community prior informed consent and benefit-sharing for traditional knowledge and related genetic resources accessed and used for scientific and commercial purposes.

It is still not clear as to whether the *sui generis* rights over genetic resources created under national ABS laws will ultimately manifest themselves as real property, intangible/information property or intellectual property. Biological resources are unique when compared to other resources (inanimate matter) used to develop innovative products and processes.

The enforcement challenges cited by countries with national ABS laws illustrate that what we are dealing with straddles real and intangible property. Enforcement of access at the in-situ level resembles resource management policy where harvested resources are generally treated as real property. The economics and nature of the enforcement of genetic resources and derivatives in the marketplace more closely resemble that of intellectual property rights. While the prior informed consent procedures under national access laws may regulate access to genetic resources primarily as real property (e.g. granting permission for physical access to the biological resource), in the process of negotiating mutually-agreed terms contract clauses are defining new intangible property rights related to the potential commercial value of the genetic material/information contained in the biological resources.

The certificate issue also seems to be getting at the nature of these real property/*sui generis* property rights issues. Prior informed consent certificates could accompany biological material (as real property) being exported/imported but a certificate system in the marketplace applied to derivatives and products of genetic resources in some way extends rights beyond concepts of real property.

Community-level Access to Traditional Knowledge and Associated Genetic Resources
Issues related to the second type of *sui generis* regime currently being evolved will be discussed more fully under the panel on community-level prior informed consent for accessing traditional knowledge and genetic resources. However, it is worth considering how *sui generis* protection may be applied to both traditional knowledge and genetic resources.

Community-held Traditional Knowledge

Sui generis protection of community-held traditional knowledge can borrow elements from the traditional protocols governing access to and use of traditional knowledge by indigenous and local communities, as well as some aspects of trade secrecy law. In Canada, indigenous communities are negotiating protocols with resource companies which govern access procedures and the use of traditional knowledge. These protocols are being developed with

significant community input and it is through this inclusive process that community interests related to traditional protocols are being respected.

It is illegal for a company to pay a competitor's employee for access to industrial secrets. The same principle of fairness provided to trade secrets under national law ought also to apply to secret traditional knowledge. It has been common practice, however, for scientists and companies to access community-held traditional knowledge through an individual community member.

Trade secrecy rights also come with certain obligations. For example, in order to get redress under the law from unauthorized access to confidential information, companies are obligated to take certain measures to reasonably protect their trade secrets from others. Under a *sui generis* regime to protect secret traditional knowledge, indigenous and local communities would likely be expected to take appropriate measures (e.g. the use of traditional protocols governing individuals of the community) to protect traditional knowledge from unauthorized access. Communities would also need to develop prior informed consent (PIC) procedures and make these publicly available so that the access process is transparent. Flexibility is needed at the community-level since prior informed consent procedures will vary from one community to the next. A *sui generis* regime for accessing traditional knowledge based on this model would consist of the published PIC procedures at the community level coupled with a national level legal framework which supports the legal status of community-level PIC regimes.

Community-level Access to Genetic Resources

The issue of community-level access to genetic resources is an issue that has not been considered at CBD meetings in any detail. Where land claims have been settled in Canada then indigenous peoples have unique opportunities through their law-making powers to regulate access and benefit-sharing from genetic resources that range on their lands. Where land claims have not been settled there is a potential role for ABS-related issues to be reflected in government/industry resource and land management practices. There are many cases in Canada (often through environmental assessment processes) where governments and industry are integrating the interests/rights of local indigenous communities into resource management practices. On the other hand, there are also some cases where Aboriginal people have expressed their concerns that traditional knowledge provided to governments led to the creation of protected areas, but the Aboriginal people were subsequently excluded from continuing their traditional harvesting practices or this secret traditional knowledge submitted to governments was disclosed to others, resulting in non-Aboriginal outfitters beginning to hunt or fish in traditional harvesting areas.

Possible objectives of such *sui generis* protection of traditionally-used genetic resources may include, *inter alia*:

- Community-level participation through a community-based prior informed consent system;

- Continued access and use of traditionally-used biological resources by indigenous and local communities;
- The preservation of traditional knowledge of in-situ biodiversity including support for traditional protocols governing traditional knowledge;
- Integration of ABS-related issues into government/industry land and resource management practices;
- Where necessary to protect and encourage customary use of biological resources, exclusive use by indigenous and local communities of traditionally-used biodiversity;
- Prohibitions against the use of sacred knowledge, plants or medicines by others; and
- Benefit-sharing at the community-level when traditionally-used biological/genetic resources are used for scientific and commercial purposes.

Sui Generis **IP Protection**

There are a couple of areas of intellectual property law that are more readily adaptable to protecting genetic resources and associated traditional knowledge. IP systems use fixed term market exclusivity to encourage investments in innovation and generic copies upon the expiration of the term of protection. The concept of fixed term protection has limitations when applied to the objective of conserving biodiversity and preserving traditional knowledge. Conserving genetic resources and traditional knowledge for only a 10 or 20 or 50 year term of protection is not optimal from a biodiversity policy perspective. Trade secrecy, marks and fair trade practices are not constrained in their usefulness in the same way as intellectual property rights with fixed term protection (e.g. patents).

In particular, adapting Appellations of Origin to both genetic resources and traditional products produced by indigenous and local communities would seem to be the most promising opportunity to utilize *sui generis* IP systems to achieve CBD objectives. Adapting appellations of origin type protection to address the issue of follow-on innovation may also be needed to ensure fairness and benefit-sharing from the use of genetic resources and associated traditional knowledge.

Another area of *sui generis* IP protection that can be applied to genetic resources and traditional knowledge is data protection for confidential business information. Data submitted by companies to government regulators can be protected from public disclosure under various regulatory laws. In this way, traditional knowledge submitted for environmental assessments can be protected from public disclosure and the secrecy of the location of harvested plants and animals thereby maintained. A potential model for the protection from public disclosure of traditional knowledge submitted for ABS purposes is that used in some countries such as New Zealand to protect sacred sites. Under such a system, traditional knowledge could be submitted to the government and held as confidential information - only to be used by the government to protect sites containing biological/genetic resources used by indigenous and local communities when they are under threat from resource development or harvesting by others.

There may also be some merit in exploring whether a form of protection for taxonomic data should be considered as part of the international regime. Only 10% of the species on Earth are

known, so clearly there is a need to provide public S&T expenditures and/or private sector incentives to accelerate the process of taxonomic research. Knowledge of species is a necessary condition of valuing their uniqueness and building public policy support for conservation of biodiversity. Society is unlikely to value that which it doesn't know exists. There are strong arguments for keeping taxonomic knowledge in the public domain but there are equally strong arguments that greater incentives are needed to encourage taxonomic research. One solution under the international regime would be to link genetic resource and taxonomic knowledge into *sui generis* protection that affords stronger protection for genetic resources that are known, described and publicly disclosed than the protection afforded to unknown in-situ species.

Another possible form of *sui generis* IP protection would entail the Convention of Biological Diversity owning a world-wide certification mark through ownership of national certification marks in key countries. The CBD would then become a standards setting body that would establish rules for use of this certification mark. This hybrid instrument could meld aspects of intellectual property and CBD objectives (including ABS) into a *sui generis* system. The merit of such a proposal may depend on the scope of the rules that Parties would establish for such a certification system and whether these may be legally-binding obligations related to user measures and enforcement.

Non-IP *Sui Generis* **Protection**

Although many of the potential elements to be considered in the development of sui *generis* systems for the protection of traditional knowledge (in the annex of COP7/16) match those of WIPO's elements for *sui generis* intellectual property protection, a key difference can be found in paragraph 4 concerning customary law. It is important for this discussion to restate this potential non-IP element:

> Recognition of elements of customary law relevant to the conservation and sustainable use of biological diversity with respect to: (i) customary rights in indigenous/traditional/local knowledge; (ii) customary rights regarding biological resources; and (iii) customary procedures governing access to and consent to use traditional knowledge, biological and genetic resources.

This paragraph illustrates the central philosophical difference regarding the protection of traditional knowledge that exists between the World Intellectual Property Organization and the Convention on Biological Diversity. WIPO views traditional knowledge through an IP lens - the philosophy underlying the objectives and nature of intellectual property rights. To be protected under *sui generis* IP law, traditional knowledge will need to be adapted to fit into this legal structure.

On the other hand, Article 8(j), and related provisions, affords an opportunity to develop *sui generis* systems of protection recognized under national law that resemble the customary laws/traditional protocols of indigenous and local communities. A key goal of any such *sui generis* regime is to support the conservation of biodiversity and preservation of traditional knowledge as compared to the overarching goal of intellectual property rights which is to foster innovation, creativity and commercial use.

In practice, the subject matter of non-IP *sui generis* systems may closely resemble that of intellectual property rights. The customary laws/traditional protocols of indigenous and local communities provide rights and obligations covering names and symbols, textile designs, medicines, songs, dances, stories, etc.

Conceptually, I see non-IP *sui generis* regimes having two faces. One face will be recognized by indigenous and local communities since measures consistent with customary laws/traditional protocols will apply at the community level. The other face will be recognized by marketplace participants as having some elements of intellectual property protection such as market exclusivity rights and redress through the courts when there is unauthorized use of traditional knowledge.