Introduction

Bowing to pressure from developing countries, indigenous groups, and civil society, a number of international organizations have embarked in recent years on measures to enhance the protection of indigenous and traditional knowledge. The United Nations Educational, Scientific and Cultural Organization (UNESCO), for example, responded in 2003 to a perceived disproportionate focus on tangible cultural heritage in its programs by adopting a new instrument for the safeguarding of intangible cultural heritage. A year earlier, the Food and Agriculture Organization (FAO) established a multilateral system to facilitate access to plant genetic resources for food and agriculture. The United Nations Environment Programme within the past decade also set up a binding framework governing access to traditional knowledge and genetic resources premised on the prior informed consent and equitable sharing of benefits with rights holders. On its part, the World Intellectual Property Organization (WIPO) continues to pursue discussions centered on intellectual property-based solutions.

These efforts to improve the protection of traditional knowledge have been informed largely by a recognition of the need to counter the negative effects on indigenous communities arising from the widespread commercial exploitation of traditional knowledge. Indigenous groups have been quite vocal in their complaints about the lack of adequate compensation, loss of community rights, misrepresentation of products and practices as indigenous, and the unauthorized public disclosure and use of secret knowledge, images, and other sensitive information pertaining to indigenous communities. An improvement in the regulatory environment, arguably, would provide indigenous groups with greater control over the use of traditional knowledge and ensure that access to traditional knowledge would be on terms that are mutually acceptable and respect indigenous culture.

The principal objective of this book is to provide a global survey of the existing measures of protection of traditional knowledge in all regions of the world, to identify the gaps in protection, and to assess the relevance of selected key approaches to the development of effective remedial solutions.

The book consists of four main parts. Part I describes the nature of traditional knowledge and community expectations regarding its protection, Part II outlines initiatives at the international level to enhance its protection and Part III elaborates on regional and national frameworks of protection in the different areas of the world. Part IV surveys complementary laws and policies for the protection of traditional knowledge and evaluates systems of protection premised on the use of customary laws, disclosure of relevant use of traditional knowledge in applications for intellectual property, and the conclusion of mutual recognition agreements on traditional knowledge. A breakdown of the issues discussed in each part of the book is as follows.

PART I

The first chapter of Part I surveys various terms used to describe the subject matter of the book, noting its diverse and communal nature. In line with emerging international practice, the term traditional knowledge is retained in the book as the principal reference for such subject matter.

The second chapter describes the social, cultural and economic value of traditional knowledge to indigenous and local communities, and highlights its modern day uses. Concerns about the negative effects on traditional communities arising from the commercial exploitation of traditional knowledge are outlined to build a case for protection premised on greater control by indigenous peoples and local communities over uses of their traditional knowledge.

The third chapter summarizes the scope of rights in different types of intellectual property, explains common justifications for the intellectual property system and points out similarities between traditional knowledge and intellectual property rights. This is followed by an assessment of the relevance of intellectual property for the positive protection of traditional knowledge especially against unauthorized use, the use of misleading or false indications as to authenticity or origin and to prevent derogatory or offensive uses of traditional knowledge. The chapter also explores the extent to which intellectual property could be used defensively by requiring the disclosure in intellectual property applications of the source or origin of traditional knowledge. It is noted that it would be difficult to protect traditional knowledge in a comprehensive manner in light of challenges with fitting some forms of traditional knowledge into well-known criteria of intellectual property, including ownership, novelty, fixation and duration.

PART II

The first chapter of Part II, Chapter 4, evaluates the extent to which traditional knowledge is protected under the major international intellectual property instruments. It notes that the Paris Convention for the Protection of Industrial Property, the Universal Copyright Convention, and the TRIPs Agreement do not provide any form of protection. However, the rights recognized for performers under the Rome Convention, the WIPO Performances and Phonograms Treaty and the Beijing Treaty could be exercised by performers of expressions of traditional knowledge. Although the Berne Convention contains a provision on anonymous works that is considered to be potentially relevant to the protection of traditional knowledge, there is no evidence that the instrument has been used for this purpose by any country. The chapter also highlights the efforts made in the World Trade Organization to revise the TRIPs Agreement to provide for protection of traditional knowledge including the incorporation of an obligation to disclose the source or origin of such knowledge.

Chapter 5 describes initiatives by WIPO and UNESCO for the protection of traditional knowledge beginning with the development of national model laws, followed by efforts to develop an international instrument on folklore, and the adoption by UNESCO of instruments for the protection of cultural heritage. The chapter also touches on the renewed focus on traditional knowledge by WIPO in the late 1990s through fact-finding missions to different regions to identify the needs and expectations of rights-holders and how they could be addressed under intellectual property law. These efforts culminated in the establishment by WIPO in 2000 of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to facilitate discussions on traditional knowledge.

In Chapter 6, the international regime governing access to genetic resources and related traditional knowledge is described, including rules on prior informed consent, mutually agreed terms and the fair and equitable sharing of benefits. The chapter traces the development of those rules, first as principles in the Convention on Biological Diversity, then as guidelines in the Bonn Guidelines, and finally as binding commitments in the Nagoya Protocol. This is followed by an examination of the scope of rights of farmers and plant breeders, the rules governing the conservation and use of genetic resources as well as provisions on the rights of indigenous peoples found in some instruments concerning the environment.

Chapter 7 outlines provisions in major international human rights instruments relevant to the interests of indigenous people and traditional communities. It highlights the work of the United Nations Human Rights Council in the development of the United Nations Declaration on the Rights of Indigenous Peoples and the creation of structures within the UN system capable of influencing policy on indigenous peoples and their interests in traditional knowledge. In this context, the chapter also surveys the provisions of a key instrument adopted by the International Labour Organization which guarantees to indigenous peoples the right to decide their own development priorities and to control their economic, social and cultural development.

PART III

The first chapter of Part III, Chapter 8, explains how rights in traditional knowledge are created and enforced under African customary laws. It examines the protection of folklore under national laws, distinguishing between laws that contain specific references to folklore and those that do not. It also discusses the relevance of African regional arrangements to the protection of traditional knowledge, noting in this context, the provisions of the Swakopmund Protocol developed by the African Regional Intellectual Property Organization (ARIPO); the Revised Bangui Agreement adopted by the Organisation Africaine de la Propriete Intellectualle (OAPI); and the African Model Legislation prepared by the Organization of African Unity (OAU).

Chapter 9 surveys US government initiatives on indigenous cultural heritage and describes the use of Native American tribal courts to control the exploitation of traditional knowledge. It also discusses some constitutional issues regarding domestic protection, including public domain, free access to information, freedom of religion and free speech. After an assessment of international commitments (not) assumed by the US in relation to traditional knowledge, the chapter summarizes the US stance in ongoing debates at various global fora regarding the adoption of a binding international arrangement for the protection of traditional knowledge.

Chapter 10 describes the framework of protection of traditional knowledge in Australia with reference to the concerns of Aboriginal and Torres Strait Islanders, the use of intellectual property and cultural heritage laws, and recommendations made by several government commissions of inquiry. It notes in the case of New Zealand, significant reforms of that

country's intellectual property laws in ways that demonstrate the government's sensitivity to concerns of the Maori with regard to the protection of their culture. The chapter also surveys the provisions of the national intellectual property laws as well as the regional Model Law of the Pacific Island countries.

Developments in other regions of the world are taken up in Chapter 11 beginning with the relevant regional and national laws in Europe followed by an examination of the intellectual property and cultural heritage laws found in the Americas, Asia and the Middle East.

PART IV

The first chapter of Part IV, Chapter 12, examines the implications of proposals for improving the legal regime on traditional knowledge through use of complementary laws and policies such as moral rights, public domain and *domaine public payant*, unfair competition laws, and trade secrets. Other proposals considered in the chapter concern the utilization of contractual agreements, documentation and databases.

The remaining chapters discuss three key approaches for the protection of traditional knowledge involving the use of customary laws, the disclosure of traditional knowledge in intellectual property applications and the adoption of mutual recognition agreements on traditional knowledge. The critical roles played by the selected approaches in the protection of traditional knowledge justify their special treatment in the book. To begin with, customary law is the primordial governance scheme for traditional knowledge. Secondly, the disclosure requirement has emerged as a widely acclaimed solution to the misappropriation of traditional knowledge. Thirdly, mutual recognition agreements would serve as complementary schemes of protection or fall back positions in the event satisfactory progress is not made in the negotiations for binding international instruments on traditional knowledge.

With regards to the first approach, Chapter 13 revisits the case for the development of *sui generis* regimes to complement the intellectual property system. To the extent the schemes that have been proposed are premised on the protection of traditional knowledge in accordance with the customs of indigenous groups, it notes customary law has become an important area of inquiry. However, despite this recognition of the relevance of customary law for traditional knowledge, not much information is available in the literature regarding the effectiveness of customary law as a protective mechanism. The chapter aims to remedy

this gap by elaborating on the concept of customary law and describing the extent to which it is recognized and enforced in various legal systems in the world.

The chapter argues that the link found to exist between traditional knowledge and customary law as evidenced by similarities in their definitions, confirms the significance of customary law as the primary regulatory mechanism over uses of traditional knowledge. The link also suggests that solutions to traditional knowledge issues drawn from customary law are likely to be more successful than the western oriented top-down approaches reflected in current international instruments on traditional knowledge.

Following a discussion of the extent to which customary law is recognized under selected legal systems, including Africa, the US, New Zealand, Australia, the Andean Community and the Pacific Island countries, the chapter assesses the effectiveness of customary law as an enforcement mechanism with reference to definitional issues, its status as national law, its principles of liability, and procedures for its ascertainment and application. Despite the noted limitations of customary law, the chapter urges the formal recognition of customary law as part of national legal systems and the improvement of methods for ascertaining and enforcing it.

Suitable mechanisms for the administration and enforcement of customary laws are recommended, including the creation of national agencies to oversee arrangements governing access, use and benefit sharing in relation to traditional knowledge. Procedures should also be put in place to allow cases involving misappropriation of traditional knowledge to be resolved by the courts. To improve on methods of ascertaining and applying customary law, the national agencies should undertake to identify rules governing the use of types of traditional knowledge and to compile them in a database that would be available to the public. However, for maximum protection, the use of customary law at the national level needs to be complemented by binding international schemes on access and benefit-sharing which provide for international cooperation in tackling jurisdictional and enforcement issues likely to arise with respect to persons who may have misappropriated traditional knowledge in contravention of the customary law rules of one country and moved out to a different jurisdiction.

Chapter 14 introduces the second approach which is examined as a method of strengthening the global regime governing access to genetic resources and enhancing its effectiveness in addressing the problem of biopiracy. The approach calls for the amendment of intellectual property

laws to require disclosure in patent applications of the source or origin of genetic resources or traditional knowledge relevant to the claims in the applications. Such disclosure, it is contended, would, *inter alia*, enable providers of genetic resources and traditional knowledge to keep track of the use of their resources or knowledge in research and development resulting in patentable inventions and provide useful information to patent examiners in the determination of the prior art as it would simplify searching the databases that have been established at the local, regional and national levels.

The chapter illustrates the negative effects of biopiracy drawing on selected cases from Africa, India and the Americas and traces the evolution of the obligation to disclose from provisions in national model laws and a draft treaty on folklore prepared by WIPO and UNESCO, to the Convention on Biological Diversity and the Bonn Guidelines as well as proposals before the TRIPS Council of the World Trade Organization. It also discusses implications of the disclosure requirement, including triggers, legal bases for, scope and sanctions for non-compliance.

Advocates of the disclosure requirement have turned to WIPO as a more appropriate forum for solutions given its jurisdiction on matters of international intellectual property policy. A major strategy WIPO has adopted in response is the preparation through text-based negotiations of instruments that would incorporate the disclosure requirement. The chapter reviews WIPO's current program on the disclosure requirement and evaluates the latest proposals contained in the texts being used as the bases of negotiations in WIPO.

The chapter concludes that the draft negotiating texts developed so far by WIPO will require further refinement and alignment to be ready for adoption as binding instruments. For WIPO member countries that are generally supportive of the disclosure requirement, the discrepancies may be seen as minor ones that could be ironed out in future negotiating sessions. However, for others rigidly opposed to the requirement, such hopes may not be realistic, leaving the distinct possibility that consensus may not be found to submit even a significantly improved text to a diplomatic conference for consideration for eventual adoption by WIPO. In the end, if satisfactory progress is not made, there will be an urgent need for like-minded traditional knowledge provider countries in collaboration with interested traditional knowledge user countries to respond to the void by working to develop solutions under bilateral, regional or other multilateral arrangements for the protection of traditional knowledge.

Chapter 15 examines an alternative mechanism for the protection of traditional knowledge as the third approach which is based on the

principle of reciprocity. In the context of traditional knowledge, references to the reciprocity principle have been made during debates at the WTO about a revision of the TRIPs Agreement to protect the interests of developing countries in traditional knowledge.

It is noted that the current international regulatory framework on traditional knowledge for the most part incorporates domestic measures which are of limited use in tackling cases of misappropriation that have international dimensions and require international cooperation to overcome jurisdictional and enforcement hurdles identified in the book. After reviewing the approaches commonly employed in international law instruments to recognize the rights of foreigners, the chapter contends that protection of traditional knowledge on the basis of reciprocity would offer a higher degree of protection for traditional knowledge holders than under the national treatment principle. In addition, it recommends the use of mutual recognition agreements (MRAs) as a special application of the reciprocity principle.

The chapter cites the prevalence of MRAs in trade as a useful popular alternative where harmonization of different international trade standards has proved to be difficult. It points out features of the MRA that make it relevant to the protection of traditional knowledge, especially in overcoming the reluctance of countries to agree to a binding international agreement out of concern that they would be required to amend their national laws to provide for the protection of traditional knowledge. For example, unlike an agreement based on national treatment, an MRA could be negotiated and implemented where the regulatory systems differ as where one country provides for rights not recognized in the other. Thus, Country A could agree to recognize and protect traditional knowledge rights from Country B on the basis of an agreement reached between the two countries even though the former does not have laws on traditional knowledge.

The chapter then elaborates on the scope of protection envisaged in an MRA on traditional knowledge. It concludes that while mutual recognition agreements do not apply to non-parties and thus will have no effect in countries that refuse to subscribe to them, the common principles such agreements reflect could form the basis for and influence quite positively the development of future international instruments for the protection of traditional knowledge.

The book is informed by the results of research spanning more than two decades. Some sections of the book constitute revisions of earlier works by the author published by journals including the American

University Law Review,[1] the Indiana International and Comparative Law Review,[2] Pepperdine Law Review[3] and the San Diego International Law Journal.[4]

Any feedback to the author is welcome (KurukTKGRCLIP@gmail.com).

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[1] Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes*, 48 AM. U. L. REV. 769 (1999).

[2] Paul Kuruk, *The Role of Customary Law Under Sui Generis Frameworks on Intellectual Property Rights in Traditional and Indigenous Knowledge* 17 INDIANA INT'L & COMP. L. REV. 67 (2007).

[3] Paul Kuruk, *Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Traditional Knowledge in the United States* 34 PEPPERDINE L. REV. 629 (2007).

[4] Paul Kuruk, *Regulating Access to Traditional Knowledge and Genetic Resources: The Disclosure Requirement as a Strategy to Combat Biopiracy,* 17 SAN DIEGO INT'L L J. 1–74 (2015).