Different approaches to the protection of individual and collective Intellectual Property Rights. The case of Traditional Knowledge

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This work stresses the importance of the role of intellectual property (specifically copyrights) for the relationship between trade and economic development. To a certain extent, the Trade Related Aspects of Intellectual Property Rights Agreement tries to harmonize the different legislations of the member countries. However, sometimes the ownership rights of ideas are not properly acknowledged and protected. The various and sometimes unsuccessful attempts to protect the Traditional Knowledge reflect this diversity. This paper explores the possible ways to deal with such an argument, with the aim of making Traditional Knowledge "value driven and market accepting" (Finger 2000) [JEL Code: O34, Z13].

1. - Introduction

As is stressed extensively in literature, there are significant differences among countries regarding copyright laws that reflect deep rooted cultural values. Cultural industries reliant on copyrights offer considerable growth and export potential opportunities to developing countries. Traditional Knowledge, considered in a market contest, could potentially belong to such industries too. Traditional Knowledge is basically the knowledge that the people in a given community, based on experience and

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on the surrounding culture and environment, have developed and continue to develop over time. In recent years, the issue of production and dissemination of Traditional Knowledge has received a lot of attention as an important economic and commercial source of income for developing countries. This is essentially due to the fact that Traditional Knowledge generates a consistent and potentially sustainable stream of money. This paper underlines the issue of Traditional Knowledge having a commercial potential in developing countries and the aim to make the people who create it the owners of the income it generates. Unfortunately sometimes the incentives and the concerns of Traditional Knowledge owners are different from those of multinationals and/or corporate research. This study will analyse the question of whether increasing Intellectual Property protection is always the best way to pursue.

On one hand are the benefits from creating incentives for people from developing countries to invest in culture and local cultural knowledge by taking advantage of economic opportunity of exporting their culture; on the other are concerns about *"defending a static stock of knowledge from outside exploitation"* (Finger 2003). A fine balance needs to be struck between both ends and the challenge is to understand how to proceed it to maximise benefits to all parties.

This work shows that a unique solution does not exist, but varies case by case. The rest of the paper is organised as follows. The next section provides a brief overview of the legal framework on Intellectual Property Rights. Section III focuses on the Trade Related Aspect of Intellectual Property Rights Agreement. The copyright issue is discussed in Section IV. Section V describes the mechanics of Traditional Knowledge. Section VI presents the conclusion and the implications of this work.

2. - Intellectual Property Rights: a brief introduction

Every time there have been advances in technology, they have been accompanied by easier methods for duplication of the same

technology and associated products. This practice makes industries like the pharmaceutical, chemical, computer software, entertainment and creative industries more reliant on intellectual property protection. There are several international declarations that took into consideration the intellectual property issue[1]. The most recent and worldwide accepted international treaty on Intellectual Property Rights issue is the Trade Related Aspects of Intellectual Property Rights Agreement.

Intellectual property protection also finds rationale in philosophy. One example is the theory of the natural rights, coming from the results of a person's own job. When the society recognizes and gives a value to these results, there is a need to create institutions to support and protect these rights. Then, Utilitarianism in its argument of the incentive refers to intellectual property rights protection: in order to promote and sustain the intellectual effort leading to intellectual development (in a broad sense), it is useful to guarantee that this effort will be rewarded with a property right. Moreover, without protection, the consumer will be affected by the lack of competition, and lack of supply of new products. The incentive for the economy is thus constituted in the innovations that in turn promote technological progress and foster development.

There is abundant literature on intellectual property rights and issues related to them in both the legal as well as economic disciplines. As Romer (1992) defines, intellectual property rights are the rents represented by the difference between the market price and its marginal cost. As Menell (1999) underlines, there are 3 schools of thought explaining the violation of Intellectual Property Rights[2]: 1) as market failures in a neoclassical context; 2) the theory of property rights from the Chicago School; 3) the neo-institutionalism with its attention to compare the different

[1] The most notable among these are: 1) Universal Declaration of Human Rights (UDHR) (1948) (artcle 27); 2) International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976) (article 15); 3) Convention on Biological Diversity (CBD) (1992) (article 8); 4) International Labour Organization Convention No. 169 (1986) (article 15); 5) United Nations Draft Declaration on Indigenous Rights (2005) (articles 12, 29, 31).

[2] Intellectual Property Rights will heretofore be referred to as IPRs.

institutions. While the first school focuses on the monopoly power and the market power that the exploitation rights concedes, the second one studies the different alternatives that can find some room in the property rights concept. The last one takes into account the economic- social and cultural contest of the different environments. (In his study of 1997, Scaliste finds that low levels of education favour the imitation of existing intellectual property, while high level of education encourage the demand for higher protection of new intellectual property. Marron y Steel (2000) found some cultural indexes, income per capita, and the level of education to be as relevant regressors of software piracy. They all had a negative sign).

This work will focus on the different approaches at the international level to the intellectual property rights, specifically on individual and collective rights protecting cultural expressions.

3. - The Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) as a way to harmonize the different legislations

There are at least three reasons that justify the need for an agreement at the international level regarding intellectual property rights; 1) economic activity is becoming more and more research based and technologically intensive.Very often the inputs utilized are subject to IPR legislation; 2) the removal of barriers in international trade and more specifically in foreign direct investments is the direction the world system is heading towards. In an increasingly liberalised world, the fairness and effectiveness of the IPR system is one important factor determining the willingness of industries to penetrate new markets; 3) the advancement in technology has made imitation and reproduction very simple, consequently increasing the production and trade of counterfeit and pirated goods. Moreover, many national intellectual property laws contain provisions that reflect different cultural values, and by the TRIPs intellectual property products in the long run will probably become more commodified.

As mentioned earlier, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is the most recent of the treaties dealing with these issues. TRIPs, negotiated in the Uruguay Round, derives its provisions from earlier treaties, like the Berne Convention for the Protection of Artistic and Literary Works and the Paris Convention for the Protection of Industrial Property. All these treaties mainly regulate national laws by referring to either the "national treatment" principle (under which foreign countries' products must be treated no less favourably than national products) or to the reciprocity principle (a foreign national is given the same rights in a country as the rights that a national of that country has in that foreign country). The TRIPS Agreement adds another principle, the most-favoured nation treatment principle. According to this principle, any advantage, favour, privilege or immunity granted by a Member of the WTO to the national of any other country must immediately and unconditionally be accorded to the nationals of all other Members.

The TRIPS agreement has also made other advances with respect to the previous treaties. It sets some substantive minima (Article 1 of TRIPs authorizes member states to adopt more extensive protection than the requirements of TRIPs itself), insisting not only on the requirement of laws but on the enforcement mechanism and the effectiveness remedies and procedures, in case of IPRs violation. Moreover, it provides a dispute settlement mechanism (that is a mechanism for consultations and surveillance at the international level to ensure compliance with the minimum standards by members countries at the national level) where to seek resolution in case of controversies. Lastly, the TRIPs agreement *"puts a trade "spin" on intellectual property rules that have in the past been guided by a host of other principles, including those related to cultural policies embodied in national laws"* (Pamela Samuelson 1999).

The intellectual property rights to which TRIPs applies are: 1) Patents, 2) Copyrights and related rights, 3) Trademarks, 4) Industrial designs, 5) Layout-designs of integrated circuits, 6) Undisclosed information and 7) Geographical indications. Its main goals are to promote and to ensure a fair balance between the

legitimate interests of right holders and users of intellectual property and defend free trade against some manifest protectionist intellectual property rules. One example of protectionism through intellectual property field was the "manufacturing clause" of US copyright law. This rule forced foreign authors to use American firms to print their works for U.S. markets in order to achieving U.S. copyright protection. It lasted until 1986. As Andreu Mas-Colell (1999) argues, *"There are two different types of international trade restrictions that are usually invoked in policy debates involving cultural goods. The first is the "cultural exception" claim, for the legitimacy of import restriction measures based on the cultural nature of the good/service concerned. The second regards the preservation of the cultural heritage, and relates on the exports side rather than on imports."*

The TRIPs agreement is designed to counter, among other distortion of free trade, the piracy of intellectual property products. Piracy distorts incentives to invest in innovation consequently reducing benefits from free trade. The TRIPs agreement will attempt to address the issue by introducing a certain extent of harmonization in national intellectual property rules, deriving from WTO panel decisions and the council for TRIPs.

Of course, different countries will react differently to this initiative, depending on the degree of consistency between what the harmonization requires, the cultural values and policies of that country. An important aspect will be the degree of deference given to national States in cases in which different interpretations of particular obligations are involved. The TRIPS Agreement is deliberately designed to address international issues of property rights while being flexible in accommodating the diverse cultural values and policies. And while this feature is an improvement on previous trade treaties, it is not safe from exploitation.

Cultural goods are incompletely 'commodified', and maybe harmonization is even undesirable in this field, unless we want to foster a homogenized global culture. Past GATT-WTO decisions reveal that cultural values in intellectual property laws would be deferred in any case where they obstacle free trade principles.

"The TRIPS Agreement has been one of the most controversial components of the WTO system; it has given rise to a large number of procedures under the Dispute Settlement Understanding, involving alleged violations by developing and developed countries, even before the core of the Agreement's obligations entered into force in developing countries (1 January, 2000). In 1999 there had already been 16 WTO dispute settlement filings based on the TRIPS Agreement." (Carlos Correa 2001).

One example of deep rooted cultural values affecting diversity in international law is that of copyright laws. There are significant differences in developed countries regarding copyright laws that reflect deep rooted cultural values (specifically between the Anglo-American approach and the continental Europe one). Copyright law was first enacted in England in 1709 with the Statute of Anne. The USA saw the principle embodied in the Constitution in 1776, and the first Federal Copyright Act was passed in 1790. It basically gives authors the "exclusive right of authorisation", i.e. the right to exclude others from copying their work without permission. In most English-speaking countries the IPR system falls under common law, and as such is more about protecting the skill, labour and investment of those responsible for the creation of works, in order to safeguard them from reproduction and other unauthorized uses. Under common law everything is "transferable", "assignable", with total freedom of contract.

In continental Europe the utilitarian term copyright is translated in "the law of author's right". For example, in continental Europe, influenced by the Kantian author's concept, the author has a "moral right" to the product, the rationale being that the author needs to be rewarded for enriching cultural life of the country. The moral right also gives the power to the author of controlling the moral integrity of his work, even after the product has become an item of trade, the reason being that any modification could lead to a deterioration of his reputation as an artist. This right can be asserted even against those who acquire the copyright ownership. This particular assertion of the moral right can distort or impede trade. In France moral rights

cannot be waived even by contract. Also the Berne convention requires members of the Berne Union to respect moral rights. While the TRIPs agreement is not explicitly in favour of moral right, the expectations are that countries that will continue to respect moral rights would not violate TRIPs. Anyway, the TRIPs agreement preserves the distinction between copyright and neighbouring right. Another example of cultural differences in the intellectual property rights' field relates to the classes of "protectable" subjects, like folklore, or aesthetic design for manufactured goods, broadcasts, performance of creative goods, and so on.

There are also national differences on the exceptions to and limitations of the scope of rights granted to copyright owners. *"U.S. copyright law also contains a fair use provision that enables a defendant charged with copyright infringement to raise an affirmative defence asserting that upon weighing several factors together, his use of the copyrighted work was fair. These factors include: 1) the purpose and character of the use (e.g., criticism, education, news reporting, and the degree of commercialization in the use); 2) the nature of the copyrighted work (e.g., entertainment products tend to have a narrow scope of fair use by comparison with factual works); 3) the amount and substantiality of the appropriation in relation to the work as a whole; 4) the extent to which the use will harm actual or potential markets for the work. The rationale of fair use doctrine lies in the public interest in balancing the incentive to create that copyright provides with that of ensuring users' access to the works that are created.*

Article 9(2) of the Berne Convention permits nations to adopt exceptions and limitations to the reproduction right "in certain special cases provided that (the excepted) reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interest of the author" (Pamela Samuelson 1999). In substance the three conditions provided for in Article 13 of TRIPS are thus identical to the three conditions under Article 9.2. of the Berne Convention. The real substantive difference is that Article 9.2. of the Berne Convention only covers the right of reproduction, while article 13 of TRIPs enlarge the

scope of article 9(2) of the Berne Convention to regulate all kind of exceptions.

The TRIPs agreement requires most nations should be in compliance with minimum standard for IPRs protection by the year 2006. From its constitution in 1995 the agreement provides for developing countries a transitional period of five years to bring their IPR legislation in conformity with the provisions of the Agreement itself, while for least developed countries the transitional period is extended up to eleven years, exactly the year 2006. The only condition to which all the privileged (under this flexibility) developing countries are subject to is that from the date the agreement came into force they must have established a mechanism for receiving applications for patents from domestic and foreign inventors.

The drive behind TRIPs came from developed countries and not from the developing ones. In fact, the level of protection required is more or less the level in place in the developed world. Moreover, the model of intellectual property protection incorporated in the TRIPs agreement is completely different from the one in developing countries, especially in Africa, where the traditional protection of IP is based on collective rights.

Michael Finger claims: *"TRIP is about knowledge that exists in developed countries, about developing countries access to that knowledge, and in particularly about developing countries paying for that access"* (Finger 2003). As Peter Gerhart states, probably the truth about developing countries signing the agreement lies between a "coercion story" (with the USA threatening to close its borders to developing countries not adequating with the minimum IPRs standards) and a "contract story" (with EU, USA and Japan agreeing in a further liberalization of their markets, i.e. in the agricultural and textile sectors). Thus in signing the TRIP the disadvantage for developing countries would be the payment of royalties (an amount of about US$60 billion per year, as Finger documented) while the advantages would consist in attracting considerable foreign investments and technology transfer (that in turn would cause an increase in FDI). The transfer of technology is an obligation in terms of the agreement, specifically article 66.2.

Both pay-offs , the increasing in foreign direct investments and the technology transfer, haven not happened yet. TRIPs also requires criminal sanctions to prevent copyright piracy. This means an additional burden and economic cost to the administration of the criminal justice system, because it forces developing countries to investigate cases of copyright piracy and to prosecute the same in the courts.

The agreement will cause major changes in developing countries IPRs regime. Prior to this agreement, in 1994 many developing countries did not even have any protection for computer software. The stronger protection will also make it more difficult for industries in developing countries to use, through reverse engineering or other means, the technology developed by foreign firms protected by property rights, unless they would be willing to pay royalties to them. It is thus very important to show developing countries that they will benefit from signing the TRIP agreement.

4. - Copyright

As the IFPI (International Federation of the Phonographic Industry) says *"Enshrined in international law for more than 200 years, copyrights provide an economic foundation for creating music, literature, art, films, software, scientific work and other forms of creative works"*. Copyright gives the creators a series of economic rights enabling them to control use of their material in a number of ways that comprise: 1) Reproduction rights, 2) Performing rights (in public), 3) Recording rights, 4) Motion picture rights, 5) Broadcasting rights, 6) Translation and adaptation rights.

In certain countries, as mentioned earlier, copyright also gives moral rights (specifically the right of paternity and the right of integrity), separate from the economic rights, that enable the creator to object to distortion or mutilation of the work that could prejudice his honour or reputation. There is also a series of related rights (called neighbouring rights) that accompany the exercise of

copyrights and that regard the dissemination of the creative work among the public[3].

In general, the economic case for copyright for author is the same as that for patents for inventors: it creates statutory property rights that overcome freeriding problems of information goods and therefore provides an incentive mechanism for rewarding creators and for the disclosure of their works. Unlike industrial innovations that require secrecy at the expense of the size of the market, artistic works need to reach the maximum number of people. The scope and breadth of copyright law, from the economic point of view, weighs up the costs and benefits of incentives and rewards and transaction costs.

The evolution of copyright legislation has been closely linked to technological changes in the audio-visual sector and to the rise of corporate capitalism during the early decades of the twentieth century (Noble, 1979; Sullivan, 1989). Many questions relating to the exercise, management and enforcement of copyright on the Internet are subject to open debate.

The TRIPs Agreement establishes a minimum period of duration of the copyright equal to the life of the author plus 50 years. It is important to underline the fact that copyright *"does not protect the artistic idea itself, only the expression of the idea in fixed form - i.e. rock'n'roll music (a certain beat, instrumental sound, etc.) cannot be protected, but its particular expression by, say, the Rolling Stones can."* (Andersen, Brigitte Kozul-Wright, Zeljika and Kozul-Wright, Richard, 2000).

"The copyright is one of the essential institutional mechanisms which has helped facilitate the creation and dissemination of cultural works through modern business enterprises, by providing a framework to manage the problems arising from the joint

[3] It follows a list of several international treaties regarding Copyright and Related Rights 1) The Berne Convention for the Protection of Literary and Artistic Works, 1971; 2) The International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the "Rome Convention"); 3) Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (the "Phonograms Convention"); 4) The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 1974 (the "Satellites Convention").

consumption and imperfect excludability of such works. As such, it is much more than a mechanism for protecting the rent derived from an intellectual resource; it is part of the institutional framework that helps define a marketable product as well as reliable income flows. To fully understand that role it is necessary to recognize that the mass production of many cultural goods continues to rely on a number of very highly specialized assets and faces unpredictable and even erratic demand conditions... The copyright system, in addition to creating a market, can, by promoting a common interest in the effective commercial exploitation of cultural ideas, help reduce conflicts between different asset owners and share some of the risks arising from a volatile market." (Andersen, Brigitte KozulWright, Zeljika and Kozul-Wright, Richard, 2000).

The purpose of copyright is to allow creators to gain economic rewards for their efforts and so encourage future creativity and the development of new material which benefits us all. Copyright material is usually the result of creative skill and/or significant labour and/or investment, and without protection, it would often be very easy for others to exploit material without paying the creator.

5. - Traditional Knowledge (TK)[4]

One area of concern is TRIPs' impact on *traditional* and *indigenous knowledge*[5].

The WIPO (the World Intellectual Property Organization[6]) uses the term TK to refer *"tradition-based literary, artistic or scientific*

[4] From now on traditional knowledge will be referred to as TK.

[5] A brief explanation about the terminology used is necessary. Traditional Knowldge is a subset of the broader concept of Cultural Heritage. And Traditional Knowledge includes the concepts of Expressions of Folklore and Indigenous Knowledge. A scheme with the appropriate vocabulary is provided in Appendix 1. The relevant literature mostly refers to the concept of TK. This work relates generally to developing countries' TK and sometimes to Indigenous Knowledge.

[6] WIPO is one of the specialized agencies of the United Nations (UN) system of organizations. WIPO's mandate is the promotion of the protection of intellectual property (IP) throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization.

works; performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields"[7].

TK is "traditional" because it is created in a manner that reflects the traditions of the communities, and is collective in nature. Its use is linked in a net of customary obligations and rights of the individuals and the community. The origin of this knowledge differs slightly from the concept modern society has of creation coming from an inspired subconscious. TK is produced in most cases through the efforts of people and their cooperation. Copying among artisans is well-established practice; the act of copying allows artists to acquire their skills.

The protection of TK has gained more and more importance in recent years.

To name a few examples new discoveries of potentially potent anti-cancer agents in plants (such as turmeric and taxol), as well as a rapidly growing herbal remedies market, has revived industry interest in traditional medicinal knowledge and practices.

A WIPO-UNESCO Model Law on Folklore was adopted in 1981, the Convention on Biological Diversity (CBD) in 1992 and in 2000 WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Western societies have not always paid much attention to the value and utility of TK as a precious source of knowledge before the establishment of these laws. Most of the times TK (under developed countries IPRs systems) has been considered as freely available information, in the "public domain", thus freely exploitable. There are paradoxical examples of developed countries' IPRs systems letting the researchers and commercial firms (not the communities who created, developed and conserved this knowledge) acquire rights of exclusive use of certain TK products[8]. Previous experiences by indigenous peoples

[7] WIPO, 2001, p. 25.

[8] U.S. patent law excludes the consideration of unpublished foreign sources when determining novelty.

in trying to protect their traditional knowledge under intellectual property laws stem mainly from the failure of traditional knowledge to satisfy requirements for intellectual protections. In other cases, where intellectual property protection could potentially apply, the prohibitive costs of registering and defending a patent or other intellectual property right may curtail effective protection. Suffice to say that until recently TK is not adequately recognized and rewarded.

Apart from the economic aspect and its capacity to generate a steady source of income, TK still represents a central tool in the lives of many communities and sometime it even includes spiritual components. *"Art is more to indigenous culture than decoration or creativity. Art is more than and aesthetic endeavour with economic consequences. It is interwoven into religion, social structure and the land"* (Isabelle Alexander 2001).

For example, Traditional Medicine in some developing countries is the only known and available medicine, and in the last years the demand of herbal medicines has increased even in the developed countries. Or the traditional methods of cultivation are now considered essential to improve and develop new plant varieties. *"There is no need, however, to choose between cultural and commercial objectives for or uses of poor people's knowledge. On the whole, economic and noneconomic uses are complements, not substitutes"* (Finger 2003).

TK includes a broad set of information, going from intangible cultural values to processes and products that could be used both in industry and in agriculture. In studying TK, the first problem to face is that a universal degree of codification about this topic does not exist, but it varies depending on the country and on the topic. And in most of the cases the transmission of this knowledge is oral, or through specific cultural and traditional information exchange mechanisms, through elders or specialists (breeders, healers, etc.), and often to only a selected few people within a community. Some craft communities in India guard the process of making the handicrafts from the daughters in their families, because once they marry they live their families. There are two different

interpretations in protecting TK. The first one relates to the IPRs context, that basically excludes unauthorized people. The other focuses on preserving TK and the communities that created and use it, eliminating the uses that could affect them negatively. There is an open debate on the merits of both interpretations. For example WIPO claims *"It seems that copyright law may not be the right, or certainly the only, means for protecting expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a mark of individual originality. Traditional creations of a community, such as the so-called folk tales, folk songs, folk music, folk dances, folk designs or patterns, may often not fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, an author — at least in way in which the notion of 'author' is conceived in the field of copyright — is absent"* (WIPO 1997:5).

An internationally approved way to protect the Traditional Knowledge has not

been found yet, notwithstanding the increasing importance of this issue in the recent years. For one, issues of equity need to be considered. For example, seed companies are able to protect their improved varieties (which the farmers also provide) under plant breeders' rights (PBRs), but farmers are not able to do the same with their own varieties because their variation over time does not meet the necessary stability and uniformity requirements.

Protecting TK would mean also helping to conserve the environment, food security, sustainable agriculture. Moreover, TK protection will help to preserve traditional lifestyles[9], through conserving cultural heritages, and giving indigenous people the right to self-identification.

Sometime, more than establishing a system of "positive

[9] Once in India the local weaver was an important figure in the society because the traditional clothes (the sari for the women and the dhoti for the men) were made by him. Nowadays machines-made clothes, and tailored clothing have substituted his job.

appropriation" (Correa 2001), protection of TK implies just avoiding "unauthorized appropriation" (e.g. bio-piracy[10]) and misappropriation. Consequently, protecting TK could also mean making an easy access to TK, and developing and broadening its use. If the indigenous communities feel "defended", they will share TK, and if adequately compensated, they will conserve it with more enthusiasm. However, there is a risk that applying some sort of intellectual property rights in this case could cause the opposite effect, limiting the access to it, thus reducing the use of TK. There could be a contradiction in applying IPRs to indigenous communities; the idea is using the legal and monetary entitlements afforded by intellectual property rights to protect and foster the local knowledge and innovations of a folk in order to secure global equity and help them preserve community identity. But if the IPR is a property and component of a particular society, then abetting its acceptance elsewhere could lead to economic transformation or adoption of the market form exactly among those people whom it is said to protect. Western societies intellectual property law, which is rapidly assuming global acceptance, often unintentionally facilitates and reinforces a process of economic exploitation and cultural erosion. The concept of individual property ownership, could be considered odd and detrimental to many local and indigenous communities.

5.1 *Protecting TK*

If protecting TK is the purpose, it is crucial that a mechanism be devised that is sensitive to the nature of traditional knowledge and of the communities that produce it while maximising benefit to them. The possible alternatives are: 1) Extending IPRs to TK. Many experts of the international fora find a possible application of the existing IPRs legal system to some TK examples. Traditional

[10] Bio-piracy: "is the process through which the rights of indigenous culture to generic resources and knowledge are erased and replaced for those who have exploited indigenous knowledge and biodiversity" SHIVA V - JAFRI A.H. - BEDI G; and HOLLA-BHAR R.; 1997, p. 31.

medicine, which could successfully be protected by patents, is one example of such an application. Having said that, in a lot of other cases the nature of TK products does not satisfy novelty and inventive criteria required by patent laws. In fact in many countries, TK may be considered de facto part of the prior art base. Moreover, applying for a patent requires full disclosure (making public) of the invention or innovation. That is to say that the information is placed in the public domain by making the patent application publication publicly available. Additionally, once a patent is granted, it is the responsibility of the patent holder to enforce the patent against infringement. Indigenous peoples would not have the resources to make this enforcement effective. Petty patents[11] could constitute a valid alternative to patents. They also allow for protections similar to those of patents, but for knowledge consisting of a less-detailed inventive step. The knowledge must still meet the novelty and industrial application criteria. The term of protection for a petty patent is typically between four and six years, which is shorter than the term for the standard patent. Even if the petty patent exists only in a few countries and is not mentioned in the TRIPs Agreement as a minimum standard for intellectual property protection, this form of patent could prove to be more viable alternative for TK protection.

Even geographical indications could be applied to natural and traditional craft products, if there is a connection between them and their geographical origin. Also copyright and industrial designs could be used to protect the artists inventing or performing creative works that are manifestations of TK. The protection of folklore for example is a way to solve the problem of "collective authorship", because at the centre of the copyright paradigm is the "author", the "creator", as a distinct and discrete entity. The UNESCO/WIPO *Model Provisions for National Laws for the Protection of Expressions of Folklore against Illicit Exploitation*

[11] The original term "petty patent" is no longer actually used anywhere in the world, after it has been substituted by the term "innovation patent" in 2001. However the term has acquired a secondary meaning, as any type of protection that is provided for inventions that do not qualify for full patent protection.

and other Prejudicial Actions is moving in this direction. It attributes rights not only to individuals but, more importantly, to collective identities and also permits the protection of ongoing creations.

The problem is not exactly that modern Intellectual Property (IP) laws do not recognize collective ownership, because any collective entity recognized by the law can own IP; the real problem is creating an organization with proper rules that at the same time would be suitable for the law to be recognized and would for indigenous people fit with their sense of organization and leadership (often based on seniority).

Two problems still remain: 1) the limited duration of copyright protection (life plus 50, or life plus 70 years) means that most folkloric works have already passed into the public domain; 2) distinguishing (both in moral and in economic terms) between the part of traditional knowledge the whole community owns and the innovations brought by an individual within the community. A case in Ethiopia offers an example. In this country, any folklore can be reproduced or adapted with the authorization of the Ministries of Culture and Information with the payment of a fee; the agency in charge to licence the use of folklore and thus to protect cultural property is the Musicians' Association. The association interpreted its authority as extending into popular music that had roots in folkloric music and by extension refused copyright protection to many artists and songwriters on the ground that those songs belonged to the Ethiopian folklore. In doing so the association was able to claim royalties for itself that would otherwise have gone to individual composers. Such decisions act as disincentives for other musicians and artisans to enter a field where they can not earn a living[12].

Enhancing IP exports through fair trade could help to solve some of the previous problems. Fair trade organizations are those that accept and operate under competitive market conditions. Fair

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[12] *"Arrangements more focused on protection of folklore sometimes backfire. Rather than collecting rents for a traditional community, an organization with authority over the community's musical or artistic tradition may find an incentive to collect rents from the community"*. (FINGER M. J. 2003).

trade importers guarantee fair working conditions, transparency in financial operations, fair returns for individual producers, and efficient management for reasonable profits and fair prices. This is not to say that constructing a fair market is an easy task. Though it has been trying for a while, the Korean animation industry has not yet succeeded in IP markets. After 30 years of experience with subcontract production for foreign companies, Korean animation companies have developed sufficient skills to be recognized and appreciated all over the world. Thus they decided to create their own products, but they didn't succeed in placing their products with major animation buyers.

LightYears is an Alternative Trading Organization specialized in developing country IP marketing, and it is supported by most fair trade importers. This organization is utilising the consultancy of a group of IP lawyers that are providing pro bono services. An example of the efficiency of LightYears is provided by the ongoing case of the Congolese- handcrafters. These people were producing (from strands of wire) scale models of the VW Beetle and Ten Thousand Villages (that is another alternative trading organizations) was importing them in the USA. VW claimed certain rights for the design of the toy because it was based on the actual VW Beetle and tried to stop the marketing of the product. In the meanwhile, Ten Thousand Villages obtained a limited license in order to sell out its inventory. Thanks to LightYears, it is likely that VW will make a larger order to Congolese designers. This experience teaches that may be, having the appropriate laws is insufficient if not accompanied by the use of the commercial tools in order to collect the knowledge value of the TK products.

Another alternative is enforcing customary laws[13]. The problem with those is that not all states recognize them. An example is provided by aboriginal people in Australia. Aboriginal customary law recognizes collective ownership of paintings and other artistic creation, but Australian laws don't recognize it. The

[13] Customary laws: "rules of conduct developed over time and enforceable in court". Source: www.nelson.com/nelson/polisci/glossary.html.

Galpu Clan tried to prevent the reproduction of a sacred image on a banknote by the Reserve Bank. The claim was rejected and the trial judge blamed that *"Australia's copyright law does not provide adequate recognition of aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin"*[14].

As mentioned earlier, some experts of the international fora ask for some modifications of the IPR tools while some NGO's request a completely new IPR framework, a sui generis regime of IPRs. A sui generis system might be defined to create legal rights that recognize any associated traditional knowledge relating to genetic resources and promote access and benefit sharing and it could legally acknowledge and protect knowledge even when it is not officially documented but for example is in the form of oral information, traditional and historic use. Some countries now require the adoption of this kind of regime (see for example some Latin American Countries in the Free Trade Agreement for the Americas[15]) but these attempts have not yet found the proper implementation; there are still a lot of issues regarding the definition of the legal framework, its enforcement, the definition of the subject to be protected, the extent and the nature[16] of the rights to be conferred and so on.

Another issue that requires consensus that has not yet come is whether be just one comprehensive IPR regime for every manifestations of TK or many depending on the various cases and diverse subject matters, like artistic expressions, traditional medicine, and plant genetic resources for food and agriculture. And of course, a sui generis IPR implemented at the national level will not be legal and valid abroad, and thus not so useful, especially in all the cases when the (mis)appropriation is due to

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[14] Source: BLAKENEY M. 2000.

[15] In 2000 the government of Peru published the final version of the Protection Regime for the Collective Knowledge of Indigenous Peoples; an important innovation of this regime was the creation of a Fund for the Development of Indigenous Peoples to which will be designated 0.5% of the sales of TK based products.

[16] The nature of the rights could range from exclusivity to remuneration to any way of preventing misappropriation.

foreign multinational/companies that eventually obtain IPRs protection abroad. Thus it becomes important also the issue regarding at which level (international or national) posing the problem of constructing/improving the IPR system, with all the consequences, advantages and limits of each choice.

A general problem that could arise in utilizing IPR tools is represented by the necessary costs in acquiring, registering, administering and reinforcing such rights. These include the capacity to identify infringements, to implement both preventive measures and judicial procedures.

2) Creating new mechanisms outside the IPRs system in order to ensure that TK will be protected and not misappropriated. Under this solution, local government could be free to decide their own means to prevent misappropriation; in this way protection will not be subject to any kind of registration. Having said that, the necessary documentation to prove the existence of a specific type of TK will be required to eliminate the possibility of a false novelty claim on that information, and/or in case of unauthorized appropriation by third party, would require some sort of compensation for the legitimate TK-holders. Some proposals of this kind were related to the request of *"tribal or communal rights"* (Greaves 1994), *"community intellectual rights"* (Berhan and Egziabher, 1996, p 38), *"Farmers' rights"* and so on. Constitutions in several Latin American countries mandate the protection of the rights of indigenous cultural communities and indigenous peoples. These regulations aim to prevent outsiders from registering patents and copyrights based on indigenous people's traditional knowledge and genetic resources, while at the same time providing these people protection within their communal conception of ownership.

But until now, nothing has emerged as a complete and efficient protection framework. Nonetheless a bunch of different efforts from different institutions could reach the objective. For example, *"the preservation of farmers' varieties may be undertaken under in situ conservation programmes sponsored by national governments, international and private organizations"* (Correa, 2001).

Probably, as Carlos Correa suggests both the alternatives will fit better depending on the circumstances and on the specific porpoise attained. *"The development of any regime for the protection of TK should be grounded on a sound definition of the objectives sought, and on the appropriateness of the instruments selected to achieve them. IPRs may be one of the tools used, but their limits and implications should be clearly understood. In particular, a balance should be obtained between the protection and the promotion of the use of such knowledge"* (Correa, 2001).

6. - Conclusions

Taking into account the existence of significant differences among countries regarding IPRs laws, this paper discusses why and how negotiations based on mutually agreeable terms, between Traditional Knowledge holders and Traditional Knowledge users can positively affect trade and development. Attention must be focused to understand where the interests of the TK holders lie and which kind of legal system would be the most appropriate i.e. accepted and recognized by them. The importance of this discussion stems from the fact the extent to which this issue should be brought under the TRIPs Agreement is still a matter of debate in the international fora.

As we have seen, there does not exist a general theoretical solution. There are two different ways to protect TK. The first one relates to the IPRs context, that basically excludes unauthorized people. In this contest possible solutions are represented by patents, petty patents, fair trade, copyright and industrial designs, geographical indications, customary laws and a sui generis regime of IPR laws.

In extending IPRs to TK, as WIPO suggests, it becomes crucial to: 1) select the appropriate terms to describe the subject matter for which protection is sought. 2) define or describe clearly what is meant for IP purposes by the terms selected. 3) facilitate access to the IP system. 4) make local communities and governmental offices familiar with the IP system. And once adopted, providing

information, assistance and advice with respect to the enforcement of TK protection.

The second way focuses on preserving TK and the communities that created and use it, eliminating the uses that could affect them negatively. If working outside the IP system is the choice, then it is important to prevent the acquisition of IPRs (particularly by patents) related to TK by formally documenting and publishing the existing TK and considering it a "searchable prior art".

Whichever regime is adopted, it is crucial to make the original rights' owners aware of both the potential commercial value of TK and the existence of established instruments permitting a proper economic valuation of TK. It should be clear that although TK is only a part of the entire and complex developing countries' knowledge, it is a part that needs specific attention.

APPENDIX 1

Cultural Heritage: The Cultural Heritage Act 2002 defines 'cultural heritage' as *"movable and immovable objects of artistic, architectural, historical, archaeological, ethnographic, palaentological and geological importance and includes information or data relative to cultural heritage pertaining to any country. This includes archaeological, palaeontological or geological sites and deposits, landscapes, groups of buildings, as well as scientific collections, collections of art objects, manuscripts, books, published material, archives, audio-visual material and reproductions of any of the preceding, or collections of historical value, as well as intangible cultural assets comprising arts, traditions, customs and skills employed in the performing arts, in applied arts and in crafts and other intangible assets which have a historical, artistic or ethnographic value."*

Expressions of Folklore: Section 2 of the "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" defines the term "expressions of folklore" as *"productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community"*.

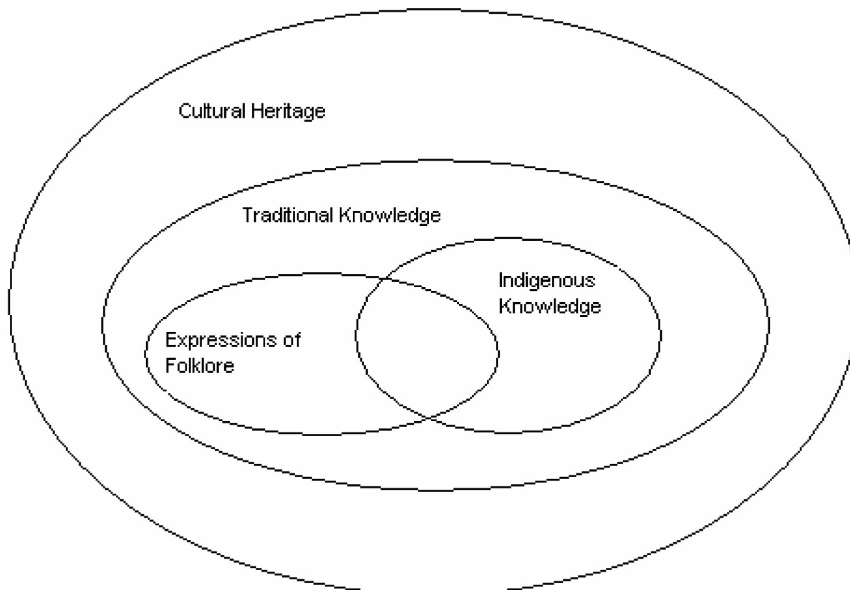
Indigenous Knowledge: As WIPO claims there are at least two definitions: 1) *"Indigenous Knowledge (IK) is the local knowledge - knowledge that is unique to a given culture or society. IK contrasts with the international knowledge system generated by universities, research institutions and private firms. It is the basis for local-level decision making in agriculture, health care, food preparation, education, natural-resource management, and a host of other activities in rural communities"* (Warren 1991). In this sense the term indigenous could be interchanged with the term traditional. 2) The second definition, is the most used one in the relevant literature. It means the traditional knowledge of

indigenous peoples, where by "indigenous", in the Study of the Problem of Discrimination Against Indigenous Populations (United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities), they mean: *"those which, having a historical continuity with 'pre-invasion' and pre-colonial societies that developed on their territories, conoider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems"*.

The following graph shows the relationship among the concepts just explained.

Graph 1

RELATIONSHIP AMONG CULTURAL HERITAGE, TK, INDIGENOUS KNOWLEDGE AND EXPRESSIONS OF FOLKLORE



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