

To what extent the protection of Intellectual Property Rights are involved in 'Bio Piracy' in Sri Lanka

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Abstract - Bio piracy could be identified as the process of claiming patents to restrict the general use of exploited plants and animal species for the purposes of bio prospect. This process is interrelated to the principle of intellectual piracy which the world considered it as an international principle to be applied irrespective of the different protections provided under the Domestic Law. The Agreement on Trade Related Aspects Of Intellectual Property Rights (TRIPS), as the international legal framework which provides standard for the intellectual property right has created a conflict of interests among developed and developing countries, with regard to the protection of biological resources and traditional knowledge of countries. The main objective of this research is to analyze the misappropriation of the propriety right by the developed countries over the biological resources in the developing countries, special reference to the Sri Lankan context, within the framework of TRIPS. The research problem is to identify the contentious discard between the International Laws and Domestic Laws in relating to protection of intellectual property rights involved in 'Bio Piracy' in Sri Lanka and how such dissension of laws has created the conflict between environmental interests and economic interests of the country. This research will also analyze the legal and practical issues relating to implementation of both domestic and International Laws in protecting the intellectual rights of biological resources in Sri Lanka. The research also would engage in analysis of the provision of TRIPS Agreement which have created serious challengers relating to the rights in area of bio diversity in Sri Lanka and how such provisions have exceeded the applicability of relevant domestic legal regime. Moreover, the focus of this research would also include the significance of developing a sui generis intellectual rights of biological system to protect the resources in Sri Lanka with the objective of critically

analyzing of how to develop a domestic legal framework which amalgamate with the TRIPS Agreement. The research methodology of the research would involve the legal research methodology and it is based on qualitative data obtained by primary sources including statutes, international instruments and constitutional provisions. The secondary sources of law which involve in the research will be scholarly articles and text books.

Keywords - Bio Piracy, genetic resources, intellectual Property rights

I. INTRODUCTION

The main objective of this research is to analyze the involvement of the intellectual property rights in 'Bio Piracy' in Sri Lanka and to what extent such rights are involved in protecting the biological resources and the traditional knowledge of the country. The research problem is to identify the issues of misappropriation of intellectual property rights by the developed countries over the biological resources and traditional knowledge of developing countries within the legal framework imposed by the TRIPS Agreement; and special reference will be given to Sri Lanka as a developing country.

The one of the main objectives of this research is to examine on how developed countries have claim ownership and unfair advantage over the biological resources and traditional knowledge in developing countries within the framework of TRIPS, though the domestic legal regimes of developing countries have imposed laws to restrict such intellectual property rights up to certain extent. The research would also engage in analyzing existing legal framework of Sri Lanka with

regard to the protection of intellectual property rights of biological resources and how such regimes are ineffective in the application of practical scenario.

II. BIO PIRACY

Bio Piracy is the process of which corporations from the industrialized nations claims ownership of, free ride on ,or otherwise take unfair advantage of the genetic resources and traditional knowledge and technologies of developing countries (Calan.N,2006).Specifically, Bio Piracy could be identified as process which gain the exclusive monopoly rights over the biological resources or traditional knowledge one country by another representatives institutions of another country .The demand for the genetic resources have increased ,as a result of the development of biotechnology in different aspects. 'Bio Piracy' is a major problem is faced by the countries rich in bio diversities. Further the main purposes of the Bio Piracy could be recognized as intention of introducing new plant varieties and living organisms, privatization of traditional knowledge and production of pharmaceutical products. Moreover Bio Piracy is consisted of two main phenomenons, namely the genetic resources bio piracy and the traditional knowledge bio piracy.

As mentioned above the developing countries with rich bio diversities are fairly the repercussions of bi piracy and it has become a serious threat to the biologic resources of such countries (Brooks et.el,2002).Further the one of major aspects at bio piracy could be identified as the process of exploring commercially valuable ,biological resources and it is directly linked with the markets for patent commodities in various industrial sectors (vandana,1997).However the main objective of the bio prospecting is commercializing the biological resources while the globalization of Intellectual Property Rights regimes has created the platform to the people who bio prosepect to expand their economic interests.

The impact of Intellectual Property Rights regime over the biological resources, in developing countries could be analyzed under different legal regimes .The Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS) is a multilateral agreement

introduced by World Trade Organization (WTO) and it provides high minimum standards for the intellectual property rights of the countries bound by the agreement. In the perspective of protection of Intellectual Property right of biological resources or genetic resources of countries, the TRIPS Agreement is consisted of provisions for the protection of new plant of varieties as a major part of the biodiversity of a country .However the provisions of the TRIPS agreement which, allow patenting the live forms could be recognized as a factor encourages the bio piracy. Therefore certain restrictions or boundaries should be implemented to prohibit patentingng plants, natural resources, animals, microorganisms and it is required to promote the sustainable use of biological or genetic resources in order to prevent bio piracy.(Malik,2003).There are many instances for well-known bio piracy incidents ,like patent obtained by American Companies for turmeric grown in South Asia and periwinkle grown in Madagascar.

However bio piracy is a process with profitable nature and its economic objectives have become major threat to the developing countries due to the exploitation of bio resources and disadvantage of cultural social and health of human life. Thus the inadequacy of the protection for the biological resources has expanded the process of bio piracy and also the legitimacy of the component of TRIPS Agreement has challenged (Khor, 2002).However there is direct impact of bio piracy over Sri Lanka as a country with rich bio diversities and also being member of WTO, the obligation to implement the provision of TRIPS agreement with in the country has created several negative impacts on the development of the country.

III. INTERNATIONAL LEGAL REGIME PERTAINING TO BIO PIRACY

The International legal regime pertaining to bio piracy could be examined under a comparative analysis, as the international laws relating to bio diversity before 1994 were differed from the existing legal framework. Earlier, the utilization of the natural resources by researchers , private organizations, scientists was justified based on the concept of common heritage of mankind.

However, the implementation of certain laws and principles imposed by the international conventions, in

order to enhance the protection of bio diversity in the world, have changed the practices of people towards the utilization of the biological resources for various purposes. The convention on Biological Diversity (1994) could be identified as land mark mechanism which was established by the authorized international community, in order to conserve the biological diversity in the world. This convention is not the first international treaty which addresses the conservation of species and habitats, but it is the first to address conservation of all biological diversity worldwide with the concept of sustainable utilization of such resources (Rosendal 2013). Among the provisions of the convention which set restrictions for the biopiracy, the article 3 and 8 (j) are significant. Accordingly, those articles emphasize the sovereign right of a country to exploit the own resources pursuant to their own environmental policies and to ensure that such activities do not causes damages to the environment of other states or the areas beyond the national jurisdictional limits. Apart the above mentioned two main articles, there are other relevant provisions of the convention linked with the legal framework which confronts the concept of biopiracy.

However, the most significant issue which requires to consider under this convention, is the continuous debate of the effects of Intellectual property rights imposed by the TRIPS agreement on the achievement of the objectives of the convention on Biological Diversity. Therefore, it is required to review the linkages between Intellectual property rights and the conventions' objectives, while highlighting the controversy. The intellectual property rights which have implications for the objectives of the convention on Biological Diversity could be analyzed under four main areas. One such area is the affect of TRIPS agreement on the access to genetic resources and fair and equitable sharing of benefits arising from such resources utilization which is guaranteed under the Article 15 of the convention of Biological Diversity. The objectives of the convention will be achieved only if intellectual property rights holders guarant the fair and equitable sharing of benefits of the genetic resources they have already accessed. However, it could be identified that, the intellectual property rights permitted by the TRIPS agreement may undermine the possibility of ensuring the equitable sharing of benefits for the countries which utilize such resources for various purposes. In addition individuals

and organizations, use these intellectual property rights permitted by the TRIPS agreement as a tool to restrict the sharing of benefits gained by using the genetic resources of a particular country. The second controversial factor of the linkage between the intellectual property rights and the objectives of the convention of Biological Diversity, is the negative affect of intellectual property rights over the preservation of the traditional knowledge of indigenous and local communities. Specifically, the grant of patents, is a major factor which encourages the individuals and corporations to misappropriate the traditional knowledge. This uneasy relationship between the intellectual property rights and conventions' objectives could be recognized as a subject with much debate.

The third aspect of the relationship between intellectual property rights and the objectives of the convention on Biological Diversity could be recognized as the, TRIPS agreements' affect on the transfer of technology. It is significant to analyze on how intellectual property rights affect the categories of development of technologies, either the technology developments gain directly from the use of genetic resources or the development of technology for the purposes of conservation and sustainability of the relevant resources. However the market oriented intellectual property rights are mainly focused on promoting the economic value of the genetic resources, while giving less focus on the benefits of the developing countries that provide access to such resources. The second set of issue related to the impact of TRIPS agreement on transfer of technology included in the objectives of the conventions, is the effect of intellectual property rights on the tranfer of technology to developing countries based on fair and equitable terms which guaranteed under the Article 7 and 66 of the TRIPS agreement. However, the role of intellectual property rights in technology transfer is complex, and empirical research is limit and largely inconclusive. (US council for TRIPS 1999).

Moreover, the fourth area which requires to analyze under the linkage between intellectual property rights and the objectives of the convention, is the intellectual property rights which affect the conservation and sustainable use of biological diversity described under the Article 15 of the convention. The contribution of intellectual property rights towards the conservation of

biological diversity requires more exploration, as the economic incentives linked with the intellectual property rights regime encourages the genetic use of restriction technologies.

However, the above mentioned controversial debate between the objectives of the convention on Biological Diversity and the intellectual property rights demonstrates that, though the convention imposed legal framework to protect and preserve the biological diversity in the world, the intellectual property rights regime permitted by the TRIPS agreement as an international legal instrument, have created certain escape clauses to the biopiracy under different perspectives. Specifically, this controversial debate among the two legal regimes should be analyzed with in the context of Sri Lanka, as a country legally obliged to both international legal frameworks. In addition , the International treaty on plant Genetic resources for Food and Agriculture (2001), The Paris convention, The International Undertaking on plant Genetic resources and the Union for the protection of New Plant varieties could be recognized as the some of other significant international instruments which aim to protect the biological diversity from the biopiracy threats.

IV. SRI LANKAN LEGAL REGIME PERTAINING TO BIO PIRACY

The existing laws relating to the Bio safety of Sri Lanka could be analyzed under different perspectives and the identification of gaps available with in the domestic legal framework, which have serious impact over the biodiversity of the country is significant. Despite the various statutes available for the protection of biological resources with in the country, the constitution of Sri Lanka plays major role in imposing the fundamental laws to the environmental protection. For examples, the Article 27(14) which safeguards the protection and preservation of the environment for the benefit of the community and Article 28(f) emphasizes the duty of every person to protect the nature and conserve riches of the environment could be identified.

However, the adequacy of the existing laws for the protection of biodiversity in the country has subjected to many criticisms, due to the practical issues relating to

the protection against the biodiversity of the country. The one such major reason affects on biopiracy, is the absence of sui generis system with in the country. Among the existing laws against bio piracy, the protection provided through the intellectual property rights regime need to be examined. The analysis on the intellectual property rights regime in the domestic context will be provided a platform to a comparative analysis with the intellectual property rights permitted by the international legal regimes. The Intellectual Property Rights Act No 36 of 2003 provides laws relating to the intellectual property in Sri Lanka. The intellectual property rights relevant to biological resources dealt with the granting of patents under the Part 4 of the Act and specifically, these patents rights ensure the protection of intellectual property rights of the genetic engineering techniques and their products. The granting of patents described in the Act, requires three main elements to be satisfied. According to the sec 63 of the Act, an invention is patentable, if it is new, involves an inventive step and industrially applicable. Except the patentable inventions, there are some inventions which could not be patented under the sec 63 of the Act, though they have acquired the three required elements for such grant of patent. The inventions which excluded from granting patents could be identified under the sec 62(3) of the Act. Specifically, under the excluded categories of inventions from granting patents, the biological process for the production of plants and animal is excluded. However, the granting patents for the genetic engineering technology is not excluded. Therefore, the granting of patents for the all genetic engineering technologies is accepted in Sri Lanka.

This exclusion of inventions which cannot be patented will not be applied for the genetic engineering process and according to the sec 63 (3) (b) , no animal or plant, except a transgenic micro organisms could be patented in Sri Lanka. These prohibitions are major steps taken by the Act to restrict the activities relating to bio piracy process. Moreover, the sec 63 (3) (f) of the Intellectual property Act has expanded the scope of intellectual property rights regime by granting discretionary power to Intellectual Property Office to decide the acceptance or refusal of granting patents for certain inventions. This discretionary power of the authority will protect the public order and morality from the damages which may cause due to harmful

inventions. Despite the Intellectual Property Rights Act, there are other statutes relating to the matter of biopiracy, like Fauna and Flora Protection ordinance (1937), National Heritage and Wilderness Areas Act (1937), Plant Protection Act (1999) and Water Hyacinth ordinance (1909) are few of such existing laws for the biosafety in Sri Lanka.

V. CONFLICT OF INTERESTS

The conflict of interests relating to the bio piracy could be recognized as the non compliance of certain elements between the TRIPS agreements and the Intellectual Property Act (2003), in the protection of the biological resources. As a member of World Trade Organization (WTO), Sri Lanka is obliged to implement the legal framework provided by the TRIPS agreement.

Thus, the obligation imposed by the TRIPS agreement upon Sri Lanka has created conflict between the economic interests and environmental interests of the country. Therefore, it is important to identify the instances where these interests are contradicted and the legal aspect which make such non compliance of interests.

The major controversial issue between the international and national laws is based on the plants variety protection and, the Article 27 of the TRIPS agreement deals with the subject matter of this debate. According to the Article 27 of the TRIPS agreement, the protection could be given to inventions of all field of technology, and Article 27 (3) (b) provides an exclusion for the patents protection of plant varieties. However, this exclusion would be permitted, only if a member country provide an effective sui generis system for the plant variety protection. This article elaborates the exemptions of granting patents for plants and animals, though the restrictions have been made for granting patents for biological resources in the same provision. Thus, the individuals or corporations of developed countries who intends to accomplish economic interests by using the biological resources in the developing countries, have ability to achieve their objectives, by applying this exemption permitted by the TRIPS agreement. However, it could be recognized that the developing countries will not find protective place within the framework of the TRIPS agreement. Therefore, the plants, animals should not be patented and the bio

piracy should be prohibited by promoting alternative attempts to conserve the genetic materials. (Millett 1999). Sri Lanka as a developing country lacks a sufficient legislation with regard to the Article 27(3) (b) of the TRIPS agreement and it affects to increase the activities relating to bio piracy.

VI. CONCLUSION AND RECOMMENDATIONS

As a developing country, Sri Lanka has no sufficient legal framework to safeguard its biodiversity from bio piracy, which mainly occurred due to the exemptions permitted by the TRIPS agreement. Therefore, it is important to establish a sui generis system which compliance with the TRIPS agreement in order to protect the biological resources from the bio piracy. However, it could be recognized that, implementing sui generis system in a developing country is defective in many aspects, due to their less practicability. There are recommendations in relating to the prevention of bio piracy in developing countries, which could be implemented by promoting certain changes in the TRIPS agreement. The revision of the requirements described in granting patents applications in order to ensure the prevention of misappropriating genetic resources and the benefits sharing gain from biological resources, is one such recommendation. Further, the requirement of expanding the exceptions to grant patents under Article 27 (3) (b) of TRIPS is another fact which WTO should be considered. Moreover, more flexibility should be given in defining the sui generis system of developing countries which protect their economic and social interests. These recommendations may enhance the efficiency of intellectual property rights involve in biodiversity protection and they will play accurate role in preventing the bio piracy in the developing countries.

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