

SUI GENERIS SYSTEMS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE

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*“Knowledge is sacred, renewed, permanent, exists,
is born, grows, expands; if ill it dies and is
not renewed once again.
Like a seed, if it dies, it cannot bear fruit.
Everything is a permanent cycle, where the basic
need is to know and to manage time,
reciprocity, diversity, so that the land is always renewed
and life flourishes.
Traditional Knowledge is life in harmony between
the holder and the world that involves it”.*

Indigenous Organizations from the Amazonic Basin**.

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** COICA in its Spanish abbreviation. See <http://www.coica.org/interna.asp?s=5&t=1>.

ABSTRACT

This paper intends to provide the reader with the most important arguments in favour of the establishment of a *Sui Generis* system for the protection of Traditional Knowledge (TK); both at the national and international level. To achieve this objective, it is based mainly on WIPO documents, as it is an authority in Intellectual Property law. Also, they reflect country members' opinions and experiences about the topic.

The starting point is the intrinsic characteristics of TK, which make it hard to fit in the conventional Intellectual Property law subject matters. What is more, its complexity goes beyond this aspect; the need of satisfying its holders' expectations is the ultimate challenge. TK has a holistic nature that existing IP law is unable to recognize and defend.

Uniformity has not been reached at the international level though; some countries still believe that existing IP law regimes are suitable for TK protection. Some others do not, and have started to implement—or at least consider implementing—a whole new system especially conceived for TK protection.

As an illustration, the paper explains the *Sui Generis* systems of Panama and Peru. The choice was not random; both nations have abundant natural resources and multiethnic population. In addition, they are pioneers regarding this topic, not only because they were first on time, but also because of the way they were developed. Both systems are the product of a process in which local Indigenous Peoples took part actively; therefore they are worth studying.

Key Words: Intellectual Property Law, Traditional Knowledge, Collective Knowledge, Indigenous Peoples, Cultural Expressions (Folklore), *Sui Generis* System, Collective Rights, Customary Law.

RESUMEN

El presente artículo tiene como objetivo presentarle al lector los principales argumentos a favor del establecimiento de un Sistema Sui Generis para proteger Conocimientos Tradicionales, en el ámbito nacional o internacional. Por lo anterior, está basado principalmente en los documentos que sobre el tema ha preparado la OMPI, autoridad en el tema de propiedad intelectual. Adicionalmente, estos documentos no sólo reflejan las opiniones, sino además las experiencias de los países miembros relacionadas con el tema.

Como punto de partida se enuncian y explican las características intrínsecas de los Conocimientos Tradicionales, las cuales hacen de ellos un tema difícil de encajar en las categorías convencionales sujetas a la protección de los regímenes de la Propiedad Intelectual. De hecho, es la necesidad de satisfacer las expectativas de los Grupos Indígenas, como dueños y titulares de los derechos sobre estos conocimientos, lo que los convierte en un verdadero reto jurídico.

La comunidad internacional no se ha puesto de acuerdo sobre la necesidad de crear Sistemas Sui Generis. Algunos países consideran que los regímenes existentes de Propiedad Intelectual son capaces de proteger los Conocimientos Tradicionales. Otros, sin embargo, han creado sus propios sistemas especialmente concebidos para responder a su particular naturaleza.

Para ilustrar este escenario, se eligieron los recientes sistemas de Panamá y Perú. La elección no fue arbitraria, por el contrario, se realizó con base en la abundancia de los recursos naturales y la gran población de grupos indígenas al interior de estas naciones, además del proceso de elaboración de estos sistemas, lo que hace de ellos un interesante objeto de estudio

Palabras clave: Propiedad Intelectual, Conocimientos Tradicionales, Conocimientos Colectivos, Grupos Indígenas, Expresiones Culturales (Folclor), Sistema Sui Generis, Derechos Colectivos, Costumbres Indígenas.

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INTRODUCTION

As a result of the boom of topics like sustainable development and biodiversity, the world has become interested in Indigenous Peoples and the legal protection for their Traditional Knowledge¹.

Numerous jurisdictions of the world and also the WIPO, have been studying the best legal way to approach the topic. The possibilities are either adapting existing IP laws to this specific issue, codifying Customary Law, or developing a new and different system aiming to provide legal protection for Traditional Knowledge. The latter solution is known as *Sui Generis* System.

1 Especially since the Convention on Biological Diversity -CBD came into force. Merle, Alñexander and others. The role of Registers and Databases in the Protection of Traditional Knowledge- A comparative Analysis. Report for the United Nations University- Institute of Advanced Studies UNU_IAS: Tokyo, April 22004, Page 6. Available at http://www.ias.unu.edu/binaires/UNUIAS_TKRegistersReport.pdf.0

This paper intends to set out the reasons that have led some jurisdictions to establish a *Sui Generis* System for the protection of Traditional Knowledge.

Starting from its complex definition as a legal subject matter and its essential characteristics, the paper leads the reader through the principal arguments given in favor of the creation of a new system that truly responds to the needs and expectations of its holders.

Finally, two current *Sui Generis* Systems of protection are explained, from the way they were developed to their particular provisions.

1. WHAT IS TRADITIONAL KNOWLEDGE?

Defining “Traditional Knowledge” as subject matter for IP protection has not been a simple task. A lot of debate and controversy have arisen within the different jurisdictions in the selection of the words to elaborate an appropriate and exhaustive definition. The process has been similar in the international context.

The general perception is that certain messages or value judgments are sent with the choice of a term, even if it is inadvertently. Thus, the choice of a term is neither arbitrary, nor irrelevant.

For instance, the use of the word “*traditional*” has been criticized by some jurisdictions² because it could limit the scope of protection to historical material only, rather than new or adapted material developed within living cultures and customs. It has been said that “*customary*” would be more suitable³. The word “*knowledge*” has also been questioned. For IP objectives, it has been suggested that “*innovations*” would more pertinently signal the subject matter.

2 WIPO, Secretariat, Fact-Finding Missions 1998-1999, Traditional Knowledge – Operational Terms and Definitions - WIPO/GRTKF/IC/3/9, Geneva, May 2002, page 8.

3 *Ibid*, at Annex 1.

Given that unanimity is hard to obtain, WIPO has tried to move forward for the benefit of international discussions. Thus, the Secretariat has used the term “Traditional Knowledge” (TK) in an open-ended way to refer

“to *tradition-based* literary, artistic or scientific 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”⁴ (Underlining added by the author).

Tradition-based appears as the key notion in TK, and it

“refers to knowledge systems, creations, innovations, and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment”⁵.

This is not a formal definition, but a working concept of TK that provides the basic elements for the understanding of the nature of TK as a legal subject matter in the international IP framework.

2. WHAT ARE THE BASIC CHARACTERISTICS OF TK?

Three basic characteristics stem from the working concept of TK:

2.1. TRADITIONAL

TK is “traditional”, meaning that it is created in a way that reflects the traditions of the community within which it is developed. Therefore,

4 *Ibid* at page 11.

5 *Ibid*.

“traditional” does not necessarily refer to the nature of the knowledge (it does not mean that is old or lacks a technical character), but to the way in which that knowledge is created, preserved and disseminated.

Due to this fact, TK is culturally biased or culturally oriented, and it is essential to the cultural identity of the social group in which it operates and is preserved. Every single element of the TK defines the community’s own identity. For instance, a specific piece of medical knowledge developed from a combination of certain plants by a South American community will differ from one developed by an Asian community, even though the plants utilized were similar. In essence, the difference lies upon the cultural approaches and beliefs of each community⁶.

2.2. MEANS OF CULTURAL IDENTIFICATION

It is also a means of cultural identification of its holders, because its preservation and integrity are linked to the preservation of the culture as such.

This characteristic can be illustrated with the following example. Two different teams of scientists are developing an invention, aiming to solve exactly the same technical problem. It is very likely that the outcome of the inventive process will be very similar. In Patent Law this would give rise to similar legal procedures to attribute ownership to one claimant or the other.

“Competing patent claims to overlapping subject matter are resolved without reference to the cultural environment which gave rise to the invention”⁷.

On the contrary, the cultural environment of TK may have a significant impact on its legal protection,

6 WIPO, Secretariat, Elements of a *Sui Generis* System for the protection of TK - WIPO/GRTKF/IC/3/8, Geneva, March 2002.

7 *Ibid* at paragraph 14.

“because being a means of cultural identification, the protection of TK, including TK of technical nature, ceases to be simply a matter of economics or of exclusive rights over technology as such. It acquires a human rights dimension indeed, for it intertwines with the issues concerning the cultural identification and dignity of traditional communities”⁸.

Likewise, in Copyright Law, the concepts of attribution and integrity in “moral rights” would have an additional importance in the context of TK. Any culturally offensive misuse of TK must be attacked, for instance, with specific remedies, such as additional damages in favor of the offended community. This is a dimension that moral rights do not have in non-traditional copyrighted works.

2.3. CULTURAL DIMENSION AND SOCIAL CONTEXT

TK can be easily distinguished from other forms of scientific or technological innovation due to its cultural dimension and social context, even if it contains information of practical or technological character.

Thus, in order to understand the full nature of TK it is necessary to understand the cultural influences that shape it⁹. TK tends to be developed in a way closely related to the immediate environment in which traditional communities are settled, and to respond to the changing situation of that community. In this sense, it has an empirical or “trial and error” basis.

From an external point of view, traditional communities may have an apparent “non systematic” or “unmethodical” way to create their TK. Their rules or system governing its creation is passed on in an informal or cultural manner (songs, stories, drawings, etc.). The process of TK’s creation is not formally documented in the same way that other technological and scientific information is recorded. But the truth is that this apparent non-systematic way to create TK

8 *Ibid.*

9 *Ibid* at paragraph 15.

does not diminish its cultural value, or its importance in terms of technological benefit.

In consequence, this “non-systematic” feature of TK leads to emphasize the cultural context in which it is created, and to the need of considering particular elements of this cultural context along with the knowledge by itself.

3. THE NEED FOR A *SUI GENERIS* SYSTEM TO PROTECT TK

3.1. WIPO SURVEY ON EXISTING FORMS OF IP PROTECTION FOR TK

The international community has not agreed on the need of the establishment of a *Sui Generis* System to protect TK.

This conclusion was the result of the survey made by the Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore. The task of this survey was to enquire about the use of existing standards of intellectual property for the protection of TK, and the creation of new standards, or *Sui Generis* Systems for the same purpose.

A number of countries indicated that existing mechanisms of IP are generally available for the protection of TK. Some of these countries identified an extensive list of existing mechanisms, implying that the eligibility for TK protection depends almost exclusively on meeting previously established conditions^{10, 11}.

For instance, Australia identified four cases as an example of the ability of Australian IP mechanisms to protect TK^{12, 13}. From these cases result that

10 WIPO, Secretariat, Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge – Preliminary Analysis and Conclusions- WIPO/GRTKF/IC/2/9. Geneva, December 2001.

11 E.g. Canada, the European Union, Turkey, Hungary, Switzerland.

12 *Above* n 12, at paragraph 8.

13 Foster v Mountford (1976) 29 FLR 233, Milpurrruru v Induforn Pty Ltd (1995) 30 IPR 209, Bulun Bulun & Milpurrruru v R&T Textiles Pty Ltd (1998) 41 IPR 513,

“protection under the Australian Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists”¹⁴.

Additionally, other IP rights are available for TK protection, like Certification Marks, the Trademark System as a whole and the Designs System.

Some others pointed out some specific mechanisms that more adequately protect TK than others. For instance, Indonesia has emphasized the relevance of Copyrights, Distinctive Signs and Trademarks¹⁵. Norway mentioned the value of Trade Secret law regarding TK that is not in the public domain¹⁶.

One of the conclusions of this study was that two IP mechanisms tend to be considered - amongst the countries that answered the survey- as more suitable for the protection of TK than others, namely Geographical Indications and Certification Marks. The first mechanism, as defined in the TRIPS agreement¹⁷ relies

“not only in their geographical connotation but also, essentially, on human and/or natural factors”¹⁸

that are

“the result of traditional, standard techniques which local communities have developed and incorporated into production”¹⁹.

Additionally,

and *Bulun Bulun v Flash Screenprinters* discussed in (1989) EIPR Vol 2, page 346-355.

14 *Above* n 13, at paragraph 8.

15 *Ibid*, at paragraph 7.

16 *Ibid*.

17 Article 22.1.

18 *Above* n 12, at page 10.

19 *Ibid*.

“the geographical reference of a geographical indication is an indirect means of appropriation of traditional techniques that otherwise might be in the public domain”²⁰.

In Certification Marks, unlike Geographical Indications, this knowledge is the most important part of the equation, regardless of any geographical link.

On the other hand, some countries²¹ informed about the adoption of special regimes created for the specific purpose of protecting TK. These are known as *Sui Generis* Systems. What makes an IP system a *Sui Generis* one is the modification of one or some of its elements so as to properly accommodate the special characteristics of its subject matter, and also the specific policy need that led to the establishment of a different system²².

The *Sui Generis* Systems of Panama and Peru are explained below.

3.2. THE HOLISTIC NATURE OF TK - THE *PAJE*'S FABLE

A short fable taken from the WIPO document

“Elements of a *Sui Generis* System for the Protection of Traditional Knowledge”²³

will illustrate the nature of TK, and the way it is perceived by supporters of the establishment of *Sui Generis* Systems for TK protection.

“A member of an Amazon tribe does not feel well and requests the *Paje*'s medical services (*Paje* is the tupi-guarani word for shaman). The shaman, after examining the patient, will go to his garden and collect some leaves,

20 *Ibid.*

21 E.g. Peru, Guatemala and Panama.

22 *Above* n 6, at page 9.

23 *Ibid.*

seeds and fruits from different plants. Mixing those materials according to a method only he knows, he prepares a potion according to a recipe of which he is the sole holder. While preparing the potion and afterwards, while administering it to the patient, the *Paje* prays to the gods of the forest and performs a religious dance. He may also inhale the smoke of the leaves of a magical plant. The potion will be served and saved in a vase with symbolic designs and the *Paje* will wear his ceremonial garments for the healing. In certain cultures, the *Paje* is not seen as the healer, but as the instrument that conveys the healing from the gods to the patient”²⁴.

If taken separately, existing IP mechanisms would protect the different elements of the Amazon *paje*’s TK whether they previously meet the legal requirement for protection. Thus:

- The different plants from which he made the potion can be protected under a plant variety protection system.
- The potion can be subject of a patent.
- A patent can also protect the use and the dosage of the potion.
- The prayer can be copyrighted.
- Copyright –related rights can protect the performance.
- The vase containing the potion can be patented or protected under a utility model.
- The designs on the vase and on the garments can be protected either by the Copyright or by the Industrial Designs Law²⁵.

24 *Ibid* at page 10.

25 *Ibid*.

Nevertheless, the alternative to separately protect the different elements of TK does not respond to the need for protection of TK. TK is not the mere sum of its separated components:

“TK is more than that – it is the consistent and coherent combination of those elements into an indivisible piece of knowledge and culture”²⁶.

In the example of the Amazon *Paje*, it is important to say that he would not attribute the merit of the healing results only to the potion he made, but to the combination of the potion with the religious ritual he performed. This short fable shows the holistic nature of TK. Existing IP mechanisms may be efficient protecting the different elements of TK separately. But a new different system is required in order to protect the holistic nature of TK and to take a comprehensive approach to it.

TK, in its holistic concept, has four unique characteristics²⁷:

1. The spiritual and practical elements of TK are inseparable: Every single element of TK serves as an inherent factor of cultural identification of its holders.
2. TK is in constant evolution: TK is not a static set of knowledge and inventions; on the contrary it evolves, adapts and dynamically changes in response to the needs of the traditional communities.
3. TK covers different fields: Going from artistic expressions to technical domains.
4. “TK may appear less than formal in character and its full character and systematic nature may only be apparent with a greater understanding of the cultural contexts and rules that govern its creation”²⁸.

26 *Ibid.*, at page 14.

27 *Ibid.*

28 *Ibid.*

3.3. ARGUMENTS IN FAVOR OF THE ESTABLISHMENT OF A *SUI GENERIS* SYSTEM

Supporters of the establishment of a *Sui Generis* System to protect TK have argued that the existing IP mechanisms cannot provide for the recognition and protection of TK, due to the differences between TK and conventional IP rights.

These differences are²⁹:

- TK is communal, often belonging to a group, tribe, family or other socio-political groups.
- TK cannot be readily associated to a single, identifiable individual author, creator or inventor.
- TK is managed and owned in accordance with Customary Rules and Codes of Practice, and are usually not sold or alienated in ways that conventional IP rights can be.
- TK is based on ancient and enduring traditions linked to spirituality – and are therefore not commercial rights in the usual sense of conventional IP rights.
- TK include rights on forms of intangible cultural products and expressions that are not protected under existing IP mechanisms.
- TK is usually transmitted by oral means, and is therefore not subject to the same conditions regarding material forms required by conventional IP systems.

29 Aboriginal And Torres Strait Islander Commission (ATSIC). *GATT-TRIPS Review – Aboriginal and Torres Strait Islander People’s Issues*. Canberra, May 1999. Available at http://www.atsic.gov.au/issues/Indigenous_Rights/Intellectual_Property/GATT_TRIPS_Review.pdf.

4. CURRENT *SUI GENERIS* SYSTEMS FOR THE PROTECTION OF TK: PANAMA AND PERU

When the WIPO did its survey on existing forms of protection of TK, Panama provided information about its

“Special Intellectual Property regime on collective rights of Indigenous Peoples for the protection and defense of their Cultural Identity as their Traditional Knowledge”.

This *Sui Generis* System was established by Law N° 20, of June 26, 2000 and regulated by Executive Decree 12, of March 20, 2001^{30, 31}.

In response to this survey, Peru provided information about the proposal for the establishment of a *Sui Generis* System, giving details of the law draft developed for that purpose³². After debate and a few changes, that proposal was adopted as the Peruvian

“Regime for the Protection of Indigenous Peoples’ Collective Knowledge, related to Biological Resources”,

established by Law N° 27811, of July 24, 2002³³.

These two systems are worth studying for several reasons. Firstly, they are pioneers in the topic. Secondly, Panama and Peru are rich in natural resources due to their geographic position. Actually, Peru is one of the twelve mega-diverse countries of the world³⁴. They are also multi-ethnic nations. The population of Indigenous Peoples in both countries is significant. Indigenous people make up about 15%

30 Above n 12, at page 6.

31 Available at http://www.digerpi.gob.pa/ley_20.html and http://www.digerpi.gob.pa/regla_ley_20.html respectively.

32 Above n° 32.

33 Available at http://www.indecopi.gob.pe/upload/legilacion_y_jurispru/legislaciones/Ley27811spanish.pdf.

34 Viva Natura Illustrated Database of Mexican Biodiversity, available at http://www.vivanatura.org/Biodiversity_megadiverse%20countries.html

of Panama's population of nearly three million³⁵. In Peru Indigenous Peoples make up over half the population³⁶.

Besides, Panama and Peru are developing countries. As such, they are willing to attract foreign investment in order to bring economic development to their citizens. Therefore, these systems reflect a deliberate balanced position in the topic: Protecting TK while allowing access to it.

Additionally, Indigenous Peoples of both countries actively took part in the design and establishment of these systems. Their participation is palpable in every single provision of the implementing laws, and in this way, the systems intend to respond to the cultural expectations of Indigenous Peoples as TK holders. For instance, both systems make possible a potential dynamic role for Customary Law and practice in defining the parameters of positive protection of TK. They also recognize TK as part of the cultural patrimony of Indigenous Peoples³⁷.

It is worth highlighting that Panamanian and Peruvian Indigenous Peoples have traditionally faced extreme poverty conditions, low level of literacy and discrimination^{38, 39}. Two important facts

35 Colombia Solidarity Campaign, available at <http://www.colombiasolidarity.org.uk/Solidarity%208/viewfrompanama.html>

36 Universal Rights Network, available at http://www.universalrights.net/people/f_indig.htm

37 "Recognizing TK to be Cultural Patrimony establishes obligations between the State and Indigenous Peoples, and creates a measure of protection against third parties where cultural patrimony is recognized as being inalienable and indefeasible. The importance of recognizing Indigenous Knowledge to be Cultural Patrimony is that it protects these rights *not only between Indigenous Peoples and third parties, but also within Indigenous societies themselves*". Above n° 1, at page 7.

38 Regarding Panamanian Indigenous Peoples' situation, see Center for International Development & Conflict Management's "Assessment for Indigenous Peoples in Panama" available at <http://www.cidcm.umd.edu/inscr/mar/assessment.asp?groupId=9502>.

39 Regarding Peruvian Indigenous Peoples' situation, see "Indigenous Peoples and Poverty in Latin America: An Empirical Analysis" available at <http://www.quechuanetwork.org/yachaywasi/IndigenousPovertyLA.pdf>.

contributed to their participation in the design of the National *Sui Generis* Systems. In the specific case of Panama, the President of the Senate was an Indigenous Representative, something exceptional for a country where Indigenous Peoples are traditionally excluded from political debate. Therefore, the draft presented by the *Kunas* (as explained below) was easily taken into account for the legislative agenda of the Congress⁴⁰.

Also, an Indigenous Movement emerged in 1992 in countries where Indigenous Peoples' population is large, like Ecuador, Peru and Bolivia. As a result of the increasing strength of this movement, a military-indigenous coup toppled democratically elected President JAMIL MAHAUD on 21 January of 2000. This fact certainly persuaded Indigenous Peoples of the neighboring countries to involve themselves in the protection of their well being⁴¹.

In other words, the *Sui gGneris* Systems of Panama and Peru are a precedent regarding Indigenous Peoples' involvement in National Law.

4.1. PANAMA

4.1.1. BACKGROUND⁴²

The “*Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural*

40 LÓPEZ MARTÍNEZ, ATENCIO, *Sui Generis* Systems for the protection of Traditional Knowledge. United Nations Conference on Trade and Development, Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices (Spanish Version) Caracas, 2001. Available at http://r0.unctad.org/trade_env/docs/lopez.pdf.

41 *Ibid.*

42 WIPO, Secretariat. Presentations on National and Regional Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Expressions (Expressions of Folklore) - WIPO/GRTKF/IC/4/INF/2. Geneva, December 2002. Available at http://www.wipo.int/documents/en/meetings/2002/igc/doc/grtkf_ic_4_inf2.doc.

Identity as their Traditional Knowledge” was born as an Indigenous Peoples’ initiative supported by the Government.

Since 1991 the ethnic group *Kuna* had been trying to protect their main cultural expression known as *Mola* through the existent Intellectual Property Law, but they could not do it for several reasons. The Government appointed a “Special Work Group” to advise them in this task. By the end, neither the suggested forms of protection satisfied the *Kunas*’ expectations (e.g. the Trademarks’ regime), nor did the ownership of the rights granted. They expressed that their lack of knowledge of the current IP law rather than its ability to protect their rights, was the principle obstacle to achieve the objective. However, they also expressed that they did not find the IP Law standards adequate for their interests, the lack of Collective Rights being the biggest drawback.

Therefore, a number of Indigenous lawyers, representing different Indigenous Groups, worked for a period of time on the draft of a law capable to protect their rights within the frame of their cultural expectations. This draft was “sponsored” by a group of Senators and thus included in the legislative agenda of the Panamanian Congress. During the debate of the law different Indigenous authorities intervened giving their support to the project and legitimating it. The text approved and consequently passed as a law of the Republic of Panama in 2000, is truly an expression of the Indigenous People capability to discuss, negotiate, and take advantage of the legislative system.

In November of 2000, after the passing of the law, the *Kunas* finally registered and obtained the first collective rights granted in Panama over their *Mola*, the traditional art developed by the women of the ethnic group.

The *Sui Generis* System of Panama is the first comprehensive system of protection of TK ever adopted in the world, particularly since the regulatory decree of the law clarified that the system also covers Biodiversity associated TK.

4.1.2. CHARACTERISTICS OF THE PANAMANIAN *SUI GENERIS* SYSTEM

4.1.2.1. *POLICY AND OBJECTIVE*

The policy of the system is to highlight and do justice to the socio-cultural values of Indigenous Peoples. In consequence, the objective pursued is to protect the Intellectual Property and TK Collective Rights of Indigenous Peoples over their creations (such as: inventions, drawings, designs, innovations, etc.) and the cultural elements of their history (such as art, music and Folklore) susceptible of being commercially exploited, through a special system of registration, promotion and commercialization of their rights⁴³.

4.1.2.2. *INDIGENOUS CULTURAL HERITAGE*

The Indigenous Cultural Heritage is formed by the customs, traditions, beliefs, spirituality, religiosity, cosmo vision, folklore, artistic expressions, traditional knowledge and other traditional expression of Indigenous Peoples⁴⁴.

Therefore, unauthorized third parties cannot monopolize any of these elements through the existent Intellectual Property Law, unless the Indigenous Groups expressly consent on that. However, any rights acquired prior to the *Sui Generis* System shall be respected and remain valid⁴⁵.

43 Law 20 of 2000, article 1.

44 *Ibid*, article 2.

45 *Ibid*.

4.1.2.3. OWNERSHIP OF RIGHTS

Indigenous Collective Rights belong to the entire Indigenous Peoples, given that they protect cultural expressions and TK that do not have known owner or author, nor date of origin⁴⁶.

When Traditional Cultural Expressions or TK belongs to more than one Indigenous Peoples, benefits obtained from the system shall be shared between them⁴⁷.

The System protects the originality and authenticity of those rights that meet the registration criteria⁴⁸.

4.1.2.4. REGISTRATION CRITERIA

In order to be registered, any Indigenous Cultural expression (TCE) and TK must meet the following requirements:

- 1) Cultural Identification: Meaning a link with the Indigenous Community and the way TK is developed within it.
- 2) Being susceptible of commercial exploitation.

4.1.2.5. REGISTRATION FORMALITIES

The System introduces the “*Collective Registry of Intellectual Property*”, which is the exclusive right granted by the State in order to exclude third parties from the exploitation of any TK or TCE. In other words, the Panamanian is a constitutive system of rights.

Additionally, the law creates the formalities of the registration process and the National entity in charge of the registration of

46 *Ibid*, article 6.

47 Executive Decree 12 of 2001, article 5(PAR).

48 *Ibid*.

Indigenous Collective Rights, the Department of Collective Rights and Expressions of Folklore of the Industrial Property Office, DIGERPI⁴⁹.

Only certain recognized Indigenous authorities are entitled to request the registry, being either “General Congresses” or “Indigenous Traditional Authorities”. The Panamanian State recognizes the existence of these Authorities as organizations in charge of the expression, decision-making process, administration and consultation adopted by Indigenous Peoples, according to their traditions⁵⁰.

Registration⁵¹:

- Does not expire.
- Is free.
- Does not require legal representation for the Indigenous Authorities when requesting registration.
- Any opposition shall be directly presented to the Indigenous Authorities representation that requested the registry.

The rights granted by the registration are:

- Exclusive right to prevent third parties from commercializing or using any TK or TCE without the express consent of the Indigenous Authorities.

49 “DIGERPI” Department of Collective Rights and Cultural Expressions, in its Spanish abbreviation.

50 *Above* 49, article 2(10).

51 *Above* 45, article 7.

- Right to forbid the reproduction, silkscreen printing or any other printing that imitates a collective right without the owner's authorization.
- Right to forbid the industrial reproduction (total or partial) of any TK or TCE acknowledged, unless it was authorized by the Ministry of Commerce and Industry, with the prior and express consent of the Indigenous Authorities.

Access to the Register is open to the public except in the case of experiments and “cognitive processes”⁵², meaning

“knowledge acquired over time through observation of and experimentation with the environment in which humans conduct their existence, which may be seen as biodiversity-related”⁵³.

4.2.1.2.6. LICENSES

The Minister of Commerce and Industry can authorize the industrial reproduction of Indigenous Peoples' TCE and TK, once their prior and expressed consent has been obtained⁵⁴.

The License contract must be included in the register created for this purpose and entrusted to the DIGERPI⁵⁵.

The registration requirements for a License Contract are as follows⁵⁶:

52 *Ibid*, article 12.

53 *Above* 49, article 2(18).

54 *Ibid*, article 17.

55 *Ibid*, article 19.

56 *Ibid*, article 18.

- Identification of the parties involved.
- Description of the Collective Right object to the contract.
- Establishment of royalties in favor of the Indigenous Peoples.
- Supply of enough information about the purposes and risks of the industrial activity for which the TCE or TK is going to be used.
- Obligation of the licensee to periodically inform the licensor about the advance of the investigation, industrialization or commercialization of the products object of the license.

Licensing the use of the certain knowledge held by an Indigenous People does not exclude others from using it or from granting licenses over the same knowledge⁵⁷.

Sublicensing is not permitted, unless the express authorization of the representatives of Indigenous Peoples that granted the license is obtained⁵⁸.

If a License is registered in contravention of any of the provisions of the system, or if it is based on false information, it may be canceled *ex officio* by DIGERPI or at the request of the party concerned⁵⁹.

4.2. PERU

4.2.1. BACKGROUND

The process for a Peruvian *sui generis* system for protection of TK arises in 1996 as a join initiative of the Ministry of Agriculture and

⁵⁷ *Ibid*, article 21.

⁵⁸ *Ibid*, article 21.

⁵⁹ *Ibid*, article 23.

INDECOPI (National Institute for the Defense of Competition and Intellectual Property). Five work groups formed by members of the public and private sectors were set up

“with the aim of implementing in, the shortest possible time, a flexible and effective regime of access to genetic resources, and guaranteeing protection of TK and the fair and equitable distribution of the benefits derived from the use thereof”⁶⁰.

The fourth of those groups was responsible for the creation of a general legal framework for the protection of the knowledge held by Indigenous Communities. The outcome of the process was achieved due to the multidisciplinary composition of the group: representatives of Indigenous Organizations, economists, lawyers, sociologists, anthropologists and biologists. It is worth highlighting that the participation of Indigenous Peoples in this process was massive.

More opinions from different sectors were gathered after the first draft came out. Even two workshops were organized for Indigenous representatives from the whole country⁶¹, to know their expectations and preferences.

WIPO and INDECOPI organized an international seminary on the subject to find out the opinions and interests of the other players. Thus, in this occasion the seminar was attended not only by representatives of Indigenous Groups, but also by representatives of non-governmental organizations, pharmaceutical laboratories, State entities, academics, international experts, etc.

60 WIPO, Document prepared by Mrs. BEGOÑA VENERO AGUIRRE, Head of Patents, National Institute for the Defense of Competition and Intellectual Property (INDECOPI), Lima. Roundtable on Intellectual Property and Traditional Knowledge - Efforts at protecting Traditional Knowledge: The Experience of Peru WIPO/IPTK/RT/99/6B. Geneva, November 1999, page 2.

61 Article 6(a) of ILO Convention 169 Indigenous and Tribal Peoples in Independent Countries, 1989, states that Indigenous Peoples must be consulted whenever consideration is being given to legislative or administrative measures that may affect them directly.

As a result, a new proposal was elaborated in order to achieve a balance between the interests of all the parties involved.

“This proposal is based on the idea that establishing an excessively protectionist or pro-Indigenous regime would drive away potential users of the knowledge, while establishing an excessively liberal regime could generate an adverse reaction on the part of Indigenous Peoples. Within both assumptions, the proposal would be condemned to failure”⁶².

The final proposal is based on the guidelines established by the Convention on Biological Diversity, especially article 8(j), article 7 of the Decision 391 of the Andean Community⁶³ and article 63 of the Industrial Property Law approved by Legislative Decree No. 823, which provides for the possibility of establishing a protection regime and, where necessary, a register of the knowledge of native and rural communities⁶⁴. It was approved by the Congress and passed as a law of the Republic of Peru.

62 *Above* n° 62 at page 3.

63 Article 7 of the Decision 391 states that “the member Countries, in keeping with this Decision and their complementary national legislation, recognize and value the rights and the authority of the native, Afro-American and local communities to decide about their know-how, innovations and traditional practices associated with genetic resources and their by-products”. Decision 391 available at <http://www.comunidadandina.org./ingles/treaties/d391e.htm>.

64 *Native Communities* are “those originated from the tribal groups of the Selva and Ceja de Selva, and are made up of series of families linked by the following main elements: 1) language or dialect; 2) cultural and social characteristics; 3) joint and permanent occupancy and use of a single territory; 4) with concentrated or dispersed settlement”.

Rural Communities are “organizations of public interest, with a legal existence and personality, and comprise families which inhabit and control particular territories linked by ancestral, social, economic and cultural bonds expressed in the joint ownership of land, communal labor, mutual aid, democratic government, and the development of multisectorial activities, whose aims are directed toward the complete fulfillment of their members and the country”.

Above n 62, at annex, page 2.

4.2.2. CHARACTERISTICS OF THE PERUVIAN *SUI GENERIS* SYSTEM

4.2.2.1. NATURE OF THE SYSTEM

Law 27811 introduces a declarative System⁶⁵ of protection for TK. The Peruvian State recognizes that Indigenous Peoples are native peoples whose rights precede the establishment of the Peruvian State⁶⁶. It also recognizes the right of Indigenous Peoples to make decisions over their Collective Knowledge⁶⁷, and that it belongs to their Cultural Patrimony⁶⁸.

Rights of Indigenous Peoples over Collective Knowledge are inalienable, because it belongs to their Cultural Patrimony. They cannot be transferred, only subject to licenses for use.

4.2.2.2. COLLECTIVE KNOWLEDGE

The System applies to *Collective Knowledge* (CK), defined as that related to the properties, uses and characteristics of biological diversity, developed by Indigenous Peoples⁶⁹.

The System protects this kind of knowledge as long as it is not in the public domain. CK is deemed to be in the public domain when it has been accessible to persons different from Indigenous Peoples through the media, publications, etc.

65 A declarative system related to TK “recognizes that the rights over TK do not arise due to any act of government but rather are based upon pre-existing rights, including ancestral, customary, moral and human rights”, *Above* n° 1, at page 32.

66 Law 27811, article 2(a).

67 *Ibid*, article 1.

68 *Ibid*, article 11.

69 *Ibid*, article 2(b).

4.2.2.3. *OBJECTIVES*

The very ambitious objectives pursued by the System are⁷⁰:

- Promotion of respect, protection, preservation, application and development of the CK of Indigenous Peoples.
- Promotion of just and equitable distribution of benefits derived from the use of this knowledge.
- Promotion of the use of this knowledge for the sake of humankind.
- To guarantee that CK is used only when the informed prior consent of Indigenous Peoples has been obtained.
- Promotion of strengthening and development of the abilities and mechanisms traditionally used by Indigenous Peoples to share and distribute collectively originated benefits, within the legal frame of the system.
- To prevent the granting of patents over inventions obtained or developed from CK of Peruvian Indigenous Peoples, unless this Knowledge had been considered by the novelty and inventiveness tests.
- To benefit all Indigenous Peoples, even those groups with whom no contact has been made, and those that have not been legally recognized as native or rural communities
- Overcoming the natural distrust of Indigenous Peoples by granting them incentives with a view to their deciding to register, preserve, develop and share their knowledge⁷¹.

70 *Ibid*, article 5.

71 *Above* n° 62 at page 7.

- Promotion of closer links between Indigenous Peoples and potential users of their knowledge with the establishment of clear and rational rules allowing both parties to obtain benefits from the protective regime⁷².

4.2.2.4. *PRINCIPLES*

- Present generations of Indigenous Peoples are deemed as custodians of CK for their own benefit and that of future generations.
- The knowledge protected by the System is collective. It belongs to one or more Indigenous Peoples instead of specific individuals belonging to those groups. More than one Indigenous Peoples can, in cases, own CK when it has been either developed in parallel, or been exchanged between them.

4.2.2.5. *CONDITIONS OF ACCESS TO COLLECTIVE KNOWLEDGE*

Any person interested in gaining access to CK either for scientific, commercial or industrial purposes must obtain the prior consent of the Indigenous Peoples that posses it, unless it is in the public domain.

When access is sought for industrial or commercial purposes, a license contract must be signed. On the contrary, when access is sought for scientific purposes no contract is required. Obtaining the prior informed consent of the Indigenous Peoples that posses the knowledge is enough.

72 *Ibid.*

4.2.2.6. FUND FOR THE DEVELOPMENT OF INDIGENOUS PEOPLES

The System introduces the Fund for the Development of Indigenous Peoples with the purpose of contributing to the development of Indigenous Peoples through the financial support of projects and other activities. The Fund has technical, economic, administrative and financial autonomy⁷³.

When access to CK is sought, regardless of the purpose, any person using the knowledge and commercializing products derived from it must devote a minimum of 10 percent of the value of the gross sales to the Fund⁷⁴. In the case of CK that has been in the public domain for the last twenty years counted from the date of the law and commercially exploited, a percent of the value of the gross sales has to be devoted to the Fund⁷⁵. The Fund's resources also come from the Public budget, donations received and fines imposed, among others⁷⁶.

The Administrative Committee, formed by representatives of Indigenous Peoples' organizations and a national organization specialized in the field⁷⁷, administers the Fund. The Committee shall use, as far as it is possible, the mechanisms traditionally used by Indigenous Peoples to share and distribute benefits collectively generated⁷⁸.

Thus, the Fund distributes the benefits obtained through the application of the regime among all Indigenous Peoples rather than just those involved in the negotiation with third parties. Indigenous Peoples shall be granted access to the resources of the Fund by

73 *Above* 68, article 37.

74 *Ibid*, article 8.

75 *Ibid*, article 13.

76 *Ibid*, article 41.

77 The National Commission of the Andean, Amazonian and Afro-Peruvian Peoples ("Comision Nacional de los Pueblos Andinos, Amazónicos y Afroperuanos" in Spanish).

78 *Ibid*, article 39.

means of projects, subject to evaluation and approval of the Committee⁷⁹.

4.2.2.7. REGISTER OF CK OF INDIGENOUS PEOPLES

The Peruvian system provides for three different kinds of Registers of CK⁸⁰:

- a) A National Public Register,
- b) A National Confidential Register, and
- c) Local Registers of CK.

The National Registers are entrusted to INDECOPI⁸¹. The Local Registers shall be established and administered by the Communities themselves according to their traditional uses and practices. However, INDECOPI may provide technical assistance, if required, to assist with the design, development and implementation of these registers within the Communities⁸².

These Registers are established for⁸³:

- a. Preserving and safeguarding CK, and the rights of Indigenous Peoples over it.
- b. Providing INDECOPI with information that enables it to defend the interests of Indigenous Peoples related to their CK.

79 *Ibid*, article 38.

80 *Ibid*, article 15.

81 *Ibid*.

82 *Ibid*, article 24.

83 *Ibid*, article 16.

The National Public Register is formed by the CK that is in the public domain⁸⁴, and

“it will basically serve to assist in providing centralized information relevant for patent prior art searches and to challenge patents and other IPR’s granted in conflict with rights over TK”⁸⁵.

Thus, it is the obligation of INDECOPI to ensure that information included in this Register is available to Patent Offices worldwide, in order to ensure that it is taken into account in the case of applications involving Peruvian CK⁸⁶.

CK that is not in the public domain forms the National Confidential Register. As it is confidential, third parties cannot consult it.

Regarding the Local Registers, the law does not include any specific provisions for the recognition of these registers as sources of prior art⁸⁷.

Indigenous Peoples may, through their representatives, register their CK either in the Public or Confidential Registers.

The register is optional rather than mandatory, which means that not entering knowledge into it does not prejudice the enjoyment at all or full exercise of the rights granted under the system.

If a register is established in contravention of any of the provisions of the system, or if it is based on false information, it may be canceled *ex officio* by INDECOPI or at the request of the party concerned⁸⁸. The same provision applies to license contracts.

84 *Ibid.*, article 17.

85 *Above* n 1, at page 24.

86 *Above* n 68, article 23.

87 *Ibid.*

88 *Ibid.*, article 70.

4.2.2.8. *LICENSES*

Licensing the use of the certain knowledge held by an Indigenous People does not exclude others from using it or from granting licenses over the same knowledge. This license does not affect either the right of future generations to use and develop that knowledge⁸⁹. Sublicensing is not permitted, unless the express authorization of the representatives of Indigenous Peoples that granted the license is obtained⁹⁰.

The contracts licensing use of CK must be drawn up in writing⁹¹ and must be entered in the register created for this purpose by the INDECOPI.

Certain minimum clauses must be included in the contracts. INDECOPI must not register contracts that do not⁹²:

- Identify the parties.
- Give a detailed description of the CK object to the contract.
- Establish royalties in favor of Indigenous Peoples.
- Supply enough information about the purpose and implications of the activity to which access to CK has been sought.
- Oblige the license to periodically inform the licensor about the advances of the research on, and the industrialization and commercialization of the products developed from the knowledge.

89 *Ibid*, article 32.

90 *Ibid*.

91 Both in Native language and Spanish, *Ibid* articles 25 and 26.

92 *Ibid*, article 27.

- Oblige the license to contribute to the strengthening of the abilities of Indigenous Peoples related to their CK.

Once a license is included in the register, third parties cannot access it, unless the parties of the contract authorize so⁹³.

A copy of the license must be shown upon application for a patent over an invention obtained or developed from CK, unless this knowledge was in the public domain. Otherwise, the patent must not be granted⁹⁴.

4.2.2.9. PROTECTION GRANTED BY THE SYSTEM

An Indigenous People holding CK shall be protected against the disclosure, acquisition or use of that knowledge, without their consent and in an unfair manner, insofar as this knowledge has not entered the public domain⁹⁵.

Third parties that have legitimately accessed TK are obligated to non-disclose it⁹⁶.

In case of infringement of any of the rights granted, or imminent danger of these rights to be infringed, Indigenous Peoples are entitled to take action against the alleged or potential infringer. Infringement proceedings can also be instituted *ex officio* by decision of the INDECOPI⁹⁷.

93 *Ibid*, article 28.

94 *Ibid*, Complementary Provisions (2).

95 *Ibid*, article 42.

96 *Ibid*.

97 *Ibid*, article 43.

CONCLUSIONS

1. Among the suggested ways to protect TK, such as codification of Customary Law and adaptation of existing IP Law, a *Sui Generis* System arises as the best alternative.

Codifying Customary Law may have the effect of altering the content and nature of the customs, thus having a potentially negative cultural impact. Oral transmission of TK from generation to generation makes it a dynamic concept.

“There is always a danger of consolidating one source of type of knowledge, it may have the unintentional effect of creating a static form of that knowledge”⁹⁸.

In addition, certain aspects of Customary Law, such as punishments (e.g. outcast, capital penalty, etc.) might not fit in the frame of “western” law.

On the other hand, the differences between traditional IP Law subject matter and TK require the making of too many changes to exiting IP law. The extent of this modification is such, that the final result would be a totally new IP Law. Besides, the protection given to TK would not respond to its nature and the cultural expectations of its holders.

A *Sui Generis* System has the advantage of being specifically developed for TK. Therefore, it takes into account TK’s nature and characteristics, being suitable for its protection. And also, if Indigenous Peoples are involved in the design of the system, most likely it will satisfy their expectations as TK holders.

2. Is the author’s opinion that any *Sui Generis* System shall intend to achieve both altruistic and practical objectives.

98 Above n° 1, at page 28.

Nowadays the survival of TK is at stake mainly because the cultural survival of its holders is under threat⁹⁹. From an altruistic point of view, a *Sui gGneris* System shall assist the preservation of Indigenous Peoples and their cultures, by doing justice to their cultural values. They have been custodians of nature for centuries, and this job also has to be recognized as key for the preservation and renovation of natural resources in the past and future of humankind. In some cases, Indigenous Peoples are “tourist attractions” in countries where the tourist industry is an important source of income¹⁰⁰. There are countless reasons to protect Indigenous Peoples’ subsistence.

Accessing TK is the practical element of a *Sui Generis* System. In the last decades “western” societies have manifested their interest in knowing and applying TK for their own benefit. Among other reasons, TK is important for the maintenance and sustainable use of biodiversity. In this context, TK is valuable for achieving conservation and identifying sustainable uses of genetic resources in important sectors, such as agriculture and medicine¹⁰¹.

Certainly, access to TK only would be possible if the altruistic objective is achieved. Once Indigenous Peoples find protection in “western” law, they would agree to share their TK within a legal frame that responds to their cultural expectations.

The Panamanian and the Peruvian *Sui Generis* System are an example of the combination of altruistic and practical objectives.

3. The Register introduced by the Panamanian system is already in operation. The *Kunas* obtained the first collective right granted

99 WIPO, Secretariat. Intellectual Property and Traditional Knowledge - Booklet n° 2. Geneva, November 2001, page 7.

100 E.g. Peru and Mexico.

101 DOWNES, DAVID, Using Intellectual Property as a tool to protect Traditional Knowledge: Recommendations for next steps. Center for International Environmental Law – CIEL. Discussion Paper prepared for the Convention on Biological Diversity Workshop on Traditional Knowledge. Geneva, November 1997. Available at <http://www.ciel.org/Publications/UsingIPtoProtectTraditionalKnowledge.pdf>.

by the Panamanian System. However, the DIGERPI databases are not available on the Internet, and statistics could not be included in this paper. The three Peruvian Registers are currently under regulation¹⁰². Thus, the discussion of their merits and limitations is restricted due to the lack of information.

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Panama

Law 20, of June 26, 2000

Executive Decree 12, of March 20, 2001

Peru

Law 27811, of July 24, 2002

Andean Community

Decision 391, of 2 July, 1996.

