SETTLEMENT OF BIOPIRACY DISPUTES: IS THE WTO AN ELIGIBLE FORUM?

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ABSTRACT

In 2001, the World Intellectual Property Organization Intergovernmental Committee (WIPO IGC) set out to create an international legislature for the regulation of traditional knowledge and genetic resources (TKaGR). More than two decades later, the legislative process is still inconclusive. One of the most significant indigenous problems this law would have addressed, is the scourge of biopiracy. Biopiracy encompasses a wide range of practices including unauthorised access, uncompensated use and unjust enrichment from TKaGR. Currently, TKaGR custodians have the option of seeking redress at national courts under diverse IP headings and unfair competition as the facts of each biopiracy case dictates. This article will examine the basis for initiating a settlement at the World Trade Organization Dispute Settlement Body (WTO DSB), appropriate case categorisation, possible remedies and likelihood of success.

WTO AS A TRADE SECRET DISPUTE RESOLUTION FORUM

On the basis of Article 39(2) of the 1994 Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement,[i] an independent cause of action can arise from the misappropriation of trade secret (TS). TKaGR custodians can route such actions through WTO DSB and national courts. The EU Trade Secret Directive (EU TSD)[ii] and the 2016, US Defend Trade Secret Act

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(DTSA) provide guidance for the institution of TS actions in respective Member States. Article 1.1 and Appendix 1 of the Understanding on Rules And Procedures Governing the Settlement of Disputes (DSU) lists the TRIPS Agreement as a 'covered agreement' so the DSU rules and procedures are applicable to claims on the violation of TRIPS Agreement at the WTO.[iii] TKaGR custodians who intend to pursue a settlement at the WTO should ensure their claims fit into WTO-recognised dispute categorisations.

According to Article 26 of the 1995 Understanding on Rules and Procedures governing the Settlement of Disputes (DSU), an occasion for dispute settlement by the DSB may arise where a provision of a covered Agreement is not complied with or where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is nullified or impaired or the attainment of any objective of that Agreement is being impeded. The broad discretion on whether to bring a case against another Member or not can crystalise from threatened economic interests,[iv] export interests,[v] legislative/regulatory non-compliance[vi] and contrariness to honest practices.[vii] However, the WTO case categorisation and the likelihood of success remains the qualifications prescribed for the initiation of WTO settlement by Article 26 and Article 3(7) of the DSU, respectively.

In respect to biopiracy, it is arguable that absence of a mandatory consent requirement when TKaGR is utilised and compulsory compliance with benefit sharing requirement makes it difficult to create a compelling compliance mechanism in the WTO. On the contrary, various intellectual property rights already protect different aspects of TKaGR and the 2010 Convention on Biological Diversity (CBD) are not alien to the WTO DSB. In *Appellate Body Report, US – Import Prohibition of Certain Shrimp and Shrimp Products (1998),* for instance, the Appellate Body made reference to the CBD for the interpretation of 'exhaustible natural resources' in Article XX(g) of the General Agreement on Tariffs and Trade (GATT) 1994.[viii] Also, the Panel in *EC – Measures Affecting the Approval and Marketing of Biotech Products (1996)*[ix] observed that CBD belongs to the body of rules which may inform the ordinary meaning of the terms contained in the covered agreements, without, however, relying on it in that particular case.[x]

WHO CAN INITIATE A WTO DISPUTE?

WTO provides institutional framework for the conduct of trade relations among its Members where the subject matter is the WTO and/or covered Agreements like the 1994 TRIPs Agreement.[xi] According to Article 1 of DSU, WTO DSB caters for the dispute settlement needs of Members not corporations, communities or private persons. What does this mean for TKaGR custodians? TK and/or GR can be owned by individuals, communities or even nations. Irrespective of the ownership of TKaGR, Article 1 of DSU above identifies Member States as the appropriate party to a WTO settlement. Unlike India where issues surrounding biopiracy and misappropriation of TKaGR are national concerns, many developing nations do not share the same priority due to financial constraint, lack of expertise and national indifference towards the preservation of TKaGR. In the light of the requirement of Article 1 of the DSU, indigenous communities should lobby to get their sovereign states to investigate and settle qualifying TKaGR cases.

PRACTICAL CLAIMS AT WTO DSB

According to Article 1(1) and 3(2) of DSU, the jurisdiction of WTO DBS is activated by an actual dispute not mere advisory enquiries.[xii] In accordance with Article XXIII of GATT 1994, Article 23(1) of the DSU provides that an aggrieved Member States may seek redress through recourse to the WTO DSB where the biopiracy claim fits within the categorisation of (a) violation complaints (b) non-violation complaints or (c) situation complaints. There is an existing "moratorium" prohibiting non-violation on IP rights – this will be examined in Section E. but probable WTO complaints will be discussed below:

Violation Complaints:

Complaints of violation of the provisions of a covered agreement may be raised before dispute settlement panels.[xiii] Article XXIII(1)(a) of GATT 1994 states that such an occasion arises if a Member's failure to carry out an obligation under GATT 1994 results in the nullification or impairment of a benefit which another Member considers accrues to it under GATT. A biopiracy case that may fall within the category of violation complaint is ongoing conduct by Members and concerted, systematic action or practice of Members.

It seems large scale unauthorised bioprospecting, mining and commercialisation of genetic resources may amount to an ongoing conduct which can be challenged at the WTO DSB. There are many other positive and defensive protective avenues to curb such ongoing conducts rather than go through the costly process of WTO dispute settlement. This could be the reason why there are currently no WTO settlement precedents on this subject. For instance, a more appropriate measure where the ongoing conduct relates to a pending patent application or an existing patent, would be an application for patent opposition or revocation.

Non-Violation Complaints

Article 26(1) of the DSU defines the scope of non-violation complaints. The Section reads, "A party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement." Whilst violation complaints focus on contradictory laws, norms and acts, non-violation complaints address impairments on benefits which should accrue from WTO and covered Agreements. Non-violation complaints are exceptional remedies because Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions in contravention of those rules.[xiv]

Article 26(2)(a) of the DSU provides that complaining party shall present a detailed justification in support of any argument made with respect to issues covered under that paragraph. There is little guidance on what "detailed justification" for a non-violation complaint means; in the absence of clarification from the WTO dispute resolution Panel and the Appellate Body, it appears that raising a non-violation claim is not worthwhile.[xv] Examples of biopiracy-related legislation that may be classified as non-violation complaints are discussed below.

National legislations, independent of their application, can be challenged in the WTO settlement proceedings.[xvi] It seems it is immaterial whether such a WTO-inconsistent legislation is mandatory or discretionary - merely restricting a Member State's authority in a

material way seems to be sufficient.[xvii] In *US – Corrosion-Resistant Steel Sunset Review (2004)*, the Appellate Body specified that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute proceedings."[xviii]

In addition to acts applying legislation in a specific instance, also "acts setting forth rules or norms that are intended to have general and prospective application can be the subject of WTO dispute settlement.[xix]

Applied to biopiracy, it seems that Section 3(p) of the 1970 Indian Patent Act which prohibits patenting - an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component(s) may be an example of a legislation as such. The basis of challenging this Section of the Indian Patent Act could be that the provision over-reaches the bounds of the TRIPs Agreement since Article 27(1) of the TRIPs Agreement permits the patent of inventions in all fields of technology.

Additionally, it seems no TRIPs-permitted patent exemption squarely covers this Indian provision. Arguably, India can contend for the legitimacy of the provision within Article 27(2) of the TRIPs Agreement which permits patent exclusion on the basis of ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment. The basis of contesting legislation as such was expressed in the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*. There, the Appellate Body was of the opinion that if legislations can only be challenged upon application, it would lead to a multiplicity of litigation.[xx] So the WTO DSB allows claims against legislation as such to eliminate the root of WTO-inconsistent behaviour.[xxi]

Unfortunately, a successful opposition of a provision like Section 3(p) of the Indian Patent Act may promote and not deter biopiracy.[xxii] A similar legislation/provision that stands the risk of being disputed at the WTO on the basis of non-compliance with TRIPs Agreement is Article 15, Section 1 and 6 of the Belgian Patent Law which makes the disclosure of the geographical origin of GRs a requirement for patent grant.[xxiii] Contrary to the exclusive triune patent requirement of novelty, inventive step and industrial application in Article 27(1) of TRIPs Agreement; the Belgian provision mandates a fourth – disclosure of the geographical origin of genetic resources.

Situation Complaint

Article XXIII(1)(c) of GATT 1994 makes provision for a third category of complaints where there is any other situation that nullifies or impairs benefits which a Member considers to accrue to it directly or indirectly under the covered agreements. Arguably situation complaints may be an avenue to challenge private conduct allegedly nullifying or impairing trade benefits where such conduct is attributable to a Member government.[xxiv]

The Panel in *Japan - Measures Affecting Consumer Photographic Film and Paper (1998)* ruled in this respect – "[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis."[xxv] Applied to biopiracy, it seems a multi-national corporation's exploitation of TKaGR which significantly impacts a Member's commercial exploitation of their TKaGR can be considered to be the action of the multi-national's state.

Additionally, where a private party acts on the instruction, under the direction or control of a Member State such a private party's action will be considered the action of a Member.[xxvi] This deters delegation of quasi-governmental authority to private bodies or checks entities with governmental-like powers from nullifying or impairing Member's benefits.[xxvii] Even in such cases, appropriate parties before the WTO DSB are opposing Member States, not the offending corporation.

POSSIBLE REMEDIES AT THE WTO DSB

Upon completion of panel and where applicable appellate proceedings, several remedies may be available to a TKaGR custodian.

i. Cessation of Offensive Act: It is noteworthy that, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of recommendation to bring a measure into conformity with the covered agreements.[xxviii] Ultimately, the desire of a TKaGR custodian is that the offensive act (biopiracy) be discontinued. This can happen at any

stage of the WTO dispute between consultation,[xxix] panel decision,[xxx] appellate decision,[xxxi] during and after compensation and suspension of concession.[xxxii]

ii. Compensation: Article 22(1) of DSU provides that compensation is a temporary measure available where recommendations and rulings are not implemented within a reasonable period of time. TKaGR custodians should be aware that this compensation is not monetary payment; instead, respondent is expected to offer a benefit, like tariff reduction, equivalent to the benefit which respondent has nullified or impaired by applying its measure. This mode of compensation is fraught with many challenges.

First, both parties must agree on a non-exclusive compensation which may benefit or be detrimental to other members – depending on their relationship with the parties.[xxxiii] Secondly, compensation must be consistent with the covered agreements which implies consistency with the most-favoured-nation obligations.[xxxiv] Compensation is not punitive but is forward-looking until implementation occurs.[xxxv] TKaGR custodians are confronted with an international trade-by-barter and forced trade relationship with the offending member. Often, the significant ties between an offended Member and the offender are the facts of the biopiracy case. Monetary compensation would have saved a winning party from this dilemma.

iii. Suspension of Concessions/Retaliation: According to Article 22 (1) of the DSU, suspension of concessions is a temporary measure to ensure timely implementation of remedies. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.[xxxvi] TKaGR custodians should take cognisance of the fact that suspension of concession could be a likely outcome of a WTO dispute.

The suspension is sustained until the Member concerned fully conforms with DSB's recommendations and rulings.[xxxvii] According to Article 3(7) of the DSU, the last resort accorded by the DSU to the Member invoking dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements. DSU sets out guidance to ensure retaliation is proportional to harm resulting from

a Member's violation.[xxxviii] Article 23(1) of the DSU provides guidance and procedures on concessions or other obligations the complaining party may suspend.

The practicality of this remedy is questionable in view of the fact that a developing or least developed country may not be part of any concession or obligation with the violating party. Furthermore, measures which introduce trade barriers are nearly always economically detrimental to the targeted Member and the Member imposing such measures.[xxxix] Additionally, the fact that this remedy does not have a retroactive effect undermines its usefulness for TKaGR custodians. Unfortunately, the biopiracy tales of many bio-rich countries are in the past. It seems introduction of retroactive remedies would strengthen the motivation of Members to initiate WTO settlement, settle speedily and comply with DSB recommendations.

LIKELIHOOD OF SUCCESS

Before bringing a case, Article 3(7) of DSU, admonishes that a Member shall exercise its judgement as to whether an action under the WTO procedures would be fruitful. According to a study carried out on disputes initiated at WTO DSB, 33 percent of all disputes filed are classified as pending or inactive and 43 percent of cases resolved does not necessarily result to success for plaintiff.[xl] Time, cost and enforceability are very important considerations prescribed by Article 3(7) of DSU and the statistics above. I consider TKaGR custodians' chances at WTO DSB below.

i. Cost of WTO Settlement: Before commencing a WTO dispute, TKaGR custodians should consider that there are actual financial, expertise and resource costs associated with the settlement of WTO disputes. In *United States — Subsidies on Upland Cotton (2005)*, Brazil's cotton trade association spent approximately $2,000,000 on legal fees.[xli] In spite of the promised assistance from WTO Secretariat in Article 27(2) of the DSU, the cost implication and possibility of a protracted WTO proceeding can deter TKaGR custodians from pursuing a WTO dispute to resolution. Furthermore, developing countries may have less bargaining power and, thus, lower potential to pursue a complaint to a settlement.[xlii]

ii. Abuse of Reasonable Time: According to Article 21(3) of DSU, a Member is allowed a reasonable time "if it is impracticable to comply immediately with recommendations and rulings." But, other than the mandate to implement measures by the end of the period, DSU does not include guidance as to what must take place during the "reasonable time."[xliii] For instance, after the reasonable period in EC Hormones, EC decided it would not modify its laws.[xliv]

Also in *United States — Subsidies on Upland Cotton*, US did not even remove its domestic subsidies, but only settled with Brazil, not other countries affected by the offending measure, to dissuade Brazil from continuing the claim.[xlv] Injunction and damages are not available to parties at WTO DSB, hence, unreasonable delay may result to a technical defeat for TKaGR custodians. The offending party may intensify acts of biopiracy during the delay and thereafter advance for an empty resolution when the TK and/or GR has been replicated.

iii. Disproportionate Effect of Retaliation: Complaining Members with smaller economies may be less likely to take advantage of the authorization to retaliate than countries with large economies because of the potential costs associated with such retaliation.[xlvi] In *EC-Bananas*, Ecuador was granted authorization to retaliate with up to $201.6 Million in trade barriers against the EC.[xlvii] Ecuador did not carry out this directive because of the small value of imports from EC to Ecuador.[xlviii] Many cases of biopiracy spring from countries with small economies, this accounts for their inability to afford the high cost of international IP litigation required to safeguard their treasured TKaGR.

iv. The Current WTO Moratorium on Non-Violation Complaint: Currently, IP non-violation complaints cannot be initiated because of the moratorium on such IP complaints. This moratorium was established in Article 64(2) of TRIPS Agreement and is still running because Members are torn between maintaining the proper balance of rights and obligations within TRIPS Agreement and the believe that non-violation complaints in IP cases would trigger legal insecurity and curtailment of flexibilities.[xlix]

A typical biopiracy case would be affected by this moratorium because most biopiracy cases arise from unfavourable interaction of TKaGR with pre-existing IP rights – especially patent. Fortunately, it seems the limitations arising from the WTO moratorium would not constrain opportunities available to TKaGR custodians for settlement at the WTO DSB because the

qualifying basis of non-violation biopiracy complaints such as Section 3(p) of the 1970 Indian Patent Act and Article 15, Section 1 and 6 of the Belgian Patent Law discussed above would promote, rather than deter biopiracy.

CONCLUSION

WTO DSB offers dispute resolution service to Members where an international dispute falls within the permitted WTO case categorisation. The WTO DSU is an eligible forum for the resolution of biopiracy disputes. An aggrieved TKaGR custodian's desire is the cessation of the infringing act. This can happen at any stage of the settlement or compensation process. However, this desire may not be realised where a non-complying party's act results to retaliation, time wastage and unbearable cost. TKaGR custodians should consider these factors before initiating a WTO settlement.

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had even dismissed the precondition of an economic interest - Panel Report, Korea – Dairy para 7.13

[v] A potential export interest is almost always conceivable, as an infringement of WTO law is synonymous to impairment of benefits. See Christian Riffel, *Protection against Unfair Competition in the WTO TRIPs Agreement: The Scope and Prospects of Article 10bis of the Paris Convention for the Protection of Industrial Property* (Leiden: Brill Nijhoff, 2016) 82. This accounts for the unsuccessful attempt of the European Communities in EC — Regime for the Importation, Sale and Distribution of Bananas (III)1997 to 'rebut the presumption of nullification or impairment … on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage' - Appellate Body Report, EC – Bananas III [250]

[vi] A WTO Member's municipal law may serve as evidence of facts, compliance or non-compliance with international obligations - Appellate Body Report, US – Section 211 Appropriations Act [105]

[vii] See Christian Riffel, *Protection against Unfair Competition in the WTO TRIPs Agreement: The Scope and Prospects of Article 10bis of the Paris Convention for the Protection of Industrial Property* (Leiden: Brill Nijhoff, 2016) 109

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[xvii] Appellate Body Report, EU – Anti-Dumping Measures on Biodiesel From Argentina (2016) para 6.229

[xviii] Appellate Body in US – United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan (2004) para 81

[xix] ibid para 82

[xx] ibid

[xxi] ibid

[xxii] An instance of the kind of provision that would be beneficial to redress of biopiracy was Section 102(a)(1) of Title 35 of US Code which restricted the admission of oral foreign TK evidence. The bases of non-violation complaint in this instance would be that, contrary to Article 3(1) of TRIPs Agreement, which states that each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, US accorded differential treatment to its local oral

TK. Fortunately, concerns over this provision has already been addressed by the US through the implementation of Section 102(a)(1) of 2013 Leahy-Smith America Invents Act (AIA) so a WTO dispute on the ground of a non-violation complaint would not be necessary. Section 102(a)(1) of AIA modifies the restrictive foreign prior art requirement in Section 102(a)(1) of Title 35 of US Code to admit foreign public use of communal TKaGR as novelty-destroying prior art. Following the implementation of Section 102(a)(1) of AIA, it seems the US court would not hesitate to consider decades of communal use of TKaGR by Indians as novelty-destroying public use.

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[xxv] Panel Report, Japan – Film (1998) para 10.56

[xxvi] Article 8 of the Articles on Responsibility of States for International Wrongful Acts of the International Commission (2001)

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