

# PROTECTING TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS REGIONALLY: THE SAARC POSSIBILITY

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## *Abstract*

*The ambit of protection of IPR has always covered TK, TCE, and the folklore in it. But recently, we are trying to broaden the horizon of such kinds of rights and make it a specific head. With no specific international or national regime in place, the idea of protecting Indigenous rights and traditional knowledge becomes very vague and ambiguous. A sui generis system can always help us bring that clarity and will be able to demarcate such rights from the other bundle of rights. Currently, they are provided indirect protection in laws of related rights. The main problem with TK and TCE is that they have already been in the public domain for so long and are kept outside the reach of protection. Another major challenge is that the current regime of IPR focuses more on individual rights than community rights. The strong sentiments of developing and traditionally rich societies would be to have a decent rigid protection mechanism in place so that they can also enjoy equitable protection. The present research focuses on analyzing the existing regime present at international and regional level. It discusses two important regional model laws already in force and analyses if at all there is a need for regional framework for SAARC.*

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## INTRODUCTION

Traditional Knowledge (“TK”) and Traditional Cultural Expressions (“TCE”) as a subject matter of Intellectual Property (“IP”) and protection of them as such, has been debated for several decades. To protect these subject matters, many countries have special legislation while some countries are using other forms of IP protection.

The World Intellectual Property Organization Inter-Governmental Committee (“WIPO-IGC”) provides insights into text-based negotiations happening at the international level to finalize an agreement on an international legal instrument for the protection of TK and TCE. While the committee has prepared a model draft on the same, there are still some areas and gaps which require discussion. The sessions are usually attended by people from indigenous and local communities for sharing their experience and contributions, and are also attended by the representatives of the States who put forward their points. WIPO came together with UNESCO in the 1980s, to conclude model provisions on folklore protection. The latest development is the IGC which started working in 2001. The Committee acts as a platform for discussions amongst the members, presently working on a renewed and revised mandate from March 2004.<sup>1</sup>

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<sup>1</sup> World Intellectual Property Organization, ‘Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions? Expressions of Folklore’ [2003] WIPO 75. <[https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo\\_pub\\_785.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf)> accessed 15 October 2022.

Amidst the international and national discussion on the protection of TK and TCE, a few regional organizations having shared or common traditional knowledge and expressions, have formed efficient frameworks for the protection; The African Regional Intellectual Property Organization (ARIPO) and the Pacific Community are among such regional organizations. The regional framework of ARIPO and the Pacific Community is formed based on the model provisions formulated by the WIPO IGC. The South Asian Association for Regional Cooperation (SAARC) is a regional organization consisting of countries having common history, similar geography, and therefore common TK and TCE, this article thus aims to analyze other regional frameworks and suggest whether the same can be incorporated in the SAARC.

For this purpose, the article is divided into five parts. After this introduction, Part II provides a comprehensive elucidation of the prevailing legal framework safeguarding TK and TCE on the international stage. Subsequently, Part III undertakes an in-depth analysis of the identified gaps within the existing regulatory system. In Part IV, the focus shifts to exploring the regional mechanisms established by the ARIPO and the Pacific Community to protect TK and TCE. The elucidation of these regional frameworks aids in understanding their implications and efficacy. Consequently, Part V undertakes a meticulous examination of the necessity for a regional framework at the SAARC. This section endeavors to propose a suitable regional framework for TK and TCE protection, drawing comparisons with the previously discussed regional frameworks. Finally, Part VI encompasses the conclusive segment of this research article.

## PROTECTION IN THE CURRENT LEGAL REGIME

To come up with a regional policy or strategy to protect TK and TCE we also need to analyze and look into the existing works extending protection to the TK and TCE in the Intellectual Property Rights (IPR) regime:

### A. Berne Convention, 1971

This convention is only applicable until local legislation has been passed in each Member State, but even those governments that have not signed it may be subject to its rules because they are becoming increasingly ingrained in International Customary Law. The subject of copyright protection is a large number of TCE for which protection is needed. Examples include poems, dances, plays, stories, ceremonies, rituals, music, drawings, paintings etc. The rights to "prevent or permit, the reproduction, variation, transmission to the public and others, and the moral rights of attribution and integrity"<sup>2</sup> are the basic types of protection offered by copyright. Many of the interests and goals of indigenous people and traditional communities seem to be not effectively served by this.<sup>3</sup>

### B. WIPO, Performance and Phonograms Treaty, 1996

Additionally, the WIPO Performances and Phonograms Treaty ("WPPT") generally provides protection that is currently in place on a global scale and may be quite valuable. The most recent problem is with the recording of these traditional performances. Another problem is often how folklore is accessed and appropriated by

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<sup>2</sup> Lily Martinet, 'Traditional Cultural Expressions and International Intellectual Property Law' (2019) 47 *International Journal of Legal Information* 6 <<https://www.cambridge.org/core/journals/international-journal-of-legal-information/article/traditional-cultural-expressions-and-international-intellectual-property-law/FB2753FCCB69B560BBBCA30CD221739C>> accessed 26 July 2023.

<sup>3</sup> Anurag Dwivedi and Monika Saroha, 'Copyright Laws as a Means of Extending Protection to Expressions of Folklore', 10 *JIPR* (July 2005) 308, 314.

outsiders; for instance, when a customary chant performance is recorded, the recording is what enables it for others to access that chant, so it's important to understand how the recording is used and distributed. Folklore performers must have the discretion to approve sound recordings of their performances and certain interactions with such recordings in the nations that ratify the WPPT.<sup>4</sup>

### **C. Beijing Treaty on Audio Visual Performance, 2012**

The Beijing Treaty protects performers whose work have been fixed in an audiovisual medium and musicians whose performances have been directly fixed or recorded in an audiovisual format. The protection offered will cover moral rights and financial rights, in their unfixed performances, reproduction, distribution, rental rights etc. The duration of a performer's rights in audiovisual fixations is at least 50 years from the date the performance was fixed.<sup>5</sup> The TCE can be protected under this treaty but again, TCE, being a right in perpetuity, cannot be restricted to only 50 years of protection.

### **D. ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, 1989**

Article 23 of this convention talks about cultural and economic autonomy. In order to realize this right in a suitable manner, they recognize the importance of handicrafts, and production undertaken in rural and community-based production. The convention also puts an obligation on the member countries to promote such activities and their development.<sup>6</sup>

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<sup>4</sup> WIPO Secretariat, 'Intellectual Property and Traditional Cultural Expressions/Folklore' <[https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo\\_pub\\_913.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf) > accessed 17 September 2022.

<sup>5</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, (Thirty-Seventh Session, Geneva) (August 27 to 31, 2018) ("ICIPGR").

<sup>6</sup> WIPO, 'Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore A Guide for Countries in Transition, Version One, Traditional

### **E. Convention on Biological Diversity**

The Convention on Biological Diversity (CBD) also includes clauses that acknowledge the importance of indigenous and local populations' TK in accordance with its national laws. Each contracting party is required by the CBD's Article 8(j) to: preserve, conserve, maintain indigenous and local people's knowledge and practices that express customary lifestyles, sustainable development, promote their wider use with the permission and engagement of the holder of such information, innovations, and practices, and foster equitable sharing of knowledge.<sup>7</sup>

### **F. Tunis Model Law on Copyright for Developing Countries, 1967**

In the Tunis Model law, we find a better ability to cover national folklore using copyright to provide protection which can function as a *sui generis* system of protection. It is a significant initiative that goes beyond conventional copyright laws to address the protection of folklore and TCE in developing nations. Its emphasis on community involvement and recognition of cultural diversity makes it a valuable instrument for preserving and safeguarding the rich cultural heritage of developing countries. However, one might wonder about the necessity of this model when there is already some indirect protection under copyright law. The key aspect we aim through this model, though, is that it is not limited by time constraints. The right to assert authorship and to prevent abuse, along with existence of other moral and economic rights such as the right of reproduction, translation, adaption etc. are held by the designated authority.<sup>8</sup> But since this treaty

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Knowledge Division and the Department for Transition and Developed Countries' (2013) at 7.

<sup>7</sup> Ibid.

<sup>8</sup> ICIPGR (n 5).

is restricted to copyright protection, it may not be the ideal way to grant protection to TK and TCE.

### **G. UNESCO-WIPO Model Provisions, 1982**

Although developing nations were concerned about the need to protect folklore, it was acknowledged at the 1978 meeting of the WIPO Governing Bodies that very few actual actions were being taken to create legal norms. In the wake of that discussion, the WIPO drafted the first draught of *sui generis* model laws for safeguarding folklore against some unauthorized uses and distortion— ‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions’ (the “Model Provisions”).<sup>9</sup> A few principles were considered, including the necessity of maintaining a proper balance between the freedom and motivation of the further growth and diffusion of folklore on the one hand, and protection against the misuse of folklore expressions on the other. This was one of the considerations made by the Committee of Governmental Experts when developing the Model Provisions. The Committee considered the fact that folkloric manifestations were part of a dynamic human culture that should not be suppressed by unduly rigid protection. As opposed to a set of idealistic requirements that are impossible to put into practice, it also felt that any shielded system should be practical and effective. The Model Provisions were designed to leave space for national laws to adopt a protection system that is most appropriate for the circumstances in the countries in question.<sup>10</sup> Most of these provisions still exist only on paper and not in reality.

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<sup>9</sup> ‘Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions’ (WIPO 1985), < <https://www.wipo.int/export/sites/www/tk/en/docs/1982-folklore-model-provisions.pdf> > accessed 18 August 2023.

<sup>10</sup> The Protection of Expressions of Folklore: The Attempts at International Level, International Bureau of WIPO. Also see *Reproduced from Intellectual Property in Asia and the Pacific, January-June 1998, No. 56/57, WIPO Publication No. 435(E)*.

## **ANALYSIS OF GAPS IN THE PROTECTION**

IGC under the auspices of WIPO has done extensive work to find and fill the gaps present in the protection of the subject matter. They formulated certain common gaps which still exist in the protection of TK and TCE, with the following objectives:

- a. Obligations, provisions, and possibilities that already exist at the international level to provide security to TCE and their descriptions.
- b. Providing illustrations for those gaps along with examples to explain them more extensively.
- c. To study the provisions or options that can be developed or already subsists both— at national and international level.<sup>11</sup>

There is a noticeable gap concerning the existing obligations, provisions, and possibilities for safeguarding the relevant subject matter. One prominent issue we observe is the presence of technical shortcomings within the current legal systems, creating a significant lacuna in the overall protection framework.<sup>12</sup>

### **A. Gaps in the Protection of TCE**

After looking at the various observations and discussions at IGC, we can aptly summarize the analysis of gaps with the concerned subject matter, the desired protection, and the assumed shortcomings:

- (i) *Literary and Artistic Productions such as Customary Music and Visual Art*: This requires protection against the unwanted use

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<sup>11</sup> See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Draft Gap Analysis on the Protection of Traditional Knowledge.” Document prepared by the WIPO Secretariat on May 30, 2008.

<sup>12</sup> Ibid.



of traditional expressions. But to claim the same, they would need to prove the originality of the TCE which makes the originality requirement a shortcoming for the same.

- (ii) *Performance of TCE*: One of the most common kinds of protection required in the subject matter is the prevention of offensive use of expressions in such a way that the communities or others may find it insulting or derogating. The idea of who owns the right is a lacuna here since the IP holders are members of a community and not a single individual.
- (iii) *Designs*: The kind of issue that is faced by the communities is they do not know how to prevent false and misleading claims with respect to the authenticity and origin of the same. Here also fixation is a problem when they have to protect body painting, face painting, sand art etc. Registration and formalities are yet another issue.
- (iv) *Secret Traditional Expressions*: These face the issue of unauthorized disclosure of confidential or secret TCE. It becomes difficult for them to keep the information hidden and they also fail to be recognized under various exceptions and limitations. A parallel can be drawn here with another head of IPR, trade secrets. Both trade secrets and secret traditional cultural expressions involve confidential information, but they serve distinct purposes. Trade secrets are confidential business knowledge owned by companies to gain a competitive advantage and are legally protected. In contrast, secret TCE are sacred elements preserved within indigenous or traditional communities, owned collectively, and passed down through generations. Both rely on

confidentiality measures, but trade secrets focus on commercial value, while secret TCE emphasizes cultural heritage and spiritual significance.<sup>13</sup> While trade secrets are protected under IP laws, legal protection for secret TCE varies, mainly seeking to preserve cultural identity.<sup>14</sup>

- (v) *Indigenous and traditional names, words, and symbols*: The desired protection is the recognition and acknowledgement of sources when such TCE is used. Defensive protection against the copying and imitation of their work, design, mark etc.<sup>15</sup>

## **B. Gaps in the Protection of TK**

Part of what we analyze to look into the gap in the protection of TCE and to bridge the same is the objectives and Policy rationales behind the gaps in the protection of TK as well. TK as a subject matter has a lot of policy objectives and principles which make them protectable. As a result, gaps in TK protection in particular legal mechanisms can be described as:

- (i) The IP law does not cover TK as a subject matter.
- (ii) Right holders are not recognized as such, and some other beneficiaries are excluded from the benefits of protection.
- (iii) Other actions which cannot be prevented include other forms of use; and non - availability of privilege to obtain compensation or other benefits.<sup>16</sup>

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<sup>13</sup> Emily Choi, 'Safeguarding Native American Traditional Knowledge Under Existing Legal Frameworks: Why and How Federal Agencies Must Re-Interpret FOIA's "Trade Secret Exemption"' Advisory Council on Historic Preservation (2019).

<sup>14</sup> Ibid.

<sup>15</sup> P.V. Valsala Kutty, 'National Experience with Protection of Expression of Folklore/Traditional Cultural Expressions > India, Indonesia and Philippines' (WIPO 2002) <<http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf>> accessed 17 September 2022.

<sup>16</sup> Ibid.

## REGIONAL FRAMEWORKS PROTECTING TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

### C. Swakopmund Protocol within ARIPO<sup>17</sup>

The protocol is a *sui generis* regional framework developed by the ARIPO to implement the initiatives taken by the WIPO at the international level for the protection of TK and expressions of folklore at the regional level. It formulates a model law for the African countries for their national legislations. The protocol was proposed in 2004 because African TK and TCE are multicultural and transboundary; the knowledge has contributed to the development of science, technology and most importantly art. The deficiency in the protection of the TK and folklore has historically led to unlawful exploitation, infringement of IPR and misappropriation. The protocol came into force on May 11, 2015, when six members of ARIPO ratified it.

The purpose of the protocol is to protect TK and TCE from infringement and against unlawful exploitation, misuse, and misappropriation. It does not intend to limit the scope of TK and TCE and recognizes their evolving nature.<sup>18</sup> The protection under this protocol is extended to TK that is “generated, preserved and transmitted in traditional and intergenerational context”, associated with an indigenous community and is very significant to the cultural identity of the community.<sup>19</sup> The protection is extended to TCE in any form or mode of expression which are produced by "creative and cumulative intellectual activity" and where features and essence of the community's cultural identity are maintained.<sup>20</sup>

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<sup>17</sup> *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, ARIPO, August 2010.

<sup>18</sup> *Ibid*, s 1.

<sup>19</sup> *Ibid*, s 4.

<sup>20</sup> *Ibid*, s 16.

The right owners or beneficiaries of TK and TCE are those indigenous communities and recognized individuals who have generated, preserved, and transmitted the knowledge and the custodian and protector of the expressions of folklore, who have maintained and used the said TCE as their heritage.<sup>21</sup> The rights holders have the exclusive right of recognition, right of authorization, right to prevent use without consent, right to receive fair and equitable benefits and right to institute legal proceedings against infringement and unlawful exploitation of TK and TCE.

It is stated that the TK and TCE are not to be subjected to any formality, but the transparency of the TK and TCE, recognition of the Indigenous community and registration of individual right holders are to be stated in proper registers. The protection under this protocol is not prejudicial to the normal use, practice, and transmission of TK and TCE already available in the public domain. These are protected for perpetuity as long as it fulfils the criteria of TK and TCE given in the protocol, except when a TK is exclusively owned by an individual, the protection is for 25 years following the non-traditional exploitation of the knowledge.

The protocol acts as a model law setting up minimum standards for the members of ARIPO for the protection of TK and TCE in the region.<sup>22</sup> In Section 24 of the protocol, it provides for regional protection and asks member nations to give national treatment to foreign right holders; it mandates measures to be taken by ARIPO and national authorities for easy facilitation of acquisition and maintenance

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<sup>21</sup> Ibid, s 6 & 18.

<sup>22</sup> Laurier Y. Ngombe, *The Protection of Folklore in the Swakopmund Protocol Adopted by the ARIPO* (African Regional Intellectual Property Organization 2011), 14 J. World IP, 403.

of the TK and TCE; and entrusts ARIPO with the task of settling concurrent claims from the member nations.<sup>23</sup>

The Swakopmund protocol bridges the gaps of protection of TK and TCE by providing a set of regulations for the territory of its member nations. The development as compared to non-existing protection and continued misappropriation is most effective only when the countries implement the model framework, *mutatis mutandis* in their legislations.

#### **D. Regional Framework of Pacific Community<sup>24</sup>**

The Pacific community of countries is a recognized global pioneer in the protection of TK and TCE. There are many cultural artifacts and agricultural products in the Pacific Islands that could be protected as TK, Expressions of Culture and Geographical Indications. These might include the regionally distinctive woven textiles, basketry, sculptures, and perhaps even tattoos. The community is committed to educating the public about the risks associated with the expropriation of Indigenous knowledge and resources, encouraging chiefs, elders, and community leaders to take the lead in defending those resources, and incorporating Indigenous peoples' concerns to protect those resources into legislation by including "Prior Informed Consent or No Informed Consent" procedures.<sup>25</sup>

The framework comprises the background and the need for the protection of TK and TCE in Pacific Island Countries, a model law for the national legislation and an explanatory memorandum. It is in consonance with the international negotiations regarding the TK and TCE at WIPO and is formed in consultation with the UNESCO and

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<sup>23</sup> *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, ARIPO (August 2010).

<sup>24</sup> Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, Pacific Community, MODEL LAW, (2002).

<sup>25</sup> Michael Blakeney, *Protecting Traditional Knowledge, and Expressions of Culture in the Pacific*, (2011) Queen Mary J. Intell. PROP. 80.

Council of Pacific Arts.<sup>26</sup> The Model law establishes statutory rights for the right owners of TK and TCE. The explanatory memorandum assists the countries in drafting national legislation to adopt the model laws and their implementation by giving notes on clauses of the model laws and the intent behind the same.

The model law sets the minimum standard for a Pacific island country for the protection of TK and TCE, it applies to the TK and TCE that existed before the commencement of law and those created after it and is not prejudicial to the IPR existing before the commencement.<sup>27</sup> The protection under the framework is extended to TK and TCE expressed, created, inspired or acquired for traditional ritual, narrative, spiritual, economic, and recreational purposes, transmitted inter-generationally, pertaining to indigenous communities and is collectively originated.<sup>28</sup>

The right holders here will be the local or Indigenous community, group or clan or a recognized individual, to whom the custodianship of the TK and TCE is entrusted. The owners and holders of the TK and TCE have the right to authorize expression, use and exploitation of the TCE and TK; right to be recognized, right to equitable remuneration, moral rights and right to institute legal proceedings against unauthorized use, derogatory use etc. The duration of the protection is in force for perpetuity.<sup>29</sup>

The national cultural authority is entrusted with the task of maintaining a register of the TK and TCE, their holders, and the final authorized user agreements. Unauthorized use invites civil as well as criminal liability under the framework and is left for the countries to determine.

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<sup>26</sup> Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, Pacific Community, MODEL LAW, (2002).

<sup>27</sup> Ibid, s 3.

<sup>28</sup> Ibid, s 4.

<sup>29</sup> Ibid, s 9.

While the Model Law does inflict severe penalties on offenders living in the enacting country, its domestic effect reduces the extent of protection and leaves offenders living outside of the enacting country unaffected. The Pacific countries may accept the Model Law and create some sort of regional treaty or pact to address this issue, giving it some “teeth.”<sup>30</sup> However, even if a regional agreement is struck, criminal charges may not be brought against criminals who live outside of the signatory nations. The multilateral tool created by the WIPO-IGC is envisioned as being able to close this gap.

### **NEED FOR REGIONAL FRAMEWORK IN SAARC**

We saw that the protection of TK and TCE is happening at all three levels i.e., International, National and Regional areas. It is visible that some protection is best done at the regional level. The example of how ARIPO and Pacific Countries are providing regional protection to the subject matter is an inspiration for other similar regions too. One of the many benefits of protecting or guarding sensitive subject matter such as TK and TCE regionally is that it provides a stronger shield of protection, and many developing countries get each other’s support. They can come together to protect the similar nature or common TK, folklore, and heritage.

SAARC is one such regional area where a dire requirement for such a regional mechanism. Owing to their common history and similar cultures, these countries have come together to form a union which is proving beneficial at many levels. The SAARC Cultural Center recognizes the importance of the work that has already been done to preserve TK and TCE through direct and indirect means, but it is also aware that the majority of programmes that look into the preservation

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<sup>30</sup> Purcell Filipo and Siaki Sali, ‘Protecting Traditional Knowledge: An Analysis of the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture’, (2020) Victoria U. Wellington L. Rev. 559.

and promotion of TK and TCE are developed by Western policymakers without much or any consultation with the policymakers and bearers of TK in South Asia. As a result, South Asians' opinions and concerns are neither fairly reflected nor considered in these programmes. Therefore, it is crucial to carefully examine the unique traits, problems, and challenges of the TK and TCE of South Asia.<sup>31</sup>

Among other things, the SAARC Forum for Intellectual Property Cooperation (Thimpu, October 2002) emphasized the need for agreement on policy frameworks for the preservation, promotion, and use of TK; it also decided to begin working and coordinating stances on model laws, procedures, and terms and conditions of contracts contribute to norms that are widely accepted; recognize, list, keep track of, and document TK. They suggested that the possible things which can be done are for example, compiling a list of the TK, focusing on the recognized medicinal plants and associated TK, and asking for an expert meeting to discuss the design of the framework needed to suit the requirements of SAARC.<sup>32</sup>

### **A. SAARC and WIPO's Combined Initiative**

The SAARC-WIPO consultation process<sup>33</sup> acts as a venue for agreeing on specific cooperation initiatives from a regional viewpoint. The Director General established this mechanism in November 2000 to increase the breadth and depth of cooperation between the two organizations and raise awareness of the political ramifications of developments in the field of intellectual property. The SAARC

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<sup>31</sup> Sanjay Garg (eds), *Traditional Knowledge and Traditional Cultural Expressions of South Asia* (SAARC 2015) Colombo.

<sup>32</sup> Summary of Discussions and Consultations, WIPO/SAARC Expert Workshop On IP, TK And Genetic Resources organized by the WIPO in cooperation with the HRD Ministry, Government of India New Delhi, November 17-18 2003.

<sup>33</sup> 'WIPO and SAARC Countries Review Joint Cooperation' available at <[https://www.wipo.int/pressroom/en/articles/2007/article\\_0062.html](https://www.wipo.int/pressroom/en/articles/2007/article_0062.html)> accessed 26 July 2023.



countries will continue to receive assistance from WIPO in exploiting IP as a tool for economic and cultural development and wealth creation. He also underlined the Organization's commitment to giving the needs and expectations of the Group's five least-developed countries special consideration.

The SAARC Group praised WIPO's initiatives to support member nations in building up their IP skills so they could better utilize their intellectual property assets to accomplish socioeconomic objectives. It was decided that the efforts to develop IP infrastructure in the member nations had a positive effect. TK, Small and Medium-sized Enterprises (SME), the creative industries, and issues relating to IP and public policy were all identified as priority areas for increased cooperation to facilitate the formulation of effective policies and aid in the achievement of real economic benefits from the use of IP.<sup>34</sup>

The SAARC members have agreed to show cooperation in future with WIPO. They must develop a variety of distinctive programmes at the sub-regional level to encourage resource sharing, experience sharing, and the exchange of best practices. However, this region has several issues, particularly given that these are developing nations. Additionally, there is no international legal protection.

For instance, let's consider India's case with Neem (*Azadirachta indica*), a medicinal plant extensively used by Indians for ages. Despite its long-standing traditional use, numerous patents (approximately 40 in the U.S. and nearly 150 worldwide) were filed regarding Neem. India took proactive measures to challenge the granting of these patents, citing that the traditional knowledge of Neem was already part of the public domain. Two noteworthy instances of such challenges were

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<sup>34</sup> Press Release (2007), WIPO <[https://www.wipo.int/pressroom/en/articles/2007/article\\_0062.html](https://www.wipo.int/pressroom/en/articles/2007/article_0062.html)>, accessed 16 October 2022.

observed: firstly, concerning patents related to the fungicidal effects of neem oil in Europe, and secondly, at the U.S. patent office regarding a storage-stable Azadirachtin formulation. Eventually, these patents were invalidated due to their lack of novelty and inventiveness.<sup>35</sup> The implications of such patents were a significant concern for India, as they could potentially have a profound impact on the country's socio-economic conditions.

To overcome this and many other violations of indigenous rights, India came up with the model of the Traditional Knowledge Digital Library (TKDL). Something that could be done at the regional level for SAARC will solve the problem of TK falling into the public domain and the right holders will get their remuneration.

## **B. TK and TCE in South Asian Nations**

Biopiracy, also known as larceny of TK, encompasses various acts such as unauthorized exploitation of a TK without the consent of the local community and breach of contracts related to the access and use of TK. A number of patents on TK and folk art have been obtained in recent decades, although they do not meet the fundamental requirements of innovation. Most of the time, crucial knowledge is stolen without previously informed agreement from traditional communities or old scientific literature, or a slight version thereof.

India, a big country with a diverse socio-cultural and ethnic population, is blessed with abundant natural resources and ancient medical expertise. Such knowledge has stood the test of time since it has been

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<sup>35</sup> Shambhu Prasad Chakrabarty and Ravneet Kaur, 'A Primer to traditional Knowledge Protection in India: The Road Ahead' LIVERPOOL LAW REVIEW 42 (2021) <<https://link.springer.com/article/10.1007/s10991-021-09281-4>> accessed 16 October 2022.

used for so long.<sup>36</sup> TKDL is nothing but a unique proprietary digital database that has stored material related to medical science from ancient systems like Ayurveda, Yoga, Siddha, and Unani which is already available in the public domain and exists in local language. The system makes it easier for the patent examiners to check the prior art. But why did India need such a policy in the 1<sup>st</sup> place? From 1990 to 2000, occurred several instances of bio-piracy such as Patents on turmeric<sup>37</sup> and Basmati rice case<sup>38</sup>. This opened the eyes of the Indian Government to come up with a solution to prevent such misappropriation. The Model has certain key features such as documentation in written literature and digital format. The database is available in different internationally recognized languages. Information includes books and formulations available in the public domain.<sup>39</sup> The information on Yoga has also been made part of our TK.<sup>40</sup>

Even on a regional level, countries like Pakistan, Sri Lanka, and Bangladesh, need such an impactful database to prove their point. Since the database helps examiners to find the novelty of patent applications. Due to this innovation, we have gained global importance and acknowledgement in the area of IPR and TK. Upon examining the efficacy and success of this model, numerous countries have expressed admiration for it at the IGC level, and many others are keen to replicate it. The SAARC members can get help from a similar TKDL model at the regional level because of common TK and TCE and acknowledging the true origin and source of such TK and TCE:

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<sup>36</sup> Saiket Sen and Raja Chakrobarty, 'Traditional Knowledge Digital Library: A Distinctive Approach to Protect and Promote Indian Indigenous Medicinal Treasure', (2014) 10 CURRENT SCIENCE 1340..

<sup>37</sup> USPTO No. 5401504, 1996.

<sup>38</sup> EPO Patent no. 436257, 1997.

<sup>39</sup> Kutty (n 15).

<sup>40</sup> Rashmi Raghavan, 'Traditional Knowledge and India's Backbend on Yoga' 2(2) J. IP. Studies (2019).

- i. Bangladesh faces a problem regarding the origin of “the Jamdani sari.” It is a beautiful garment worn by females from Bangladesh. The Jamdani sari's distinctive feature is that the designs are made as the fabric is being woven, rather than being stitched or printed. Its infinitely varied woven designs are the source of its beauty and exquisiteness. This is proven by numerous studies, historical evidence, and in-depth examination of the cultural, commercial, and geographic context of the Jamdani weaving trade, as well as other means. It is important to note that the history of Jamdani and even its manufacturing have a strong connection to the Dhaka region and its unique socio-economic and cultural traditions. Meanwhile, India has registered a few products under its Geographical indications (GI) regime that in fact originated in Bangladesh. The "Jamdani share" of Dhaka, which India has registered as "Uppada Jamdani", is one of these commodities. In light of the GI regime, this research addresses the issue of recovering and safeguarding Jamdani as a Bangladeshi product.<sup>41</sup> This can be solved via a strong regional protection system.
- ii. In Bhutan, one of Bhutan's thirteen ancient arts and crafts, known as the Zo rig chu sum, Thagzo, which translates to "the art of textile or handloom weaving," has been crucial in forming Bhutan's distinct cultural identity. Since the beginning of recorded history, weaving has been a common technique. The nation, as well as the knowledge and abilities attributed to it, have been transferred from one generation to the following. Weaving is a unique form of art. The textiles produced are primarily used by Bhutanese people. Nevertheless, in recent years, Machine-woven textiles with

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<sup>41</sup> Iftekhhar Iqbal, 'Protection of Jamdani as a Geographical Indication in Bangladesh A Research Report on Research Report on Jamdani as a GI in Bangladesh', (2020) <[http://saarculture.org/wp-content/uploads/2020/07/kttce\\_Daya\\_Dissanayake.pdf](http://saarculture.org/wp-content/uploads/2020/07/kttce_Daya_Dissanayake.pdf)>, accessed 16 October 2022.

Bhutanese patterns that are created in India growing increasingly common in Bhutan. Furthermore, with the intrusion, there is a significant amount of modernization, globalization, and an interest in the continuity of the beautiful and time-honored tradition of weaving. They are getting copied repeatedly in the fashion industry, with stiff competition from cheaper factory-made cloth, and easily available commercial yarns and dyes, the original work of Bhutan is taking a seat beat. But a small country like Bhutan can never do it alone. A regional structure for the protection of IPR at a regional level can help.<sup>42</sup>

- iii. Sri Lanka, in order to preserve its TK of Health and Medicine, as a part of humanity's intangible cultural heritage, the disappearing knowledge of traditional health and wellbeing practices. It charts the development of conventional wisdom over time and conventional cultural representations. Various research discussed the internal and external factors that contributed to the development of Sri Lanka's TK along with describing historical advancements and successes in this field, with examples drawn from prehistoric historical and literary sources, in terms of healing and wellbeing. The TK of health and wellness encounters numerous challenges, primarily stemming from the historical effects of colonization. To safeguard and preserve this valuable knowledge, it is imperative for both government-sponsored indigenous medical systems and international organizations to play a crucial role in its protection.<sup>43</sup> The best course of action is to adopt

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<sup>42</sup> Sonam Yudon, 'Overview of Traditional Weaving (Thagzo) in Bhutan' 18 Traditional Knowledge, And Traditional Cultural Expressions Of South Asia (2020), <<http://saarculture.org/2020/07/03/traditional-knowledge-and-traditional-cultural-expressions-of-south-asia>>, accessed 16 October 2022.

<sup>43</sup> Nirekha De Silva, 'Sri Lanka's Traditional Knowledge about Health and Wellbeing: History, Present Status and the Need for Safeguarding', *Traditional Knowledge and Traditional Cultural Expressions Of South Asia*,<sup>1st</sup> edn, (2020)

and put into action a more thorough, locally appropriate, and inclusive plan to protect TK about health and wellness. The new mechanisms, which replaced the old institutions in place to conserve TK, had a significant negative impact on Sri Lankan TK as a result of the state giving primacy to Western religion, education, and culture. The ancient social systems and modes of knowledge were in danger due to capitalism.

### PROPOSAL FOR REGIONAL FRAMEWORK

The SAARC can adopt a regional framework for its countries to create laws for the protection of TK and TCE, the basis for the proposed framework in comparison to the Swakopmund protocol and the Pacific regional framework is as follows:

<b>Criteria</b>	<b>Swakopmund Protocol</b>	<b>Pacific Regional Framework</b>	<b>Proposed Framework for SAARC</b>
<b>Beneficiaries</b>	Indigenous and local communities Recognized individuals	Indigenous and local communities Recognized individuals	Indigenous and local communities Recognized individuals
<b>Protection</b>	Traditional Knowledge Expression of Folklore	Traditional Knowledge Expression of Culture	Traditional Knowledge Traditional Cultural expressions Cultural Heritage
<b>Duration</b>	For Indigenous and local communities- Perpetuity till criteria is fulfilled. For Individuals- 25 years following the non-traditional exploitation.	For Indigenous and local communities- Perpetuity For Individual- Perpetuity	For Indigenous and local communities- Perpetuity For Individual- Perpetuity

<b>Rights</b>	Right of recognition. Right of authorization, Right to prevent use without consent Right to receive fair and equitable benefits Right to institute legal proceedings against infringement and unlawful exploitation of TK and TCE	Right of authorization Right to be recognized Right to equitable remuneration Moral rights Right to institute legal proceedings against unauthorized use, derogatory use etc.	Right of recognition. Right of authorization, Right to prevent use without consent Right to receive fair and equitable benefits Right to institute legal proceedings against infringement and unlawful exploitation of TK and TCE Moral rights
<b>Benefit Sharing</b>	Fair and equitable benefit sharing of commercial use of TK and TCE.	Equitable remuneration for the use and exploitation of TK and TCE.	Fair and equitable benefit sharing for the use and exploitation of TK and TCE.
<b>Liability for Unlawful Use</b>	Civil liability is to be determined by the laws of the member countries	Civil and Criminal liability is to be determined by the laws of the member countries	Civil and Criminal Liability are to be determined by the laws of the member countries
<b>Public Domain</b>	Does not prejudice the use and exploitation of knowledge existing in the public domain.	Extends protection applicable to TK and TCE in the public domain before the commencement of the legislation	Protection of TK and TCE retrospectively, prior use before implementation must provide for fair and equitable remuneration.

The Proposed Framework for SAARC encompasses specific criteria and provisions aimed at protecting TK and TCE within the SAARC region. The beneficiaries of this framework include both indigenous

and local communities, as well as recognized individuals, with a primary focus on acknowledging their cultural contributions and heritage. In terms of protection, the framework addresses three key aspects: *TK* which comprises the valuable knowledge, innovations, and practices passed down through generations within communities; *TCE*, encompassing various artistic, musical, and performative expressions tied to a community's cultural heritage; and *Cultural Heritage*, recognizing the importance of safeguarding broader aspects of a community's traditional culture.

The proposed duration of protection for TK and TCE is intended to be perpetual for indigenous and local communities, ensuring the enduring preservation and continuity of their cultural heritage. Similarly, individual creators or custodians also benefit from perpetual protection, offering recognition and security for their valuable contributions.

Regarding rights granted to beneficiaries, the framework establishes essential entitlements. The Right of Recognition ensures that creators or custodians are duly acknowledged for their contributions to TK and TCE. The Right of Authorization empowers beneficiaries to permit or deny the use of their cultural knowledge and expressions by others. Additionally, beneficiaries hold the Right to Prevent Unauthorized Use, allowing them to safeguard their traditional knowledge and cultural expressions from misuse and exploitation. Furthermore, they are entitled to receive Fair and Equitable Benefits when their TK and TCE are commercially utilized or exploited. The framework also grants beneficiaries the Right to Institute Legal Proceedings, enabling them to pursue legal action against infringement or unlawful exploitation. Moral Rights are also acknowledged, protecting the reputation and integrity of creators or custodians and their cultural expressions.



Benefit Sharing is a critical aspect of the proposed framework, aiming for fair and equitable distribution of benefits resulting from the commercial use or exploitation of TK and TCE. This recognition of contributions reinforces the significance of preserving traditional knowledge and cultural expressions.

Regarding liability for unlawful use, the framework stipulates that the determination of both civil and criminal liability shall be governed by the laws of member countries in cases of unauthorized use or exploitation of TK and TCE. Including both civil and criminal liability for unlawful use serves several purposes:

- (i) It acts as a powerful deterrent against unauthorized use or exploitation.
- (ii) This approach ensures comprehensive protection by addressing different aspects of the issue.
- (iii) TK and TCE hold significant cultural and heritage value for indigenous communities and local populations, justifying criminal liability as a means of protecting them as shared heritage beyond mere individual or commercial assets.
- (iv) There is a need to protect the public interest and preserve cultural diversity for future generations, as unlawful use or misappropriation of TK and TCE can have broader consequences beyond the immediate parties involved.
- (v) Including both types of liability helps address enforcement challenges, particularly in cases involving transnational infringements or parties with significant resources, where criminal liability provides additional legal tools to tackle more serious cases of exploitation.

The Public Domain treatment within the framework is designed to accommodate TK and TCE that might have been in the public domain before the implementation of the legislation. The retrospective protection of such knowledge and expressions is ensured, with the provision for fair and equitable remuneration for cases where they were in use prior to the framework's enactment.

This Proposed Framework for SAARC is a comprehensive initiative aimed at protecting and preserving TK and TCE.

### **CONCLUSION**

The present research dealt extensively with the protection of TK and TCE internationally and regionally. The subject matter though not protected as a separate IP category holds significance in the realm of IP and its inter-relationship with history, culture, and society. The TK and TCE are to be protected as community rights providing the right to attribution, right of recognition and fair and equitable remuneration for the use of the intellectual property.

The regional framework discussed in the project, i.e., the Swakopmund Protocol and the Pacific regional framework for the protection of TK and TCE, provides for minimum standards and the skeleton of legislation to be adopted nationally in the member nations. These model laws recognize the need to protect TK and TCE by identifying their custodians, either the community or individuals having transmitted them from generation to generation. The rights granted are exclusive rights of authorization and attribution for the use and exploitation of TK and TCE. The models provide for one central authority to maintain transparency in recognizing and registering the said TK and TCE.

The aforementioned instances of biopiracy, failure to identify the original owner or lack of protection to Bhutanese handwork and its

falling into the public domain, ultimately show us that there exists a dire need for protection of TK and TCE for SAARC countries. Owing to their common history and similar cultures, these countries have come together to form a union which is proving beneficial at many levels. The SAARC Cultural Center acknowledges and realizes that most programs that look into the preservation and promotion of TK and TCEs are developed by Western policymakers without much or any consultation with the policymakers and bearers of TK in South Asia. One important suggestion would be to give more importance to regional protection than the protection given at individual levels by members. SAARC being a group of developing countries will provide more efficiently if they join hands together. Since the working committee would be the member countries, they will be able to provide more accurate and customized sort of protection than the uniform model present globally.

The future prospects of protecting regional TK and TCE show promise through collaborative initiatives aimed at capacity-building. These efforts aim to empower local communities and stakeholders by providing valuable resources, training, and support concerning TK and TCE rights. Furthermore, the harmonization of laws dedicated to safeguarding TK and TCE will not only foster preservation but also open up opportunities for tourism and economic growth. The recognition and acknowledgment of TK and TCE within their respective indigenous communities are expected to attract cultural tourists, thereby stimulating local economies and generating sustainable income for communities dedicated to preserving their valuable traditions.

For the protection of TK and TCE at the SAARC level, the model framework can be a hybrid of both the Swakopmund protocol and the Pacific regional framework by adopting the most beneficial provisions

in it. It will emphasize the importance of recognizing the rights and contributions of indigenous and local communities, as well as individual creators or custodians, and seeks to create a robust protection system within the SAARC region.