Chapter III

Global Intellectual Property Régime: Genesis and Growth

3. Introduction

Proprietary rights, especially those related to Intellectual Property and its protection, have permeated the development discourse as well as diverse political, philosophical and legal perspectives from time immemorial. However, as IPR and its protection have come affect the day to day life people all over, the debate over it is no more restricted to academic research, policy making and legal parlance; rather it has become a matter of debate and discussion among ordinary people as well.

Given the severe implications of the new IPR regime as well as the challenges and opportunities generated by it, a study in this direction presupposes an enquiry into the historical trajectory vis-à-vis the Great Conventions, its nature and features, the correlation of IPR with other conventions such as CBD, WIPO, UPOV, UNCTAD, UNHRC and FAO which is precisely being attempted in this Chapter.

3.1 Genesis of Intellectual Property Rights

Intellectual property rights have a long history that could be traced back to the Venetian Republic in the fifteenth century in which some form of intellectual property existed as a customary practice (May 2002:159-160) and the Republic did not formalise such protection until it adopted the first patent law on March 19, 1474. This law encouraged inventors for their creativity with award but prevented monopolies. (Stephen P 1975: 6) Even if this Venetian statute was in ancient form, it had the features of a modern patent system, including such as "a balance of knowledge available through a state sanctioned public realm; the rights of the 'innovator' to benefit from his intellectual endeavour; and the notion of reward for effort." The Republic's effort to formalise intellectual property notions also demonstrated the strategic importance of promoting innovation and competitive industrial practices. (Christopher May 2002:163)
According to Christopher May, the Venetian statute was more modern than subsequent English patent law, as "it provided for patents as a matter of right and general principle, not merely of royal favour." In addition to patents, the Venetian Republic was also credited with the development of copyright law and during the late fifteenth century, Venice was considered "the capital of printing." (Christopher May 2002:169) By the time the modern notions of intellectual property had been formally institutionalised in Venice, city-state got declined in the sixteenth century. The basic patent rules developed in Venice were preserved in the subsequent systems, including France and the Holy Roman Empire, adopted the patent system almost exactly as developed in Venice. (Prager 1944: 719-720) The momentum of development started in England with the importation and improvement in technology. As a result, the development of intellectual property law eventually shifted to England. (MacLeod 1988:11-14) By the eighteenth century, the Statute of Monopolies and the Statute of Anne had attracted attention from many countries, including the United States. These two famous English statutes, together with the Intellectual Property Clause of the United States Constitution and early French intellectual property laws, eventually became the models for intellectual property laws around the world, including many less developed countries and former colonies. (Stephen P 1975: 19-42)

By the eighteenth century, most countries, in particular the colonial powers, had offered formal intellectual property protection to their nationals and resident aliens satisfying specified conditions. By then, industrial revolution had made impact on production process, transportation and communication. As cross-border markets developed and expanded, countries became concerned about the limited national protection and the virtually nonexistent international protection for foreign authors and inventors. Although foreign creators and inventors could obtain protection as resident aliens, this protection was woefully inadequate, due largely to antiquated law, technical objections, and the lack of an adequate private international law theory. Justice was often unreasonably denied, and the need for stronger international intellectual property protection therefore arose. In the copyright area, early international protection existed in the
form of bilateral treaties, protecting authors and creative efforts through reciprocity provisions. By the late nineteenth century, a network of bilateral copyright conventions had been established among major European powers. (Stephen P 1975: 23-45) Notwithstanding this treaty network, authors could expect very little uniformity in protection outside of their home countries. This lack of uniformity was complicated by the fact that the duration of a copyright treaty was sometimes tied to a broader commercial treaty and copyright protection would be deeply affected if the commercial treaties were revoked or renegotiated. (Peter K.Yu 2004:327)

In the mid-nineteenth century, France issued the Decree of March 28, 1852, which unilaterally extended copyright protection to all works regardless of their country of origin which has improved France's copyright relations with other countries and accelerated the movement toward a multilateral copyright system. (Ringer1968:1050-1052) In 1858, authors and artists met at the Congress on Literary and Artistic Property in Brussels to discuss the international protection of authors' rights. Three years later, a new Congress was called in Antwerp to induce countries to adopt uniform legislation that would provide authors with "the greatest possible protection." In 1877, artists met again in Antwerp to adopte a unanimous resolution to call upon the established Institute of International Law "to draft a project of world law on the protection of artistic works." (Peter K.Yu 2004:328).

3.1.1 Berne Convention

At the Universal Exposition in Paris, when it was decided to create an International Association of Literary Societies and Authors. In 1882, the association met again in Rome, and called upon the association's Executive Council to convene a conference that would include all of the interested parties with the aim of creating a union. The association unanimously approved the proposal, and the conference met in Berne in September 1883. At the Berne conference, a draft convention of ten articles was proposed, and the government of Switzerland agreed to communicate the project to "all civilised countries." For the next three years, intergovernmental conferences were held in Berne and the final conference met on September 6, 1886, twelve countries were in attendance. (Solberg 1986: 68&81)
The original Berne Convention was the first truly multilateral copyright treaty in history and established some important basic principles. First, the Convention created a "Union for the protection of the rights of authors in their literary and artistic works," which has an independent existence regardless of its membership. (Stephen M 1989:101) Second, in lieu of reciprocity, the Convention adopted the principle of national treatment, which requires member states to grant to foreigners the same rights they grant to their own nationals. Third, the Convention provided merely minimum protection for translation and public performance rights. (Ricketson 1986: 14-15)

Since its creation, the Berne Convention has been revised substantially. For example, the 1908 Berlin Act prohibited the use of formalities as a condition of the enjoyment and exercise of rights under the Convention. The 1928 Rome Act expressly recognised the moral rights of authors, such as the rights of attribution and integrity, as well as the right to authorise broadcasts. The 1948 Brussels Act established a mandatory copyright term of life of the author plus fifty years, which replaced the optional term adopted in the Rome revision conference. (Peter K. Yu 2004: 329)

The most significant revision of the Convention took place in the 1960s when less developed country participants were understandably concerned about their lack of sufficient and affordable access to information and knowledge. Led by India, these countries demanded "that unless some major copyright concessions were made for developing countries, they would have to make drastic changes in their international copyright arrangements." The 1967 Stockholm revision conference therefore became the venue in which less developed countries sought "to adjust the system of protection under the Berne Convention to their economic, social and cultural needs." (Ringer 1968:1065).

So under the 1967 Stockholm Act, the Convention recognised the implicit reproduction right while including exceptions to this newly recognised right. The Convention also extended protection to authors with habitual residence in a member state, regardless of their citizenship. Finally, in response to the demands by less developed countries, the
Stockholm Act established a Protocol Regarding Developing Countries, which sought to enable less developed countries to broadly limit rights of translation and reproduction. (Ricketson 1987: 120-123)

The demands by less developed countries were unacceptable to developed countries. Thus, the 1967 Act was never ratified. Four years later, the Stockholm Act was superseded by a less ambitious Paris Act, which significantly revised the Protocol Regarding Developing Countries while retaining virtually everything else in the Stockholm Act. Since the Paris revision conference, the Berne Convention has not been revised, and the 1971 Paris Act remains the only Act open to accession today. (Ricketson 1987: 621-631)

Since the Second World War, the United States' attitude toward international intellectual property protection has changed substantially. After the War, the United States became a major exporter of copyrighted works in the world. Countries therefore were eager to induce the United States to join the international copyright system and were willing to establish under the auspices of UNESCO an alternative copyright treaty called the Universal Copyright Convention. (Ringer 1968:1050-1061)

In 1988, the United States finally joined the Berne Convention, abolishing the application to foreign authors of all formalities that interfere with the enjoyment and exercise of copyrights. Had the United States not become a member of the Berne Union, it might have great difficulty in pushing for stronger protection in the TRIPS Agreement under the WTO, which requires all member states to abide by the 1971 Paris Act of the Berne Convention.\(^1\) While it considered the standards of the Berne Convention "to be quite high," it found those of the Paris Convention rather low. (Watal 2001:16)

3.1.2 The Paris Convention

Early international protection of patents and trademarks came in the form of bilateral treaties. The Treaty of Commerce of 1881 between

\(^1\) TRIPS Agreement, Annex 1C, Legal Instruments--Results of the Uruguay Round vol. 31(1) article 9, *ILM*, P.1201.
Germany and Austria-Hungary, and the Customs Convention of 1876 between Austria-Hungary and Liechtenstein, were the only international agreements providing for the reciprocal protection of patent rights. It was concluded after the International Conference of 1880 had adopted the draft convention for the protection of industrial property. Trade names were protected between France and Great Britain, and by the Convention for the Protection of Trade Marks, Trade Names and Designs, between France and Switzerland, of February 23, 1882.

So it may be said that the only rights of industrial property which were protected before the Convention of 1883 were trademarks and designs or models. Due to this development, it was no surprise that foreign inventors were reluctant to exhibit inventions at the international exposition in Vienna in 1873, despite invitations by the Austro-Hungarian Empire. Eventually, the Austro-Hungarian Empire adopted a law "for the provisional protection of articles introduced at the Vienna Exposition."

Although the discussions in the 1873 Congress were limited to patents and did not address the diversity of laws governing such protection, the Congress "was very keen on . . . discussing the nature of the rights of inventors, and on laying down the rules which would afford them complete protection." Thus, this Congress provided "the first step" toward the formation of the Paris Convention. To achieve uniform patent legislation in all countries, the Congress voted on four resolutions. (Stephen P 1975:55-60)

First, it "affirmed and provided justifications for the natural right of the inventor, which 'should be protected by the laws of all civilised nations.'" Second, it "laid down an equal number of 'principles on which an effective and useful patent law should be based.'" Third, it noted that "the necessity of reform is evident, and it is of pressing moment that Governments should endeavor to bring about an international understanding upon patent protection as soon as possible." Finally, it "converted the preparatory committee of the Congress into a permanent executive committee, and it empowered them to continue the work commenced, 'to use all their influence that the principles adopted be made known as widely as possible and carried into practice . . . and to call from time to time meetings and conferences.'"
Five years later, the French Minister of Commerce organised the International Congress on Industrial Property on the occasion of the 1878 International Exposition in Paris. This Congress expanded beyond patents and "took up all matters relating to patents, trademarks, designs and models, photographic work, trade names, and industrial rewards." Although there was an initial push for a multipartite union that would unify the various industrial property laws, participants disagreed on whether it would be desirable, or even possible, to achieve such uniformity. (Stephen P 1975:60-62)

Countries also disagreed on how and what type of universal rules the international community should adopt. By the middle of the Congress, it was apparent that "the only important question upon which an agreement could be reached was the principle of national treatment of foreigners." Eventually, the participants managed to settle on some common ground of minimal unification.

At the end of the Congress, the participants adopted a resolution to create a Permanent International Commission, which sought "very long and detailed draft of a complete universal law" and presented it to the French Minister of Commerce. As the draft was too ambitious the delegates redrafted the document, which eventually formed the basis of the discussions of the International Conference of 1880 in Paris. (Stephen P 1975:62-64)

At that conference, eighteen states were represented. Throughout the conference, there had been heated discussions about national treatment, rights of priority, forfeiture of patents, and validation of trademarks and industrial designs and models. Nevertheless, the delegates eventually adopted the draft Convention. In 1883, the French government called to follow and signed the Convention. Next year four more countries joined to the Convention, but Ecuador subsequently denounced the Convention in 1885. The Convention went into effect in July 1884. (Stephen P 1975:63-673)

Interestingly, despite joining the Convention, the Netherlands and Switzerland did not offer any patent protection to inventions. During that conference, a question arose whether the Netherlands and Switzerland would be bound by the Convention to protect nationals of other contracting states. The author of the draft Convention answered in the negative, and
thus, the Paris Convention did not require reciprocity, and countries that did not offer patent protection could still become a member of the Convention. (Peter K.Yu 2004:329-334)

Although the Convention did not unify the diverse patent and trademark laws of the contracting states, it achieved several goals. First, it created a "Union for the protection of industrial property". Indeed, this Union was so effective that none of the contracting states denounced the Convention expressly or impliedly during the First and Second World Wars. Second, in lieu of reciprocity, the Convention adopted the nondiscrimination principle of national treatment, which requires member states to grant to foreigners the same rights they grant to their own nationals. Third, the Convention provided for the rights of priority, which enabled applicants to claim the earlier dates of applications submitted in their home countries and avoid objections made on those applications based on prior publication, application, or use. Finally, the Convention sidestepped the difficult issues concerning the forfeiture of patents upon importation or the right holder's failure to "work," or exploit, the patent in a foreign country. Instead, it affirmed the independence of patents doctrine, which stated that a patent granted in one country is independent in time and validity from patents granted in other countries. (Peter K.Yu 2004:329-334)

Since it entered into effect, the Paris Convention has been periodically reviewed, clarified, revised, and expanded in subsequent revision conferences. The Convention also enabled contracting parties to make special related arrangements that do not contravene the Convention provisions. For example, the Madrid Agreement Concerning the International Registration of Marks simplified the trademark application process by allowing an applicant to simultaneously pursue applications in all member states of the Madrid Union. The Nice Agreement on International Classification of Trademarked Goods and Services facilitated trademark registrations by establishing an international standard for the classification of goods and services. The Patent Cooperation Treaty streamlined the early stages of the patent application process in member states by allowing an applicant to file applications simultaneously in
multiple jurisdictions while benefiting from an extended priority period. The European Patent Convention created the European Patent Office and authorised the office to examine patents for all of the participating countries. (Peter K. Yu 2004:330-335)

In sum, although the Berne and Paris Conventions cover different sets of intellectual property rights, they have similar origins. Taken together, the two conventions provided the foundations of the current international intellectual property regime. Today, the Berne and Paris Conventions remain in effect and have since been incorporated by reference into the TRIPS Agreement and the world trading system.

3.1.3 From GATT to WTO

The Bretton Woods institutions were formed to rejuvenate the war ravaged Europe from economic chaos. Towards this aim the world economic, monetary, and trading systems were initially created in 1944 at Bretton Woods, New Hampshire with the formation of the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank). A third organisation, the International Trade Organisation (ITO), was contemplated at Bretton Woods but never formed due to irresolvable issues. Instead, the General Agreement on Tariffs and Trade (GATT), a transitional collection of international trade rules, formulated in 1947, substituted for the ITO which facilitated several rounds of negotiations, ending with the Uruguay Round in 1994. (Arewa 2006: 158-159)

"The central lessons the drafters of GATT took from interwar history was that unilateral action on trade questions and disputes led ultimately to the collapse of the international trading system". So the GATT was created to combat the destructive protectionism and "beggar-thy-neighbor" policies that led to the collapse of the world trading system during the Great Depression era. (Chayes & Handler Chayes1995:100) After the Second World War, intellectual property became important to many developed countries as these countries competitive advantage was based on intellectual property rights. (Gervais 2003: 9-10)The first attempt to frame IPRs as a trade-related issue was made by a group of trademark-holding firms organised as the Anti-Counterfeiting Coalition, which
unsuccessfully lobbied for the inclusion of an anti-counterfeiting code in the 1973-79 GATT Tokyo Round. (Dutfield 2002: 20-26)

Following the lead set by the U.S. trademark industries, the copyright, patent and semiconductor industries also decided during the early 1980s to frame effective IPR protection in overseas markets as a trade-related issue and a problem for the U.S. economy that the government ought to respond to. So by the time the contracting parties of the GATT met in Punta del Este to launch another trade round, U.S. corporations had forged a broad crosssectoral alliance and developed a coordinated strategy. (Dutfield 2002: 20-26)

This strategy was against the collective interest of the developing countries. In the Tokyo Round, the EEC, US, Japan, Switzerland, NZ, Canada, the Nordic Countries and Austria on 13 July 1978 released a ‘Framework of Understanding’ setting out what they believed to be the principal elements of a deal. Developing countries point out that they had been left out of a process that was laying the foundations for a final agreement. The then Director-General of the GATT Oliver Long in his report recognised the problem of exclusion, but defended this behaviour as a practical necessity (GATT 1979). Three years later, in the GATT Ministerial meeting, countries were only able to reach a limited agreement that allowed the Director-General of the GATT to discuss the legal and institutional aspects of the code with his counterpart in WIPO. (Watal 2001:15)

In the meantime, developing countries had pushed for reforms in an opposite direction, seeking reduced obligations under the Paris Convention. Since the mid-1970s, majority of developing countries had been demanding a revision of the Convention to lower the minimum standards of intellectual property protection and exclusive compulsory licensing of patents. The United States' strong objections to these demands eventually led to break down of 1981 Diplomatic Conference in Nairobi. (Watal 2001:15-16)

There are two reasons that instigated United States to change IPR from WIPO to GATT. First, the "one country one vote" forum like WIPO
disfavored developed countries by rendering them ineffective in their negotiations. Second, the WIPO forum focuses primarily on intellectual property issues, thus preventing the United States from providing cross-sector concessions that link intellectual property to international trade items, such as agricultural subsidies and quotas in textiles.

The deeper problem with this process was that it involved a strategy in which a non-representational inner circle of consensus was expanded to create larger circles until the goals of those in the inner circle had been met. Drafts are exchanged among the negotiators through a Green Room process to sort out the issues. (Gorlin 1999: 4)

This Green Room process had been profoundly shaped by the consensus-building exercise that the private sector had undertaken outside of the Green Room. In this negotiation European Community resolved major differences with the United States and obtained support to include geographical indications in the new GATT treaty. (Watal 2001:23) The Quad states (US, EC, Japan and Canada) were all enrolled in support of the US business agenda, as were their business communities. ²

It made apparent the status of intellectual property as a resource. It became more evident to a wider range of policy makers that intellectual property was a means of retaining comparative advantage for technology-rich countries. As markets opened and trade barriers were lowered, comparative advantage in the low-technology sectors would move to countries where labor costs were lower. High-technology countries would look to intellectual property to protect employment and industries through the conceptual input to production. (Gurry 2005: 292)

Four years after the Nairobi round, the GATT member states met in the ministerial meeting in Punta del Este. At that meeting, they set out their negotiating objectives for the Uruguay Round, including a new international treaty in the field of intellectual property was concluded on 15 April 1994 and entered into force on 1 January 1995 within the framework

of WTO, which eventually became the TRIPS Agreement. (Ryan 1998:12)

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organisation and elsewhere to deal with these matters. This declaration delineated four major substantive negotiating issues: (1) substantive standards for intellectual property protection; (2) procedures under national law for the enforcement of such protection; (3) dispute settlement procedures between parties to any eventual agreement on TRIPS; (4) and the relationship between GATT and other relevant international organisations, including WIPO, concerning TRIPS and the relationship between an eventual agreement in the Uruguay Round and existing intellectual property conventions.3

Initially, many less developed countries mistakenly believed that they could use the text of this declaration to "limit the negotiations primarily on trade in counterfeit goods and other such trade-related aspects." According to these countries, the GATT mandate did not allow for the discussion of substantive issues on intellectual property rights and claimed that only WIPO had the competence to discuss substantive intellectual property issues. (Watal, 2001:19-21)

Limited understanding of intellectual property protection by developing countries were revealed by UNDP statement "the IP agreements were signed before most governments and people understood the social and economic implications of patents on life. They were also negotiated with far too little participation from many developing countries now feeling the impact of their conditions." (Sell 2003:139-40) Moreover, most of the nongovernmental organisations that are active today did not exist or have an intellectual property focus a decade ago. Indeed, many of these organisations woke up only after the completion of the TRIPS Agreement.

In 1988, Congress introduced the Omnibus Trade and

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Competitiveness Act to bolster the leverage of U.S. trade negotiations. This statute amended section 301 of the 1974 Trade Act by including two new provisions: Super 301 required the United States Trade Representative (USTR) to review U.S. trade expansion priorities and identify priority foreign country practices that posed major barriers to U.S. exports. Special 301 requires the USTR to identify foreign countries that provide inadequate intellectual property protection or deny American intellectual property goods fair or equitable market access. (Peter K. Yu 2004:345-350)

Since the enactment of the new section 301 provisions, Brazil, India, Japan, and Thailand have all been identified as either priority foreign countries or on the priority watch list for trade sanction purposes. Besides it had also threatened to impose, trade sanctions on Argentina, Mexico, and South Korea. These sanctions ultimately divided the less developed countries and induced them to agree to the United States' position. As a result, in the early 1990s, whether countries should include intellectual property issues in the GATT was no longer an issue. In October 1990, Canada formally proposed the creation of a new Multilateral Trade Organisation. This organisation eventually was renamed the World Trade Organisation and laid down the foundation of the multilateral trading system. Because developed countries had serious concerns about being excluded from this multilateral system, on the earlier developing country position of WIPO as the appropriate forum for lodging the results of the TRIPS negotiations.” (Watal 2001:24-34)

To avoid a deadlock, the GATT Secretariat and Chairman Lars Anell of the TRIPS Negotiating Group prepared what was commonly referred to as the Dunkel Draft—a "take it or leave it" draft of the TRIPS Agreement that constituted the Secretariat's best judgment of what would be acceptable to all of the participants. This no-option strategy proved to be immensely successful, and the draft was adopted with very minor changes at the Marrakesh ministerial meeting in April 1994. (Watal 2001:40-44)
By marrying intellectual property to international trade, the TRIPS Agreement not only revolutionised international protection of intellectual property rights, but also "played a new and important role in the international economic system." (Abbott 1997:39-40) As Professor Keith Maskus (2002) noted, the Agreement "is the first multilateral trade accord that aims at achieving partial harmonisation in an extensive area of business regulation."

3.1.4 TRIPS Agreement

The initial focus of the Uruguay Round of the GATT, and specifically the TRIPS Agreement, was the industrialised nations' attempt to secure multilateral protection for new technologies, pharmaceuticals, and copyrighted media works against unauthorised imitation or duplication. However, by 1990, intellectual property protection for living organisms (including PGRs) had emerged as a major international issue as many newly patented pharmaceutical and agricultural biotechnology inventions began making their way to the market. (Kennedy Luvai, 2007:51)

The phenomenal spate of mergers and acquisitions in the chemical and pharmaceutical sectors that began in the 1970s continued through the 1990s with these companies swiftly moving into the areas of genetically engineered plants--plant breeding that took advantage of advanced genomics and crop development. These claims for more expansive intellectual property protection were met with opposition from some developing countries on various grounds, including the assertion that intellectual property rights in living organisms ran counter to some national concepts of public health, safety, and welfare. (Kennedy Luvai 2007:51-52)

With the TRIPS Agreement, the global phase of IPR has been crystallised. Previous efforts at the globalisation of IPR were selective in terms of the applicable categories, and less comprehensive both in the scope of their coverage and the number of contracting parties. These earlier treaties did not have the luxury of a global and ideological superstructure for administration and enforcement, such as the WTO of which TRIPS is a
component. The TRIPS Agreement was birthed at the highpoint of our extant knowledge-based global economic and information society. The hallmarks of these phenomena include an exponential increase in digital technology and life sciences-related technological break-throughs, also referred to as the “bio-revolution.” (Oguamanam, 2004:164)

**Main dates in the application of the TRIPS Agreement**

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<tr>
<th>Event</th>
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<tr>
<td>Final Act of the results of the Uruguay Round</td>
<td>14.04.1994</td>
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<tr>
<td>Entry into force of the WTO Agreement</td>
<td>01.01.1995</td>
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<td>Special arrangements for pharmaceuticals and agricultural chemical products not protected in a member country as of the date of entry into force of the Agreement (Art. 70.8-9)</td>
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<td>a) Means for filing applications</td>
<td>01.01.1995</td>
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<td>b) Criteria for patentability (to be applied as of the time that the patent protection has become available in the country in question)</td>
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<td>c) Exclusive marketing rights for five years (to be applied once all conditions of Article 70.9 are met)</td>
<td>01.01.1995</td>
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<td>Entry into force of TRIPS Agreement (Art.65.1)</td>
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<td>National treatment principles applicable to all countries</td>
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<td>Most-favoured-nation treatment applicable to all countries (An.4)</td>
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<td>Review of issue of patentability of plants and animals other than micro-organisms (Art.2 7.3(b))</td>
<td>01.01.1999</td>
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<td>Transitional arrangement for developing countries (Art. 65.2.)</td>
<td>01.01.2000</td>
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<td>Transitional arrangement for economies in transition, but only if conditions of article 65.3 are met</td>
<td>01.01.2000</td>
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<td>Transitional arrangement for developing countries concerning product patent protection - to technologies not previously protected by product patents (Art. 65.4)</td>
<td>01.01.2005</td>
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<tr>
<td>Transitional arrangements for least developed countries (Art. 66.1)</td>
<td>01.01.2006</td>
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<tr>
<td>Transitional arrangements (or) least developed countries concerning patent protection for pharmaceutical products and legal protection of undisclosed test data submitted as a condition of approving the marketing of pharmaceuticals (Declaration on the TRIPS Agreement and Public Health)</td>
<td>01.01.2016</td>
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Part I of the Agreement laid down the basic conditions, including national treatment, "most favored nation" treatment, the non-coverage of exhaustion issues, and the objectives and principles of the Agreement. This Part also includes such development-friendly safeguard provisions as articles 7 and 8 of the Agreement, which "were singled out as having a special importance in para.19 of the Doha Ministerial Declaration. An argument made that these provisions now have higher legal status not only for the negotiations but in interpreting the Agreement in the context of, e.g., dispute-settlement procedures."[4]

Part II dramatically increased the level of international minimum standards in eight different categories: copyrights and related rights, trademarks, geographical indications, industrial designs, patents, plant variety protection, layout designs of integrated circuits, and undisclosed information. There is no doubt that these changes were dramatic for less developed countries, as they went beyond just intellectual property and affected such other areas as agriculture, health, environment, education, and culture. For example, the Agreement created new obligations in these countries to protect "product patents for food, pharmaceuticals, chemicals, microorganisms or copyright protection for software." (Watal 2001:4)

The TRIPS Agreement also required changes from all WTO member states, including both developed and less developed countries. As Jayashree Watal (2001) pointed out, "at least one, undisclosed information, has never been the subject of any multilateral agreement before, and another, protection for integrated circuit designs, had no effective international treaty, while others, like plant variety protection or performers' rights, were geographically limited." Furthermore, the Agreement created new rights under existing categories, "such as rental rights for computer programmes and sound recording (and for films under certain circumstances) under copyright and related rights; higher level of protection for geographical indications for wines and spirits; and reversal of burden of proof for process patentees."

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Part III of the TRIPS Agreement delineated international standards for the enforcement of intellectual property rights for the first time, including civil, administrative, and criminal procedures and remedies and measures related to border control. It deals with "one of the most difficult and, for rights holders, painful aspects of intellectual property rights." (Gervais 2003: 9-10)

Part IV covers the acquisition and maintenance of intellectual property rights, administrative revocation, and inter-parties procedures, such as opposition, revocation, and cancellation. It subjects the final administrative decisions in these procedures "to review by a judicial or quasi-judicial authority."

Part V includes the mandatory dispute settlement procedures that require all disputes arising under the Agreement to be settled by the WTO dispute settlement process. Under this mandatory process, a WTO member state can initiate consultations with another member state that allegedly has breached its treaty obligations. If consultations fail, the parties may request that the Dispute Settlement Body (DSB) establish a panel to hear the complaint. Following hearings and deliberations, the panel issues a report, which the DSB automatically adopts unless it decides by consensus against adoption or unless a party appeals for review by the Appellate Body. The Appellate Body will then issue a report, which the DSB will automatically adopt unless it makes a consensus-based decision to reject that report. If the member is found to be in breach of its treaty obligations and fails to implement the DSB's recommendations or rulings within a "reasonable period of time," the complaining party may request negotiations for compensation or request that the DSB authorise the suspension of concessions and other obligations covered by the treaty. (Peter K.Yu 2004: 350-370)

Part VI The obligations under the TRIPS agreement apply equally to all members, but developing countries have a longer period to phase them in. Industrial country members had to comply with all of the

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provisions of the agreement as of January 1, 1996. For developing countries and transition economies the corresponding date of compliance was generally January 1, 2000, and for least-developed countries (LDCs) it was January 1, 2006. At the Doha ministerial conference, the date for LDCs was extended to 2016 with respect to pharmaceutical products. However, subject to certain conditions, exclusive marketing rights (EMRs) for eligible pharmaceutical and agricultural chemical product inventions must be made available by all such WTO members, with effect from January 1, 1995, for a period of five years from the date of the marketing approval, or less if the patent decision is made earlier. (Watal 2001: 4-8).

Part VII provides a review mechanism, which requires the Council for TRIPS to review the implementation of the Agreement at two-year intervals after the expiration of the transitional periods, and in light of any relevant new developments that might warrant modification or amendment of the agreement.6

3.1.5 Article 27.3(b)

Most controversial article of the TRIPS agreement is Article 27.3(b). By leaving "plant varieties" undefined, TRIPS implies effective protection of all plant varieties. Members can choose any one of the three regimes: (1) patents, (2) a sui generis system, or (3) a combination of both patents and the sui generis system to protect plant varieties. (Estelle Long, 1998: 263-64) Without setting substantive standards of protection, Article 27.3 narrows members’ choice of regime through the effectiveness requirement. The open-ended language of the article creates a flexible standard of protection sympathetic to developing nations' socio-economic priorities, provided the effectiveness requirement is satisfied. The flexibility presents a range of possibilities from systems like the plant patent regime of the United States or specific variety protection systems of the European Union, to the possibility of customised plant protection regimes suited to the needs of developing nations. (Straus 1998:100-01)

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6 Ibid, 1222-1224.
3.1.6 Reform of the TRIPS Agreement

In the preparations for the WTO ministerial meetings at Seattle in 1999, more than half of the 250 proposals came from developing countries. Of these 250 proposals, 15 were on TRIPS and 8 came from developing countries. And while many factors contributed to the collapse of the Seattle Conference, exclusion of developing countries from key negotiations probably was the main cause of its failure. (Dutfield 2002: 82-83)

Before the Doha Declaration, there were three major options under discussion for the revision of Article 27.3(b). The majority position advocated the revision of Article 27.3(b) to exclude life forms altogether from the ambit of TRIPS. Another group argued for allowing full discretion to the States to exclude any life form from patentability. Finally, an intermediate position supported the status quo of the existing text, which became the outcome of the negotiations.

The Doha ministerial conference reflected the concerns of developing countries. A separate declaration on the TRIPS agreement and public health emphasised that the agreement does not and should not prevent WTO members from taking measures to protect public health. The declaration clarified that each member is free to determine the grounds on which compulsory licenses are granted and to establish its own regime on parallel imports. It extended the transition period for LDCs with respect to pharmaceutical products by 10 years, to 2016. In addition, the TRIPS Council was instructed to find an expeditious solution to the problems of countries with limited manufacturing capacities in the pharmaceutical sector in making effective use of compulsory licensing.

The Doha Ministerial Declaration also launched the Doha Development Agenda includes a mandate for completing the negotiations on the system of multilateral notification and registration of geographical indications for wines and spirits by the next ministerial conference, to be held in 2003. It calls for further work on ongoing issues in the TRIPS Council concerning the extension of additional protection under geographical indications to products other than wines and spirits; review of the provisions on biotechnological inventions; the relationship between the
Convention on Biological Diversity and the TRIPS agreement; and traditional knowledge and folklore. Separately, ministers reaffirmed the mandatory provisions on the transfer of technology to LDCs and agreed that the TRIPS Council should ensure the monitoring and full implementation of the obligations in question.

TRIPS Council on 4-5 June 2003, debated proposals on the three interconnected issues of the review of article 27.3(b) of the TRIPS agreement dealing with biological materials, traditional knowledge and folklore, and the relationship between TRIPS and the Convention on Biological Diversity (CBD). (Khor 2003)

The Africa Group paper gave a comprehensive treatment of patenting of life forms, sui generis systems for protecting plant varieties, and protection of traditional knowledge, and reiterated its position that the TRIPS Agreement should be amended to prohibit patents on all life forms as they are contrary to the moral and cultural norms of many societies. It also stressed that the requirement to protect plant varieties should not in any way undermine but support Members’ rights to public goals such as food security and poverty elimination. The Group expressed concern that the review of TRIPS Article 27.3(b) has not been finalised and that the deadline of December 2002 set at Doha had passed. Protection of genetic resources and traditional knowledge will not be effective unless international mechanisms are established within the TRIPS framework. Other means, such as access contracts and data bases for patent examination, can only be supplementary to such international mechanisms which must contain an obligation on members collectively and individually to prohibit and prevent misappropriation of genetic resources and traditional knowledge. It proposes that “Article 27.3(b) be revised to prohibit patents on plants, animals, microorganisms, essentially biological processes for the production of plants or animals, and non-biological and microbiological processes for the production of plants or animals.” (Khor 2003)

The paper by Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela is aimed at strengthening the arguments for inserting a provision in TRIPS “that mandates patent applicants for inventions that use biological
resources and traditional knowledge, to disclose the source of origin of such resource and knowledge, as well as provide evidence that they have obtained the necessary prior informed consent (PIC), and complied with national laws on benefit sharing. In contrast to the two other proposals, the Swiss paper does not envisage any need to amend TRIPS. Switzerland views WIPO as the primary forum to deal with the issue of IPRs and traditional knowledge. Moreover, TRIPS and CBD can be implemented without conflict and there is no need to modify the provisions of either. The US said traditional knowledge should be removed from the agenda in the TRIPS Council. It did not consider the use of TRIPS as a suitable means to ensure disclosure, PIC and benefit sharing. The EC welcomed the Swiss proposal. The Council chairman said there was no consensus on the issue and he would try to work towards a consensus position on this by the next ministerial meeting. (Khor 2003)

Several developing countries submitted to the Council for TRIPS in March 2004, a checklist of issues to be addressed discussion. The third and final issue of the checklist is the requirement for patent applicants to provide evidence of fair and equitable sharing of benefits arising from the use of genetic resources. Developing country Members stressed the importance of an international mandatory system reflected in the TRIPS Agreement to address cross-border misappropriations of genetic resources. The US and Japan opposed the checklist arguing that there is no conflict between the CBD and the TRIPS Agreement and that there is no need to amend the TRIPS Agreement. There are no signs that this stalemate could be overcome in the short term, especially after the Cancun Conference showed profound divergences with the WTO system (South Bulletin, 2005).

3.2 The United Nations’ Specialised and other Agencies working on IPR

There has been a considerable increase in the number of activities in important UN agencies relating to intellectual property. While most of the activities and processes in the UN are concentrated at WIPO, there are also significant developments in other agencies including developments at the

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CBD, the Food and Agriculture Organisation (FAO), WHO, the United Nations Conference on Trade and Development (UNCTAD) and in the UN human rights bodies and committees. While there are notable activities at other agencies such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and through processes such as the World Summit on Information Society (WSIS), the discussion here will concentrate on the former agencies and processes.

3.2.1 The World Intellectual Property Organisation

The World Intellectual Property Organisation ("WIPO") was established in 1970 as the successor to the United International Bureaux for the Protection of Intellectual Property, which administered the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. In 1974, WIPO joined the United Nations as a specialised agency in charge of administering intellectual property matters. Currently, WIPO continues to administer the Paris and Berne Conventions as well as twenty-one other international intellectual property treaties among its 183 Member States. (Olejko 2007: 870)

The advent of TRIPS created significant strategic and institutional challenges for WIPO. (Musungu & Dutfield 2003) WIPO had to share its hitherto ‘exclusive competence’ on intellectual property matters with the WTO. First, despite the shift of the negotiating forum to the GATT/WTO, WIPO remains an important part of the WTO regime and was heavily involved in the WTO negotiation process. (Abbott 1997: 680-682) From the standpoint of the international organisations, "the WTO did not supplant WIPO as the principal intergovernmental organisation devoted to intellectual property lawmaking. TRIPS itself implicitly acknowledges the continuing importance of WIPO as a forum for negotiating treaties, particularly those embodying 'higher levels of protection of intellectual property rights.'" (Helfer 2004: 24-25)

Moreover, article 68 of the TRIPS Agreement stated specifically that the Council for TRIPS "may consult with and seek information from any source it deems appropriate" in carrying out its functions and "shall
seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of WIPO." The consultation required by this provision eventually led to the agreement between the WIPO and the WTO, resulting the cooperation between the two organisations for the provision of access to, and translation of national legislation; the communication of national emblems and transmittal of objections pursuant to article 6ter of the Paris Convention; and legal-technical assistance and technical cooperation.

WIPO also provides a number of additional advantages for the negotiation of intellectual property treaties. For example, WIPO has a mandate its members to strengthen IPR protection and can thus start discussions on IP subjects more easily than the WTO. It can also draw upon experts from both the government and private sector for more broad-based discussions. It also presents a neutral forum without external influences like trade pressures impinging on decisions. (Ryan 1998:12)

Indeed, as Professor Graeme Dinwoodie (2002) noted, "the sudden emergence of the WTO as part of the international intellectual property lawmaking process seems to energise WIPO, resulting in the conclusion of several new treaties in copyright, patent and trademark law, as well as the reorganisation mentioned above that was designed to make WIPO fit for the twenty-first century." In the past decade, the WIPO forum has been used to negotiate the protection of audiovisual performers, broadcasters' rights, and traditional knowledge. WIPO was also actively involved in the Internet domain name process, in particular the development of the model policy used in resolving disputes in generic top-level domains. Moreover, "the highly politicised bargaining during preparations for WTO ministerial conferences have led to some hesitation in re-opening TRIPS in that forum." As indicated by the discussions concerning the relationships

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between intellectual property and biodiversity, countries prefer to use the TRIPS Agreement as their reference point, but are reluctant to return to the WTO to renegotiate the Agreement. (Watal 2001: 5-8)

Shortly after the TRIPS Agreement was entered into effect, countries returned to WIPO to update the treatment of copyright issues and legal protection for sound recordings and databases. In December 1996, WIPO hosted a diplomatic conference in Geneva to consider proposals to update international intellectual property norms in light of changes to the digital environment. The origins of this Diplomatic Conference can be traced back to 1989, when the governing body of the Berne Union called upon WIPO to convene a Committee of Experts to explore the possibility of a supplementary agreement to the Berne Convention "to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies." (Samuelson 1997: 369-376) This request was routine, as previously the Berne Convention had been revised roughly every ten to twenty years, and had not been updated since the Paris revision conference in 1971.

WIPO responded to the challenges by TRIPS at two basic levels. Currently, WIPO provides technical assistance to developing country Members of the WTO irrespective of their membership in WIPO as the standards established under WIPO treaties and the technical expertise that existed in the organisation were indispensable in ensuring the success of the TRIPS project. Besides, WIPO has embarked on a number of initiatives ranging from the patent agenda to the digital agenda which underlie its post TRIPS agenda.

Under the patent agenda, negotiations on a draft Substantive Patent Law Treaty (SPLT) in the Standing Committee on the Law of Patents (SCP) and the reform of the Patent Cooperation Treaty (PCT) in the Working Group on the Reform of the PCT, have evidenced trends towards upward patent law harmonisation. The most important subject on which there have been high profile discussions is the relationship between intellectual property and genetic resources, traditional knowledge and folklore. Although no significant
outcomes have resulted in the IGC’s work, its existence has had a high political profile both within governments and civil society organisations. The WIPO General Assembly in September/October 2003 extended and modified the IGC’s mandate for another two years.

At the same time, WIPO’s technical and legal assistance activities have come in for serious criticism for a variety of reasons in the recent past. The first is that the International Bureau’s work especially with relation to legal technical assistance has over-emphasised the benefits of intellectual property while giving very little attention to its costs. Secondly, the International Bureau is partisan in its approach to the debate about intellectual property and development and that it is not giving developing countries the best advice. Next concern is that because of the nature of activities under the technical assistance programmes; the International Bureau may exercise undue influence on developing countries which may affect the stances of these countries in WIPO negotiations. Despite these criticisms, however, there has been no discernible reorientation of design and delivery of WIPO’s technical assistance.

Currently, WIPO and the WTO are the two principal organisations that share authority over international intellectual property lawmaking. Actual boundaries between the competencies of the WTO and WIPO are not definite, but a division of power has emerged based on functional lines. While WIPO manages existing international agreements, assists developing countries with compliance, and studies new forms of protection, the WTO focuses on intellectual property rights lawmaking through the implementation and enforcement of international agreements and the supervision of dispute settlement mechanisms. (Olejko 2007: 871)

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3.2.2 The International Union for the Protection of New Varieties of Plants (UPOV)

Historically, the genesis of UPOV can be traced to the breeding industry. In the early 1900s, the breeding industry furthered the idea of Plant Breeders Rights (PBRs) and lobbied for enhanced protection in exchange for quality of seeds. Although Europe witnessed a strong sentiment against plant variety protection for fear of creating monopolisation over food, national certification schemes provided for breeders' rights. Meanwhile, at the invitation of the French government, twelve western European nations met to agree on a unified mechanism to promote seed trade. Protecting plant varieties, the signatories envisioned, would prevent rather than promote monopolisation over new plant varieties. (Ragavan & O'Shields 2007:104)

In 1960, a group of European nations met to create the International Union for the Protection of New Varieties of Plants (UPOV), which was designed to create a multilateral legal basis for plant breeders' rights in privately-bred, sexually-reproduced plant varieties in the domestic law of the member nations. The UPOV extended legal protection to all varieties of plants as long as they were (1) new, (2) distinct, (3) uniform, and (4) stable. Subsequently, the U.S. passed its own form of plant variety protection--the Plant Variety Protection Act of 1970. These pieces of legislation are indications that plant breeding in North America and Europe had become dominated by private plant breeders, who desired intellectual property rights in their "creations." (Kennedy Luvai 2007: 45)

Although UPOV originally attempted to distinguish itself from patents due to the European sentiment against patenting plant varieties, the UPOV conventions have been styled akin to the patent regimes and based on Western IP philosophy to provide incentives for long-term breeding activities. The UPOV Convention, for instance, sought to promote "equity between breeders, authors and inventors" in order to develop seed trade. To date, UPOV retains its original quality as an instrument of the breeders. The subsequent revisions of the Convention in 1978 and later in 1991 increased the scope of breeders' rights. UPOV's bias towards breeders, however, has resulted in developing nations' skepticism against adopting
the model as the choice sui generis system. (Ragavan & O'Shields 2007: 104-105)

Under the 1978 UPOV, local varieties grown by farmers were treated as being freely appropriable, as "open access" resources, because they lacked the uniformity and stability required for protection. The 1978 UPOV, however, did have a "farmers' exemption" that allowed any farmer who purchased seeds of a protected variety to save seeds from those crops for subsequent replanting without paying additional royalties. The seed industry heavily lobbied many governments to limit or eliminate the 1978 UPOV farmers' exemption. The 1991 UPOV curtailed the farmers' exemption. Article 15.2 made the farmers' exemption optional and allowed each UPOV member nation to decide whether or not to extend such rights as a matter of domestic law. If a member nation did extend a farmers' exemption, the 1991 UPOV stipulated that the member nation should include strict limits on the exemption to respect plant breeders' rights. Articles 14 and 15.1 also narrowed plant breeders' exemptions--"essentially derived" varieties cannot be marketed without permission from the original plant breeders. And unlike the 1978 UPOV, which did not allow member nations to grant utility patents for sexually reproduced varieties, article 35(2) of the 1991 UPOV seemed to do just the opposite. (Kennedy Luvai 2007: 46)

3.2.3. The Convention on Biological Diversity (CBD)

The Rio de Janeiro Convention on Biological Diversity (CBD) aims to set up an international framework for the preservation and utilisation of the world's biological resources. The CBD is the result of prolonged, international pressure to respond to the destruction of, and unequal profits from, the biodiversity of the southern hemisphere. After years of debate, the United Nations agreed upon the CBD in 1992. It came into force in 1993, and as of today 188 States have ratified it.14

Amidst the global pressure to privatisate biological resources, the CBD stands as an important watershed in international efforts to promote

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biodiversity conservation. For instance, the Convention binds signatories to a number of basic principles regarding how, by whom, and for whose benefit biodiversity must be conserved. Article 1 of the CBD states its overall objectives. These objectives include first, the "conservation of biological diversity;" second, the sustainable use of biological diversity components; and finally, the "fair and equitable sharing of the benefits arising out of the utilisation of genetic resources." CBD recognises the sovereign rights of States over their biological resources in Articles 3 through 15. Article 3 recognises that, "States have ... the sovereign right to exploit their own resources," including, under Article 2, biological and genetic resources of actual or potential value. Article 8(j) requires Contracting States to: respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices (emphasis added).\(^\text{15}\)

Article 15 specifically discusses the details of regulating access to genetic resources through increased transparency in patent application. The first paragraph gives States sovereign rights over their resources and confers on them the "authority to determine access to their genetic resources." Paragraph 4 allows access to genetic resources, subject to "mutually agreed terms," while paragraph 5 specifies that the same access "shall be subject to prior informed consent (PIC) of the Contracting Party providing such resources." Moreover, Article 15 specifies that the transfer of technology is an invaluable instrument for the effective implementation of the CBD.\(^\text{16}\)

The CBD through various Conference of Parties (COPs) including COP-7 which took place in Malaysia in February 2004 has been discussing

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\(^{15}\) Ibid: 823-826.

\(^{16}\) Ibid: 828.
various issues relating to intellectual property. It is in this context that the Bonn Guidelines on Access and Benefit Sharing were developed and on the basis of which the Working Group (WG) on Access to Genetic Resources and Benefit-sharing (ABS) has been mandated to elaborate and negotiate an international regime on ABS. The WG on ABS is expected to carry out its work in collaboration with the WG on Article 8(j), which deals with indigenous communities’ issues. In this context, there has been a clear trend at the CBD to elaborate and consolidate an ABS regime as well as to develop elements for sui generis systems for the protection of traditional knowledge and to explore the conditions under which the use of existing intellectual property rights can contribute to reaching the objectives of the CBD.

Another important trend at the CBD, which has become particularly controversial, relates to a situation where the CBD Secretariat has been moving towards ‘sub-contracting’ issues relating to the relationship between intellectual property and genetic resources and associated traditional knowledge to WIPO. Although decision from COP-7 ostensibly invites several international organisations to cooperate with the WG in elaborating the international regime on ABS, the underlying idea appears to have been to progressively increase the substantive role of WIPO in the debate about intellectual property and genetic resources in the CBD context. Inspite of the significant number of developing countries which have expressed their reservations about this approach both at the CBD and at WIPO, the trend appears to be the continued push for the delegation of matters relating to intellectual property and genetic resources and associated traditional knowledge to WIPO (South Centre and CIEL (2004)).

The Bonn Guidelines provide voluntary measures for contracting parties for drafting legislative, administrative, or policy measures aimed at access-and-benefits sharing (“ABS”). Specifically, the Guidelines strengthen the importance of PIC as a means to prevent misappropriation of genetic resources. Thus, PIC should be granted for certain specific uses of a biological resource provided that any change in use prompts a new application for PIC and that competent local authority are involved in the process of PIC
certification. The Guidelines also propose that the country of origin of the genetic resource should be disclosed in patent applications as a means of tracking compliance with PIC. (Arezzo 2007: 378)

Notwithstanding the important principles set forth in the CBD, international measures for protecting biodiversity remain uncertain. Harmonisation on the international level seems far away. Although contracting parties do have an obligation to comply with CBD provisions under international law, the CBD has not been ratified by some of the most economically significant countries, such as the United States. Even the Bonn Guidelines are not mandatory for contracting parties to implement. Moreover, the fact that the CBD was developed outside the realm of the WTO and TRIPS makes practical enforcement difficult, if not impossible. (Arezzo 2007: 379)

3.2.4 The Food and Agriculture Organisation (FAO)

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) endorses a multilateral system of access and benefit-sharing of plant genetic resources (FAO 2001). Article 10 mandates that contracting parties "facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilisation of these resources." The covered plant genetic resources are limited to the relatively short list of plant genera and species which was established in response to concerns over food security and global interdependence in food production. ITPGR extends access to plant genetic resources for research and breeding purposes. Article 12, however, stipulates that "recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture." (Nelson 2005: 1115)

Small farmers are likely to be disappointed by this treaty because it appears to allow intellectual property protection for new plant varieties derived from original plant varieties, and hence does not fully protect farmers' rights. As a counter-measure, some countries, such as India and Australia, have opened registries of traditional knowledge in an attempt to provide intellectual property-like protection for plant varieties, and to require
that anyone seeking access to the genetic resources sign a material transfer agreement covering derived varieties. (Nwabueze 2003: 618-620)

ITPGRFA entered into force on 29 June 2004, 90 days after the ratifications and or accessions by 40 countries.\(^\text{17}\) Once the treaty comes into force, a governing body, composed of all Contracting Parties, will be established with the responsibility for the full implementation of the Treaty. The Treaty establishes a framework for the conservation and sustainable use of plant genetic resources for food and agriculture and, in particular, provides for a multilateral system for facilitated access and benefit sharing for selected plant genetic resources.

The most contentious issues of the governing body and probably on an on-going basis thereafter, will relate to intellectual property issues including conditions relating to access to the crops in the multilateral system and the terms of the material transfer agreements (MTA). While it is too early to discern any particular institutional trends with respect to the ITPGRFA and, in particular, on how the issues relating to intellectual property will develop, it is clear that important developments are likely to occur at FAO with various implications for the profile of intellectual property issues at the organisation. The speed with which the Treaty has come into force demonstrates the large interest by countries in the issues covered and would suggest a likely trend towards increasing discussions on intellectual property issues at FAO, considering the importance attached to facilitated access and the MTA.

3.2.5 The United Nations Conference on Trade and Development (UNCTAD)

UNCTAD has, over the years, played a key role in international intellectual property matters and has, in particular, conducted fundamental work relating to intellectual property and development including the relationship between intellectual property and technology transfer as well as competition policy. It is also noteworthy that UNCTAD played an important role during the negotiations between the UN and WIPO to make

\(^{17}\) “Article 28 of the ITPGRFA,” at http://www.fao.org/
it a specialised agency of the UN. In the period leading to the adoption of the TRIPS Agreement and in many respects thereafter, UNCTAD’s work on intellectual property has been somewhat limited. This trend has been attributed to the fact that there was a deliberate effort by key players to sideline UNCTAD on these issues because UNCTAD had served as an important forum for developing countries to develop strategies and analytical work which demonstrated the serious negative consequences for technology development and related objectives that arose from the existing intellectual property regimes. (Braithwaite & Drahos 2000: 68)

There is no single major programme in UNCTAD on intellectual property. UNCTAD has continued to be involved in intellectual property work in the context of other policy areas and/or in collaboration with other organisations. In this context, there is significant work focusing on traditional knowledge as well as the continuing work on transfer of technology and the work on E-Commerce in relation to open source software and related issues. On the collaboration side, UNCTAD has over the last few years conducted a quite successful joint capacity building project on intellectual property rights and sustainable development with the International Centre for Trade and Sustainable Development (ICTSD). This project has been responsible for a large number of research works on intellectual property and development as well as meetings and conferences.18

Finally, it has emerged in the context of the preparations for UNCTAD XI, that the trend where developing countries make efforts to increase the work of UNCTAD on intellectual property and to have UNCTAD undertake analysis on strengthening the development dimension in international intellectual property rule-making, including effective transfer of technology to developing countries; protection of traditional knowledge, genetic resources, and folklore will continue. On the other hand, it is also clear that the opposition by the United States and other developed countries to the inclusion of intellectual property in the mandate of UNCTAD will continue.

3.2.6 The United Nations Human Rights Bodies and Committees

Over the last four or so years, there has been a clearly discernible trend for the human rights community and various UN bodies especially the various human rights bodies and committees to examine and explore the implications of intellectual property for the protection and promotion of human rights. For example, the Sub-Commission on Human Rights adopted resolutions on intellectual property and human rights at both its session in 2000 and in 2001 in addition to a report by the High Commissioner for Human Rights in 2001 on the ‘Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on the Protection of Human Rights’. The reports of the Special Rapporteurs on globalisation and human rights also addressed the issue of intellectual property and human rights (Oloka-Onyango, J., and D. Udagama 2000). More recently, the Committee on Economic, Social and Cultural Rights (CESCR) has been working on a General Comment on article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which deals with the enjoyment of the benefits of scientific progress and its applications; and the concept of benefiting from the protection of the moral and material interests resulting from scientific, literary or artistic productions.

More interesting, the Human Rights Committee at its 80th Session this year in its concluding observations on the report submitted by Uganda with respect to the International Covenant on Civil and Political Rights (ICCPR), urged Uganda to adopt comprehensive measures to allow a greater number of persons suffering from HIV/AIDS to obtain adequate treatment. Although not specifically mentioned, it is considered that this meant the adoption, among others, of appropriate intellectual property rules and the use of TRIPS flexibilities. Finally, there has also been increasing activities by civil society groups in this area and organisations such as 3D and the Ethical Globalisation initiative have been developing significant programmes in this area.

LIST OF RELEVANT ORGANIZATIONS WORKING ON IP ISSUES

<table>
<thead>
<tr>
<th>Intergovernmental Organisations</th>
<th>General description of organisation</th>
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<tbody>
<tr>
<td>World Trade Organisation (WTO)</td>
<td>WTO has a general mandate to promote trade liberalisation and sustainable development. In the context of the Uruguay Round of trade negotiations, the issue of IP was included through the negotiation and approval of the TRIPS Agreement. TRIPS covers copyrights, trademarks, geographical indications, industrial designs, patents, layout designs, undisclosed information, control of anticompetitive practices, enforcement issues and dispute settlement procedures. The Council for TRIPS to which all WTO members conform, monitors the operation of the TRIPS Agreement.</td>
</tr>
<tr>
<td>World Intellectual Property Organisation (WIPO)</td>
<td>WIPO is an international organisation committed to promoting the use and protection of the works of the human spirit. The General Assembly, Budget Committee and three Standing Committees (Patents, Copyrights and Trademarks) are the principal organs that govern WIPO. Several important agreements have been signed under auspices of this organisation.</td>
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Main Intellectual Property Protection Treaties:
- Paris Convention for the Protection of Industrial Property
- Patent Law Treaty
- Madrid Agreement for the Repression of False and Deceptive Indication of Source of Goods
- Trademark Law Treaty
- Nairobi Treaty for the Protection of the Olympic Symbol
- Brussels Convention relating the distribution of Programme Carrying Signal transmitted by Satellite
- Berne Convention for the Protection of Literary and Artistic Works
- Geneva Convention for the Protection of Producers of Phonograms
- Against Unauthorized Duplication of their Phonograms
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
### Main Global Protection Treaties:
- WIPO Copyright Treaty
- WIPO Performance and Phonograms Treaty
- Madrid Agreement concerning the International Registration of Marks
- The Hague Agreement for the International Deposit of Industrial Designs
- Lisbon Agreement for the Protection of Appellation of Origin
- Budapest Agreement on the International Recognition of the Deposit of Microorganisms for the purposes of the Patent Procedures

### Main Classification Treaties:
- Conference of the Parties on the Convention on Biological Diversity (COP)

The Conference of the Parties is the governing body of the Convention on Biological Diversity (CBD), and expedites implementation of the Convention through the decisions it makes at its periodic meetings. The COP has recently become very active in seeking recognition of the principles of the CBD in other international forums, including the WIPO and the WTO.

### United Nations Educational, Scientific and Cultural Organisation (UNESCO)

UNESCO has a long tradition in the protection of culture and folklore. There are several international legal texts signed under the auspices of UNESCO and relating to intellectual property. These include the Universal Convention on Copyrights (1952), the Recommendation on the Safeguarding of Traditional Culture and Folklore (1989), and the Model Law for the Protection of Folklore elaborated jointly with WIPO.

UNESCO's Observatory on Information Society: The rapid development and use of information and communication technologies have prompted UNESCO's member States to mandate the organisation to keep them abreast of these new ethical, legal and social issues by establishing a permanent international observatory on the information society. The objectives of this observatory are to raise awareness on the constant evolution of ethical, legal and social challenges brought about by new technologies.

It aims to become a public service readily accessible to all by:

* providing updated information on the evolution of the information society at the national and international levels;
* fostering debates on related issues.
<table>
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<tr>
<th>Organisation Name</th>
<th>Description</th>
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<tbody>
<tr>
<td>World Health Organisation (WHO)</td>
<td>The WHO is a United Nations organisation specialising in health issues. Its mandate seeks freedom from disease and better health for the human population worldwide.</td>
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<tr>
<td>UNHCHR</td>
<td>UNHCHR promotes universal enjoyment of all human rights by giving practical effect to the will and resolve of the world community as expressed by the United Nations. It plays the leading role on human rights issues and emphasises the importance of human rights at the international and national levels. The Office of the High Commissioner on Human Rights is the principle UN body that administers the UN human rights treaties.</td>
</tr>
<tr>
<td>UNIDO</td>
<td>UNIDO is a UN agency committed to helping developing countries and those in transition to accelerate their industrial development, while meeting social and environmental challenges.</td>
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<tr>
<td>UNDP</td>
<td>UNDP is the UN agency for the promotion of development. It undertakes global and regional advocacy and analysis to increase knowledge, share best practices, build partnerships, mobilise resources and promote enabling frameworks including international targets for reducing poverty.</td>
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<tr>
<td>ITU</td>
<td>The ITU is an international organisation where governments and the private sector can coordinate global telecom networks and services.</td>
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<tr>
<td>National Cooperation Agency</td>
<td>Main negotiations, activities and processes</td>
</tr>
<tr>
<td>Department for International Development of the United Kingdom (DFID)</td>
<td>The Department for International Development (DFID) is the UK Government department responsible for promoting development and reducing poverty. DFID also focuses part of its work on managing the process of globalisation in order to benefit the poor. In pursuing its objectives, DIFD seeks to influence all the relevant international forums, including the GS, the Commonwealth, the WTO, international financial institutions such as the IMF and the Development Banks, the UN and the European Union. Most of DIFD's development targets and strategies are mandated in the so-called White Papers issued by the UK Government.</td>
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<tr>
<td>Non-governmental Organisations</td>
<td>(Main negotiations, activities and processes</td>
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<td>Organisation</td>
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<tr>
<td>Quaker United Nations Office (QUNO)</td>
<td>QUNO is a non-governmental organisation focusing on human rights, refugees, peace, disarmament, trade and development.</td>
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<tr>
<td>International Centre for Trade and Sustainable Development (ICTSD)</td>
<td>ICTSD is a non-governmental organisation that contributes to a better understanding of development and environmental concerns in the context of international trade. ICTSD engages a broad range of actors in ongoing dialogue on trade and sustainable development. With a wide network of governmental, non-governmental and intergovernmental partners, ICTSD plays a unique systemic role as a provider of facilitation services at the intersection of international trade and sustainable development.</td>
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<tr>
<td>Third World Network (TWN)</td>
<td>The Third World Network is non-profit-making international network of organisations and individuals involved in issues relating to development, the Third World and North-South issues. Its main objective is to conduct research on economic, social and environmental issues pertaining to the South.</td>
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<tr>
<td>Institute for Agriculture and Trade Policy (IA'TP)</td>
<td>The IATP is a non-governmental organisation that promotes family farms, rural communities and ecosystems around the world through research and education, science and technology and advocacy.</td>
</tr>
<tr>
<td>Genetic Resources Action International (GRAIN)</td>
<td>GRAIN is a non-governmental organisation (NGO), which promotes action against one of the world's most pervasive threats to world food and livelihood security: genetic erosion.</td>
</tr>
<tr>
<td>CIEL</td>
<td>CIEL is a non-profit law firm promoting international environmental law and sustainable development.</td>
</tr>
<tr>
<td>GAMBIA</td>
<td>GAMBIA is an autonomous, non-profit international research organisation. Its objective is to build awareness of the need for arid opportunities in research activities in agricultural technologies.</td>
</tr>
<tr>
<td>STPHU Sub-Programme on Biotechnology and Globalisation (SPBG)</td>
<td>STPHU has a Sub-Programme on Biotechnology and Globalisation (SPBG). The overall aim of the SPBG is to undertake research, promote policy consultations and disseminate information on the implications of biotechnology for development.</td>
</tr>
</tbody>
</table>
The Center for the Public Domain, a philanthropic foundation based in Durham, North Carolina, is dedicated to the preservation of a healthy and robust public domain. Its work is based on the conviction that new legal regimes, social institutions and transparent technologies must be created to reinforce the information commons. The Center uses as a slogan the famous Abraham Lincoln phrase: “Whenever there is a conflict between human rights and property rights, the former must prevail.”

Oxfam International is a confederation of twelve non-governmental organisations working together in more than 90 countries to find lasting solutions to poverty, suffering and injustice.

MSF is an independent medical aid agency committed to two objectives: providing medical aid wherever needed and raising awareness of the plight of people needing medical assistance.

The Consumer Project on Technology is a non-governmental organisation (NGO) created to investigate a wide range of issues concerning technology and consumer interests.


### 3.3 The Inter-Relationship between International Agreements

Above mentioned international agreements touch upon IPR and its impact on genetic resources associated traditional knowledge ultimately complicates their implementation and allows for different interpretations of the obligations. So developing countries raised the need to create coherence between the various international agreements. However, to date the negotiations continue, with few substantial outcomes as regards introducing measures to ensure the defensive protection that developing countries seek in order to prevent the misappropriation of genetic resources and traditional knowledge. (Duncan 2007)

WTO’s TRIPS Council and the WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) currently address the inter-relationship between international agreements. Generally, developing countries and
NGOs consider that the FAO agreements are in harmony with the CBD. The former cover the specific needs of agriculture, and are considered to hold the middle ground between the CBD that focuses on the protection of biodiversity and the TRIPS Agreement that extends proprietary rights over intangible assets, including plant genetic resources. (Duncan 2007)

3.3.1 The Need for Coherence between TRIPS and the CBD

The conflict between TRIPS and the CBD is spurred by moral and rhetorical assumptions. One assumption claims that the patent regime is a Western form of IPR, which is totally unsuitable to the majority of the societies in the South that have accepted TRIPS by acceding to the WTO. Another assumption asserts that private rights are completely alien to indigenous communities because the vast majority of their farmers, who manage biodiversity at the local level, are accustomed to collective rights.

The CBD intends to strengthen developing countries' capacities to conserve and use biological diversity on a long-term basis by reserving all rights over those resources for the developing countries and by including the right to enjoy the benefits of their resource base. These countries feel that they are consistently exploited because of the structural imbalances between countries rich in biological diversity and those strong in technological and legal instrumentation. Conversely, TRIPS intends to provide private property rights over products and processes based on biodiversity. The pressure of multinational companies helped achieve TRIPS' intended results. (Duncan 2007)

While emphasising the conflict between TRIPS and CBD, it is important note that members of the CBD have an obligation to ensure that IPRs are "supportive of and do not run counter to the CBD's objectives." Moreover, Article 22 of the CBD states that its provisions will not affect countries' rights and obligations to "any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity." This harmonisation process is mainly "subject to national legislation and international law" and stands as a basis for countering the runaway march of the IPR regimes (CBD 1992).
If there is a conflict exists between two treaties dealing with the same subject matter, according to the Article 30 of the Vienna Convention on the Law of Treaties enshrines that the latter law prevails over the first. In this case, TRIPS will prevail since it came into force after the CBD. However, if evaluated under prima facie evidence and by a strict sense of legal point of view, the subject matter of the CBD and TRIPS basically differ; therefore, States should fully and simultaneously implement both of them. For instance, although both Article 27 of TRIPS and some of the provisions of the CBD deal with the utilisation of biological resources, they do so to achieve two different objectives that are not necessarily mutually exclusive. (Curci 2005: 15)

Although TRIPS subject matter does not suffer from an identity problem per se, some provisions regulate the same object and have the same purpose as CBD provisions. In order to fully apply and universally ratify both treaties, certain provisions contained in both treaties need to come into harmonisation. Maljean-Dubois (2000) considers the relationship between these two international instruments as an apparent conflict rather than an incompatibility; he posits that a relationship of complementarity has yet to develop. Such complementarity can be achieved through adequate interpretation of all the obligations at stake and further legislative work, harmonising the two treaties for the benefit of the international community.

Legally speaking, inconsistencies between IPRs applied to life forms under TRIPS and the obligations of CBD are multifaceted. The inconsistencies particularly reveal themselves in the following fields: the access to and fair and equitable sharing of benefits from the utilisation of genetic resources, the respect for traditional knowledge held by the indigenous communities, and the transfer of technology. (Curci 2005: 15)

Developing countries consider that there is tension between CBD and TRIPS, while many developed countries maintain that no conflict exists between the two instruments. NGOs emphasis the importance of implementing the CBD and creating coherence between the various

international agreements that deal with genetic resources and traditional knowledge ensure the sustainable use of biodiversity and prevent misappropriation, and for the protection of traditional knowledge. (Duncan 2007)

On the one hand, the CBD deals with access to genetic resources and creates an obligation for the fair and equitable sharing of benefits arising out of the utilisation of genetic resources on mutually agreed terms and informed consent. On the other hand, the TRIPS Agreement allows intellectual property rights to be extended to genetic resources. The Agreement obliges WTO Members to protect plant varieties, through a patent or through a sui generis regime, or through a combination of both. It does not however, mention benefit sharing or informed consent. (Duncan 2007)

In order to create coherence with the CBD, the amendment to TRIPS that developing countries and NGOs envisage would primarily aim to address concerns about bio-piracy. In this regard, developing countries seek to amend TRIPS in order to introduce internationally binding disclosure requirements in patent applications, including proof of consent and benefit sharing. (Duncan 2007)

3.3.2 The TRIPS-Plus Trend

In a general sense, TRIPS-plus refers to “commitments which go beyond what is already included or consolidated in the TRIPS Agreement.” (Vivas 2003: 4) More precisely, it can be defined as a “concept which refers to the adoption of multilateral, plurilateral, regional and national IP rules and practices which have the effect of reducing the ability of developing countries to protect the public interest.” It increases the level of protection for right holders beyond that which is given in the TRIPS Agreement and exceptions under the TRIPS Agreement.” (Musungu & Dutfield 2003: 3). FTAs, at the regional and bilateral level, are the most well known vehicles for TRIPS-plus obligations for developing countries. IP is one of the most contentious issues in FTAs negotiations negotiated by the United States with Thailand and with SACU countries. However, TRIPS-plus also occur in international fora such as WIPO. (Vivas 2003:4) The draft Substantive Patent Law Treaty (SPLT) is an illustration of how
WIPO’s norm-setting activities could result in TRIPS-plus standards for developing countries, particularly as there have been attempts to focus the negotiations on a limited number of provisions, favored by developed countries, and thus excluding the proposals by developing countries aiming at safeguarding their public policy flexibilities. At the national level, TRIPS-plus provisions obligate developing countries to amend national legislation to implement TRIPS Agreement particularly in areas of undisclosed information or copyright.

There is a rationale for the acceptance by developing countries of TRIPS-plus obligations in the context of FTAs at the regional and bilateral level but it is not clear what kind of incentive induces them at the multilateral level or at the national one.

### 3.3.3 Bilateral and Regional Trade Agreements

Notwithstanding the numerous concerns raised by TRIPS, industrialised countries and transnational corporations consider TRIPS agreement to be only a minimum standard of protection for IPRs on biological resources; they now seek higher standards through bilateral negotiations. Indeed some wants to include animals and plants among the patentability subject matter and to impose the UPOV Convention as the "effective sui generis protection" for plant varieties, as Article 27 TRIPS mandates (GRAIN 2001). "Using the TRIPS-plus criteria described above, GRAIN has, in 2001, identified 23 cases of bilateral or regional treaties between developed and developing countries that should be classed as TRIPS-plus as far as IPR on life forms are concerned.

Bilateral agreements obligate patent protection on plants and animals. This is true for Jordan, Mongolia, Nicaragua, Sri Lanka, and Vietnam. Under another approach, South Africa and the seventy-eight African Caribbean Pacific (ACP) countries are supposed to grant patents on "biotechnological" inventions, thereby protecting plants, animals, and microorganisms as required by TRIPS. (Curci 2005:33)

Under bilateral agreements with industrial countries, at least Korea, Mexico, Morocco, and Tunisia have been required to join the Budapest
system, while Jordan and other countries must implement their own substantive provisions. These obligations go beyond TRIPS standards because the Budapest treaty obliges parties to recognise the physical deposit of microorganism samples with an international depository authority instead of full written disclosure of the invention. Under this treaty, a deposit fulfills the requirement for disclosure. Furthermore, this treaty, whose contracting parties are mostly industrialised states, relies on a network of recognised international depository authorities, which operate special rules on access to the biological samples in order to avert potential patent infringement. (Curci 2005:33)

In a bilateral free-trade agreement text, that has not been made public yet, it is reported that the United States for the first time agreed to include language relating to traditional knowledge, according to a Peruvian government source: "the language, which appears in a side letter to the overall agreement, apparently stresses the importance of such practices as informed consent, benefit-sharing, and utilisation of contracts with the aim of encouraging the protection of biodiversity." The agreement facilitates the access by U.S. patent applicants to a database to find eventual evidence of prior art in the form of traditional knowledge related to a genetic resource. (Curci 2005:34)

Thus, the United States has been negotiating free trade agreements with intellectual property components with regional forums and individually with countries. The EU and Japan are getting more aggressive with free trade agreements. These free trade agreements replicate the TRIPS approach where higher standards for intellectual property protection are directly obtained in exchange for concessions in core trade areas such as agriculture and other market access preferences and where trade measures are used as an agreed avenue to enforce intellectual property standards abroad.

Another important trend in the bilateral approach to intellectual property negotiations has been the requirement that the parties to the free trade agreement ratify or accede to a host of WIPO treaties. For example, article 15 of the United States and Morocco free trade agreement requires the parties to ratify or accede to eight WIPO treaties in addition to making
best efforts to ratify or accede to two others as it requires not just adherence to selected provisions of particular treaties but adherence to whole treaties. (Peter K.Yu 2004: 328-329)

### 3.3.4 Some FTA processes addressing traditional knowledge

<table>
<thead>
<tr>
<th>SIGNED DEALS</th>
<th>STATUS</th>
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<tbody>
<tr>
<td>Trans-Pacific Strategic Economic Partnership Agreement-New Zealand, Brunei, Chile, Singapore</td>
<td>Signed 3 June 2005 In force as of 1 January 2006</td>
</tr>
<tr>
<td>New Zealand-Thailand Closer Economic Partnership Agreement</td>
<td>Signed 19 April 2005 In force as of 1 July 2005</td>
</tr>
<tr>
<td>US-Peru Trade Promotion Agreement</td>
<td>Signed 7 December 2005 Not yet in force</td>
</tr>
<tr>
<td>Economic Cooperation Organisation Trade Agreement (ECOTA) Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyz Republic, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan</td>
<td>Signed 17 July 2003</td>
</tr>
<tr>
<td>Panama-Taiwan Free Trade Agreement</td>
<td>Signed 21 August 2003</td>
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#### UNDER NEGOTIATION OR IN PROCESS

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<tr>
<td>US-Andean Trade Promotion Agreement Colombia, Ecuador and US, with Bolivia as observer. Peru was originally included.</td>
</tr>
<tr>
<td>US-Panama Free Trade Agreement</td>
</tr>
<tr>
<td>US-Thailand Free Trade Agreement</td>
</tr>
<tr>
<td>Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC-FTA) Bangladesh, Bhutan, India, Nepal, Sri Lanka and Thailand</td>
</tr>
<tr>
<td>South Asia Free Trade Agreement (SAFTA) Bangladesh, India, Maldives, Nepal, Pakistan, Sri Lanka</td>
</tr>
</tbody>
</table>

**Source:** GRAIN in collaboration with Dr Silvia Rodríguez Cervantes (2006): “FTAs: trading away traditional knowledge,” March, at http://www.grain.org/publications
There is general perception that bilateral agreements are more effective as these arrangements "can take into consideration the particular phases of development confronting each country, and provide for the gradual inclusion of a developing country into the global economy." (Giunta & Shang 1993: 327-339) In addition, bilateral agreements "can target practices of a particular country offensive to U.S. interests and do so in an expeditious manner." (Leaffe1991:273-295) Empirical evidence has also demonstrated that U.S. bilateral agreements "had generally encouraged speedier and more substantial changes in suspect nations" after the United States threatened to impose trade sanctions on those countries. (Giunta & Shang 1993: 340)

3.4 Summary

Our examination of the genesis and growth of the new global IPR regime allows us to summarise certain important findings. Historically, the genesis of IPR could be traced back to the Venetian Republic in the fifteenth century where a customary practice of protection existed and adopted the first patent law on March 19, 1474. The basic patent rules developed in Venice were preserved in the subsequent systems, including France and the Holy Roman Empire, almost exactly as developed in Venice. By the eighteenth century, the Statute of Monopolies and the Statute of Anne had attracted attention from many countries, including the United States. By the late nineteenth century, a network of bilateral copyright conventions had been established among major European powers.

The first multilateral treaty was the Berne Convention on copyright. The most significant revision of the Convention took place in the 1960s when less developed country participants were understandably concerned about their lack of sufficient and affordable access to information and knowledge. Early international protection of patents and trademarks came in the form of bilateral treaties. The Paris Convention was first multilateral treaty on patents. Taken together, the two conventions provided the foundations of the current international IP regime.
After the Second World War, IP became important to developed countries as these countries competitive advantage was based on IP rights. The ITO was contemplated at Bretton Woods but never formed due to irresolvable issues. Instead, the GATT facilitated international trade rules through several rounds of negotiations, ending with the Uruguay Round in 1994. By the time the GATT met in Punta del Este to launch another trade round, U.S. corporations had forged a broad crosssectoral alliance and developed a coordinated strategy against the collective interest of the developing countries. By marrying IP to international trade, the TRIPS Agreement not only revolutionised international protection of IPR, but also "played a new and important role in the international economic system.

Most controversial article of the TRIPS agreement is Article 27.3(b). Article 27.3 narrows members' choice of regime through the effectiveness requirement. Before the Doha Declaration, there were three major options under discussion for the revision of Article 27.3(b). The majority position advocated the revision of Article 27.3(b) to exclude life forms altogether from the ambit of TRIPS. Developing countries took a position that the TRIPS Agreement should be amended to prohibit patents on all life forms as they are contrary to the moral and cultural norms of many societies. So they argued for inserting a provision in TRIPS “that mandates patent applicants for inventions that use biological resources and TK, to disclose the source of origin of such resource and knowledge, as well as to provide evidence for the prior informed consent (PIC), and complied with national laws on benefit sharing.” Whereas the US maintained that TK should be removed from the agenda in the TRIPS Council. It did not consider the use of TRIPS as a suitable means to ensure disclosure, PIC and benefit sharing. Besides, the US and Japan opposed the checklist arguing that there is no conflict between the CBD and the TRIPS Agreement and that there is no need to amend the TRIPS Agreement.

In addition to TRIPS, WIPO, UPOV, CBD, FAO, UNCTAD deal one or other aspect of IP and TK at the international level. WIPO focus on the relationship between IP and genetic resources, TK and folklore. Although no significant outcomes have resulted in the IGC’s work, its
existence has had a high political profile both within governments and civil society organisations. In 1960, a group of European nations met to create the UPOV which was designed to create a multilateral legal basis for plant breeders' rights in privately-bred, sexually-reproduced plant varieties in the domestic law of the member nations. UPOV's bias towards breeders, however, has resulted in developing nations' skepticism against adopting the model as the choice sui generis system.

The CBD aims to set up an international framework for the preservation and utilisation of the world's biological resources. The objectives of CBD include the "conservation of biological diversity;" the sustainable use of biological diversity components; and the "fair and equitable sharing of the benefits arising out of the utilisation of genetic resources." The CBD through its Bonn Guidelines has been mandated to elaborate and negotiate an international regime on ABS. In this context, an ABS regime as well as to develop elements for sui generis systems for the protection of TK and to explore the conditions under which the use of existing IPR can contribute to reaching the objectives of the CBD. Notwithstanding the important principles set forth in the CBD, international measures for protecting biodiversity remain uncertain.

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR) endorses a multilateral system of access and benefit-sharing of plant genetic resources. Article 10 mandates that contracting parties "facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilisation of these resources." Article 12, however, stipulates that "recipients shall not claim any IP or other rights that limit the facilitated access to the plant genetic resources for food and agriculture. As a counter-measure, some countries, such as India and Australia, have opened registries of traditional knowledge to attempt to provide IP like protection for plant varieties, and to require that anyone seeking access to the genetic resources sign a material transfer agreement covering derived varieties.

UNCTAD has undertaken measures to analyse and strengthen the development dimension in international IP rule-making, including effective
Chapter III

transfer of technology to developing countries; protection of TK, genetic resources, and folklore will continue. More recently, the Committee on Economic, Social and Cultural Rights (CESCR) has been working on a General Comment on article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which deals with the enjoyment of the benefits of scientific progress and its applications; and the concept of benefiting from the protection of the moral and material interests resulting from scientific, literary or artistic productions.

Developing countries raised the need to create coherence between various international agreements. The conflict between TRIPS and the CBD is spurred by moral and rhetorical assumptions. One assumption claims that the patent regime is a Western form of IPR, which is totally unsuitable to the majority of the societies in the South that have accepted TRIPS by acceding to the WTO. Another assumption asserts that private rights are completely alien to indigenous communities because the vast majority of their farmers, who manage biodiversity at the local level, are accustomed to collective rights.

While emphasising the conflict between TRIPS and CBD, it is important to note that members of the CBD have an obligation to ensure that IPR are "supportive of and do not run counter to the CBD's objectives." Although TRIPS subject matter does not suffer from an identity problem per se, some provisions regulate the same object and have the same purpose as CBD provisions. In order to fully apply and universally ratify both treaties, certain provisions contained in both treaties need to come into harmonisation.

Developing countries consider that there is tension between CBD and TRIPS, while many developed countries maintain that no conflict exists between the two instruments. In order to create coherence with the CBD, the amendment to TRIPS that developing countries and NGOs envisage would primarily aim to address concerns about bio-piracy. In this regard, developing countries seek to amend TRIPS in order to introduce internationally binding disclosure requirements in patent applications, including proof of consent and benefit sharing.
Whereas, TRIPS-plus FTAs reduce the ability of developing countries to protect the public interest of their societies. FTAs, at the regional and bilateral level, are the most well known vehicles for TRIPS-plus obligations for developing countries. Industrialised countries and transnational corporations consider TRIPS agreement to be only a minimum standard of protection for IPR on biological resources; they now seek higher standards through bilateral negotiations. Thus, the United States has been negotiating free trade agreements with IP components with regional forums and individually with countries. The EU and Japan are getting more aggressive with free trade agreements. Another important trend in the bilateral approach to IP negotiations has been the requirement that the parties to the free trade agreement ratify or accede to a host of WIPO treaties.

In recent years, the misappropriation of folklore, TK, and indigenous practices has become an increasingly important issue in global politics. The international community has yet to reach a consensus on how to protect indigenous materials, partly due to limited understanding of the issue and partly due to the complexities involved in defining and classifying the materials.

In brief, the examination and analysis in this regard, allows us to suggest that the TRIPS agreement was enforced on most countries especially developing countries in a unilateral and high handed manner. There are evidences to suggest that the provisions in TRIPS benefit the corporate interest and their parent countries in more ways than perceived. Conversely, most of such provisions, especially those related to article 27.3 (b) have had deleterious effect on the protection and management of IP related to biodiversity and traditional knowledge. Many of the provisions in TRIPS Agreement are in direct conflict with corresponding provisions in the conventions such as CBD, UPOV, UNCTAD, UNHRC and FAO.