

Chapter 2

Beyond the CBD and the Nagoya Protocol: Other Instruments that Affect ABS and Intellectual Property

I. Introduction

Chapter 1 provided a brief overview of the access and benefit sharing (ABS) system as established under the Convention on Biological Diversity (CBD) and the Nagoya Protocol. This background is necessary to understand how ABS is supposed to operate both at the national and international levels. This chapter is dedicated to a brief overview of international instruments on intellectual property (IP) and on other instruments that may help to interpret questions of ABS and IP issues, while the chapters that follow will address discrete topics where the two interface. The intent of this particular chapter is therefore not to go into detail on any particular issue, but to understand the various sources of international law of relevance to ABS and IP beyond the CBD and the Nagoya Protocol.

II. Intellectual Property Treaties

Intellectual property (hereafter IP) refers to various sets of exclusive rights that are granted to applicants as a reward or incentive for intellectual endeavour. They include patents, copyrights, trademarks/trade names, utility models, plant variety protection laws, geographical indications, *sui generis* traditional knowledge laws, among others. Like ABS, IP is generally a system that is governed by national laws. IP treaties which countries have signed may contain commitments that will dictate the contours of when exclusive rights ought to be granted and what should remain in the public domain. The key IP treaties that affect ABS are described below, along with a brief discussion of the state of play on relevant intergovernmental discussions that are taking place at the hosting institution on related issues.

A. The TRIPS Agreement

As one of the agreements to which all Members of the World Trade Organization (hereafter WTO) must adhere, the Agreement on Trade-related Aspects of Intellectual Property Rights (hereafter the TRIPS Agreement) has had a major impact on the scope of intellectual property protection around the world. The TRIPS Agreement establishes minimum standards of IP protection, which must be incorporated through national legislation by WTO Members unless specifically exempted by the WTO as in the case of the Least Developed Countries (hereafter LDCs).⁴² Such standards are established for a variety of IP instruments including patents, copyrights, trademarks, geographical indications (hereafter GIs), industrial designs, plant variety protection, integrated circuit designs and undisclosed information. The treaty body for the TRIPS Agreement is the TRIPS Council, which is an intergovernmental body serviced by the WTO Secretariat in Geneva, Switzerland.

⁴² A waiver currently exempts LDCs from complying with the substantive provisions of the TRIPS Agreement through 1 July 2021 (and through at least 2016 for granting product patent protection for pharmaceuticals and protection from unfair commercial use of pharmaceutical test data).

From the perspective of potential impact on ABS, the forms of IP that are the most important are patents, copyrights, trademarks, plant variety protection and GIs.

While incorporating many of the provisions of the Paris Convention for the Protection of Industrial Property, TRIPS requires that patents may only be granted to inventions that are new, involve an inventive step and are capable of industrial application (Article 27.1). Under Article 28.1 of the TRIPS Agreement, patents are a public authorization that grants to the owner the right to preclude others from the acts of making, using, offering for sale, selling or importing a protected product or process for at least 20 years. WTO Members may define the respective criteria of novelty, inventive step and industrial application in light of their policy priorities and needs, but may not offer patent protection for less than 20 years. Various exceptions to this right are recognized both in the TRIPS Agreement as well as through WTO Dispute Settlement decisions and widely recognized national judicial and administrative practices. Petty patents (otherwise known as utility models) are not governed by the TRIPS Agreement.

The TRIPS Agreement does not itself define the contours of a copyright and instead incorporates the substantive provisions of the Berne Convention of 1971, including the term of protection as the life of the creator plus 50 years. Article 9 of the TRIPS Agreement does stipulate, however, that copyright protection extends to expressions and not ideas, procedures, methods of operation or mathematical concepts as such. TRIPS does guarantee copyright protection to computer programs (Article 10, TRIPS), and recognizes rental rights (Article 11, TRIPS) and the rights of performers, producers of phonograms and broadcasting organizations (Article 14, TRIPS). The scope of copyrights is discussed further in the section below on World Intellectual Property Organization (WIPO) treaties.

According to Article 15 of the TRIPS Agreement, “[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including persona names, letters, numerals, figurative elements and combinations of colours as well as any combinations of such signs, shall be eligible for registration as trademarks.” The term of protection for a trademark is potentially indefinite, following an initial registration for a term of no less than 7 years. Members may require that the trademark be actually used in order to maintain a registration (Article 19, TRIPS). Distinctive signs are one means by which misappropriation can occur, as well as a vehicle that provider countries could use to prevent misappropriation (see Chapter 6).

Plant variety protection is not governed directly by the TRIPS Agreement. Among its many functions, the TRIPS Council periodically reviews certain substantive provisions of the TRIPS Agreement. The interface between the TRIPS Agreement and the CBD was first examined by the TRIPS Council in its 1999 review of Article 27.3(b), which allows governments to exclude some kinds of inventions from patenting, i.e. plants, animals and “essentially” biological processes (but micro-organisms, and non-biological and microbiological processes have to be eligible for patents). It was at this time that developing countries argued for the need to re-examine the implications of allowing the so-called ‘patenting of life’, including examining the impact of patenting genes, viruses and other living organisms. The TRIPS Agreement, under Article 27.3(b), mentions only that plant varieties

are eligible to receive some form of either *sui generis*⁴³ or patent protection, or a combination of both. Additional information on plant variety protection can be found in the section on the International Union for the Protection of New Varieties of Plants (UPOV) below.

The examination of the relationship between TRIPS and the CBD was given a higher mandate in 2001, when the WTO Ministerial Conference that launched the Doha Development Round decided in its Declaration that the TRIPS Council should “examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension”.⁴⁴ Despite the mandate, this issue, along with GIs (see below), remain outside the set of issues being negotiated to conclude the Doha Development Round. Further, a debate exists among WTO Members as to whether this means that the issue should instead be addressed by the WTO Trade Negotiations Committee rather than the TRIPS Council. As a result of the continuing impasse in negotiations, the Director General of WTO launched consultations at his own initiative, attempting to resolve the outstanding issues of the CBD/TRIPS relationship and GIs in 2009.

The WTO’s work on TRIPS and the CBD has thus generally focused on the question of whether or not there is a conflict between the two treaties, and whether an amendment of the TRIPS Agreement is necessary to ensure that these treaties are implemented in a ‘mutually supportive’ manner.⁴⁵ The discussion, more specifically, focuses primarily on the question of if there ought to be an amendment of Article 29 of the TRIPS Agreement to include a mandatory disclosure of origin requirement for patent applications containing genetic resources and/or associated TK. Article 29 of the TRIPS Agreement requests Member States to require patent applicants to disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art. While this debate had been framed as a CBD issue, neither the CBD nor the Nagoya Protocol requires mandatory disclosure of origin. To the extent that the Nagoya Protocol requires effective checkpoints to ensure implementation, however, a disclosure of origin or source requirement could potentially be considered as a mechanism to assist national competent authorities should IP offices be designated as a checkpoint.

This handbook discusses in detail the substantive issue of TRIPS compatibility and disclosure requirements in Chapter 3. It suffices for purposes of this chapter simply to indicate that governments remain, despite the numerous studies tabled and government submissions to the TRIPS Council since the 2001 mandate, divided on this issue mainly along North-South lines as far as the consequences of non-compliance with a disclosure requirement are concerned. Most recently, in April 2011, a group of developing countries including Brazil, China, Colombia, Ecuador, India, Indonesia, Peru, Thailand, the African, Caribbean and Pacific Group of States (the ACP Group) and the African Group, tabled a draft decision calling for the amendment of the TRIPS Agreement at the Trade Negotiations Committee introducing a mandatory disclosure requirement as part of the Agreement’s minimum standards on IP.⁴⁶ The draft Article 29*bis* proposes the following:

⁴³ *Sui generis* is a Latin term that simply means ‘of its own kind.’

⁴⁴ Doha Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1, para. 19.

⁴⁵ See WTO document IP/C/W/368/Rev.1 of 8 February 2006, para. 6.

⁴⁶ See WTO document TN/C/W/59 of 19 April 2011.

“1. For the purposes of establishing a mutually supportive relationship between this Agreement and the Convention on Biological Diversity, Members shall have regard to the objectives, definitions and principles of this Agreement, the Convention on Biological Diversity, and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, in particular its provisions on prior informed consent for access and fair and equitable benefit sharing.

2. Where the subject matter of a patent application involves utilization of genetic resources and/or associated traditional knowledge, Members shall require applicants to disclose:

(i) the country providing such resources, that is, the country of origin of such resources or a country that has acquired the genetic resources and/or associated traditional knowledge in accordance with the CBD; and

(ii) the source in the country providing the genetic resources and/or associated traditional knowledge.”

Applicants are also required to “provide a copy of an International Recognized Certificate of Compliance” under the Nagoya Protocol, or alternately “relevant information regarding compliance with prior informed consent and access and fair and equitable benefit sharing as required by the national legislation of the country providing the genetic resources and/or associated traditional knowledge.” No action has yet been taken by the Trade Negotiations Committee Members on this draft.

While not classified strictly speaking as a CBD and TRIPS compatibility issue (but relevant nonetheless from the perspective of enabling the mutual supportiveness of the two treaties, as noted in Chapter 6 of this text), the TRIPS Council is also the forum where debates are occurring on the possible amendment of the TRIPS provisions on geographical indications. GIs are place names (in some countries also words associated with a place) used to identify products that come from these places and have certain specified characteristics. GIs are considered as potential tools to promote benefit sharing and preserve certain traditional practices associated with genetic resources (see Chapter 6). Article 22 of the TRIPS Agreement establishes that Members must provide a measure of protection for GIs in order to prevent misleading the public as to the geographical origin of a good, and to prevent unfair competition. A higher level of protection is accorded under Article 23 for GIs for wines and spirits, where they must be protected even where the public may not necessarily be misled. These obligations are subject to certain exceptions enumerated in Article 24, such as for names that have already become commonplace.

Currently, the debates on GIs in the TRIPS Council focus around two issues. The first deals with the establishment of a multilateral system of notification and registration of GIs for wines and spirits, and the second deals with the extension of the higher level of protection currently afforded to wines and spirits under Article 23 to all goods. Despite having discussed these topics for numerous years, WTO Members continue to differ widely on these two issues. With respect to the former issue, the debate is currently focused on the legal effect of the multilateral register, with some countries (including the European Union (EU)) arguing that TRIPS ought to be amended to call for the establishment of a register that establishes a “rebuttable presumption” that the GI is to be protected in other WTO members — except in a

country that has lodged a reservation within a specified period.⁴⁷ Others have called for establishing a voluntary system where GIs could be notified and entered into a database. Proponents of this view, which includes a number of developed and developing countries, oppose an amendment of the TRIPS Agreement.⁴⁸ A compromise proposal has been put forward by Hong Kong SAR, China. No convergence of views appears to be imminent, however.⁴⁹

With respect to the second issue, here too Member governments are divided over whether or not the protection granted under the current regime of Articles 22 and 23 of the TRIPS Agreement are adequate. The Director-General of the WTO summarized the current impasse best in a report submitted as an official TRIPS Council document:

*“Delegations continued to voice the divergent views that have characterized this debate, with no convergence evident on the specific question of extension of Article 23 coverage: some Members continued to argue for extension of Article 23 protection to all products; others maintained that this was undesirable and created unreasonable burdens.”*⁵⁰

A number of countries treat the issue of a multilateral register for GIs as linked with negotiations on the mandatory disclosure requirement. There has been no formal decision linking the two even though a linkage has been proposed by some countries, and the future of how issues are linked is uncertain. Despite the lack of progress in reaching consensus on these issues, they remain a standard agenda item at the regular meetings of the TRIPS Council.

Key Points

- ⇒ The TRIPS Agreement establishes minimum standards of protection for WTO Members over a variety of IP instruments including patents, copyrights, trademarks, geographical indications, industrial designs, plant variety protection, integrated circuit designs and undisclosed information. As such, it is considered an important reference point for international IP rules.
- ⇒ The TRIPS Agreement was not designed as a treaty that inherently promotes CBD objectives. There are provisions in the treaty which have an impact on those objectives, including the provisions on patents, plant variety protection and geographical indications.
- ⇒ There has been a longstanding discussion at the TRIPS Council about whether a disclosure of origin requirement (and in particular patent law-related sanctions in case of non-compliance) is compatible with the TRIPS Agreement. While this debate had been framed as a CBD issue, neither the CBD nor the Nagoya Protocol requires mandatory disclosure of origin or source.
- ⇒ Ongoing discussions at the TRIPS Council include debates surrounding a possible amendment of the TRIPS Agreement to include a mandatory disclosure requirement, the establishment of a multilateral register for geographical indications and whether a

⁴⁷ See WTO document TN/C/W/26 of 14 June 2005.

⁴⁸ See WTO document TN/C/W/10/Rev.2 of 24 July 2008.

⁴⁹ See, WTO, document TN/IP/W/8, 2003.

⁵⁰ See WTO document TN/C/W/61 of 21 April 2011.

higher level of protection should be accorded to all goods, rather than just wines and spirits. While these are standing items on the agenda of the TRIPS Council meetings, there does not appear to be any major breakthroughs as governments do not seem to be able to reach consensus.

B. The WIPO Treaties

Established as a specialized agency of the United Nations in 1967, the World Intellectual Property Organization (WIPO) provides secretariat services for many of the substantive IP treaties and is also the venue for the negotiation of many new IP treaties. These include the treaties which the TRIPS Agreement incorporates substantive provisions of IP protection, i.e., the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. Among its functions, the WIPO Secretariat, located in Geneva, Switzerland, also provides the administrative backbone for the Patent Cooperation Treaty (PCT), which creates a mechanism to facilitate cross-border patent applications.

As mentioned above, WIPO serves as the treaty secretariat for the Berne Convention on copyrights. Copyrights take on significance with respect to the interface between ABS and IP as they have an impact on how certain TK may be treated. Article 2(1) of the Berne Convention enumerates a non-exhaustive list of items that must be protected by copyright:

“Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show’ musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

Works are protected by the granting of exclusive rights on a work for a minimum term of life of the creator plus 50 years. Various limitations and exceptions have been carved out of copyright, such as for fair use. Two other copyright treaties were also negotiated under WIPO auspices, i.e., the so-called WIPO Internet treaties, which include the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These treaties deal specifically with the effects of the digital environment on copyright.

Of particular note is that WIPO is currently engaged in potentially standard setting discussions on the interface between biodiversity and IP. In October 2000, the General Assembly of WIPO established the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (hereafter the IGC). The WIPO General Assembly has given the mandate to the IGC to conduct negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of TK, traditional cultural expressions (TCEs)/folklore and genetic resources. These negotiations have at the time of this writing

produced draft texts on these respective topics that remain heavily bracketed⁵¹, indicating that the IGC Members are as yet not in agreement on a number of issues. The international work on developing suitable legal frameworks for TK aims at the following objectives:

- Recognising its cultural and spiritual value
- Recognising the right to self-determination and customary laws and practices
- Respecting basic principles as e.g. free and prior informed consent
- Ensuring the protection against misappropriation
- Ensuring sharing of the benefits generated through its utilisation
- Regulating the application in scientific work and industrial processes
- Responding to the specific needs of TK holders

The IGC draft text on genetic resources discusses, *inter alia*, defensive databases, a proposed mandatory disclosure requirement and intellectual property clauses calling for mutually agreed terms for access and equitable benefit sharing. Major issues in the negotiations concerning the text on TK include the question of what constitutes public domain, the subject matter of protection, the beneficiaries of protection, and exceptions and limitations. A draft text also exists for TCEs. Debate continues to exist also on whether these topics should be covered under a single treaty or three separate ones.

No date has yet been announced for a diplomatic conference leading to any treaty instrument(s). The IGC is serviced by the WIPO Secretariat, and a number of studies on the topic of the interface between biodiversity, TCEs, TK and IP have been commissioned and published by WIPO over the years. Negotiations continue as of the date of writing.

Key Points

- ⇒ Many of the substantive provisions of basic WIPO treaties such as the Berne and Paris Conventions have been incorporated into the TRIPS Agreement by reference.
- ⇒ The activity of WIPO most relevant to the interface between biodiversity and IP is the work of the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC). The WIPO General Assembly has given the mandate to the IGC to conduct negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of traditional knowledge (TK), traditional cultural expressions (TCEs)/folklore and genetic resources. At this point, it is not yet clear whether disclosure requirements will form part of the treaty text emanating from the IGC.
- ⇒ Negotiations at the IGC continue as of the date of writing. WIPO has not yet announced a date for any diplomatic conference leading to the adoption of a treaty.

⁵¹ See WIPO document WO/GA/40/7 of 12 August 2011 and the Facilitators' Draft of a Consolidated Draft Relating to Intellectual Property and Genetic Resources, 7 February 2013, available at <http://www.ip-watch.org/weblog/wp-content/uploads/2013/02/IGC-consolidated-document-Rev-2-Feb-2013.pdf>.

C. UPOV

As noted above, Article 27.3(b) of the TRIPS Agreement gives WTO Members the option of providing patent protection for plant varieties or for setting up a *sui generis* system for plant breeders' rights, or for some combination of the two. The International Union for the Protection of New Varieties of Plants (UPOV) is a multilateral treaty that facilitates the international protection of new varieties of plants through a *sui generis* system of plant breeders' rights for such new plants that meet certain minimum standards. It is therefore a treaty that is of interest to users who seek to commercialize a newly developed variety of a plant. The minimum standards that must be contained in national legislation differ depending upon whether a country has acceded to the UPOV treaty as amended in 1991 or an earlier version of the UPOV treaty.

As plants are genetic resources, the interface of UPOV with the Nagoya Protocol and the CBD is essentially similar to that for patents, in so far as the grant of a plant breeders' right confers the right to exclude others from the use of the variety without a license, subject to a number of possible exceptions. To that end, plant breeders' rights can be used to misappropriate genetic resources and related TK, and it can also serve as the basis for benefit sharing. The UPOV Secretariat appears to hold the view that disclosure of origin cannot be accepted as an additional requirement for protection, since the conditions for plant variety protection under the UPOV Convention have already been established and cannot be increased.⁵² Objections to this view have been raised by certain civil society groups.⁵³

With regard to farmers' rights, the 1991 text took up access-related elements of farmers' rights to a very limited extent. While such elements traditionally comprise saving, exchanging and selling of farm-produced plant material, Article 15(2) contains an optional exception to the breeder's right giving UPOV parties the opportunity to, "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety." If this farmers' exception is implemented domestically, it often is restricted to small-scale farmers or coupled with a specific license fee system. UPOV 1991 essentially abandons any practices of exchanging and selling farm-produced seeds according to customary law⁵⁴ if these practices involve protected material.

UPOV is governed by a Council of its members, and is serviced by a secretariat (its Office) that is housed in the WIPO building in Geneva, Switzerland. There are currently 70 countries that have, to date, become a member of UPOV.

That a country has not ratified UPOV does not mean that they do not have a system in place to protect new plant varieties. Rather, some biodiversity rich countries such as India and Thailand have opted to establish a *sui generis* system of plant variety protection outside of the UPOV framework, which contains, *inter alia*, provisions that go farther in protecting farmers'

⁵² Vivas-Eugui and Oliva (2010), p. 7.

⁵³ See, for example, Dutfield (2011).

⁵⁴ Customary Law- covers 'customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic part of a social and economic system that they are treated as if they are laws' (*Black's Law Dictionary*, 7th edition, 1999). Traditional communities maintain their own customary laws governing their community and use of the environmental resources.

rights and recognizes the development of domestic varieties based on traditional means of exchange of seeds. Such an option is available under the TRIPS Agreement to meet the requirements of Article 27.3(b).

Key Points

- ⇒ The International Union for the Protection of New Varieties of Plants (UPOV) is a multilateral treaty that facilitates the international protection of new varieties of plants through a *sui generis* system of plant breeders' rights for plants that meet certain minimum standards.
- ⇒ The interface of UPOV with the Nagoya Protocol and the CBD is essentially similar to that for patents, in so far as the grant of a plant breeders' right confers the right to exclude others from the use of the variety without a license, subject to a number of possible exceptions (such as, for example, the farmers' right to save seeds if contained in national legislation).
- ⇒ Some biodiversity rich countries such as India and Thailand have opted to establish a *sui generis* system of plant variety protection outside of the UPOV framework.

D. Free Trade Agreements

Multilateral treaties are not the only sources of international law that can address the interface between biodiversity and intellectual property. Free trade agreements (FTAs), often concluded on a bilateral basis, can sometimes contain IP provisions that affect the CBD objectives. Like the abovementioned multilateral treaties, the obligations contained in FTAs often require changes in national legislation or the adoption of new legislation.

It would be beyond the scope of this handbook to examine all the possible variants of biodiversity-related IP provisions in FTAs. It suffices for the purposes of this chapter to note that many of the provisions dealing with the interface had heretofore been so-called 'TRIPS-plus', i.e., requiring countries to adhere to standards that were more stringent than called for by the TRIPS Agreement. For example, Japanese FTAs with countries such as Chile (2007) and Indonesia (2007) oblige these countries to adhere to UPOV 1991 standards even though the TRIPS Agreement does not oblige countries to do so (as noted above, it only stipulates that some form of plant variety protection be offered to new plant varieties if patent protection is not offered).

Another provision that has raised a lot of concern is the rule in some US FTAs that the disclosure of an invention shall be considered as sufficiently clear if it provides sufficient information to be carried out by a person skilled in the art, and that an invention is sufficiently supported by its disclosure if the latter conveys that the applicant was in possession of the claimed invention at the filing date. This could arguably make it difficult for FTA partners to maintain patent-related sanctions for non-compliance with disclosure of origin, source, etc.⁵⁵ Such provisions potentially obligate the countries party to the FTA to adhere to standards that

⁵⁵ See Articles 16.9.9 and 16.9.10, of the FTA between USA-Peru. Similar provisions are found in the FTA between USA-Morocco, see Articles 15.21.10 and 15.21.11.

in effect offer, through most-favoured nation principles, TRIPS-plus IP protection standards to all countries despite not having been negotiated multilaterally.

The International Centre for Trade and Sustainable Development (ICTSD) finds, however, in a 2010 study that “an increasing number of North-South FTAs have incorporated biodiversity related provisions into these bilateral trade agreements in addition to traditional IP provisions, seeking a more balanced and sustainable approach”.⁵⁶ The study cites, in particular, the examples of understandings made by Colombia and Peru, respectively, pursuant to concluding FTAs with the United States. These understandings make an attempt to preserve policy space where TK and biodiversity interests are at stake.⁵⁷

Key Points

- ⇒ Free trade agreements (FTAs), often concluded on a bilateral basis, can sometimes contain IP provisions that affect the CBD objectives.
- ⇒ Many of the provisions dealing with the interface had heretofore been so-called ‘TRIPS-plus’, i.e., requiring countries to adhere to standards that were more stringent than called for by the TRIPS Agreement. Some studies show that more recently, biodiversity and TK rich developing countries are increasingly resisting the call to narrow the policy space available to them on IP provisions that have an impact on their biodiversity and TK resources.

III. The WHO Pandemic Influenza Preparedness Framework

The World Health Organization (WHO), a United Nations specialized agency headquartered in Geneva, Switzerland, has been engaged in work, *inter alia*, on vaccines, and potentially interfaces with the ABS provisions of the Nagoya Protocol/CBD. While there exists a debate as to whether pathogens are covered under the NP, this handbook takes the position that they are not excluded by the work done at WHO (see the section in Chapter 3 on Pathogens).

Member States of the World Health Assembly adopted in May 2011 a resolution endorsing the report of the Open-Ended Working Group on Pandemic Influenza Preparedness on the sharing of influenza viruses and access to vaccines and other benefits, and the resulting ‘Pandemic Influenza Preparedness Framework’, which includes as annexes standard material transfer agreements (SMTAs) for the sharing of pathogens with entities that are first, part of the WHO network for influenza monitoring, and second, for entities outside of that network, including between private companies.⁵⁸ These SMTAs are essentially contractual obligations between the signatories. WHO network participants are obliged to use the first SMTA, while the second SMTA serves as a guideline text for negotiations of MTAs between a network member and parties that are not part of the WHO network. The text of these SMTAs is contained in Annex II of this handbook.

⁵⁶ Vivas-Eugui and Oliva (2010), pp. vi-viii.

⁵⁷ *Ibid.*, pp. 8 and 9.

⁵⁸ World Health Assembly Resolution 64.5 of 24 May 2011.

Unlike the ITPGRFA (see Chapter 1), the WHO SMTAs do not confer upon any government any treaty obligation. Under Article 4(3) of the Protocol, “[d]ue regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol”. This language serves largely as a reminder that unless specifically excepted by a separate treaty, the ABS system established by the Protocol may be interpreted by courts to cover influenza viruses.

Key Points

- ⇒ The World Health Assembly endorsed in May 2011, the use of standard material transfer agreements (SMTAs) for the sharing of pathogens with entities that are first, part of the WHO network for influenza monitoring, and second, between network entities and entities outside of that network. These SMTAs are contractual obligations between the signatories. WHO network participants are obliged to use the first SMTA, while the second SMTA serves as a guideline text for negotiations of MTAs between a network party and parties that are not part of the WHO network.
- ⇒ Unlike the ITPGRFA, the SMTAs do not confer upon any government any treaty obligation.

IV. Protecting Traditional Knowledge

The CBD and the Nagoya Protocol cover traditional knowledge associated with genetic resources. This begs the question how TK is to be protected. Various human rights instruments are the starting point for recognition of customary rights for ILCs, including over their TK. While these treaties may not specifically address ABS and IP issues as such, to the extent that rights of ILCs are grounded in them mean that they are important documents that may be used to interpret the more technical treaty provisions on ABS and IP in other treaties. Below is a brief survey of the most important of these treaties. A later chapter examines the appropriateness of various IP tools for protecting TK (see Chapter 5).

A. ILO Convention 169

Headquartered in Geneva, Switzerland, the International Labour Organisation (hereafter ILO) was the first UN body that specifically dealt with indigenous matters. Work started in 1926 with the development of standards for the protection of indigenous workers. ILO first focused more on the integration of indigenous workers into mainstream society than on dealing with and securing customary indigenous rights. This approach changed when in 1989, Convention 169 (the Convention Concerning Indigenous and Tribal Peoples in Independent Countries) was adopted. This treaty entered into force in 1991. Convention 169 focuses on land rights, labour, social security and education. While Article 15(1) provides for a rights-based approach to natural resources and thus complements the 1992 Rio documents, the issues of TK and IPRs are beyond the scope of Convention 169⁵⁹:

⁵⁹ Text available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>, accessed in January 2012.

"The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources."

The Convention does not define who the indigenous and tribal peoples are, but provides criteria for describing the peoples it aims to protect. Article 1(2) states: "*Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.*" Article 1(1) describes the difference between tribal and indigenous peoples which is also of relevance for the interpretation of the CBD and the Nagoya Protocol. These treaties speak of "*indigenous and local communities*" without giving any indications who might be the actual members of these groups. According to Convention 169, the following distinction is made:

1) Tribal peoples:

Their social, cultural and economic conditions distinguish them from other sections of the national community

Their status is regulated wholly or partially by their own customs or traditions or by special laws or regulations

2) Indigenous peoples:

Are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries

Do, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions

The main drawback of Convention 169 is the very limited membership of currently 22 states, of which 14 are located in Latin America. Although it is legally binding for its members, it does not include an enforcement and compliance mechanism.

The specific importance of this Convention for indigenous peoples living in its Member States specifically in the context of TK and IPRs was recently underlined by a judgement of the Supreme Court of Costa Rica. While supporting the future patentability of inventions "*essentially derived from the knowledge associated with traditional biological practices or cultural practices in the public domain*" in Costa Rica, the Supreme Court also stated that such an amendment "*is a change that directly affects the interests of indigenous communities, and, as a result, in conformity with the 169 Convention this amendment must be consulted...*"⁶⁰ This judgement supports the call by indigenous peoples' organisations to be formally included in the development of national ABS and IP regulations that would cover their genetic resources and TK.

Key Points

⁶⁰ Cabrera Medaglia (2010), p. 286.

- ⇒ ILO Convention 169, while limited to the 22 states that signed it, is important in helping interpret the term ‘indigenous and local communities’ within the context of ABS.
- ⇒ A judgment in Costa Rica supported the formal inclusion of ILC organizations in the development of national ABS and IP regulations.

B. Universal Declaration of Human Rights and ICESCR

Rights in TK need to be discussed in the light of the provisions of the Universal Declaration of Human Rights 1948 (UDHR)⁶¹ and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR, entered into force in 1976)⁶². While the former is a recitation of important universally accepted human rights norms, the latter is a treaty with obligations for which the United Nations Office of the High Commissioner for Human Rights, headquartered in Geneva, Switzerland, services the treaty body charged with implementing the ICESCR. Read in a sequence, several articles of these two instruments shed some light on the human right status of the protection of TK as intellectual property (see Box 6 below).

Box 6	
Basic Human Rights Instruments and their Potential Impact on ABS and IP	
ICESCR Article 1	Impact
1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.	Establishes the right to self-determination, including the right to dispose of natural resources, implying also the right to protect these resources incl. intellectual property
UDHR Article 7	
All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.	The equal protection under the law implies that protection of intellectual property should also be available for indigenous peoples
UDHR Article 17	
(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.	Providing the right for collective property and protection against being deprived of that property
UDHR Article 27	
(1) Everyone has the right freely to participate in the cultural	Implying the protection of rights

⁶¹ Text and more information available at: <http://www.un.org/en/documents/udhr/>, accessed in January 2012.

⁶² Text and more information available at: <http://www2.ohchr.org/english/law/cescr.htm>, accessed in January 2012

life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

over advancements and innovations based on TK

Source: based on Posey.⁶³

The UDHR and ICESCR are instruments that help to define basic rights. While making no specific reference to IP, ABS or TK as such, they may provide interpretive guidance.

Key Points

⇒ Various provisions of both the UDHR and ICESCR are also helpful interpretive tools for cases that involve TK associated with genetic resources.

C. UNDRIP

The United Nations Declaration on the Rights of Indigenous People (UNDRIP) is a comprehensive statement addressing the rights of indigenous peoples. It was drafted and formally debated for over twenty years prior to being adopted on 29 June 2006 during the inaugural session of the UN Human Rights Council. The UNDRIP protects indigenous peoples against discrimination, and recognizes their rights to internal self-determination, culture, land, spirituality and religion, and health. The UNDRIP acknowledges the collective nature of indigenous peoples' rights as a basic principle. UNDRIP emphasizes the rights of indigenous peoples to maintain, control, protect and develop their cultural heritage, TK and TCEs, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines and knowledge of the properties of fauna and flora. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, TK and TCEs.

The UNDRIP is to date the most explicit recognition in a human rights instrument of a specific set of rights over various items that are potentially covered by the ABS regime, including TK and TCEs, as well as the manifestations of their sciences, technologies and cultures. Although the UNDRIP is not legally binding and consequently does not provide for compliance and enforcement mechanisms, its provisions add to the existing body of customary international law, and is a valuable reference point when articulating the rights of indigenous peoples. Relevant provisions of the UNDRIP are reproduced below.

Box 7

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Article 31.

⁶³ Posey (1994), pp. 125-26.

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Source: UNDRIP (2007).

Key Points

- ⇒ While not legally binding, UNDRIP affirms a positive right of indigenous people to maintain, control, protect and develop their cultural heritage, TK and TCEs, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.

D. UNESCO

Adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference in 2003, the Convention for the Safeguarding of Intangible Cultural Heritage (hereafter CSICH) exists as a means to identify and preserve intangible cultural heritage for future generations, as defined under Article 2 of that Convention:

“1. The “intangible cultural heritage” means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

(b) performing arts;

(c) social practices, rituals and festive events;

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.”

This breadth of coverage therefore includes various practices that might overlap with certain TK associated with genetic resources, such as in item 2(d). “Safeguarding” is further defined as measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage. While the Convention obliges parties to the Convention to take necessary measures for safeguarding (Article 11(a), CSICH), it stops short of granting any specific rights when a country has identified an intangible cultural heritage.⁶⁴ At the international level, a Committee maintains a Representative List of the Intangible Cultural Heritage of Humanity and a List of Intangible Cultural Heritage in Need of Urgent Safeguarding. Registration on either List is thought to be a means for countries to mobilize assistance to protect the intangible cultural asset. Registration as a UNESCO intangible heritage may, nonetheless, be useful for ILCs in making the case that certain TK associated with genetic resources belongs to them, and not to others.

The Convention is administered by UNESCO’s Secretariat, located in Paris, France.

Key Points

⇒ UNESCO’s Convention for the Safeguarding of Intangible Cultural Heritage provides for the listing by countries of intangible cultural heritage on a Representative List of the Intangible Cultural Heritage of Humanity and a List of Intangible Cultural Heritage in Need of Urgent Safeguarding. International registration may be useful for ILCs in making the case that certain TK associated with genetic resources belongs to them, and not to others.

V. Conclusion

The international policy making landscape for issues that straddle both IP and biodiversity issues is complex. A number of forums have concluded treaties at the international level that will have an impact on biodiversity issues, and many forums continue to be engaged in discussions that could potentially change the landscape of the interface. To make matters even more complex, the same issue (for example, disclosure of origin) may be discussed in more than one forum (WTO and WIPO/IGC), or be a subject dealt with at both the multilateral and bilateral levels (for example, plant variety protection). Countries may be bound by one treaty, but not by another (China is bound by CBD, but not by the ITPGRFA). Some obligations are treaty obligations, while others are contractual (the WHO SMTAs on pandemic influenza).

⁶⁴ On the other hand, the Convention would not prevent any Party from granting such specific rights either.

The situation of each country therefore needs to be analyzed on the basis of which treaties it has become a party to, and defies easy analysis.

The remainder of this handbook is dedicated to the nearly-universal CBD, the links between the ABS system established by the Nagoya Protocol and the TRIPS Agreement obligations that affect the CBD objectives. References to other agreements will be made throughout where relevant. Readers should keep in mind, however, that new rules could emerge from the forums mentioned above. As a general observation, however, many of the issues being considered are contentious, and may take some time to come to an agreement.