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BIODIVERSITY, TRADITIONAL KNOWLEDGE AND FOLKLORE: WORK ON RELATED IP MATTERS IN THE WTO

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Issues related to biodiversity, traditional knowledge and folklore have received increasing attention in the global intellectual property (IP) arena, including in the work of intergovernmental organizations and civil society. The World Trade Organization (WTO) is one of the forums in which the debate on related IP matters is occurring. Other intergovernmental organizations in which such debates are taking place include, among others, the World Intellectual Property Organization (WIPO),[1] the Convention on Biological Diversity (CBD),[2] the Food and Agriculture Organization (FAO),[3] the United Nations Conference on Trade and Development

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* Counsellor, WTO Secretariat. This paper is based on two presentations made at a conference on "IP Protection for Traditional Knowledge and Cultural Expressions" held at the Santa Clara University School of Law on November 9, 2007. I am grateful to the organizers of the conference, and to Adrian Otten and Jayashree Watal for their comments on the draft. The views expressed must not be attributed to the WTO, its Secretariat, or any of its Member governments.

[1] WIPO, the discussions on these topics are currently centered in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), which met for the first time in 2001. For an overview of WIPO's work in this area, *see* Molly Torsen, *supra*, at 199.

[2] For example, the CBD Conference of the Parties (COP) established in 2000 an Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing with the mandate to develop guidelines and other approaches to assist parties of the CBD with the implementation of its access and benefit-sharing provisions. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, developed by the Working Group, were adopted in 2002. In 2004, the COP requested the Working Group to elaborate and negotiate an international regime on access and benefit sharing.

[3] In 2001, the FAO Conference adopted the International Treaty on Plant Genetic Resources for Food and Agriculture, which covers all plant genetic resources relevant for food and agriculture.

(UNCTAD),[4] the World Bank, and various United Nations human rights bodies.[5] This paper primarily looks at the WTO's work relating to this complex issue. The focus of this work has been on the relationship between the TRIPS Agreement and the CBD, particularly in respect to genetic recourses and associated traditional knowledge.

The genesis of this work is in the April 1994 Marrakesh Ministerial Decision on Trade and Environment[6] that instructed the first meeting of the General Council of the WTO to establish a Committee on Trade and Environment (CTE). The committee was to consider the relevant provisions of the TRIPS Agreement as an integral part of its work. The CTE initiated this work in 1995.[7]

The focus of the work later shifted to the WTO Council for Trade-Related Intellectual Property Rights (TRIPS Council).[8] Issues

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[4] For example, the UNCTAD-ICTSD (International Centre for Trade and Sustainable Development) Project on Intellectual Property Rights and Sustainable Development, aimed at improving the understanding of development implications of IPRs, has addressed these matters in a *Resource Book on TRIPS and Development* and a *Study Series* on various topical IPR issues, *available at* http://www.iprsonline.org/unctadictsd/ResourceBookIndex.htm.

[5] These issues are addressed, for example, in the *Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly on 13 September 2007 (UN document A/RES/61/295), and the *General Comment No. 17 on the Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author (Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights)*, adopted by the UN Committee on Economic, Social and Cultural Rights on 21 November 2005 (UN document E/C.12/GC/17).

[6] Marrakesh Declaration of 15 April 1994, http://www.wto.org/english/ docs_e/ legal_e/ marrakesh_decl_e.pdf.

[7] *See* WTO Secretariat Note on *Environment and TRIPS* in WTO document WT/CTE/W/8, dated 8 June 1995, *available at* http://docsonline.wto.org/ GENsearchResult.asp. On these early discussions, see JAYASHREE WATAL, INTELLECTUAL PROPERTY RIGHTS IN THE WTO AND DEVELOPING COUNTRIES 175-182 (2001).

[8] Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) is one of the three sectoral Councils operating under the General Council. It is the body, open to all Members of the WTO, responsible for the administration of the TRIPS Agreement and in particular for monitoring the operation of the Agreement.

relating to genetic resources and traditional knowledge first came up in the work of the TRIPS Council in regards to the review of Article 27.3(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The starting point in Article 27 is that patents are to be available for any invention, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. There are certain exceptions to this general rule. In particular, Article 27.3(b) contains exceptions in the area of biotechnology that allow countries to exclude certain types of inventions from patenting, *i.e.* plants, animals and "essentially" biological processes. However, plant varieties and micro-organisms have to be eligible for protection either through patent protection or a system created specifically for the purpose ("*sui generis*"), or a combination of the two.

Article 27.3(b) reflects a compromise reached in the Uruguay Round TRIPS negotiations in the area of biotechnology, and its provisions were made subject to a review four years after the entry into force of the TRIPS Agreement. This review has been under way in the TRIPS Council since 1999. At one end of the spectrum, some have advocated that all plant and animal inventions be made non-patentable, or, to use a more popular expression, that there should be no patents on life. At the other end, some delegations have expressed a preference for eliminating the exception to the normal rules of patentability allowed in Article 27.3(b). In essence, they would prefer making patents available to all areas of biotechnology, subject only to the normal tests of novelty, inventive step and industrial applicability. However, the present language of Article 27.3(b) remains acceptable to many delegations who welcome the flexibility that the provisions grant to countries to adopt policies in this area that best reflect their values and interests. While some in this group would welcome clarification of some of the terms used in the provisions, others caution that precise definitions would quickly become outdated in this rapidly evolving area and could narrow national policy space.[9]

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[9] For more information, *see* WTO Secretariat note on *Review of the*

In the context of the review of Article 27.3(b), questions have arisen regarding the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore. The TRIPS Council's work programme on these matters was formalized in the 2001 Doha Ministerial Declaration.[10] Paragraph 19 of that Declaration instructed

> the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b) [. . .] to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, and the protection of traditional knowledge and folklore, and other relevant new developments raised by Members pursuant to Article 71.1 of the TRIPS Agreement.[11]

Furthermore, Ministers instructed the Council that "[i]n undertaking this work, [it] 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."[12]

Work in the WTO on these issues, especially on the relationship between the TRIPS Agreement and the CBD, has also been carried out pursuant to the provisions in Article 12 of the Doha Ministerial Declaration on the so-called "outstanding implementation issues" identified by developing countries. Since 2003, this work has been undertaken outside the work programme of the TRIPS Council as part of a consultative process carried out by the Director-General

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Provisions of Article 27.3(b); Summary of Issues Raised and Points Made, circulated in WTO document IP/C/W/369/Rev.1, dated 9 March 2006.

[10] Adopted on 14 November 2001, WTO document WT/MIN(01)/DEC/1.

[11] *Id.*

[12] This mandate was reaffirmed in paragraph 44 of the Hong Kong Ministerial Declaration, adopted on 18 December 2005 (WTO document WT/MIN(05)/DEC, *available at* http://www.wto.org). It reads as follows: "We take note of the work undertaken by the Council for TRIPS pursuant to paragraph 19 of the Doha Ministerial Declaration and agree that this work shall continue on the basis of paragraph 19 of the Doha Ministerial Declaration and the progress made in the Council for TRIPS to date. The General Council shall report on its work in this regard to our next Session."

of the WTO.[13]

The aspect of these complex issues that is, at present, being most actively pursued by many developing countries in the WTO is the relationship between the TRIPS Agreement and the CBD. Article 1 notes that the objectives of the CBD are "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources." Article 15 "recogniz[es] the sovereign rights of States over their natural resources." Parties to the CBD are to endeavor to create conditions to facilitate access to genetic resources for environmentally sound uses. Access to genetic resources shall be on mutually agreed terms and subject to prior informed consent. Parties are to take appropriate measures with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the country providing such resources, on mutually agreed terms.

Under Article 8(j), each party to the CBD shall, "as far as possible and as appropriate" and "subject to its national legislation,"

> 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 utilization of such knowledge, innovations and practices.

Pursuant to Article 16, parties have also undertaken to provide and/or facilitate access to and transfer of technologies "under fair and most favourable terms," "consistent with the adequate and effective protection of intellectual property rights" and "in

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[13] In paragraph 39 of the Hong Kong Ministerial Declaration, Ministers, *inter alia*, requested the Director-General, without prejudice to the positions of Members, to intensify his consultative process.

accordance with international law."

The debate in the TRIPS Council has been focused on how CBD provisions on genetic resources and traditional knowledge, in particular those on access and benefit sharing, relate to the TRIPS Agreement. In the context of the work in the Council, matters relating to genetic resources and associated traditional knowledge are normally addressed at the same time. Two general issues concerning the overall relationship between the TRIPS Agreement and the CBD that have been raised in the Council's discussion are: first, whether or not there is conflict between the TRIPS Agreement and the CBD and, second, whether something needs to be done, at least on the TRIPS side, to ensure that the two instruments are applied in a mutually supportive way and, if so, what.

One view is that there is no conflict between the two agreements, because they have different and non-conflicting objectives. Governments can implement them in a mutually consistent and supportive way through national measures. Another view is that even if there were no inherent conflict between the two agreements, there is a case for international action in relation to the patent system, in order to ensure or enhance, in their implementation, the mutual supportiveness of both agreements.[14]

However, there is a wide measure of common ground among all WTO Members on certain underlying objectives, namely, the importance of the avoidance of erroneous patents entailing the use of genetic material and traditional knowledge and, securing compliance with national access and benefit-sharing arrangements. Still, there are different views on how these should be achieved.

Some developing countries are seeking, as part of the results to the Doha Round of trade negotiations, an amendment of the TRIPS Agreement to require patent applicants to disclose, as a condition of patentability, the origin of biological resources and/or

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[14] For more information, see WTO Secretariat Note on *The Relationship between the TRIPS Agreement and the Convention on Biological Diversity; Summary of Issues Raised and Points Made*, circulated in WTO document IP/C/W/368/Rev.1 and Corr.1, dated 8 February and 9 March 2006, respectively.

associated traditional knowledge. Under the proposed new Article 29*bis*, where the subject matter of patent application is concerned, countries should require applicants to: (1) disclose the country providing the resources and/or associated traditional knowledge, (2) disclose the country from which they were obtained, and (3) after reasonable inquiry, provide the country of origin. Members should also require that applicants provide information including evidence of compliance with the applicable legal requirements, in the providing country, for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or associated traditional knowledge. Authorities should have the power to prevent the further processing of an application or the grant of a patent and to revoke or render unenforceable a patent when the applicant has, knowingly or with reasonable grounds to know, failed to comply with these obligations or provided false or fraudulent information. This so-called "disclosure proposal" was initially made by Brazil, India and a number of other developing countries. More recently, the African Group and least-developed countries have joined the sponsors of this proposal. This brings the number of WTO Members co-sponsoring the proposal up to 60.[15]

Some European countries are ready to envisage a more limited disclosure requirement relating to the origin or source of genetic material and related traditional knowledge. Norway has proposed to amend the TRIPS Agreement to introduce an obligation to disclose in patent applications the supplier country (and the country of origin, if known and different) of genetic resources and traditional knowledge (whether or not associated with genetic resources).[16] In order to allow countries to keep track at the global level of patent applications relating to genetic recourses, the

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[15] The proposal has been circulated in WTO document IP/C/W/474 and addenda 1-7, available at http://www.wto.org (follow "trade topics" hyperlink; then follow "intellectual property" hyperlink; then follow "Article 27.3b" hyperlink).

[16] *See* WTO document IP/C/W/473, available at http://www.wto.org (follow "trade topics" hyperlink; then follow "intellectual property" hyperlink; then follow "Article 27.3b" hyperlink).

European Communities has expressed its readiness to explore a requirement to disclose the country of origin, if known, or source of genetic resources and associated traditional knowledge.[17] Under the systems envisaged by Norway and the European Communities, non-compliance would be subject to legal sanctions, but these would be outside the patent system. Switzerland has referred to its proposals at WIPO to amend the Regulations under the Patent Cooperation Treaty (PCT) to explicitly enable the parties to the PCT to require patent applicants to declare the source of genetic resources and traditional knowledge in patent applications. Legal consequences for non-compliance would be those allowed under the PCT and the Patent Law Treaty.[18]

Some other WTO Members hold the view that the underlying policy objectives referred to above could best be addressed through a "national-based approach" without putting more burdens on the patent system, *i.e.* tailored national access and benefit-sharing regimes and contracts based on them. In accordance with the CBD, countries could incorporate in their national legislation requirements for the conclusion of contracts between the authorities competent to grant access to genetic resources, any related traditional knowledge, and those who wish to make use of such resources and knowledge. National regimes could have many components, including the use of permits, contractual obligations, visa systems and civil and/or criminal penalties for non-compliance. In this respect, examples of national practices have been provided.[19] With regard to concerns about erroneously granted patents, more efficient use of the existing mechanisms in the patent system itself could be made, including the requirement to provide information material to patentability, post-

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[17] *See* WTO document, IP/C/W/383, *available at* http://www.wto.org (follow "trade topics" hyperlink; then follow "intellectual property" hyperlink; then follow "Article 27.3b" hyperlink).

[18] *See* WTO documents IP/C/W/400/Rev.1, 423 and 433, *available at* http://www.wto.org (follow "trade topics" hyperlink; then follow "intellectual property" hyperlink; then follow "Article 27.3b" hyperlink).

[19] *See* WTO documents IPC/W/341 and 393, *available at* http://www.wto.org (follow "trade topics" hyperlink; then follow "intellectual property" hyperlink; then follow "Article 27.3b" hyperlink).

grant opposition, re-examination and revocation proceedings.[20] Another suggested way to address this issue would be the establishment of databases of traditional knowledge so as to strengthen the prior art resources available to patent examiners.[21]

As mentioned above, the relationship between the TRIPS Agreement and the CBD is being addressed both by the TRIPS Council under its work programme pursuant to paragraph 19 of the Doha Ministerial Declaration, and as part of a consultative process carried out by the Director-General of the WTO on the so-called "outstanding implementation issues" referred to in paragraph 12 of the Declaration. There are different views on whether such outstanding implementation issues form part of the agreed negotiating package for the Doha Round. Nevertheless, it would appear that any significant progress towards resolving these TRIPS matters in the WTO in the near future would be unlikely in the absence of major progress with the Round. Even with a successful conclusion of the Round, it is difficult to predict at this point exactly what the outcome might be in these areas.

The recent discussions in the WTO on the relationship between the TRIPS Agreement and the CBD described above have covered one aspect of the issue of protection of traditional knowledge, namely the disclosure of any traditional knowledge associated with genetic resources used in an invention. However, another aspect of the protection of traditional knowledge, namely whether there would be need for some positive, new type of intellectual property protection of traditional knowledge, or so called *sui generis* protection has been touched on but not actively pursued in the recent WTO work. A related issue concerns a possible need for any new form of IP protection of folklore, or traditional cultural expressions.

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[20] For discussion, *see* WTO documents IP/C/W/434, 449 and 469, *available at* http://www.wto.org (follow "trade topics" hyperlink; then follow "intellectual property" hyperlink; then follow "Article 27.3b" hyperlink).

[21] *See* WTO documents IP/C/W/504 and 472, *available at* http://www.wto.org (follow "trade topics" hyperlink; then follow "intellectual property" hyperlink; then follow "Article 27.3b" hyperlink). For a summary of the discussions on the merits of the proposals referred to above, see *supra* note 15.

The issue of *sui generis* protection of traditional knowledge and folklore has been a standing item on the TRIPS Council's agenda.[22] A few years ago, the African Group made a proposal on *sui generis* protection of traditional knowledge,[23] but there has been very little discussion specifically on the protection of folklore.[24] While many attach importance to these matters, WTO Members seem to have preferred to discuss them in the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources and Traditional Knowledge and Folklore (IGC).[25]

In broader IP discussions on matters related to the protection of traditional knowledge and folklore, a conceptual distinction is often drawn between these two areas. From an indigenous communities' perspective, traditional knowledge and traditional cultural expressions are often seen as being part of a single, holistic, cultural tradition. However, from an IP perspective, issues relating to traditional knowledge are usually examined through the patent lens: whether information embodied in such traditional knowledge should be protected and, if so, how. Such issues mostly interface with research and development and industries in the area of biotechnology. However, issues relating to folklore tend to be examined more through the copyright lens: generally, the focus is on traditional expressions of culture, not on information content as such – which parallels copyright protection and covers expressions, but not ideas or information. These issues mostly interface with the work of contemporary artists and creative or cultural industries.

A new international Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) was recently adopted under the auspices of United Nations Educational,

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[22] *See* paragraph 19 of the Doha Ministerial Declaration, *supra* note 10.

[23] WTO document IP/C/W/404, dated 26 June 2003, available at http://www.wto.org/english/tratop_e/TRIPS_e/art27_3b_e.htm (Follow link under Members documents -African Group - IP/C/W/404).

[24] For more information, *see* WTO Secretariat Note on *The Protection of Traditional Knowledge and Folklore; Summary of Issues Raised and Points Made*, circulated in WTO document IP/C/W/370/Rev.1, dated 9 March 2006, *available at* http://www.wto.org/english/tratop_e/trips_e/ipcw370r1.pdf.

[25] On the work of the WIPO IGC, see Torsen, *supra*, at 199 *et seq.*

Scientific and Cultural Organization (UNESCO).[26] Article 1 states that its main objective is "to protect and promote the diversity of cultural expressions." The UNESCO Secretariat has elaborated the term "promotion" by stating that "'promotion' calls for perpetual regeneration of cultural expressions to ensure that they are not confined to museums, 'folklorized' or reified."[27]

The CCD is mostly silent on traditional cultural expressions and the role of intellectual property in promoting cultural diversity in its operative provisions; however, there are a few references to these issues in the Preamble to the Convention. In its Preamble, the parties to the Convention, among other things, take into account the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate, and distribute their traditional cultural expression, and to have access thereto. Furthermore, the parties emphasize "the vital role of cultural interaction and creativity" and recognize "the importance of intellectual property rights in sustaining those involved in cultural creativity."

There is a lively on-going debate in academia and civil society on what kind of IP policies, in respect of folklore, would best meet the objectives of promoting the cultures of smaller ethnic or linguistic groups, including indigenous communities. These cultures should be "regenerated" rather than "confined to museums, 'folklorized' or reified." To what extent should one put emphasis on preservation and promotion in regards to the interaction between and recreation within different cultural traditions? Such questions touch another on-going debate in the area of copyright, namely the role of a robust public domain as a source of material on which follow-on creation and artistic freedom depend. There are two debates on the public domain. The first debate concerns modern copyright. There

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[26] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, 45 I.L.M. 269, *available at* http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[27] *Ten Keys to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, UNESCO, at 5, 2005, http://unesdoc.unesco.org/images/0014/001495/149502E.pdf.

is a perception that an ever-growing scope of protection is "encroaching" upon the public domain on which follow-on creation depends.[28] This has led to academic debate on the relationship between copyright and the public domain or the commons.[29] The second debate concerns possible enhanced protection of expressions of folklore, in which context the issue of the public domain is often seen from a different perspective. Intellectual property is perceived as unfair in that "it allows any individual alien to the traditional indigenous communities to create, based on such traditions, a new original work without the consent of such communities." The notion of "public domain" is thus seen to be in conflict with the "private domains" established by the indigenous juridical and customary systems.[30] This raises the question of how to reconcile these two debates on the public domain.[31]

Finally, there is also the issue of how to make maximum use out of existing forms of protection. Copyright can be used to promote and reward creative work that builds on and revitalizes cultural traditions. Although older works may fall outside protection and, even in respect of works still eligible for protection, the author may not be known, it should be noted that Article 15(4)(a) of the

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[28] *See, e.g.,* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004), and James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003).

[29] *Id.* However, it would be a misunderstanding to see this as a debate on "copyright versus public domain". In fact, many commentators see copyright and public domain as two sides of the same coin, and that the incentives provided by intellectual property allow the material to be created in the first place, which later flow into the public domain.

[30] Gabriel Ernesto Larrea Richerand, *Reflections on Cultural Diversity, Issues in Mexico and the International Agreement on Cultural Diversity*, *in* MÉLANGES VICTOR NABHAN, HORS SÉRIE LES CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 349-356 (Éditions Yvon Blais, 2004).

[31] For discussion, see Hannu Wager, *Copyright and the Promotion of Cultural Diversity*, *in* PROTECTION OF CULTURAL DIVERSITY FROM AN INTERNATIONAL AND EUROPEAN PERSPECTIVE (Peter van den Bossche & Hildegard Schneider eds., Intersentia, forthcoming 2008). Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), adopted in Berne on 9 September 1886, last revised at Paris Act on July 1971, *available at* http://www.wipo.int/treaties/en/.

Berne Convention[32] enables competent authorities to represent unknown authors of unpublished works. The definition of "performers" in Article 2(a) of the WIPO Performances and Phonograms Treaty[33] specifically covers those who perform "expressions of folklore" and thus make them eligible to benefit from the protection under the treaty. Geographical indications, trademarks and other distinctive signs can be used to protect and promote local know-how and cultural traditions. Also certain other areas of intellectual property, such as design protection, unfair competition rules and trade secrets may be useful tools that allow local communities, including indigenous communities, to protect and economically build on their cultural traditions.

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[32] Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), adopted in Berne on 9 September 1886, last revised at Paris Act on July 1971, *available at* http://www.wipo.int/treaties/en/.

[33] Adopted on 20 December 1996, *available at* http://www.wipo.int/treaties/en/.