Chapter 7

TRIPS-minus and Protection still Pending
7.1 Introduction

The multilateral intellectual property protection framework, as exemplified by TRIPS, has been constructed to best deliver the protection on those intellectual property rights that the major players - the developed countries - have sought to have protected. The multilateral framework is given further substance by the network of TRIPS-plus treaties and bilateral agreements, in which the same developed countries figure prominently. The dominant characteristic of this framework is that, to be protectable as intellectual property, a right must be private in nature and ascribable, identifiable, and commercially exploitable. Issues or rights which do not fit within this framework - notably traditional knowledge in the broadest sense - enjoy little, if any, of the protection offered by TRIPS, the TRIPS-plus treaties and the bilateral agreements. The absence of protection on an international scale for these issues has witnessed them subject to encroachment by the multilateral protection framework on terms dictated by that framework. In essence, they suffer a TRIPS-minus protection environment.

Foremost in this TRIPS-minus environment are those areas encompassing intellectual property issues related to genetic resources, traditional knowledge and folklore, which have emerged in a wide range of policy areas, including food and agriculture, biological diversity and the environment, human rights, cultural policy, trade and economic development. Intellectual property rights have been granted for uses of plants which form part of traditional knowledge systems in the agricultural, health and environmental fields.¹ Traditional designs, songs and dances have been used by the entertainment and fashion industries to create works which are

protected for the industries by intellectual property. Discussions about such uses of genetic resources, traditional knowledge and folklore have linked the protection of intellectual property to policy objectives as diverse as the promotion of free trade, environmental conservation, food security, and cultural diversity.

Early attempts at creating a protection regime to encompass these areas have met with only limited success. In 1981, WIPO and UNESCO adopted a model law on folklore. In 1989 the concept of Farmers’ Rights was introduced by the FAO into its International Undertaking on Plant Genetic Resources and in 1992 the Convention on Biological Diversity highlighted the need to promote and preserve traditional knowledge. The protection of traditional knowledge and folklore has also been discussed for a number of years within the framework of UNESCO and other international organisations such as UNCTAD and WHO. In spite of these efforts, a comprehensive and universally acceptable legislative framework for the protection and promotion of traditional knowledge, folklore and genetic resources has not yet emerged.

In 1998 and 1999, WIPO undertook a number of global fact-finding missions "to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development." These missions were intended to enable the "study of current approaches to, and future possibilities for, the protection of intellectual property rights of holders of indigenous knowledge, innovations and culture." During the subsequent WIPO-sponsored conferences to discuss the missions’

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2 Ibid.
3 Ibid
5 The fact finding missions were carried out in the following areas: South Pacific (Australia, New Zealand, Fiji and Papua New Guinea), South Asia (Bangladesh, India and Sri Lanka), Southern and Eastern Africa (Uganda,
findings in respect of the linkages between intellectual property and traditional knowledge and their implications, three primary issues which were of universal concern to the countries involved in the studies emerged, namely:

- the protection of traditional knowledge, innovations and creativity, whether or not associated with those resources; and
- the protection of expressions of folklore, including handicrafts;
- access to genetic resources and benefit-sharing.\(^6\)

### 7.2 Traditional Knowledge, Folklore and Cultural Heritage

Traditional knowledge, folklore and cultural heritage are complex, multifaceted concepts that encompass many elements. They are characterized by the fact that, generally, they are not produced systematically, but in accordance with the individual or collective creators' responses to and interaction with their cultural environment. Being representative of cultural values, they may constitute elements that integrate a vast and mostly coherent complex of beliefs and knowledge. More than likely they will be held collectively, being vested in the community rather than in individuals (although individuals as leaders or elders may hold them in trust). Furthermore, most traditional knowledge, folklore and cultural heritage are transmitted orally.

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United Republic of Tanzania, Namibia and South Africa), North America (United States of America and Canada), West Africa (Nigeria, Ghana, Mali and Senegal), the Arab countries (Oman, Qatar, Egypt, and Tunisia), South America (Peru and Bolivia), Central America (Guatemala and Panama) and the Caribbean (Trinidad and Tobago, Guyana and Jamaica); the reports of the missions are available at [www.wipo.int/globalissues/tk/report/final](http://www.wipo.int/globalissues/tk/report/final), last accessed 31 December 2005.

\(^6\) WIPO International Bureau, above n 1, 2.
from generation to generation, and thus remain largely undocumented. They are also dynamic in the sense that they are current, possess everyday relevance, and are subject to processes of constant evolution. Accordingly, existing intellectual property mechanisms, which are intended to function in a trade-related, private protectionist context, do not fully respond to the essential nature of traditional knowledge, folklore and cultural heritage.

Whilst a number of descriptions for traditional knowledge, folklore and cultural heritage have been put forward, there are no widely acceptable definitions.\(^7\) This is as much a reflection of the broad scope of what may be encompassed within their bounds, as well uncertainty what might constitute “protection” and its purpose. It has been suggested, for example, that the term “folklore” is quite inappropriate in this context since it presumes matter of a historical nature only, and suggests that “expressions of culture”, being current self-expressions of living functional traditions, should be used instead.\(^8\) What seems a common consensus is that “protection” in the narrow intellectual property sense does not address the needs or scope of these concepts, even allowing for differences in their possible definitions.

Many developing countries, holders of traditional knowledge, expressions of culture and cultural heritage, and non-governmental and civil society organisations are advocating for greater protection to be made available. Within both WTO and WIPO extended debate has taken place on the nature of the appropriate system to protect traditional knowledge, expressions of culture.

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\(^7\) WIPO currently uses the term “traditional knowledge” to refer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment.

and cultural heritage within the international sphere. Central to the debate is the question of whether they can be protected under the current multilateral intellectual property system, and, if not, what *sui generis* system should be adopted.

Some commentators argue that the very attributes of traditional knowledge prevent it from being included into the traditional IP system. Traditional knowledge seeking protection under conventional copyright provisions runs afoul of the requirement for identification and attribution. In the area of patent protection, traditional knowledge does not meet the patentability requirements of novelty, inventive step, and industrial application. Some countries have decided that the existing intellectual property framework is inadequate to protect traditional knowledge, and are pursuing their own *sui generis* systems of protection. However, the calls for the creation of an international *sui generis* system are increasing.

The challenge has been, and continues to be, the most appropriate and efficient means by which to protect in the international context, instead of just local laws constructed to suit local circumstances. Since the local populations or their representatives often act as both custodians and exponents of the traditional knowledge and expressions of culture, they do not constitute the main threat to the preservation of the traditional knowledge and culture. The main threat comes from outside the community.

The above-mentioned WIPO fact-finding missions on traditional knowledge and the subsequent consultative fora devised a number of observations and recommendations which were addressed.

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to the states themselves, to the international community, and to the international organisations with an interest in the protection of traditional knowledge. The missions and consultative fora recommended that WIPO, UNESCO and the other international organizations should work towards the creation of a sui generis international convention for the protection of expressions folklore. Most of the fora also commented on the WIPO model law of 1982 as a relevant basis for national laws on the protection of traditional knowledge.\textsuperscript{11}

The mission which examined traditional knowledge in Arab countries and the subsequent consultative forum made a number of pertinent observations and recommendations. They observed that: \textsuperscript{12}

- Arab countries are rich with one of the most precious cultural and civilizational heritage in the world, which constitutes an important pillar for human civilization and an integral part of the world patrimony;
- Arab folklore (Arab popular heritage) is a strong means of bringing together the Arab peoples. However, this common aspect does not exclude nor diminish the importance of the local variations specific to each people;
- Arab folklore (Arab popular heritage) and traditional knowledge are subject to various dangers, including negligence, disappearance, piracy, mutilation and illegal exploitation; therefore, there is a need for the provision of legal protection at national, regional and international levels;
- currently, there is no legal framework available for the protection of expressions of Arab folklore at either national and international levels.

\textsuperscript{11} Namely, the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore from Illegal Exploitation and Other Prejudicial Actions, 1982.
\textsuperscript{12} WIPO, above n 4, Part III, Annex 5, 83-4.
The mission and forum recommended to the Arab countries that they should:

- create specialized institutions or centers as a national and cultural necessity for the collection, classification, conservation, documentation and dissemination of folklore (Arab popular heritage) and develop a specialized environment;
- work together on their national legislation for the provision of measures aiming at the protection of expressions of folklore;
- (each) prepare an open list of expressions of folklore and traditional knowledge the preservation and protection of which are considered necessary;
- rely, when reviewing and amending their legislation, on the WIPO model provisions set, as adapted to recent developments in the field.\(^\text{13}\)

Similarly, the mission and forum recommended to international organizations, that WIPO, UNESCO and the specialized international organizations intensify their efforts in order to provide greater assistance to Arab countries in particular and developing countries in general by:

- providing training and technical and legal cooperation to Arab countries;
- elaborating an international convention on the protection of expressions of folklore;
- establishing a standing committee on expressions of folklore and traditional knowledge in both WIPO and UNESCO.\(^\text{14}\)

Since the WIPO missions, little progress has been achieved in respect of the key issue of the creation and universal acceptance of a *sui generis* international protection convention. However WIPO has established a standing committee, as recommended above, and the GCC states have

\(^\text{13}\) Ibid, 84.
\(^\text{14}\) Ibid.
taken some steps towards the creation of national protection schemes and the identification, documentation and preservation of their cultural heritages.

All GCC states are very sensitive to and very proud of their respective rich cultural heritages, and are mindful of need, particularly in recent years, to protect them. The states have long had in place laws for the protection of artifacts, but these relate to the physical protection of these objects, their preservation, and the prevention of their illicit export, as distinct from establishing an intellectual property rights protection regime. The states have also ratified the UNESCO Convention on the Protection of the World Cultural and Natural Heritage (1972). Oman and the UAE have further ratified in 2005 the UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage (2003). Oman has gone a step further, and listed a number of sites on the World Heritage List.  

Oman has been pre-eminent amongst the GCC states in its efforts to protect and preserve its cultural heritage. Its primary law for the protection of its cultural heritage, the National Heritage Protection Law, was promulgated in 1976. The law’s principal objectives are the physical preservation of the integrity of cultural property of the state and the prohibition or restriction of export of any property or object of historical significance. The law encompasses all kinds of monuments as well as “chattels of cultural properties.” Oman has also taken steps to document and preserve some aspect of its traditional knowledge and cultural heritage, as illustrated by these few examples:

15 Namely, the Archaeological Sites of Bat, Al-Khutm and Al-Ayn (1988), Bahla Fort (1987), Land of Frankincense in Dhofar governorate in the south of the country (2000), and the Arabian Oryx Sanctuary (1994).
17 “Chattels of cultural property” are defined as including archaeological fossils, rare archetypes of flora and fauna, fragments of manuscripts, ancient books, documents and printed matter of special historical, artistic, scientific or literary value or interest, as well as traditional style furniture items, painted earthenware, musical instruments, jewellery, precious stones and weapons.
the Public Authority for Craft Industries, which is responsible for preserving every aspect of Oman's traditional craft industries, is undertaking a census of all Omani crafts, including geographical sources and spread, tools and machinery used, social, cultural status of the craftsman and the product, significance, and traditional Arabic names. The crafts include traditional arts and crafts that include indigo dyeing, silverwork, pottery, weaving and textiles, fragrance manufacture, copper work and sweet-making;

- the Oman Center for Traditional Music, established in 1983 to document, conserve and promote traditional Omani music has documented and digitized since its inception more than 80% of Oman’s musical traditions including photographs, and audiovisual and sound recordings;

- Omani Traditional Medicine Clinics, established in 1988 with the aim of conserving Omani national heritage in the field of traditional medicine. Traditional healers from different regions of Oman provide to the public free-of-cost medical treatment based on plant medicines. Each healer keeps his specialized medicinal knowledge secret.

More recently, some of the GCC states have been examining the possibility of introducing traditional knowledge protection laws on either a national or regional basis. One particular model which has gained favourable attention in Bahrain, Oman and the UAE, is the Panamanian Traditional Knowledge Law. The objective of the Panamanian law is to protect the collective intellectual property rights and traditional knowledge of indigenous communities through the registration, promotion, commercialization and marketing of their rights, and by the protection of the authenticity of crafts and other traditional expressions. The scope of the protection is very wide and encompasses customs, traditions, beliefs, spirituality, and folkloric and traditional

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18 Established in March 2003 by Royal Decree No. 24/2003 as a department with ministerial status.
19 Panama, Law No. 20 of 26 June 2000, on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous peoples for the Protection and Defence of their cultural Identity and Their Traditional Knowledge, and Enacting Other Provisions; and the corresponding Executive Decree No. 12 of 20 March 2003.
20 See Verma, above n 10, 794.
expressions through inventions, designs and innovations, cultural and historical elements, music, art and traditional artistic expressions. Traditional Knowledge is protected to the extent it provides for the cultural identification of indigenous peoples, is susceptible to commercial use, and is registered. If there is no known author and no date of origin of the protectable subject-matter, it will constitute the heritage of an entire indigenous people. Authority to attribute rights is vested in Congress or the Traditional Indigenous Authority. The law also provides for exceptions to rights conferred as well as measures of enforcement. The Executive Decree of 2001 has made clear that the regime covers biodiversity-related traditional knowledge, thus giving a practical expression to Article S (j) of the Convention in Panama.21

Some of the GCC states have moved to include, to a lesser or greater degree, some formal recognition of expressions of culture and traditional knowledge in their respective copyright laws. Although this inclusion provides some form of legal standing for traditional knowledge, they still do not fully address the dilemmas of protection in an intellectual property context. On occasion, it appears that the reference was more of a token gesture by the legislative draftsmen rather than a conscious and determined effort to enhance protection.

Bahrain does not make any reference to the possible protection of folklore or expressions of cultural heritage in its copyright law or any other intellectual property law. The copyright law identifies an author as one who produces a work which can be clearly ascribed to the author by name or by other means.22 Protection is extended to authors of works of a literary, scientific, artistic and cultural nature, irrespective of the method of expression or creation.23 The nature of the works including songs and musical compositions, choreographic works, and works involving

21 Ibid.
22 Bahrain, Legislative Decree No. 10 of 1993, art 1
23 Ibid, art 2(1).
compilations and classifications of folk heritage items. However, while compilations may be protected, the subject of the compilations, namely the folk heritage items themselves, are not protected. There is no other reference in the rest of the law, either direct or by inference, to expressions of traditional knowledge or cultural heritage or their possible protection.

Kuwait makes even less reference to the protection of traditional knowledge or expressions of cultural heritage in its laws. Folklore or similar is not included in its statement of works to which protection is extended. Added almost as an afterthought, at the very end of its copyright law is a declaration of a moral position without any accompanying practical means of affording any form of protection. It provides that “the national heritage of Kuwait society is a public property of the State. And the state, acting through the Ministry of Information, has the right to exercise the author’s literary and financial rights for him.” Again, as with the Bahraini law, it requires attribution to an individual for protection to be able to have effect, or for the states to act on the individual’s behalf to protect that individual’s private rights.

Similarly, the UAE copyright law contains a definition of folklore as “every expression of people’s heritage, oral, musical, dynamic, or tangible in distinct elements which reflects the artistic traditional inheritance, developed or endured in the State and which cannot be attributed to an author.” Having done so, it makes no further reference to the protection of folklore or any other form of cultural heritage. Folklore is not included amongst the range of works or activities entitled to protection. Nor is there any provision for the state to take any form of proprietary right or responsibility in respect of the protection of national folklore.

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24 Ibid, art 2 (2).
25 Kuwait, Law No. 64 of 1999, art 41.
Saudi Arabia goes a little further than Bahrain, Kuwait and the UAE, and adopts a slightly stronger position on the protection of folklore. The copyright law acknowledges folklore as:

“all literary, artistic or scientific works which are assumed to have been created on Saudi territory and transmitted from one generation to the next and constitute part of the traditional Saudi cultural and artistic tradition.”

It provides that the national folklore shall be considered the public property of the state, the relevant copyrights for which are exercised by the Ministry of Information. As an initiative to preserve the internal integrity of, and to maintain some control over, works deemed to be Saudi folklore, the importation or distribution of copies of classified works of folklore or copies of translations or reproductions of folklore produced outside the Kingdom is prohibited, except with the permission of the Ministry.

Oman makes a considerably stronger statement of intention on protection. The Omani copyright law recognizes folklore as being included in those works to which the protection of the law extends. It defines folklore as:

“Literary, artistic or scientific works innovated by popular groups in the Sultanate expressing their cultural identity, which are transferred from one generation to another and represent a fundamental element in the traditional national popular heritage. The competent authority shall exercise the author’s rights in works of folklore to object to any mutilation, modification or unlawful commercial exploitation.”

28 Ibid., art. 7(1).
29 Ibid., art. 7(2).
30 Oman Royal Decree No. 37/2000, Article 1: the “competent authority” in this context is the Minister of Commerce and Industry, with whom most intellectual property protection responsibility resides, notwithstanding the existence of the Ministry of Heritage and Culture and an independent Public Authority for Craft Industries.
The protection of the law extends to cultural works in general, regardless of the value, method of expression or objective of such works. 31

Qatar goes even further than Oman, insofar as its copyright law makes particular detailed reference to the position of national folklore, and gives illustration of the range of folkloric expressions which may be protected. National folklore is defined as:

"Any expression which consists of distinctive elements of the traditional artistic heritage, originating or developed in the State of Qatar and reflects its artistic heritage, shall be considered as national folklore, including in particular the following expressions:
(1) oral expressions such as tales, popular poetry and riddles;
(2) musical expressions such as popular songs accompanied by music;
(3) motion expressions such as popular dances, plays, artistic forms and rituals, whether or not incorporated into material form;
(4) tangible expressions such as:
(a) products or popular art particularly drawings with lines and colors, engravings, sculptures, ceramics, pottery, woodwork, mosaic, metal, jewelry, hand-woven bags, knitting, carpets, textiles, (b) musical instruments; and
(c) architectural forms." 32

The law declares that national folklore is the public property of the State, and the State, as represented by the Minister, is charged with the responsibility of protecting the national folklore by all legal means and methods. It is empowered to exercise the author's rights – in fact, to act as the author of works of folklore with respect to any acts of distortion, alteration or commercial utilization. 33

The problem with all the above laws, to the extent that they provide some protection for traditional knowledge and expressions of culture, is that they still operate with the paradigm of

31 Ibid, art 2.
32 Qatar, Law No. 7 of 2002, art 1.
33 Ibid, art 32.
the global convention of copyright as a private economic right. Notwithstanding any recognition of the particular character of traditional knowledge or expressions of culture, the laws are still based on the premise that ownership can be attributed to person, a discrete group, or legal entity. The laws extend protection to an author rather than to an item, work or performance itself; hence works which cannot be clearly attributed to an author are not protected.

Furthermore, the bilateral agreements to which Bahrain and Oman have committed act to restrict what little provision may exist in the national copyright laws to extend protection to traditional knowledge. Both the Bahrain and Oman FTAs include in their definitions of performers, “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore” [emphasis added]. But, at the same time, the FTAs create two problems: firstly, in the context of their provisions on copyright, “performance” means a performance fixed in a phonogram unless otherwise specified. The rights, being private rights, must belong to the individual, and do not cover a situation where individual ownership cannot be attributed. Secondly, both FTAs restate the position of TRIPS Article 70.3, to the effect that neither party shall be required to restore protection to subject matter that has fallen into the public domain in its territory on the date that the FTA comes into force. This exclusion applies equally to all traditional knowledge, including knowledge relating to genetic material and the pharmacological properties of plants and their medicinal applications.

34 Bahrain FTA, art 14.6.5; Oman FTA, art 15.6.5
7.3 Patents, Biodiversity and Access to Genetic Resources

The issue of protection of traditional knowledge arose in WTO in 1999 in the context of the mandated review of Article 27(3)(b) of TRIPS. Article 27(3)(b) requires Members to protect plant varieties either by a patents or effective *sui generis* system, or any combination thereof.

Developing countries have been seeking clarification of the exclusion provisions of TRIPS Article 27(3)(b). They have argued that life forms should be excluded from patentability, that information relating to the origins of a biological invention should become part of the patent application process and that the principle of prior informed consent should be incorporated into TRIPS. In particular, they have expressed concern with the granting of patents and other intellectual property rights over traditional knowledge to parties other than the indigenous peoples/communities who own and control them. They are further concerned that their traditional knowledge is being exploited without their prior knowledge or authorization and without a sharing of the benefits that accrue from such use.

The strong position taken by the developing countries on the protection of traditional knowledge, led to its inclusion in the Doha Ministerial Declaration in November 2001. Paragraph 19 of the Declaration instructed the Council for TRIPS – as part of its review of TRIPS Articles 27.3(b) and 71.1 – to consider the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore. The Declaration instructed the Council:

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35 See Verma, above n 10, 780.
In pursuing its work programme including under the review of Article 27(3)(b), the review of the implementation of the TRIPS Agreement under Article 71.1, to 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.36

The Convention on Biological Diversity, which was agreed in 1992, seeks to promote the conservation of biodiversity and the equitable sharing of benefits arising out of the utilisation of genetic resources.37 It asserts the sovereign rights of nations over their national resources, and their right to determine access according to national legislation with the aim of facilitating the sustainable use of these resources, promoting access and their common use. It notes that access to genetic resources should be on the basis of prior informed consent, and on mutually agreed terms that provide fair and equitable sharing of the results of R&D and the benefits of commercialisation and utilisation.38

The Convention calls for the fair and equitable sharing of the benefits derived from the use of traditional knowledge, and states that access and transfer of genetic resources should be consistent with the “adequate and effective protection of intellectual property rights.”39 It notes that patents and other areas of intellectual property may have an influence on implementation of the Convention, and governments should co-operate (subject to national and international law) in

36 WTO Ministerial Declaration, Doha, November 2001, para. 18; available at www.wto.org/english/thewto_e/minist_e/min01_e/minedcl_e.htm
38 Ibid, art 15.
39 Article 8j of the CDB provides that “Members should 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.”
order to ensure that such rights are supportive of and do not run counter to the Convention’s objectives.40

Since the Doha Ministerial Meeting, the Council for TRIPS has examined the relationship between the provisions of the TRIPS and the Convention and the protection of traditional knowledge under the review of TRIPS Article 27(3)(b). Discussions on these issues have focused on whether TRIPS should be amended in order to require applicants to disclose the country of origin and source of any genetic material/traditional knowledge used either in the research and development process and/or directly in the invention they seek to patent.

The countries which endorse the formalization of a linkage between TRIPS and the Convention are generally countries which enjoy many of the genetic resources and associated traditional knowledge which have raised concerns over the misappropriation of biopiracy of genetic resources and knowledge, for use in patented inventions. These countries, led by India, Peru and Brazil, are overwhelmingly developing country WTO members. They point to high-profile cases, such as the neem tree, basmati rice and ayahuasca juice, as evidence for the need for an internationally binding, enforceable disclosure requirement that would oblige patent applicants to disclose the source of the genetic materials and associated traditional knowledge used in the invention claimed; evidence of prior informed consent with the original holders of the resource or knowledge; and evidence of a benefit sharing agreement with the original holders.

They further argue that such compliance would be consistent with the objectives of the Convention as well as with Article 7 of TRIPS, which provides that the protection of intellectual property rights should contribute to the promotion of technological innovation ... to the mutual

40 Convention on Biological Diversity, above n 37, art 1.
advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

The industrialized countries have argued that WTO is not the right place to negotiate a full-fledged system of protection for a complex, and as yet undefined, subject-matter such as traditional knowledge or folklore. They have suggested that WIPO, rather than WTO, should first clarify conceptual issues of traditional knowledge, address the issue of legal protection of traditional knowledge, examine the possible options and prepare model national legislation. Only at that point should WTO take responsibility for the matter. The major users of genetic resources in patent inventions, which are overwhelmingly developed countries with significant research and development interests, have argued that a disclosure requirement could place unnecessary burdens on industry that could harm development.

The developing countries also argue that the present intellectual property regime is inadequate to address their concerns on the protection of traditional knowledge. They propose that TRIPS be suitably amended or provide a mechanism to require an applicant for a patent on biological material or traditional knowledge to disclose the source and country of origin of the biological resources and traditional knowledge used in the invention as a condition for the granting of a patent. They further propose that, at the same time, the applicant should be required to provide evidence of prior informed consent and fair and equitable benefit-sharing under the relevant national regime.

41 See WTO, "TRIPS Article 27.3(b) and related issues: Background and the Current Situation", at http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm
42 Ibid.
WIPO's deliberations through its Intergovernmental Committee, established as a result of its 1999 fact-finding missions, has shown just how polarized and entrenched are the opposing views on the need, scope and nature of legal protection of traditional knowledge and its format. Despite their strong, polarized positions on these issues, the countries have agreed that WIPO should produce the elements for a model *sui generis* system of protection for traditional knowledge, though the developed countries are of the view that any legally binding international *sui generis* system at this stage is premature and unnecessary and that attempts should first be made at the national level to determine its feasibility. Developing countries, on the other hand, are seeking to expeditious work to be undertaken on this.

While some developed countries have shown a degree of willingness to address these issues either in the WTO or in WIPO, others including the United States and Japan remain firmly opposed. They do not see any conflict between the Convention on Biological Diversity and TRIPS, and argue that patent disclosure requirements would be ineffective with respect to prior informed consent and access to benefit-sharing goals, as well as adding a burden to the patent system.

The present proposals before the Council of TRIPS include:

- a group represented by Brazil and India and including Bolivia, Colombia, Cuba, Dominican Republic, Ecuador, Peru, Thailand, and supported by the African group and some other developing countries, seek amendments to TRIPS so that patent applications are required to disclose the country of origin of genetic resources and traditional

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43 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

44 See Verma, above n 10, 779.
knowledge used in the inventions, evidence that they received prior informed consent, and evidence of “fair and equitable” benefit sharing.45

- Switzerland has proposed an amendment to the regulations of WIPO’s Patent Cooperation Treaty so that domestic laws may require inventors to disclose the source of genetic resources and traditional knowledge when they apply for patents. Failure to meet the requirement could delay the grant of a patent or, could entail a granted patent being invalidated if it contains fraudulent intent.46

- The European Union’s position includes a proposal to examine a requirement that all patent applicants disclose the source or origin of genetic material, with legal consequences of not meeting this requirement lying outside the scope of patent law.47

- The United States has restated its earlier support for a “contract-based” approach. The United States also argues that the additional requirements proposed by the developing countries would be a burden on the patents system and would undermine technological development incentives. Where patents have been granted erroneously, the United States suggests that states should focus on remedies, including the use of organised databases, information on patentability criteria and post-grant opposition or re-examination systems, as an alternative to litigation.48

In October 2005, India proposed that the Hong Kong Ministerial Declaration include specific provision authorizing the launch of negotiations to prepare an amendment to TRIPS to make disclosure requirements mandatory for patent applicants, as well as details of prior informed

45 See WTO, above n 41
46 Ibid.
47 Ibid.
48 Ibid.
consent and benefit-sharing agreements.\textsuperscript{49} The proposal received strong support from many developing countries, but raised equally strong objection from the United States, Japan and Korea. Meanwhile, in November the Council of TRIPS proposed that the Hong Kong Ministerial Declaration include authorization of continued negotiations on the Convention-TRIPS relationship.\textsuperscript{50}

Partly, no doubt, as a result of these strongly held and widely diverging opinions, the Hong Kong Ministerial Declaration simply took note of the work, and urged WTO members to continue talks under the auspices of the WTO Director-General.\textsuperscript{51}

In view of the fundamental differences in the international fora over the issue of protection traditional knowledge and genetic resources and the form that the protection, if any, should take, and in light of the low level of patent activity in the Gulf region, it is perhaps not surprising that the GCC states have not taken legislative steps to protect their biodiversity and genetic resources in the intellectual property context. Also contributing to this status is the fact that patent activity amongst the GCC states involving indigenous genetic resources is virtually non-existent; most patent activity originating in the Gulf region having arisen from the oil and gas industry. Accordingly, the patent laws or plant protection laws of the GCC states generally follow a conventional format, and show a common WIPO-sourced heritage.\textsuperscript{52}

However, the Saudi patent law, which incorporates specific reference to protection for new plant varieties, either by design or good fortune, provides some exemptions for farmers against the


\textsuperscript{50} Ibid.


\textsuperscript{52} See Chapter 3.7 above for a discussion on WIPO’s contribution to the GCC states’ intellectual property laws.
exploitation of crop genetic resources under the guise of breeder’s rights. Under the good faith usage provisions of the patent law, a third party who exploits a plant variety or makes serious arrangements to do so prior to the filing of a plant variety patent, or the related priority date, shall be entitled – despite the issuance of a patent – to continue to perform those acts without expanding them.\textsuperscript{53}

A Bahraini proposed plant varieties protection law, which has been in local circulation in draft form for a few years, proposes to exempt from the scope of protection propagating material which is the product of the harvest obtained by farmers from their own holdings.\textsuperscript{54} The Omani plant variety law restricts breeder’s rights to Omani nationals and expatriates residing in Oman, and subjects of countries that provide in their respective legislation the same level protection for Omani citizens, provided that such subjects have a legally resident agent in Oman.\textsuperscript{55}

However, these fledgling efforts are being undermined by external pressures aimed at reinforcing their TRIPS-plus protective environment. The Bahrain and Oman FTAs limit the grounds on which a patent may be revoked to those that would have justified a refusal to grant a patent, that is, the application does not satisfy the tests of being new (or a new use), involving an inventive step and being capable of industrial application.\textsuperscript{56} The FTAs also provide that fraud, misrepresentation, or inequitable conduct may be the basis for revoking a patent or holding unenforceable. However, opposition to the grant of a patent may not proceed until after the patent has been granted. Since disclosure of any genetic material in respect of the patent is not a condition for granting the patent, its non-disclosure would not come under the classification of either fraud or misrepresentation, and would not be grounds for revoking a patent.

\textsuperscript{54} Bahrain, draft plant varieties protection law, provided by officials of the Ministry of Commerce, December 2004.
\textsuperscript{55} Oman, Royal Decree No. 92/2000, art 7.
\textsuperscript{56} Bahrain FTA, art 14.8.4; Oman FTA, art 15.8.4.
However, this is not to say that the GCC states have not made moves in this regard. As mentioned above, the states have already begun to register their traditional knowledge heritage across a number of areas. In the area of plant varieties, the UAE is the host country for the UN backed Date Palm Global Network. It has also set up the Gulf region’s first genetic plant bank to identify plants which can resist salinity. The aim of the bank is to expand cultivated areas in the country and other Gulf and Islamic states. The bank has more than 6,500 kinds of such plants that can resist salinity, gathered from all around the world. All GCC states contribute to this database.

Similarly, Oman is developing a database of all indigenous plant varieties, and has started work on a special botanical reserve to complement the database. The primary objective of the database is to lay foundations for future research, environmental protection, access, and intellectual property protection. It has already completed the database for Omani date varieties, and is currently working on wild shrubs and plants. In respect of the issue of the protection of breeder’s rights versus those of farmer’s, the plant varieties protection law provides for governmental discretion to accommodate some local knowledge, conventions and practices. However, in the absence of any registrations of new plant varieties on the register to be established under the law, the efficacy of these provisions has yet to be tested.

Indigenous plants are still in common usage for therapeutic and medicinal purposes throughout the GCC states. The following are just a few examples of plant varieties used for medicinal

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purposes in the Gulf region, and which are currently the subject of scientific research in the UAE.60

- seeds of the senna plant, *Cassia italica*, used as a laxative and for stomach pains;
- seeds of the desert squash, *Citrullus colocynthis*, highly acclaimed as a cure for diabetes;
- the bitter sap of the milkweed *Calotropis procera*, dried and used to treat tooth ache; poultices made from the leaves are applied to joints to heal rheumatism;
- *Salsola imbricata* and several *Suaeda* species, dried and powdered, used as snuff to clear the sinuses;
- poultices of the henna plant used to soothe headaches; henna is also extensively used as a hair dye and particularly to decorate hands and feet in intricate designs for special occasions such as weddings and *Eid* celebrations;
- the poisonous plant, *Rhazya stricta*, used in small quantities to settle gastric upsets;
- the fragrant herb, *Teucrium stocksiamum*, a member of the sage family, used for combating fevers;
- the seeds of garat, *Acacia nilotica*, ground to a powder, and used to dry out second degree burns.

### 7.4 Geographical Indications

The nature of the protection currently afforded to geographical indications under TRIPS, and the form and extent of future protection, is another matter of considerable ongoing contention within

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the WTO and other international fora. The original negotiations on the geographical indications provisions of TRIPS were among the most difficult to resolve, because of the fundamental differences between the two main proponents of the agreement, namely the United States and the European Union. Accordingly, in recognition of the compromises that had to be made to finalise the negotiations, TRIPS has created an artificial distinction by providing a basic standard of protection for all geographical indications, and a higher standard specifically for those relating to wines and spirits.

Two issues have been debated in the TRIPS Council under the Doha mandate, namely the extension of the higher level of protection of TRIPS Article 23 beyond wines and spirits, and the creation of a multilateral register for wines and spirits.

In respect of the issue of extending the levels of protection beyond wines and spirits to other products, some WTO members are seeking to initiate negotiations to amend TRIPS, while other members oppose the move. The debate has included the question of whether the Doha Declaration provides a mandate for negotiations.\(^{61}\)

Those advocating extension argue that the higher level of protection enables them to improve marketing their products by differentiating them more effectively from their competitors. The latest proposal from the European Union calls for TRIPS to be amended so that all products would be eligible for the higher level of protection of Article 23 and for inclusion on the multilateral registration system currently being negotiated for wines and spirits. The European

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\(^{61}\) Paragraph 18 of the Doha Declaration notes that the Council of TRIPS will handle work on extension under the Declaration's paragraph 12 on implementation issues. Paragraph 12 states “negotiations on outstanding implementation issues shall be an integral part” of the Doha work programme, and that implementation issues “shall be addressed as a matter of priority by the relevant WTO bodies ...” Many developing and European countries argue that the outstanding implementation issues are already part of the negotiation and its package of results (the “single undertaking”). Others argue that these issues can only become negotiating subjects if the Trade Negotiations Committee decides to include them in the talks.
Union is not proposing to make the proposal retrospective, and argues that it would not affect current trademarks. However, it is still seeking protection for a large number of products whose names have so far not been protected, under a “claw-back” provision.

Those opposing extension, including the United States, argue that the existing level of protection, under TRIPS Article 22, is adequate. They argue that extending the additional protection to other products would impose extra financial and administrative burdens on all WTO members, and most heavily on developing countries, and that these burdens would outweigh any trade benefit.

WTO Members remain deeply divided on the issue, with no agreement in sight.

The issue of the introduction of a multilateral system of notification and registration of wines and spirits register is being treated separately from the question of extending the higher level of protection — although some countries consider the two to be intimately linked. The debate on the multilateral registration system began in 1997 under TRIPS Article 23.4 and continues under the mandate provided by the Doha Agenda (paragraph 18 of the Doha Declaration). The Doha Declaration’s deadline for completing the negotiations was the Cancun Ministerial Conference of 2003. That deadline was not achieved, and negotiations continued into the recent Hong Kong Ministerial Conference. Three proposals have been submitted for discussion — two opposing proposals from the European Union and from the US-led group of countries, and a compromise proposal from Hong Kong.62

The European Union’s proposal, circulated June 2005, calls for TRIPS to be amended by the addition of an annexure to TRIPS Article 23.4. It advocates the establishment of a registration system that would be mandatory upon all WTO members, irrespective of whether they have any geographical indications listed on the register. Registration would require a geographical indication to be protected in other WTO members — except in a country that has lodged a reservation within a specified period. A reservation would be limited to the grounds that the term has become generic or that it does not fit the definition of a geographical indication. If it does not make a reservation, a country would not be able to refuse protection on these grounds after the term has been registered.

A contrary joint proposal has been offered by a group of countries led by the United States, and including Australia. This proposal advocates the creation of a voluntary system where notified geographical indications would be registered in a database. Those governments choosing to participate in the system would be required to consult the database when taking decisions on protection in their own countries. Non-participating members would be “encouraged” but “not obliged” to consult the database.

Hong Kong has proposed a compromise solution, whereby participation in the system would be voluntary. Members would be free to participate and notify geographical indications protected in their territories, and the obligation to give legal effect to registrations under the system would only be binding upon those members choosing to participate in the system.

The Ministerial Declaration of the recent WTO Hong Kong Conference reveals strikingly the extent of the divergence of views on the geographical indications issue, and the lack of progress over the last decade since TRIPS appeared and the five years since the Doha Declaration. The
Hong Kong Ministerial has been unable to state anything more substantive in relation to the geographical indications issue than to note of the report of the Chairman of the Special Session of the Council for TRIPS in setting out the progress in the negotiations, and agreeing to intensify these negotiations in order to complete them within the overall time-frame for the conclusion of the negotiations foreseen in the Doha Declaration. The Chairman’s report was more direct. It reported that:

"Despite the active engagement of delegations and the detailed discussion of the proposals, it is a matter of concern that the level of convergence in these negotiations has not significantly expanded in the period since the last Ministerial Conference."

The Chairman’s report rather pessimistically continues that further work is also required on a range of other points, including on questions of costs and administrative burdens, and mechanisms to be established, but that it would be difficult to make major headway on these issues without greater convergence on the two key issues of the multilateral register and the extension of protection.

Protection of geographical indications in the context of the abovementioned debates on an extension of protection and a multilateral register creates somewhat of a conundrum for the GCC states. While they may well give limited support to a proposal for a multilateral register, they would have considerable difficulty in endorsing a proposal which advocated an extension of protection beyond wines and spirits if such proposal presupposed any degree of commitment to also protecting wines and spirits. The states are also unlikely to be supportive of the proposal for

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a register which includes wine and spirits because of the legal and bureaucratic issues domestically. On the other hand, the issue of broadening the scope of geographical indications may be attractive since the states realize that they themselves have products which are generic to the own territories and to the Gulf region and which may be worthy of protection. These products include certain blends and brews of coffee, traditional Arabic clothing, ceremonial weapons, woven products and methods, sweets, perfumes and fragrant oils, to mention just a few. It could also be argued that domestically the GCC states provide a form of protection to geographical indications for wines and spirits and pork derivative products by not allowing any trademarks directly related to these products to be registered and/or protected – irrespective of whether those marks originate from the original owners or from foreign or domestic competitors or counterfeiters.

The GCC states would perceive that the need for a formalised system of protection does not arise as much domestically, as it does abroad. Domestic protection can call upon a combination of custom and cultural traditions, as well as provisions of domestic trademark laws and commercial conduct codes. However, adequate protection overseas for domestic geographical indications will require protection at home as well as local protection for the other country’s geographical indications.

As discussed earlier, only two states, namely Bahrain and Oman, have specific geographical indications laws in place, while the other states incorporate some notional reference or slightly stronger provision within their trademark laws.65 The Bahraini geographical indications law requires a geographical indication to be protected in its country of origin to obtain local

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65 See discussion on the geographical indications provisions of TRIPS and the GCC states in Chapter 4.6 earlier.
To enable local protection to occur, it stipulates that the Ministry [of Commerce and Industry] shall maintain a register of geographical indications. The Omani geographical indications law and the geographical indications provisions of Qatar’s trademark law do not require registration as a precondition for local protection, notwithstanding the fact that they both also provide for the existence of a register. The Omani law also restricts protection to those geographical indications that remain protected or which are still used in their country of origin. According to recent advice none of these three states have yet received any applications for registration of a geographical indication, although officials of the states have suggested local goods which they consider could qualify for protection, and which they consider should be protected under local laws. The unresolved question is which particular laws might most appropriately and effectively provide protection, that is, whether they should be protected under trademark laws or geographical indications laws. Just a few of the products that have been suggested to the author as suitable for some form of protection include:

- a number of mineral/spring waters from the different states;
- karwa and other local and regional blends of Arabic coffee and cardamon;
- perfumes, particularly those which utilize frankincence, myrrh and other indigenous plant-derivatives;
- halwa, a date-based sweet traditionally and still customarily served with karwa to visitors and as a mark of Gulf hospitality;
- other date-based food and handicraft/artisan products;
- honey;
- pearls and pearl-shell products from the Persian Gulf region.

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66 Bahrain, Federal Law No. 16 of 2004, art 3.
68 Interviews conducted by the author with officials in the Bahrain, Ministry of Commerce, Oman Ministry of Commerce and Industry, and Qatar Ministry of Economy and Trade, December 2004.
However, these products do not enjoy an international market warranting a high degree of protection of their geographical indications elements. What is still unclear to the GCC states is whether commitment to any of the three major proposals expounded will lead to protection to local geographical indications in foreign markets, or whether it will be primarily geared to protecting foreign geographical indications in domestic markets. A number of foreign geographical indications are already excluded from protection in the GCC on moral or religious grounds, and would continue to be so.

The recent movement by the GCC states towards closer trade relationships with the United States through their bilateral agreements, would militate against the generation of benefits by their adoption of an enhanced protection regime for geographical indications. In the absence of any clear and identifiable benefit, it is most unlikely that the states would commit to an enhanced protection regime that extends beyond the current status quo. But the states would also hold that a more compelling reason for them to maintain the status quo is the inability of the major players in the WTO to agree amongst themselves as to the nature that an enhanced level of protection, if any, should take. The states would see little need or point to travel any further in respect of protection for geographical indications in an intellectual property protection context.
7.5 Concluding Remarks

Despite the involvement of several inter-governmental bodies working on the protection of traditional knowledge and an impressive body of literature and documents produced by international, national and non-governmental bodies, the progress achieved in this respect is not very remarkable so far.\(^{69}\) In fact, the major achievement to date has been the provision of a sustained and active debate over a number of years, which has enabled the developing countries to ensure that the issues surrounding the appropriate protection of traditional knowledge, biodiversity and access to genetic resources continue to maintain a high profile and undergo intense public scrutiny.

As they have done previously with other areas of intellectual property, the GCC states are likely to stand back and to observe the negotiations and positioning of the major representatives from both the industrialised nations and the developing countries. Since the major players cannot yet resolve their diametrically opposed positions on protection in an intellectual property context, the GCC states would no doubt consider that refraining from becoming involved would be the appropriate course of action. In the meantime, the states will continue with their own national initiatives to identify, record, register and protect the abundant elements of their national cultures and heritages, until the appropriate mode for the protection of the intellectual property aspects of those cultures and heritages is clarified. They will no doubt become involved if the benefits to them are abundantly clear, or if their obligations in the international context require them to support a particular position of commitment.

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\(^{69}\) See Verma, above n 10, 804-5.