

Mutual Recognition Agreements and the Protection of Traditional Knowledge

by Professor Paul Kuruk¹

1. Introduction

The legal protection of traditional knowledge (TK) has emerged as an issue of global importance propelled in large part by the increased interest of biotechnology companies in the genetic resources of developing countries. In recent years, the international community has intensified its search for effective remedial measures to counter perceived negative effects on indigenous communities arising from the widespread commercial exploitation of traditional knowledge particularly in the pharmaceutical, agriculture industries, entertainment and retail market sectors.² Indeed, indigenous groups have been unrelenting in their complaints about inadequate compensation, loss of community rights, misrepresentation of products and practices, and the unauthorised public disclosure and use of secret knowledge, images and other sensitive information pertaining to indigenous communities.³

Significant improvements in the regulatory environment would provide indigenous groups greater control over the use of traditional knowledge and ensure access to traditional knowledge on mutually acceptable terms that respect indigenous culture. This paper provides an overview of the current international, regional and national instruments on traditional knowledge, noting that, for the most part, they incorporate domestic measures and are of limited use in tackling cases of misappropriation that have international dimensions. After a review of the principle of reciprocity as a basis for recognising foreign rights, the paper examines recent arguments at the WTO for the protection of traditional knowledge under notions of reciprocity through a revision of the TRIPs Agreement to incorporate a disclosure requirement in applications for patents derived from traditional knowledge.

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² Within the pharmaceutical industry, traditional people's knowledge and experiences of the medicinal properties of plants have played a crucial role in the development of drugs. Approximately 75 per cent of pharmaceutical products derived from plants in one year were reportedly discovered through the study of their traditional medical uses. KERRY ten KATE & SARAH A. LAIRD, *THE COMMERCIAL USE OF BIODIVERSITY, ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING* 61 (1999).

³ See generally, Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regime: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States* 48 *AMERICAN. UNIV. L. REV.* 769, 770-775 (1999).

In the final section, the paper recommends the use of mutual recognition agreements, as a special application of the reciprocity principle, to overcome some of the enforcement difficulties noted. The paper describes the use of mutual recognition agreements in trade generally and discusses their potential use as a suitable alternative in the absence of a binding international instrument for the protection of traditional knowledge. The conclusion reached in the paper is that while mutual recognition agreements do not apply to non-parties and thus will have no effect in countries that refuse to subscribe to them, the common principles such agreements reflect could form the basis for and influence quite positively the development of a future international instrument for the protection of traditional knowledge.

2. Legal Regulation of Traditional Knowledge

The current regulatory framework on traditional knowledge comprises various instruments dealing with folklore, cultural heritage, biodiversity and human rights. With respect to folklore, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organisation (WIPO) have prepared two international instruments as guidelines in the development of national legislation on folklore: the Tunis Model Copyright Law adopted in 1976 and the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions adopted in 1982. In 1989, the General Conference of UNESCO adopted a Recommendation on the Safeguarding of Traditional Culture and Folklore and called upon its member countries to take the necessary legislative steps to give effect to various identification, conservation, preservation, dissemination, protection and international cooperation measures outlined therein. Subsequently, WIPO's Performances and Phonograms Treaty⁴ of 1996 enhanced the protection of folklore by extending neighboring rights to "actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works *or expressions of folklore*."⁵

In relation to cultural heritage, UNESCO's Illicit Trade Convention of 1970 protects cultural property against illicit import, export and transfer of ownership, while the World Heritage Convention of 1972 encourages international cooperation for the protection of the cultural and natural heritage of mankind through the development of a list of properties considered to have "outstanding universal value." More recently, UNESCO adopted the Convention for the Safeguarding of Intangible Cultural Heritage⁶ of 2003 to remedy a perceived marginalisation of intangible cultural heritage under the World Heritage Convention.

The Convention on Biological Diversity of 1992 (CBD) adopted under the auspices of the United Nations Environmental Program (UNEP) requires signatory countries to "*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*"⁷ Like the CBD, the International Treaty on Plant Genetic Resources for Food and Agriculture adopted by the Food and Agriculture Organization in November 2001 (FAO Treaty) is concerned with the conservation and sustainable use of plant genetic resources for food and agriculture and calls on signatories to support farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources. The FAO Treaty establishes a multilateral system both to facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilisation of these resources.

Human rights instruments, including the 1948 Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights guarantee fundamental rights relating to, among other dimensions, culture, privacy,

⁴ WIPO Performances and Phonograms Treaty, 1996.

⁵ Id. Art. 2.

⁶ Convention for the Safeguarding of Intangible Cultural Heritage, 2003.

⁷ Convention on Biological Diversity, Art. 8(j).

property and self-determination. Their provisions are relevant to the claims of indigenous communities inasmuch as they recognise collective rights to property and could be used by indigenous groups to support their rights to control and dispose of their cultural resources, including plants that may be commercial interest.

Complementing these international instruments are laws and model laws developed by a number of regional organisations, including the Organisation of African Unity (now the African Union), the Andean Community and the South Pacific. For example, the South Pacific Model Law protects the rights of traditional owners in their traditional knowledge and expressions of culture and innovation, including their commercialisation, subject to prior informed consent and benefit-sharing. Similarly, under the African Model Law for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (Model Law) community rights in biological resources are recognised and enforced in accordance with the oral or written norms, practices and customary law of local communities. With respect to the Andean Community, Decision 486 on a Common Intellectual Property Regime obligates member states to safeguard and respect their biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities. The Decision also bars from registration as trademarks that incorporate the name of indigenous, African American, or local communities, or of such denominations, words, letters, characters, or signs as are used to distinguish their products, services or methods of processing, or that constitute an expression of their culture or practice, unless the application is filed by the community itself or with its express consent.

At the national level, traditional knowledge has been protected through a number of statutory devices. Some countries protect traditional knowledge within their copyright legislation by simply referring to expressions of folklore as a form of copyright work but without incorporating provisions that take into account the special character of folklore. A second group of countries goes further to include in their copyright legislation provisions specifically designed for folklore. Generally, the provisions are based, to differing degrees, upon the Model Provisions and relate to, *inter alia*, the scope of protection, the authorisation of utilisations of expressions of folklore, sanctions, remedies and jurisdiction. A third group of countries provide protection outside the intellectual property framework, usually under cultural heritage laws. In some of these countries, expressions of folklore are protected as part of the national heritage with special emphasis on the preservation, safeguarding and promotion of folklore rather than on legal protection. Yet another group of countries provides protection using a scheme that reflects a combination of intellectual property law and cultural heritage law. For example, under Panama's law (Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity as their Traditional Knowledge), the rights of use and commercialisation of the art, crafts and other cultural expressions based on indigenous traditions must be governed by the regulation of each indigenous community approved and registered in the National Copyright Office of the Ministry of Education.

3. The Reciprocity Principle and Traditional Knowledge

A. Issues of Enforcement

While the current regulatory framework improves the protection of aspects of traditional knowledge, it nevertheless contains significant enforcement problems. For example, the CBD regime is premised on access to genetic resources based on the prior informed consent of contracting parties and on mutually agreed terms. In this sense, the CBD is essentially contract based. To the extent that existing regional instruments have been designed to assist in conforming national legal regimes to the CBD, such regional instruments also mirror the access- and benefit-sharing provisions of the CBD and are therefore also contract based. Although contract-based solutions for the protection of traditional knowledge are not inherently bad, they may be of limited use in cases that have international rather than domestic dimensions.

To begin with, the best drafted contract is meaningless if the party who breaches the contract moves out the state where the contract was entered into and establishes residence in another country.

Without cooperation from the second country, courts in the first country cannot acquire jurisdiction over that party to make him account for the breach. Similar issues will arise if the party moved out of the first country to avoid paying a judgment issued against him for breach of an access- and benefit-sharing contract. Without cooperation from the second country, it will be impossible to enforce the judgment. Furthermore, if the party in breach of the contract were to acquire in the second country intellectual property rights related to the genetic resources obtained in the first country, again, without the second country moving cooperatively to revoke the intellectual property rights, the indigenous groups in the first country who have ownership claims in the resource in general would have no adequate legal remedies. Their only option might be to travel to the second country to initiate legal action there, but that could be an expensive strategy and full of uncertainties for the indigenous groups lacking of familiarity with foreign laws.

In all these cases, TK rights holders cannot sufficiently protect their rights if the country where the party has moved does not have laws that protect traditional knowledge. Clearly, some form of international cooperation would be critical under these circumstances for an effective protection of traditional knowledge. Matters would be improved considerably if there were in place a mechanism for recognising and enforcing the rights of foreign holders.

B. Recognition of Foreign Rights

A number of approaches have been employed in various international law instruments to recognise the rights of foreigners, including reciprocity and national treatment. National treatment, which is a principle of non-discrimination, holds that an eligible foreign right holder should enjoy the same rights as domestic nationals. It is incorporated in major international instruments, including the Paris Convention⁸ and the Berne Convention.⁹ For example, Article 2 of the Paris Convention provides: *“nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals.”* Similarly, Article 5 of the Berne Convention provides: *“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention,” and that ‘protection in the country is governed by domestic law. However, when the author is a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors’”.*

Protection of traditional knowledge on the basis of national treatment may not necessarily resolve all the enforcement problems discussed above. Assume Countries A and B have both ratified an international instrument on traditional knowledge that incorporates the principle of national treatment for foreign right holders. To the extent that Country A provides TK rights to eligible nationals under its laws, it must make the same TK rights available to eligible foreigners from Country B resident in Country A. Where Country A already has an effective national law on TK, national treatment should be an adequate basis for foreigners to protect their rights in Country A. Note, however, that what is protected in Country A is not the set of rights the foreigners from Country B would be entitled to in Country B, but rather what Country A provides to its nationals under its law. It follows, therefore, that where Country A does not extend rights to TK, the foreigners from Country B cannot claim rights under a non-existent national law and their rights in Country B are not applicable in Country A.

Of greater relevance to the protection of traditional knowledge is the reciprocity principle. “Under reciprocity or reciprocal recognition, whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle.”¹⁰ Reciprocity requires Country A to recognise the rights of foreigners from Country B resident in Country A only

⁸ Paris Convention for the Protection of Industrial Property, March 20, 1883, 21 U.S.T. 1583.

⁹ Berne Convention of September 9, 1886 for the Protection of Literary and Artistic Works, 828 U.N.T.S. 221, 249.

¹⁰ WIPO, *Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources. The International Dimension*, para. 11 WIPO/GRTKF/IC/6/6 November 30, 2003.

where Country B also recognises the rights of nationals of Country A resident in Country B. Clearly, the reciprocity principle makes sense where both countries are interested in protecting the same subject-matter. However, if Country A does not protect TK and has no interest in doing so, the reciprocity principle cannot be used for the protection of traditional knowledge unless an incentive is offered in exchange for its commitment to protect TK.

Protection of traditional knowledge on the basis of reciprocity offers the possibility of fuller protection for TK rights holders than the application of national treatment. Under the principle of reciprocity, Country A may recognise and enforce the TK rights of a person from Country B even where Country A does not recognize such rights under its domestic (national) laws. This flexibility of the reciprocity approach makes it suitable for the protection of complex subject matter such as traditional knowledge, in respect of which some states have been reluctant to adopt national legislation. Under the reciprocity principle, such states could still commit to protecting foreign traditional knowledge without making any changes in their domestic laws.

As an implicit endorsement of the reciprocity principle in the context of traditional knowledge, one of the early model intellectual property instruments advocated by both WIPO and UNESCO emphasised the need to protect folklore on the basis of reciprocity. Specifically, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions required that “[e]xpressions of folklore developed and maintained in a foreign country [be] . . . protected . . . subject to reciprocity.”¹¹ Similarly, the principle of reciprocity is incorporated in UNESCO’s Illicit Trade Convention, which enables an aggrieved signatory party to file claims based on its domestic cultural property laws in another signatory state to recover cultural property illegally removed from the complainant’s jurisdiction.¹²

C. The Reciprocity Argument at the WTO

More recently, the reciprocity principle has crept into the international discourse on traditional knowledge in the context of arguments raised by developing countries urging a review of the TRIPS Agreement. For example, in June 2003, the Africa Group at the WTO submitted a proposal on traditional knowledge to the TRIPS Council that stressed the need for international mechanisms within the framework of the TRIPS Agreement to provide, *inter alia*, for “an obligation on Members collectively and individually to prohibit, and to take measures to prevent, the misappropriation of genetic resources and traditional knowledge.”¹³ Along the same lines, a second group of countries, including Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, India, Peru, Thailand and Venezuela, demanded that the TRIPS Agreement be amended to require an applicant for a patent relating to biological materials or to traditional knowledge provide, as a condition for obtaining patent rights, the “disclosure of the source and country of origin of the biological resource and traditional knowledge used in the invention.”¹⁴

These submissions before the TRIPS Council regarding a review of the TRIPS Agreement have been characterised as pressure for “a reform of the existing international intellectual property framework to incorporate protection for traditional knowledge on the basis of reciprocity.”¹⁵ Essentially, the developed countries are being asked to commit to enhanced protection for the traditional knowledge of developing countries under principles similar to those whereby the developing countries have already agreed to

¹¹ See COMMITTEE OF GOVERNMENTAL EXPERTS ON THE INTELLECTUAL PROPERTY ASPECTS OF THE PROTECTION OF EXPRESSIONS OF FOLKLORE, MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS (1982), reprinted in 16 COPYRIGHT BULLETIN (No. 1 2) 62 (1982) at Art. 14.

¹² Illicit Trade Convention, Art. 13.

¹³ WTO, *Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement: Joint Communication from the African Group* (2003) WTO Doc IP/C/W/404 (June 26, 2003).

¹⁴ WTO, *The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge* IP/C/W/403 (June 24, 2003), at para. 1. See generally, Nuno Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing the TRIPS Agreement: The Problem and the Solution* 371, 2 WASH. U. J.L. 371 (2000).

¹⁵ Paul Kuruk, *Bridging the Gap Between Traditional Knowledge and Intellectual Property Rights: Is Reciprocity an Answer?* JOURNAL OF WORLD INTELLECTUAL PROPERTY (2004)

recognise the intellectual property rights of developed countries under the TRIPS Agreement. For example, under the TRIPS Agreement, WTO members are obligated to “*require that an applicant for a patent . . . disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art.*”¹⁶ In addition, the TRIPS Agreement imposes a condition on patent applicants to provide “information concerning the applicant’s corresponding foreign applications and grants.”¹⁷

The developing countries would like to see an extension of the disclosure principle to cover material facts regarding source and country of origin, information frequently omitted from applications for patents derived from traditional knowledge. Such disclosure would promote the objectives of the patent system by reducing instances of bad patents, enabling patent examiners to ascertain more effectively the “inventive” step claimed in a particular patent application and enhancing the ability of countries to track down and challenge instances of bad patents.¹⁸ In some respects, the developing countries view their “acceptance” of the TRIPS Agreement as a significant sacrifice they have made for the benefit of the developed countries. The developing countries would like to see their concessions reciprocated by a voluntary agreement by the developed nations to protect the interests of the developing countries in traditional knowledge through a mandatory disclosure of the source of traditional knowledge in relevant patent applications.

This form of the reciprocity argument, involving a demand for recompense for a benefit extended to another, is not new. It was used successfully by the United States in the pre-TRIPS era to address inequities in trade relations that the then-existing international legal framework did not appear to regulate. Arguably, the United States’ reciprocity arguments succeeded, to a certain extent, because of the ability of the government to back up its demands with threats or actual application of sanctions. The developing countries cannot achieve similar results by voicing arguments based simply on moral grounds of fairness without credible threats of sanctions. Because the WTO system discourages the unilateral application of trade sanctions, it is doubtful whether a threatened suspension or withdrawal of trade concessions as part of a negotiating posture by TK source countries would even be taken seriously. The potential of trade sanctions as a negotiating strategy for developing nations is clearly limited and could, in effect, backfire, causing greater economic harm in the developing countries than in the targeted developed nations. For example, the imposition of sanctions by a developing country on an economically and politically stronger developed country could provoke unpleasant retaliatory action that the developing country would prefer to avoid. Furthermore, such sanctions, either through increased duties or quotas, would always entail an economic cost in the developing country, as the prices of affected imports would invariably rise.

Perhaps, rather than look to sanctions, the developing countries should evaluate carefully the demands of the developed countries on the WTO Agenda and be prepared to make reasonable concessions on those matters in exchange for enhanced protection of traditional knowledge. Given the system of concessions and mutual exchanges that is now part of the bargaining process at the WTO, the developed countries would be less inclined to accede to the request to protect traditional knowledge without being offered something significant in return. Until such an incentive is provided and agreed to, the reciprocity principle is unlikely to be formalized in the WTO in the context of traditional knowledge through a revision of the TRIPS Agreement.

4. Mutual Recognition Agreements as an Alternative Enforcement Mechanism

Because of the varying degrees of interest shown by governments in the protection of traditional knowledge, as well as the wide diversity in the traditional knowledge found in different parts of the world, the adoption of a binding international regime applicable to all types of traditional knowledge may not be feasible at this stage. Bilateral and multilateral agreements reflecting cooperation between countries on traditional knowledge may offer better solutions for now. Such arrangements could take

¹⁶ TRIPS Agreement, Art. 29(1).

¹⁷ *Id.* Art. 29(2).

¹⁸ *The TRIPS Agreement and the Convention on Biological Diversity*, supra note 14, at para. 6.

the form of mutual recognition agreements (MRAs), as advocated recently by the African Group at WIPO. Under the MRAs, separate and flexible mechanisms could be worked out between interested countries focusing on the particular types of traditional knowledge for which protection is required as well as the form of protection that makes sense from the point of view of the participating countries. The following section elaborates on the relevance of MRAs to the protection of traditional knowledge.

A. Use of MRAs in Trade

As defined in relation to consumer goods, MRAs are “agreements between countries to recognise and accept the results of conformity assessments performed by conformity assessment bodies (CABs) of the countries that are parties to the agreement.”¹⁹ In this context, the term “conformity assessment” refers to the process by which products are measured against the various technical, safety, purity, and quality standards that governments impose on products. Such MRAs allow an exporting country’s CABs to use the tests and standards of the importing country in evaluating products, thereby potentially reducing the number of CABs that must evaluate a product destined for multiple markets. Prominent examples of MRAs include arrangements concluded in 1997 between the U.S. and the European Union covering trade in telecommunications equipment, electromagnetic compatibility, electrical safety, recreational craft, oil, pharmaceutical good manufacturing practices, and medical devices.

Many advocates of MRAs assume that the standards of the importing country would always form the basis of the MRAs²⁰ as the following comment illustrates: “I view MRAs . . . as contracts for service. The United States enters into an agreement with a trading partner under the expectation that the trading partner will take steps to help FDA perform its primary function of applying domestic legal standards to products imported into the United States. The service contracted for may be the provision of information, such as the sharing the report of an inspection, or it may be the evaluation of a medical device by a body recognized by the partner’s regulatory authorities. In both cases, the assumption is that US law provides the standards that ultimately determine the acceptability of an inspected facility or an imported product. In such an agreement, the role of the trading partner is not that of law maker but rather that of information source or service provider.”²¹ However, that view is not unanimous. According to Linda Horton, “those who use the term [MRA] do not always use it the same way. A fundamental question is always: whose requirements are being met? Is it the ‘customer’s’ requirements that are being met, i.e., the importing country? . . . The international analogue is that the conformity assessment be done in accordance with the laws of the importing country. Or, conversely, is it the supplier’s requirements that are being met, i.e. those of the exporting country’s [sic]? There is a widespread desire in industry to be able to export if the requirements of the exporting country have been met.”²²

Although by definition an MRA “provides for reciprocal reliance upon facets of the regulatory systems in the participating countries,”²³ which are recognized as “equivalent, entirely or in part,”²⁴ it is not a requirement of MRAs that the standards be the same in both countries. As one commentator observes, “when two or more countries pledge to accept each other’s standards as equivalent, a mutual recognition agreement is formed. . . . [E]quivalent does not mean ‘the same’ – it only means functionally equivalent, or functionally substitutable. In forming an MRA, each country in essence says that the other’s standards and regulatory system are close enough to its own that it can entrust the protection of its citizens in that matter to the other country.”²⁵

¹⁹ Public Citizen, Mutual Recognition Agreements (<http://www.citizen.org/trade/harmonization/MRA/index.cfm> last visited August 20, 2004)

²⁰ Linda R. Horton & Kathleen E. Hastings, *A Plan that Establishes a Framework for Achieving Mutual Recognition of Good Manufacturing Practices Inspections* 53 FOOD AND DRUG LAW JOURNAL 527, 530 (1998).

²¹ Richard A. Merrill, *The Importance and Challenges of Mutual Recognition* 29 SETON HALL LAW REVIEW 736, 740 (1998).

²² Linda Horton, *Mutual Recognition Agreements and Harmonization* 29 SETON HALL LAW REVIEW 692, 724 (1998).

²³ Linda Horton & Kathleen Hastings, *supra* note 20.

²⁴ Arvin P. Shroff, *FDA Enforcement Initiatives in the United States and Abroad* 49 FOOD AND DRUG LAW JOURNAL 575, 578 (1994).

²⁵ James McIlroy, *Commonality of Standards - Implications for Sovereignty - A Canadian Perspective* 24 CANADA-UNITED STATES LAW JOURNAL 245, 247 (1998) (noting “The mutual recognition approach does not require Canada and the United States to adopt the same standards. We must merely agree to agree to recognize each other’s standards, even if they are quite different.”).

Implementation of MRAs often results in significant savings in administrative and other costs of enforcement, a factor that partly explains the appeal of MRAs to the Food and Drug Administration in the U.S.²⁶ MRAs also address transparency concerns because an MRA would forbid domestic regulatory regimes from erecting or applying regulatory barriers to imported products²⁷ and therefore promote bilateral trade.²⁸

MRAs have become a useful popular alternative, particularly where harmonisation of different trade international standards have proved difficult. In general, mutual recognition agreements are easier to negotiate than efforts to harmonise regulatory regimes. Unlike harmonization, which requires jurisdictions to make their regulations identical or at least more similar, MRAs “can permit entry and sale of products or services without requiring fundamental regulatory convergence.”²⁹

A potential benefit of MRAs is that principles agreed under MRAs could form the basis of an international agreement open to other countries. As has been noted in the context of trade-related MRAs between the U.S. and the European Union: “*the element-by-element approach [involved in an MRA] could advance liberal multilateralism through a great power management approach to the extent that the elements chosen for negotiation could be embodied in preferential agreements which could be opened for accession to third countries willing to assume the agreement’s obligations. Specifically, the transatlantic powers could negotiate agreements on important topics not yet fully covered by the WTO and try to use those agreements as the basis for further liberalization of world trade and investment*”.³⁰

B. Relevance of MRAs to Traditional Knowledge

Certain features of the MRA make it worth pursuing as a mechanism for the protection of traditional knowledge. Unlike an agreement based on national treatment, an MRA can be negotiated and implemented where the regulatory systems differ, as when one country provides for rights not recognized in the other. Thus, Country A could agree to recognise and protect TK rights from Country B on the basis of an agreement reached between the two countries, even though the former does not have laws respecting traditional knowledge.

Conceivably, both TK source countries and TK user countries could be parties to an MRA. Where the MRA is entered into between TK source countries, it should be relatively easy to negotiate because such countries are already likely to have well-developed national regimes and the MRAs would simply incorporate aspects of such laws. However, for TK user countries, where such laws may not exist, negotiations are likely to be protracted and would require the provision of incentives in return for a commitment to protect traditional knowledge originating from TK source countries. Concerns of TK user countries that may have discouraged them from committing to the protection of traditional knowledge under their laws may also have to be dealt with. For example, the U.S. has been reluctant to provide for the protection of traditional knowledge for fear it could be used by indigenous groups as the basis of claims for greater autonomy. This fear could be addressed under the MRA by firm guarantees that the MRA is not to be used for political purposes.

Although many of the MRAs in the trade area incorporate standards of the importing countries, plausible arguments could be made for applying the standards of the exporting countries, where appropriate. In the context of the protection of foreign traditional knowledge (i.e. TK from a TK source country that is being misappropriated in a TK user country), one could analogise and consider the TK source countries and the TK user countries as the exporting and importing countries, respectively. With

²⁶ Arvin Shroff, *supra* note 24, at 578. (“The FDA recognizes that it cannot increase its foreign inspections at the same pace as it has over the past few years. There is a finite amount of resources and foreign inspections are costly, time consuming and resource intensive. As a result the agency has been looking to MRAs with foreign countries.”)

²⁷ Merit E. Janow, *Assessing APEC’s Role in Economic Integration in the Asia-Pacific Region* 17 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW AND BUSINESS 947, 994 (1997).

²⁸ George A. Bermann, *Regulatory Cooperation between the European Commission and US Administrative Agencies* 9 ADMINISTRATIVE LAW JOURNAL OF THE AMERICAN UNIVERSITY 933, 972 (1996)

²⁹ Janow, *supra* note 27, at 994.

³⁰ Richard H. Steinberg, *Great Power Management of the World Trading System: A Trans Atlantic Strategy for Liberal Multilateralism* 29 LAW AND POLICY IN INTERNATIONAL BUSINESS 205, 249 (1998).

that view, the misappropriation of TK could be treated in the same manner as other types of trade discrepancies. An MRA setting forth a commitment by the TK user country to protect foreign traditional knowledge under the standards of the TK source country would provide an effective means of redressing the imbalance, especially where the TK user country does not provide for the protection of traditional knowledge under its own laws.

At a minimum, an MRA on traditional knowledge should address fundamental issues such as protectible subject-matter and scope of recognised rights, and provide for effective systems of enforcement. To solve the definitional problem in the protection of traditional knowledge and simplify the process of obtaining prior authorisation for use of protected works, each TK source country should to extent possible, specify in the MRA where particular types of protected works of traditional knowledge are found and any restrictions that may exist regarding their commercial exploitation.

The scope of recognised rights could be negotiated using the comprehensive regional model laws that have been developed as useful points of reference. For example, the following principles from the model laws, which are central to the protection of traditional knowledge, could also be provided for in the MRAs. First is the recognition that indigenous groups own or have rights of custodianship over indigenous resources and that the scope of such rights would be determined with reference to customary practices. In this context, the African Model Law recognises the rights of communities over their innovations, practices, knowledge and technology acquired over generations³¹ and provides that *“community rights are to be protected in accordance with norms, practices . . . [of] . . . the concerned community and indigenous groups.”*³²

Efforts should also be made under the MRAs to mitigate the problems posed by the application of intellectual property criteria to traditional knowledge,³³ by permitting deviations from established Intellectual property (IP) criteria where necessary effectively to protect traditional knowledge. For example, the African Model Law tackles the evident bias for “individuals” under intellectual property law by emphasising instead the “collective” nature of indigenous rights in traditional knowledge.³⁴ To remedy the problem caused by the requirement under IP law that protected matter be recorded or reduced to some form of writing, African and Pacific Model Laws dispense with this requirement altogether. Thus, traditional knowledge would be protected under the African³⁵ and Pacific Model Laws³⁶ whether or not it is in writing or some other material form. Significantly, the model regional laws also specify that customary law rights in traditional knowledge are to be held for an indefinite period,³⁷ thereby removing an additional constraint from the protection of TK under intellectual property law.

It should be clarified in the MRA that the right to use TK is not automatic and that access to traditional knowledge could be denied on account of the sacred nature of an item or simply out of a desire of the indigenous group not to commercialise it. The African and Pacific Model Laws not only recognise the right to refuse such access, but provide elaborate rules on prior informed consent to ensure that indigenous groups have sufficient information about proposed uses of traditional knowledge to make an informed decision whether or not to grant access.³⁸ Even where approval has been granted, such consent could be withdrawn for failure to comply with the conditions of the grant or other unauthorised uses of traditional knowledge.³⁹

³¹ African Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders and Regulation of Access to Biological Resources, Art. 16. A copy of the African Model Law is available at http://www.opbw.org/nat_imp/model_laws/oau-model-law.pdf.

³² *Id.*, Art. 17.

³³ A. EKPERE, OAU’S MODEL LAW: THE PROTECTION OF THE RIGHTS OF LOCAL COMMUNITIES, FARMERS AND BREEDERS, AND FOR THE REGULATION OF ACCESS TO BIOLOGICAL RESOURCES: AN EXPLANATORY BOOKLET.

³⁴ African Model Law, *supra* note 31, Art. 16

³⁵ *Id.*, Art. 17.

³⁶ Model Law for the Protection of Traditional Knowledge and Expressions of Culture, Art. 9. The Pacific Model Law is reproduced in SECRETARIAT OF THE PACIFIC COMMUNITY, PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE 3-1.5 (2002).

³⁷ *Id.*

³⁸ African Model Law, *supra* note 31, Art. 5.

³⁹ *Id.*, Art. 20.

Because exploiters of TK have often taken undue advantage of indigenous groups by not rewarding them appropriately for uses of traditional knowledge,⁴⁰ it is imperative that the MRAs incorporate some form of benefit-sharing arrangement. The MRAs should require that a portion of the benefit obtained from access to traditional knowledge be assigned to indigenous groups to be applied in accordance with traditional practices. Also, such benefits need not be expressed solely in monetary terms but could include in-kind arrangements, such as the construction of schools, hospitals or roads to benefit traditional communities. It is instructive in this context that the Pacific Model provides for equitable monetary or non-monetary compensation,⁴¹ while the African Model law guarantees indigenous groups at least 50 per cent of the benefits gained from the utilisation of indigenous resources.⁴²

Effective enforcement systems would be critical to the use of MRAs for the protection of traditional knowledge. At a minimum, MRAs should permit owners of TK from participating countries to file lawsuits in other countries to protect their rights as specified in the MRAs. This type of right is not novel and is found in several cultural heritage instruments. To facilitate the recognition of TK rights by the courts, it could be agreed by TK user countries that appropriate determinations by specified groups or institutions in TK source countries would be accepted as creating very strong presumptions of the existence of such rights for purposes of litigation in the TK user countries. Remedies for unauthorised uses of TK could include injunctive relief, seizure and forfeiture of infringing material, accounting for profits, damages, attorneys' fees, and costs. Criminal penalties such as jail terms should also be considered for very egregious cases.

The force of the MRAs would be enhanced considerably by the creation of institutional mechanisms to oversee matters related to the protection of TK. For example, TK source countries might find it in their best interests to create an organization designed to articulate, assert and defend TK rights vulnerable to exploitation in TK user countries. Such an organisation could also act as the conduit for processing requests to use traditional knowledge received from interested persons in TK user countries, which would then be passed on to the relevant TK source state or states party to the MRA. Where a resource is found in more than one country, the organisation could be authorized to develop guidelines for allocating benefits derived from the exploitation of traditional knowledge.

5. Conclusion

Under the current circumstances, MRAs should be considered as an alternative to the creation of a binding international instrument on traditional knowledge, as they allow for the conclusion of flexible arrangements to facilitate the enforcement of TK rights in foreign countries, taking into account the specific interests and concerns of signatory parties. Although as a rule, MRAs do not apply to non-parties⁴³ and thus will have no effect in TK user countries that refuse to subscribe to them, the common principles they reflect could form the basis for and influence quite positively the development of a future international instrument for the protection of traditional knowledge.

⁴⁰ CARLOS M. CORREA, TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY 5 (2001).

⁴¹ Pacific Model Law, *supra* note 36, Art 12.

⁴² African Model Law, *supra* note 31, Art 22(2).

⁴³ Steinberg, *supra* note 30, at 249.

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