

## INTELLECTUAL PROPERTY RIGHTS AND ASIAN-AFRICAN STATES

*V.G. Hegde\**

### I. Introduction

The majority of the Asian-African States, historically, have remained at the periphery of the global intellectual property rights (IPRs) regime<sup>1</sup>. In the present context, they have to deal with a legal regime in whose creation they had no part. There are number of reasons for this and the present study proposes to deal with them, *albeit* briefly. Firstly, the evolution of modern IPR regime, as it exists today, has a history of over hundred years and essentially evolved in response to a need in the aftermath of industrial revolution<sup>2</sup> within Europe. Secondly, most of the Asian and African States largely became part of the international community post Second World War<sup>3</sup> and accordingly were not consulted as equal partners in the creation of IPR regime. Lastly, and most importantly they had other priorities soon after joining the international mainstream, such as economic development and

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\* Associate Professor, Centre for International Legal Studies, Jawaharlal Nehru University, New Delhi. He can be contacted at [vghegde@gmail.com](mailto:vghegde@gmail.com).

<sup>1</sup> The term 'intellectual property right' (IPR) evolved in 1960s. Earlier there were two categories of rights relating to intellectual property, namely Industrial Property and Copyright. IPRs now include, as per the categorization under *The Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPs Agreement), rights such as patents, copyrights, trademarks, industrial designs, geographical indications and even trade secrets. In fact, this list is growing. *The Convention Establishing World Intellectual Property Organization (WIPO)*, 1967, for example, describes in Article 2 (viii) an IPR as rights relating to literary and artistic and scientific works; performances of performing artists, phonograms and broadcasts; inventions in all fields of human endeavour; scientific discoveries; industrial designs; trademarks, service marks and commercial names and designation; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

<sup>2</sup> For studies linking IPRs, patents in particular, with industrial revolution see generally Christine Macleod, *Inventing the Industrial Revolution: The English Patent System 1660-1880* (Cambridge, 1988); H.I. Dutton, *The Patent System and Inventive Activity During Industrial Revolution, 1750-1852* (Manchester, 1984); Eric Schiff, *Industrialization Without National Patents: The Netherlands 1869-1912, Switzerland, 1850-1902* (Princeton, 1971).

<sup>3</sup> See generally, R.P. Anand, *New States and International Law*, (Delhi: Vikas Publications, 1972).

other related issues. It is also important to note that IPRs also have cultural and civilizational dimensions the commercial exploitation of which could deprive certain sections of the society its due, particularly in economic terms affecting thereby indirectly their way of life. IPRs, as it evolved in the West, are primarily based on the concept of reward and are also intrinsically linked to commercialization of the protected subject-matter. The essential question before the Asian and African States, therefore, would be – what subject matter should be protected and how?

The other major concern with regard to IPR protection in the context of these States was the ‘internationalization of the protection’. Developed world felt the need not only for a ‘stronger’ IPR protection in certain limited areas such as patents considering its reach and comparative advantage in the arena of technological development, but also mandating an effective protection regime within domestic jurisdictions. This lack of increasing inflexibility in deciding their terms of IPR protection has been another crucial concern for the Asian and African States. This has led many of these countries to contest the interpretative milieu within which IPR regimes are to be operated. The internationalization of IPR protection has also brought about changes in the procedural setting of the entire protection mechanism. This has inevitably necessitated the development of uniform and formal institutional structures. On account of this, patent offices, for example, would need restructuring, copyright boards or copyright registration centers need to be modernized and made more responsive to the evolving stronger IPR regimes. An inevitable outcome of all these developments are linked to cost and as to how to deal with the increasing cost of implementation.

Asian and African States have also to deal with forms of IPR protection hitherto unknown to them. Many of these traditional societies located in these States even today are not aware of IPRs<sup>4</sup>. While these societies encapsulate within them a vast variety of knowledge, they are oblivious of the IPR regimes. IPRs simply do not exist for them. Accordingly, there is this

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<sup>4</sup> Para 19 of the *Doha Declaration, 2001* expanded the ambit of TRIPs Agreement, in particular Article 27.3 (b) and mandated the TRIPs Council to examine issues relating to Traditional Knowledge, Genetic Resources and other related areas. World Intellectual Property Organization has been dealing with this issue as well. See *WIPO-UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge* in [www.wipo.org](http://www.wipo.org). Also see Utkarsh Ghate, Madhav Gadgil and P.R.Sheshagiri Rao, “Intellectual Property Rights on Biological Resources: Benefiting from Biodiversity and People’s Knowledge”, *Current Science*, vol. 77, no. 11, 10 December 1999.

problem of justifying IPRs for certain kinds of subject matter within their jurisdiction which these countries thought it would never need any form of protection. They were told, on the other hand, that – if you do not protect them, someone else would take away the benefits. Creeping commercialization of varied subject matter of protection elsewhere, including life-forms, found or in existence within their domain is another impending problem for the Asian and African States. In all this, they are increasingly dependent on developed world for better international legal and technological framework without sacrificing their own edifice of community rights of sharing. In this sense, for many Asian and African States IPR regimes, as it exists today, do not have much relevance. Many of the IPR-related multilateral treaties do not sufficiently take into account or reflect the concerns of Asian and African States. These treaties are carved out in a more general and technical languages without taking into account the concerns of principal legal and social systems of the Asian and African region. The present study will, *albeit* briefly, attempt to examine some of these issues.

## **II. Evolution of Intellectual Property Rights**

The idea of protecting intellectual property as a property emerged in Europe. While one could protect and regulate tangible property, it was argued, why the same protection is not extended to intangible property, particularly when it has commercial value. Industrial revolution, as mentioned above, added weight to this argument. During industrial revolution, a new invention or a new technological innovation provided a comparative advantage in a given production process. Inventors, during that period, were worried about others who would easily imitate or copy their inventions. For this reason, inventors were refusing to showcase their new inventions in various exhibitions which were taking place all over the Europe during later part of the nineteenth century<sup>5</sup>. Inventors were keen on their returns and profit. In other words, this return or reward was termed as economic rent<sup>6</sup>. Several European countries enacted patent legislations with a view to protect their inventors and to provide them with an exclusive right on their invention for a limited period so that they could commercialize their ideas. In other words, a limited monopoly was created through a statute. Several other European countries were, however, against creation of such monopoly rights even for a limited

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<sup>5</sup> See Edith Penrose, *The Economics of International Patent System* (Baltimore, John Hopkins Press, 1951); Ulf Anderfelt, *International Patent Legislation and Developing Countries* (The Hague: Martinus Nijhoff, 1971).

<sup>6</sup> Penrose, n.5.

period. They argued that this would jeopardize the larger public interest concerns. Some countries enacted patent legislations and while others withdrew these legislations. This patent controversy of the nineteenth century brought forth the demarcation between those States who held new and emerging technology and those States who were on the receiving end of the technological revolution. Those States who were lagging behind in the technological revolution were the ones who were opposing the creation of patenting regimes<sup>7</sup>.

It should be noted that in any IPR debate both at the national and international level, the primary issue was with regard to the balancing of private gains of an IPR holder vis-à-vis a public interest component. The owners of technology would look for a right which could give them extended and exclusive protection thereby providing an opportunity to commercialize the technology. The users of the technology, on the other hand, would look for and wait for the technology to come into public domain so that the same could be utilized to produce goods in large scale. The essence of the nineteenth century European patent controversy in the entire IPR debate did not lose its relevance, although the complexities of the discourse have changed manifold. After a prolonged debate, amidst protests and walkouts, several European countries, mainly France, Germany and others pushed for the conclusion of an international convention on patents and trade marks, namely, the Paris Convention on Industrial Property, 1883 ('Paris Union' hereinafter). Several other European countries, for the reasons mentioned above, sought to remain outside the Paris Union<sup>8</sup>. The formation of Paris Union was followed by the Berne Convention for the Protection of Literary and Artistic Works in 1886 ('Berne Union' hereinafter).

Both the Paris Union and the Berne Union formed the basis for the modern IPR system. Till the early part of the twentieth century none of the

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<sup>7</sup> See Anderfelt n.5. Also see Fritz Machlup and Edith Penrose, "The Patent Controversy in the Nineteenth Century", *The Journal of Economic History*, vol.10, 1950; For a brief description concerning substantive aspects of the 19<sup>th</sup> century patent legislations in Europe and the United States see J.S. Girling, "Some Fundamentals of the United Kingdom Patent System"; Robert G. Watson, "Origin and Early History of Patents for Inventions"; Harold G. Fox, "The History of the Patent System" – all articles published in the *Souvenir of the Indian Patents Centenary 1856-1956* (Calcutta: Patent Office, 1956).

<sup>8</sup> Ibid. The Netherlands repealed its patent law in 1869 and again reintroduced some years later. The patent controversy engulfed both Germany and Switzerland. Some attribute the reasons for the eruption of this controversy to the depression of 1873 and with increasing nationalism and protectionism.

Asian and African countries were part of this system, although several of the South American countries were made original members of the Paris Union. Japan, among the Asian States, was the first one to enter the Paris Union in 1900 by being part of the 1911 Washington Revision Conferences of the Paris Union<sup>9</sup>. It took another six decades for the Asian countries to join the Paris Union when in 1958 Indonesia and Ceylon took part in the sixth Revision Conference. None of the African countries were part of the IPR system except Tunisia, Morocco, Niger and Nigeria. Many of the African countries were part of the IPR system not by their own choice. They were inducted in as colonies of the European countries. In some cases, as it happened in the case of several of the South American countries, they were made members of the IPR system to bring into force some of the Revision Conferences. Tunisia, for example, joined the IPR system in 1887 followed by India, Niger, Nigeria and several other countries. In the eighteenth and nineteenth century numerous patent privileges were granted by several colonies, some for inventions and some for establishing new industries according to processes known elsewhere.<sup>10</sup> Accordingly, national patent legislations were devised to meet the peculiar needs of each individual country. Thus the American Patent Act emphasized local working of the patent and importation of foreign inventions<sup>11</sup>. In Europe, similar attempts were made. The French enactment on patents, for example, required the patentee to exploit his invention locally for the following reasons: (a) the backwardness of French industry; (b) the English penetration of the French economy; and (c) the desire to ameliorate the situation of the French industrial worker.<sup>12</sup>

The IPR model developed under the Paris and Berne Union provided the Member States with sufficient flexibility to implement the required standards

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<sup>9</sup> For a brief historical account of the Revision process of Paris Convention see S.P.Ladas, *Patents, Trademarks and Related Rights* (1975).

<sup>10</sup> Penrose p.11.

<sup>11</sup> The historical development of the patent institution during this period is summarized as “a transition from complete equivalence between inventors and introducers to a distinction between patents of invention and patents of importation.” This development of the patent institution with regard to local working of the patents to patents of importation should be contrasted with the present position taken in Article 27.1 of the TRIPs Agreement. See *Historical Trends in Protection of Technology in Developed Countries and Their Relevance for Developing Countries*, UNCTAD/IIP/TEC/18, 26 December 1990.

<sup>12</sup> Anderfelt p.15.

of protection within domestic jurisdiction<sup>13</sup>. The essential principles developed were (a) national treatment; (b) right to priority; and (c) independence of applicable international norms and standards. The principle of national treatment conferred the same protection to nationals of the other member countries as it granted to its own nationals. This could be regarded as the beginning of national treatment principle in the arena of multilateral trade which otherwise was hitherto applied bilaterally. However, this principle failed to take into consideration the unequal nature of development which existed even between original members of the IPR system at that time. The rule of right to priority also appeared on the IPR scene. It allowed the prospective inventors to acquire exclusive rights on the first-come-first basis. In other words, it allowed a patentee, for example, who had filed a patent application in one Member State, to acquire a priority right of certain period (12 months) during which he could file an application for a patent grant in any Member State without the risk of having third parties do it before him. The independence of IPR grant recognized the IPR standards as established in each of the Member States. For example, patents applied for in various countries of the Union by nationals of countries of the Union were regarded as independent of patents obtained for the same invention in other countries, whether members of the Union or not.<sup>14</sup>

The post Second World War evolution of IPR system had to take into account the concerns of large number of Asian and African States. Many of them had just joined the international community as independent States. Their larger concerns were related to economic development, issues of governing natural resources, transfer of technology and several other related issues<sup>15</sup>. IPR-related issues, particularly relating to patents, were brought on

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<sup>13</sup> The independence of patents, for instance, was recognized. Patents applied for in the various countries of the Paris or Berne Unions were independent from one country to another. Domestic IPR laws decided the substantive issues such as for example, the criteria of patentability—novelty, inventiveness and industrial applicability.

<sup>14</sup> Article 5 *bis* of the Paris Convention on Industrial Property.

<sup>15</sup> The United Nations General Assembly (UNGA) adopted on 14 December 1962 *Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources which inter alia*, referred to “the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests and to respect for the economic independence of States”. This was followed by the UNGA Resolution 3201 (S-VI) of 1 May 1974 containing a *Declaration on the Establishment of New International Economic Order*. On 12 December 1974 UNGA adopted the *Charter of Economic Rights and Duties*.

the agenda of United Nations<sup>16</sup> and other related agencies. Some of these related to – patents taken out by foreigners without the intention of local exploitation; harmful restrictive provisions in the licence agreements; royalty payments constituting a heavy burden on the balance of payments, which may be further aggravated by imports of patented products carrying artificially high prices. The United Nations Conference on Trade and Development (UNCTAD) in its New Delhi Session (1968) expressed continued concern of developing countries for the adequacy of international patent system, with emphasis on the necessity for these countries being able to export products made with acquired technology. Pursuant to this, there were requests and studies for the future revision of the IPR system. The Seventh Special Session of the United Nations General Assembly<sup>17</sup> adopted a resolution which, *inter alia*, called for the revision and review of international conventions on patents and trademarks, to meet in particular, the special needs of developing countries, in order that these conventions could become a more satisfactory instruments for aiding developing countries in the transfer and development of technology. The revision of the international patent system was the key element in the entire IPR debate as it was considered to be crucial factor in the economic development. Patent was linked to industrial development. Accordingly, it was categorized as industrial property. Copyright and related rights were at the periphery of the entire debate as they were considered to be less concerned with such issues as transfer of technology and economic development.

The efforts to reform the IPR system should also be seen in the context of post New International Economic Order (NIEO) debate within United Nations. NIEO raised several broad economic and trade issues which affected developing countries which invariably comprised of several Asian and African States. Even at that time the entire IPR debate was restricted largely to Paris Union and to a lesser extent towards Berne Union. The emerging disparities in the field of industrialization and the transfer of technology were the key issues<sup>18</sup>. During this period, while several Asian

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<sup>16</sup> Brazil brought a resolution in 1961 in the UN General Assembly on the item entitled “The Role of Patents in the Transfer of Technology to Underdeveloped Countries”. A/C.2/L.565, November 8, 1961.

<sup>17</sup> General Assembly Res. 3362 (S-VII).

<sup>18</sup> See generally *The Role of the Patent System in Transfer of Technology in Developing Countries*, TD/B/AC 11/19 Rev.2, 1975; *Study, Examination of the Economic, Commercial and Developmental Aspects of Industrial Property in the Transfer of Technology to Developing Countries*, UNCTAD/TD/B/C.6/A.C.5/3, 1981.

countries were aggressively pushing the agenda of economic development and self-reliance, several of the African countries were still pursuing the goal of decolonization and were in search of suitable model of economic development. As regards IPRs, the issues were<sup>19</sup> – balancing the needs of developing countries and the rights granted by industrial property rights; promote the actual working of inventions; establish the principal obligations and rights of the owners of industrial property rights; encourage creative inventions in the developing countries; judge the real value of inventions for which protection is sought; screen and control licensing contracts; improve the means of information set up under national legislation; create suitable institutional structures; prevent or combat abusive practices in the field of industrial property; take it as understood that all forms of industrial property, including trademarks, should be designed to facilitate development and to ensure cooperation between countries; consider the principle of equality of all forms of industrial property, of national treatment, of the independence of patents and of preferential treatment for developing countries; assist the developing countries in strengthening their scientific and technological infrastructure and in the training of specialists; and to give each country all latitude to adopt the legislative and administrative measure consistent with its needs and with its social and economic policy.

### **III. Shaping Uruguay Round Agenda**

The revision process of the Paris Convention on Industrial Property, with the above stated objectives, could not be concluded even after a decade of negotiations. Both the developed and developing countries were divided on several issues. With regard to local working of the patented invention, for example, developing countries were insistent on strict local working and the developed countries, on the other hand, argued that importation of the product could be taken as fulfilling the requirement of local working. Local working of the invention, it was argued, would bring in a new technology and also would help in developing the skilled workforce who would be conversant with the new and emerging technology. The process of reverse engineering, a tool used by many developed countries when they were struggling to develop, could be justified as a legitimate option. The nineteenth century debate and the postures developed against the granting of

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<sup>19</sup> WIPO, PR/SM/3, *Final Summary Minutes of the Diplomatic Conference on the Revision of the Paris Convention*, First Session, Geneva, 4 February to 4 March 1980, p.2; also see *Declaration on the objectives of the Paris Convention*, WIPO, PR/DC/3, *Basic Proposals, Diplomatic Conference on the Revision of the Paris Convention*, Geneva, 25 June 1979, p.7.



patent monopoly resurfaced in a slightly different way in the latter part of the twentieth century. By then, the 1986 Uruguay Round mandate and terms of reference with regard to IPRs were laid on the table. Several Asian and African countries had opposed the inclusion of IPRs into the ambitious Uruguay Round agenda of the General Agreement on Tariffs and Trade (GATT).<sup>20</sup>

As mentioned already, countries which owned and worried about the international dimension of the appropriation of technological innovation sought to create strong IP regimes. The strong IP regimes, they argued, would facilitate maximum returns from the market in the shortest time. The life of the new and high technology was, it should be noted, shortened due to its faster diffusion rate and its easy copying<sup>21</sup>. Diffusion and copying allowed fairly easy operation of the process of 'reverse engineering' in reconstructing the whole technological innovation. This, in fact, favoured immensely developing countries. On the other hand, the imperfections of the international technology market, its lack of transparency and its oligopolistic character have been posing new set of problems to developing countries, coupled with uncertainty. It has been pointed out that these uncertainties emerge from the importance attached to national policies and the inadequacies of the present state of knowledge about the exact impact of the new technologies on the overall economic development<sup>22</sup>.

It is also noted that new technological developments are weakening the traditional pattern of a simple technological innovation being followed by several Asian and African countries. Reference should also be made to the monopolistic tendencies in the international market for technology, especially

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<sup>20</sup> GATT generally dealt with 'goods'. For the first time Uruguay Round included three new issues into the negotiating agenda namely, IPRs, Services and Investment.

<sup>21</sup> The trend with regard to the erosion of technological superiority of developed nations was identified in the 1990s. This 'closing of the gap' has been attributed to the decline of some traditional industries in the developed countries. See Paul R. Krugman, *Rethinking International Trade* (Cambridge: MIT Press, 1990).

<sup>22</sup> These issues have been assessed in various studies initiated while Uruguay Round Negotiations were in progress. See generally, Paolo Bifani, "The New Mercantilism and the International Appropriation of Technology" in *Technology, Trade Policy and the Uruguay Round* (New York: United Nations, 1990); Abdulqawi A. Yusuf, "Developing Countries and Trade-Related Aspects of Intellectual Property Rights" in *Uruguay Round: Papers on Selected Issues* (New York: United Nations, 1989); Paolo Bifani, "Intellectual Property Rights and International Trade", *Uruguay Round Papers on Selected Issues* (New York: United Nations, 1990)

high technology, the role of MNCs and most importantly the diminishing role of innovation. It should be further noted that the international market for high technology is heavily dependent on IPRs to create barriers for new entrants in such a way as to protect infant high technology industry. Accordingly, the mandate for Uruguay Round of negotiations referred to the “effective and adequate protection of trade-related aspects of IPRs”.<sup>23</sup>

In all fairness, it should be stated that the Uruguay Round mandate on TRIPs was forced on developing countries by few developed countries so as to protect the interests of their MNCs. Major arguments for bringing in the issue of IPRs within the ambit of GATT were motivated by the moves made by these companies. A powerful group of chemical, pharmaceutical, computer, entertainment, publishing and electronics corporations of the developed world lobbied to introduce intellectual property issue into the multilateral trade negotiations under the GATT<sup>24</sup>. Developing countries, including India, Republic of Korea from the Asian continent opposed the inclusion of IPRs in the GATT negotiations on the ground that it is not the forum for dealing with such a topic and that it should be dealt by WIPO, a specialized agency of the UN to deal exclusively with IPRs<sup>25</sup>. Developed countries, on the other hand, argued for the inclusion of what was termed as ‘trade-related’ aspects of IPRs in the GATT negotiations.

There were basically two broad approaches in the TRIPs negotiations. Developed countries had taken an approach which was generally grounded on the premise that inadequate and discriminatory protection of IPRs constituted a major distortion of and impediment to trade and should as such be dealt within the framework of GATT. On the other hand, the developing

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<sup>23</sup> Ibid.

<sup>24</sup> See, For the policy initiatives taken by the United States see R. Michael Gadbow, “Intellectual Property and International Trade : Merger or Marriage of Convenience”, *Vanderbilt Journal of Transnational Law*, vol.22, no.2 1989, p.223; In another study which could be termed as representational in terms of highlighting the kind of lobbying went on for introducing IPRs into the global negotiating agenda see, *Intellectual Property Rights in NAFTA : Implications for Health Care and Industrial Policy in Ontario* (Toronto : Ecumenical Coalition for Economic Justice: 1993).

<sup>25</sup> Surendra J. Patel, “Intellectual Property Rights in the Uruguay Round: A Disaster for the South?”, *Economic and Political Weekly*, vol. 24, no.18, 1989, p.983; Frederick M. Abbot, “Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework”, *Vanderbilt Journal of Transnational Law*, vol. 22, no.4, 1989, p.707; Chakravarti Raghavan, *Recolonization: GATT, The Uruguay Round and the Third World* (Penang: Third World Network, 1990).

countries argued that it was not for the GATT to consider the protection of IPRs through the elaboration of substantive norms and standards to be applied by all countries. However, during the mid-term review of this mandate in 1989 developing countries agreed to negotiate the mandate on TRIPs. The reasons for this agreement possibly could be on account of various other bilateral issues such as the bilateral approach taken by the US by invoking its section 301 of its Trade Act of 1974. This US domestic law authorized the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of IPRs. From the Asian and African continent, India, China, Egypt, Republic of Korea, Philippines, Thailand, Malaysia were primarily targeted<sup>26</sup>.

The international protection of Intellectual Property Rights (IPRs), considering the complex and ongoing domestic implementation issues, is unquestionably at crossroads. Two decades ago, specifically while launching Uruguay Round (UR) Negotiations, it was argued by the developed world that time was ripe for a more stringent and broader protection for IPRs. At that time, idea which was propounded and which entered the mandate of the UR negotiations was to 'clarify' and 'elaborate' the existing international legal regimes relating to IPRs<sup>27</sup>. It was not simply about IPRs. As argued at that time, it was about 'trade-related' aspects of IPRs i.e. TRIPs<sup>28</sup>. Instead of clarifying and elaborating the extent of protection of IPRs, the TRIPs negotiations went on to set certain threshold of principles and standards of protection thereby creating an international obligation for the Member States

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<sup>26</sup> USTR *Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property* and also see John H. Barton and Bart S. Fisher, "Introductory Note: United States: Omnibus Trade and Competitiveness Act of 1988", *International Legal Materials*, 1989, p.15.

<sup>27</sup> The Punta del Este Ministerial Declaration launching Uruguay Round of Negotiations stated – In order to reduce the distortions and impediments to international trade and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedure to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines; negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods..." (Emphasis added) see *Basic Instruments and Selected Documents* (Geneva: General Agreement on Tariffs and Trade), 1987 Supplement 33, p.19.

<sup>28</sup> TRIPs Agreement nowhere clarifies or elaborates what is or what should be termed as 'trade-related'.

of WTO<sup>29</sup> with diverse economic backgrounds. Majority of the Asian-African States were simply not aware of the entire dimensions and consequences of TRIPs, although there were, till then, studies linking IPRs and economic development<sup>30</sup>.

TRIPs, despite criticisms, had actually succeeded in moving IPRs standards from legal and economic dimensions to several other dimensions such as environment, culture and lifestyle<sup>31</sup>. It could, therefore, be argued that till TRIPs arrived on the scene, IPRs standards as envisaged in several IPR-related multilateral treaties, generally provided flexibility in implementation process delineating it with culture-specific areas. Local IPRs laws retained their fragrance of independence at the domestic level while incorporating the multilateral obligations. TRIPs, set within the framework of General Agreement on Tariffs and Trade (GATT) and later World Trade Organization (WTO), emerged as an intangible 'good'. Although TRIPs Agreement defined the contours of IPR protection offered to products of the mind as a 'good' within WTO Framework, the entire emphasis shifted to term IPR as a 'private right'.<sup>32</sup>

#### **IV. Approaches to Knowledge Preservation**

The protection and preservation of new knowledge is an essential part of human development. The preservation or conservation of knowledge for the purpose of commercial gain is something unknown to the large part of the Asian and African continent. Knowledge, particularly scientific knowledge, was considered to be of immense value during the period of industrial revolution. As discussed above, this idea of commercialization of knowledge was not part of the system. On the contrary, except in few instances, the knowledge-sharing was the primary norm in many of the traditional societies of the Asia and Africa. Patenting, for example, was unknown to large part of Asia and Africa, as it exists today in the West, during the latter part of the nineteenth century. The preservation of knowledge for the future generations were considered to be a sacred act. On that count, many of these

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<sup>29</sup> Article 1 TRIPs Agreement requires that Member States shall implement the provisions of the Agreement

<sup>30</sup> This aspect has already been discussed in the earlier part of this essay.

<sup>31</sup> IPRs were generally dealt with separately within domestic arena as patents, copyrights and trademarks. With TRIPs coming into being, there is a unified application mechanism. This standardization of IPR regimes has created several implementation problems for the Afro-Asian States.

<sup>32</sup> See Preamble to the TRIPs Agreement.

communities and societies had developed their own system of preserving the knowledge. Since the knowledge was considered as sacred, it was systematically assimilated and safeguarded within communities. While the access by a stranger or an outsider to this knowledge was carefully restricted, the same was not linked to commercialization or commodification. Perhaps this could be attributed to the nature of the knowledge or technology produced in the Asian and African context and also as much to the nature of the evolution of these societies. This is a phenomenon which could be seen in all the traditional and tribal societies not only in Asia, in Africa and elsewhere. Even today this dilemma could be seen in the perspectives of major developing and less developed countries of the Asia and Africa in implementing the TRIPs obligations<sup>33</sup>. Local communities in Africa and Asia had developed their own systems of preserving their knowledge base through sharing and community participation. The preservation of knowledge base through community participation is the most interesting one and takes care of the public interest concerns of an exclusive right like 'patent'. This is one idea which is fast emerging as a solution to many of the issues concerning the preservation of 'traditional knowledge'.

One of the perennial conceptual issues which dominated the IPR debate concerned with the normative structuring and balancing of 'public interest' versus 'private gain' both at the multilateral and domestic level. We could briefly examine this in the context of Asia and Africa and as an antithetical approach to West which seeks to treat knowledge as a commodity. Patent, for example, should protect the rights of an inventor, it was argued. Inventor is the one who toils for long hours to invent something new and he should be allowed to profit from it. While this is one view, the other view regarded patent as a monopoly right; accordingly it should be restricted in its scale of operation. It should be granted for a definite period. Monopoly as monopoly

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<sup>33</sup> Leading Asian and African countries and members of the Asian and African Legal Consultative Organization (AALCO) ('Committee' at that time) namely, India, Japan, Republic of Korea, Thailand, Egypt, Nigeria and Tanzania, – made some proposals on the TRIPs mandate during the early part of the Uruguay Round of Negotiations. See *Intellectual Property Rights – Standards and Principles Concerning Its Availability, Scope and Use, The Indian View*, MTN. GNG/NG 11/W/37, 10 July 1989 (GATT); *Statement by Thailand*, MTN. GNG/NG11/W/27 21 September 1988; *Submission by Japan*, MTN. GNG/NG 11W/7, 29 May 1987; *Standards and Enforcement of Intellectual Property Rights: Communication from Republic of Korea*, MTN. GNG/NG 11/W/48, 26 October 1989; *Communication from Argentina, Brazil, Chile, Columbia, Cuba, Egypt, India, Nigeria, Peru, Tanzania and Uruguay*, MTN. GNG/NG 11W/71, 14 May 1990.

*per se* in legal terms was regarded as inimical to the public interest. Accordingly, a view emerged according to which in the event of non-working locally of a patent grant within a stipulated period of time, there should be an option to compulsorily license it to a third party in public interest.

All the major legal systems, therefore, while evolving IPR norms incorporated provisions to balance 'public interest' and 'private gains'. It worked fairly well till that time the subject matter of IPRs was within in the domain of new mechanical devices, pharmaceuticals and medicines and so on. But, the whole issue became complex when 'traditional knowledge' preserved within the traditional societies are to be protected by way of a patent or copyright. How to stop the piracy of substantive contents of a knowledge or information which would be used in patenting in other countries? Many Asian and African tribal communities and traditional societies have been passing their knowledge-base through oral traditions for which no documentary proof is available. This has become a major issue in other forms of intellectual property rights such as copyright and geographical indications. Without even acknowledging these communities, several others have made huge profits by clandestinely acquiring IPR protection. By the time the world comes to know about the original owners of the intellectual property, the profit would have flowed in sufficient quantities. IPRs, after all, are about the commercialization and about making profits. If there are no profits and if the profits are trivial, no one will bother about the worth of that knowledge. It is, therefore, crucial to examine, whether TRIPs does attempt to harmonize these conceptual issues concerning certain kinds of IPR protection.

## **V. Implementation of TRIPs: Some Conceptual Issues**

TRIPs had three-pronged approach to treat IPRs<sup>34</sup> so as to apparently ensure that it did not become a barrier to international trade. In the first place it sought to reduce distortions and impediments to international trade by creating uniform standards. At the second level and as a sequel to the first one, it sought to ensure effective and adequate protection of IPRs. At the

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<sup>34</sup> Preamble to the Agreement on Trade-related Aspects of Intellectual Property Rights. WTO has 149 Member countries as on December 2005. Among these 37 Members are from Asia and 34 of them are from Africa. There are 17 countries from both these Continents who have the Observer Status with WTO. Both Asia and Africa, together, constitute nearly one-half of the membership of the WTO and many more are waiting to join. It is important to note that the nearly entire membership of Asian-African Legal Consultative Organization (AALCO) is represented on WTO.

tertiary level, it also sought to ensure measures and procedures to enforce IPRs at the domestic level. It was argued that a 'weak' IPR regime by itself became a barrier to international trade. Terminologically, a 'weak' IPR regime meant a regime which did not incorporate the standards prescribed within TRIPs. Accordingly, TRIPs Agreement laid out new rules and disciplines concerning IPRs by creating "adequate standards and principles concerning the availability, scope and use of trade-related IPRs". Some States have argued that this mandate of TRIPs is far beyond its original negotiating agenda or terms of reference to 'clarify' and 'elaborate' existing IPR standards. Furthermore, it recognized IPRs as private rights.<sup>35</sup> While saying so, it also sought to recognize underlying public policy objectives of national systems for the protection of IP, including developmental and technological objectives<sup>36</sup>. Even the Berne and Paris Convention standards and procedures were also made part of the TRIPs<sup>37</sup>. TRIPs, in sum, created rights and obligations from the point of view of a right holder.

Several of the TRIPs terminologies are hazy and accordingly remain in the realm of interpretations. In other words, several IP standards set within TRIPs are amenable to varied interpretations within the framework of different national jurisdictions. TRIPs implementation will eventually be a legislative drafting process within a national legal framework and the same will have to be notified to the TRIPs Council<sup>38</sup>. TRIPs, therefore, attempts to harmonize IPR standards by creating a minimum threshold. Harmonization and codification of international legal norms also would entail a uniform and acceptable language. A uniform language does not necessarily mean that there could be a uniform standard. The TRIPs Agreement, while laying down these principles, does not specifically outline the standards of protection. For example, how does one define an 'adequate' and 'effective' protection of IPRs? The definition of the term 'adequate', 'effectiveness' could vary in different jurisdictions. TRIPs mandate that Members should give effect to the provisions of the Agreement<sup>39</sup>. While doing so, the standards of protection should not fall below the standards set in TRIPs. Members, it is further noted, would be free to determine the appropriate method of

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> See Article I and II of the TRIPs Agreement.

<sup>38</sup> TRIPs Council reviews the implementation process. This is an ongoing process. It should be noted that several Asian and African countries are at different levels implementation. See, TRIPs Gateway page in the [www.wto.org](http://www.wto.org).

<sup>39</sup> Article 1 of the TRIPs Agreement.

implementing the TRIPs provision within their own legal system and practice<sup>40</sup>.

IPRs, as in the case of any other international obligation, have generally been operating at international and national level. While multilateral conventions provided the setting for minimum standards, these standards were implemented through national standards and practices. In this sense, TRIPs requirements for implementation should be fulfilled in the normal course while allowing some space for broader interpretation. It is, however, argued that a broad interpretation of TRIPs provisions itself could become a barrier to international trade. According to TRIPs, for example, patents have to be granted in all fields of technology, whether products or processes, whether imported or locally produced.<sup>41</sup> These patenting standards, in other words, will have to be incorporated in one way or the other in the national laws and practice. It is possible that a language may be formulated to give effect to these standards. But, it could be subjected to several procedural restrictions thereby effectively blocking the implementation process<sup>42</sup>. On the grounds of protecting public order, environment, morality, health, human, animal or plant life exceptions to the implementation of the patenting standards could be created. To put it differently, implementation in any given case could be qualified. For this reason, till date, there is no national implementation that could be regarded as TRIPs-inconsistent.

TRIPS-consistency should be seen in a particular context. A State might, in a given case, has the option to trigger WTO Dispute Settlement Mechanism if it finds that the implementation process has resulted in creating a trade barrier<sup>43</sup>. So far such an argument has not come before the WTO Dispute Settlement Mechanism. TRIPs cases before the dispute settlement panels have essentially dealt with the question of violation of existing measures within a covered agreement, in this case TRIPs. It is also important to note that Members may decide to take a dispute to a consultation process or for a panel process eventually for various trade and non-trade related

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<sup>40</sup> Ibid.

<sup>41</sup> Article 27 of the TRIPs Agreement.

<sup>42</sup> A local language requirement, for instance. It could be a requirement for a model and so on.

<sup>43</sup> There are few non-violation complaints with regard to TRIPs see TRIPS Gateway page in [www.wto.org](http://www.wto.org).



concerns. In one case involving India and US, though insignificant in terms of monetary value, some key short-term implementation issues were raised<sup>44</sup>.

In keeping with the historical evolution of IPRs and its possible misuse, TRIPS does refer to abuse of IPRs by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.<sup>45</sup> Even implementation standards could be justified on the grounds of public interest in sectors of vital importance in a State's socio-economic and technological development<sup>46</sup>. All these terminologies within the TRIPs context need to be defined. This cannot be done without taking into account the national implementation issues. Both terms – abuse of IPRs and international transfer of technology – will have to be interpreted from the national implementation perspective. The objectives of the TRIPs Agreement, as noted in Article 7, “should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual 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.”

There are numbers of terminologies within TRIPs Agreement, as stated above that need to be taken into account while taking recourse to implementation process. This has become evidently crucial as the IPR and its scope of application within TRIPs has expanded to more non-traditional areas such as life-forms, life styles, folklore, traditional knowledge, trade secrets and biodiversity-related issues. Even there are new forms of IP protection which many Asian and African countries need to implement and they have been attempting to implement it with a fresh approach by adhering to a broad interpretation of the TRIPs terminologies.<sup>47</sup> One such attempt

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<sup>44</sup> India-US case concerning Patent Protection for Pharmaceuticals and Agricultural Chemicals (1997-98) DS50; see, WTO Dispute gateway page in [www.wto.org](http://www.wto.org).

<sup>45</sup> Article 8(2) of the TRIPs Agreement. These are categorized as anti-competitive practices in contractual licenses under Article 40 of the TRIPs Agreement which *inter alia*, provides that Members may specify in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property right having an adverse effect on competition in the relevant market. Some examples of such practices have been given, namely, exclusive grant back conditions, conditions preventing challenges to validity and coercive packages licensing.

<sup>46</sup> Article 8 (1) of the TRIPs Agreement.

<sup>47</sup> Many countries does not have legislation on Geographical Indications. The protection of Trade Secrets provided in Article 39 of the TRIPs Agreement is generally regulated by contractual formulations.

was made while launching Doha Round wherein Members came out with a separate TRIPs Declaration. That Declaration, it should be noted, was an attempt to broaden the interpretative matrix of the various TRIPs provisions keeping in view the problems of developing countries, particularly countries from Africa and Asia. Doha Declaration on TRIPs, taking into account the concerns of public health and other related issues, attempted to put in place a harmonious interpretation of TRIPs balancing public interest concerns vis-à-vis private gains.<sup>48</sup>

There are other subject-specific areas within TRIPs which have been granted protection. Life-forms, even life in certain circumstances, could be patented under the TRIPs Agreement, although it clearly states that 'essentially biological processes' are not patentable. Microbiological and essentially non-biological processes are patentable, including microorganisms.<sup>49</sup> Plant Varieties are to be protected separately either by a *sui*

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<sup>48</sup> Implementation of Doha Declaration, particularly concerning TRIPs and Public Health resulted in the first-ever amendment of the WTO Covered Agreement i.e., TRIPs. Member countries agreed on 6 December 2005 on a decision with regard to patents and public health which provided waiver making it easier for the poorer countries to obtain cheaper generic versions of patented medicines by setting aside a provision of the TRIPs Agreement that could hinder the exports of pharmaceuticals manufactured under compulsory licences to countries that are unable to provide them. Article 31 (f) of the TRIPs Agreement was modified. The original Article 31 (f) provided that "any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use". The new Article 31 *bis* would now allow pharmaceutical products made under compulsory licences to be exported to countries lacking production facility. It also provided for the avoidance of double remuneration to a patent owner. The Annex to the new provision will also require the WTO to assess the lack of manufacturing capability in the importing country. However, this provision could be invoked only in 'emergencies' and 'extreme urgent situations. In addition to this, the provision will be applied in good faith in order to deal with public health problems and not for industrial or commercial policy objectives. States will have time till 1 December 2007 to ratify this amendment. For the text of the amended article and other details see TRIPs Gateway page in [www.wto.org](http://www.wto.org).

<sup>49</sup> The international legal regime for regulating the patenting of microorganisms merely refers to deposit and modes of disclosure: see Budapest Treaty of April 28, 1977, on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. The substantive contents for granting patents to microorganisms will have to be decided under the national laws; For a legal and conceptual analysis of the issue of patenting life forms, see, V.G.Hegde, "Intellectual Property Rights: National and International Legal Aspects Relating to Patenting of Life Forms", *Indian Journal of International Law*, vol. 38, no. 1, p.28.

*generis* system or by an effective patent system<sup>50</sup>. The thresholds of IPR protection for terms like ‘*sui generis*’ and “effective” is plainly vague. Till date, no country has followed a consistent pattern in implementation. Some countries, India for example, has referred to farmers’ rights, community gene fund, and community rights and to host of other rights<sup>51</sup>. Several other Asian and African countries are still grappling with the problem of TRIPs compliance. The relationship between IPRs and other Multilateral Environmental Agreements such as Convention on Biodiversity also needs consideration. TRIPs Agreement does not specify any particular standard for the protection of plant varieties.

There are also issues relating to copyright protection of computer software. Some countries have been providing patent protection to certain forms of computer software when they are part of a larger technical or mechanical device. The term of copyright protection is too long for computer software. The validity of software in commercial terms usually does not exceed five years. In that case, a copyright protection of life time and sixty years is too much for software. Patent is the preferred route as it provides more absolute right and for a shorter period. States are also looking for a sort of *sui generis* protection. Similar problems are being faced with regard to protection of data and database.

## **VI. Implementing TRIPs in the Asian and African Context**

IPRs should be regarded as one of the essential tools for development and also for the survival and preservation of the human and biological diversity within the continents of Africa and Asia. The nature of technology flows along with foreign direct investment, as discussed above, is heavily dependent, *inter alia*, on the scope and application of IPR standards. Both continents need that. For Africa, availability of drugs and medicines at reasonable prices are crucial to keep pace with the growing menace of Aids and other diseases. The high prices of drugs and pharmaceuticals will also cut into their developmental goals thereby affecting their already fragile financial situation. Big multinational pharmaceutical companies will not move to these

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<sup>50</sup> Article 27.3 (b) of the TRIPs Agreement. For plant varieties protection, the standard usually referred to is the International Convention for the Protection of New Varieties of Plants, 1961 (UPOV Convention). Many Asian and African countries, including India, oppose UPOV standards, as its latest revision of 1991 does not allow farmers to use their own seeds for sowing. India and many other Asian and African countries are agreeable to the 1978 version of UPOV.

<sup>51</sup> The Protection of Plant Varieties and Farmers Rights Act, 2001.

continents without ensuring appropriate IPR protection for their drugs. Even after putting in place a TRIPs-consistent IPR regime by the several countries of these continents,<sup>52</sup> many of them are still unsure of the availability of cheap drugs for their poor population. Lack of market could be one reason for such a tepid response by the global pharma companies. Affordability of these drugs, on account of high prices, is another key issue. It is not entirely clear whether the pricing mechanisms of drugs are linked to IPR standards. India, for example, could be able to supply drugs to Africa at a much cheaper price than the original Western manufacturers of certain pharmaceutical processes. This raised several issues concerning 'parallel importing', new and broad interpretation of local working component of pharmaceuticals, issuance of compulsory licensing and other related issues. Doha Declaration on TRIPs and public health reflected many of these interpretative concerns and it actually broadened the policy options for the Asian and African countries.

The protection of traditional knowledge (TK) and indigenous innovation systems through IPRs is another key issue in Asia and Africa. In addition to this, piracy of these knowledge systems from Africa and Asia to other areas is a key concern as well. Defining TK, in its entirety, is also crucial. TK could include the knowledge systems possessed by ethnobotanists, ethnopharmacologists, agriculturists, foresters; and food technologists. It could also include body of knowledge vital to the day-to-day life of indigenous and local communities derived through generations of living in close contact with nature. Those who nourish these knowledge systems have also been categorized as traditional administration authorities, traditional natural resource managers, traditional health providers, storytellers, singers, dancers and traditional healers. At the multilateral level, these knowledge systems, innovations and practices of indigenous and local communities are considered key to the conservation and sustainable development of biodiversity.<sup>53</sup> There are obligations to protect customary use of bio-resources not only at the international level,<sup>54</sup> but also even at the national level.<sup>55</sup> Accordingly States have an obligation to adopt economically and socially sound measures. Importantly, States are also bound to ensure that

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<sup>52</sup> Less-Developed Countries (LDCs) do not have to implement TRIPs standards till 2013. LDCs have time for implementing pharmaceutical patents till 2016.

<sup>53</sup> According to Article 8 (j) of the Convention on Biodiversity, Parties have an obligation "to respect, preserve and maintain these elements".

<sup>54</sup> Article 10 (d) of the Convention on Biological Diversity.

<sup>55</sup> Article 18 (4) of the Convention on Biological Diversity.

patents and other IPRs are supportive of the objective of the Convention on Biological Diversity and do not undermine them.

The work of the TRIPs Council has been expanded to include some of these issues. Para 19 of the 2001 Doha Declaration broadened the scope of discussion on some of these issues by *inter alia*, stating that the TRIPs Council should also look at the relationship between the TRIPs and the UN Convention on Biological Diversity, the protection of traditional knowledge and folklore. It further stated that the TRIPs Council's work on these topics should be guided by the TRIPs Agreement's objectives (Article 7)<sup>56</sup> and principles (Article 8)<sup>57</sup> and must take development issues fully into account. A recent proposal by a Group of Developing Countries,<sup>58</sup> while essentially reflecting the Asian and African view point on these issues insists that the patent applicants should (a) disclose the country of origin of genetic resources and traditional knowledge used in the inventions; (b) evidence that they received "prior informed consent" and evidence of "fair and equitable" benefit sharing. It should be noted that the language used in this submission is drawn from the Convention on Biological Diversity. While making this submission, these countries have proposed a new provision Article 29 *bis* to reflect the ideas proposed in their text, particularly concerning disclosures.<sup>59</sup>

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<sup>56</sup> Article 7 of the TRIPs Agreement (as discussed already in the earlier section) provides "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual 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.

<sup>57</sup> Article 8 of the TRIPs Agreement states "(1) Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. (2) Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology".

<sup>58</sup> See the submission made by Group of Developing Countries which included, among others, India, China, Thailand, Tanzania and Pakistan. *The Outstanding Implementation Issues on the Relationship between the TRIPs Agreement and the Convention on Biological Diversity*, IP/C/W/474 of 5 July 2006 (WTO, Geneva).

<sup>59</sup> Article 29(1) of the TRIPs Agreement requires that "...an applicant for patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the

Japan, however, felt that the work undertaken by the TRIPs Council in this regard should not duplicate the work in WIPO with regard to genetic resources, traditional knowledge and folklore.<sup>60</sup>

The submission by the African Group on this issue in 2003,<sup>61</sup> it should be noted, was comprehensive. It covered whole range of issues concerning the African continent such as food security, nutrition, elimination of rural poverty and the integrity of local communities. It also referred to the necessity of protecting the custodians of genetic resources and traditional knowledge. It also endorsed the view that non-disclosure of the original genetic material should result in the non-granting of patents or any other protection under IPRs. African States had opposed granting of patents for life and life-forms while holding that as morally and ethically reprehensible<sup>62</sup>. Accordingly, African Group was insistent on the complete review of Article 27.3 (b). In June 1998 itself the Heads of States of Organization of African Unity (OAU) had endorsed the ideas on the preservation of community rights and the control of access to biological resources.<sup>63</sup> This paved the way for the development of African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.<sup>64</sup>

Asian States are slightly differently located with regard to TRIPs implementation. Many of them had to change their laws, particularly patent laws, to comply with TRIPs.<sup>65</sup> Accordingly, many of them have amended their IPR laws and have also evolved new national legislations to give effect to TRIPs. India, for example, amended its patent laws thrice to give effect to its TRIPs obligations. India has also introduced a new law on Geographical

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best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application”.

<sup>60</sup> Japanese Submission to the TRIPs Council on *The Patent System and Genetic Resources*, IP/C/W/472, 13 June 2006 WTO, Geneva). The Japanese submission also referred to the work of the WIPO, in particular to the Ninth Session of the Intergovernmental Committee on the Intellectual Property and Genetic Resources.

<sup>61</sup> The submission by the African Group to the TRIPs Council – *Taking Forward the Review of Article 27.3(b) of the TRIPs Agreement*, IP/C/W/404, 26 June 2003 (WTO, Geneva).

<sup>62</sup> *Ibid.*

<sup>63</sup> See the Declaration made to this effect by the OAU Head of States Summit held in Ouagadougou in June 1998, Doc. CM/2075 (LXVIII) ADD.1.

<sup>64</sup> This was adopted by OAU in 2000. For the text see [www. grain. org](http://www.grain.org).

<sup>65</sup> Article 65 of the TRIPs Agreement provided a ten-year transition period for developing countries. This transition period was extended in accordance with the provisions of the Doha Declaration in 2001 to LDCs till 2013.

Indications and Plant Varieties Protection and Farmers Rights. Thailand, for example, is in the process of finalizing its Draft Community Forest Act<sup>66</sup> which *inter alia*, (a) defines and grants land rights to community; (b) insists on sustainable utilization of natural resources; (c) identifies the role of communities to use and develop forests their traditional way; and (d) to promote the process wherein the State and community cooperate in supporting the State's development process. Philippines have put in place a Community IPR Act, Guidelines on Bioprospecting (1995), Traditional and Alternative Medicines Act, 1997; and finally Indigenous People's Rights Act, 1997.<sup>67</sup> Pakistan has, *inter alia*, developed a law on access and community rights<sup>68</sup>.

## VII. Conclusions

The interpretative content of the IPRs regime at the global level, in the context of Asia and Africa, is entering a new phase. IPRs were, historically, constituted as industrial property and copyright and evolved in response to the needs of an industrial society in Europe in the nineteenth century. Euro-centric nature of the modern IP system came to be challenged after the Second World War. Large number of Asian and African States emerging from their long colonial yoke transformed the global society in many ways. Issues relating to IPRs were also part of that transformation. Since the essential character of IPRs had generally been linked to industrial development and other related issues such as transfer of technology, developing societies of Asia and Africa had very little say in its formulation. This discourse on IPRs changed with TRIPs. TRIPs, *inter alia*, expanded the horizons of IPR protection to non-industrial concerns such as life, life forms, biological resources, genetic resources and other community-oriented issues. IPRs, in the present context, are highly inclusive and the list of protection mechanism is growing. IPRs are no longer about just patents and copyrights only. Paragraph 19 of Doha Declaration mandated the TRIPs Council to examine all these linkages. The ongoing review of TRIPs Agreement is presently saddled with several Asian-African-oriented proposals. Among these proposals, the primary emphasis is on the adequate and effective protection of traditional knowledge, genetic and biological material. The

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<sup>66</sup> This draft, as per the information available on the web, is of 1996 vintage. For the draft text see [www.grain.org](http://www.grain.org).

<sup>67</sup> All these enactments are in force.

<sup>68</sup> WTO also provides a brief survey on the notifications issued by each member country and other related issues. See, [www.wto.org](http://www.wto.org).

outlining of disclosure norms relating to these subject matters of protection in the Asian-African context is another crucial issue. There is also a proposal, recently placed before the TRIPs Council, by the developing countries to carve out new Article 29 *bis* to give effect to an effective disclosure mechanism on matters relating to TK and genetic material.

The other crucial area of concern for Asian and African States relate to pharmaceutical patents. LDCs, however, have a transition period now extended up to 2016 and in other patent cases the amendment of their laws is now till 2013. Availability and affordability of drugs and medicines are an important issue, particularly for Africa. The implementation of TRIPs will require investment in infrastructure and upgrading of technical skills. Unless these are undertaken by the Asian and African countries, the fruits of IPRs may not reach their populace. The WIPO Development Agenda reflects some of these issues and implementation is the key. With the endowment of abundant natural and biological resources, Asian and African Countries hold the key as well for the future. IPR as an instrument will have to modify itself. The proposals of the African Group to the TRIPs Council in 2003 outline some of these concerns. Asian and African countries have a comparative advantage in these areas of new and emerging areas. Accordingly, the emerging international legal norms relating to IPRs in the global context, whether within TRIPs framework or within emerging bilateral or regional framework, will eventually have to reflect these new concerns.