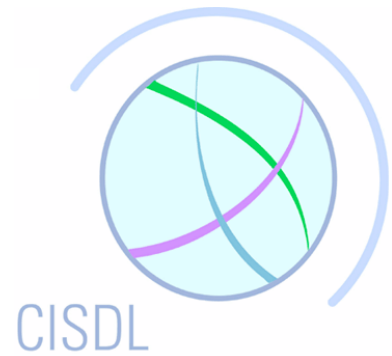


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## Centre for International Sustainable Development Law

*The CISDL should exist to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.<sup>1</sup>*

Approved by:	CISDL
Contact:	Jorge Cabrera, Lead Counsel, CISDL

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<sup>1</sup> In this context, sustainable development is defined as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs', as stated in 'Our Common Future: The Report of the World Commission on Environment and Development' (Oxford: Oxford University Press, 1987). Furthermore, sustainable development is seen as an open and participatory process of environmental, social, economic, cultural and political change. Sustainable development can be achieved through, *inter alia*, protecting and enhancing ecosystems, transforming the direction of investments and the orientation of technology, and re-designing institutions to ensure current and future potential to meet the needs and aspirations of communities.

## Sustainable International Biodiversity Law

*with Jorge Cabrera Medaglia and Kathryn Garforth<sup>2</sup>*

For the purposes of this chapter, the term biodiversity echoes the definition in the *Convention on Biological Diversity*<sup>3</sup> and include the variability among all life forms at the genetic, species and ecosystem levels.<sup>4</sup> Future research should uncover and highlight areas where the right balance has been struck between the social, environmental and economic aspects of biodiversity issues, and on areas where more work is needed to integrate the three areas of sustainable development as they relate to biodiversity.

In particular, a future-oriented ISDL research agenda in international biodiversity law can focus on developing knowledge in two specific areas of inter-linkages. First, research is needed to define the linkages between different biodiversity-related policies and law in economic, environmental and social regimes. Second, research is needed to strengthen connections between biodiversity initiatives at the national, regional and international levels.

### Sustainable International Biodiversity Law in Economic Regimes

The relationship between trade and biodiversity protection has acquired increased significance over the past decade, as various multi-lateral agreements have been adopted by the international community.

In 1992 at the Earth Summit in Rio de Janeiro, world leaders agreed to the *Convention on Biological Diversity* which, for the first time, set out the principle of state sovereignty over natural resources in international treaty law.<sup>5</sup> This meant that access to genetic resources within a state's borders now required permission from the relevant state authority and brought biodiversity much closer to the international trading system. In 1994, world leaders met again, this time in Marrakech, Morocco, and agreed to adopt a new set of trade rules and establish an international trade authority – the World Trade Organization. The new rules included agreements on minimum standards of intellectual property protection and allowable forms of sanitary and phytosanitary measures both of which affect the protection and conservation of biodiversity. Finally, in 2000, the Conference of the Parties to the CBD agreed to the *Cartagena Protocol on Biosafety*<sup>6</sup>, which fulfills the mandate established in article 19(3) of the CBD and sets out means to ensure “the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity” in the context of international trade.<sup>7</sup> This multiplicity of agreements points to the need for research to explore the relationship between the legal regimes for trade and biodiversity as well as their implications for sustainable development. To this end, future research in this area must consider numerous aspects of the trade-biodiversity interface.

There are five parts from the Uruguay Round of trade negotiations that are particularly relevant to international biodiversity law: GATT 1994<sup>8</sup>, the Agreement on Agriculture<sup>9</sup>, the Agreement on

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<sup>2</sup> Jorge Medaglia Cabrera, is a professor at the University of Costa Rica and Lead Counsel for Sustainable International Biodiversity Law at the CISDL. Kathryn Garforth, is a Research Fellow at the CISDL.

<sup>3</sup> 5 June 1991, 31 I.L.M. 818 (entered into force 29 December 1993) [Biodiversity Convention].

<sup>4</sup> *Ibid.* art. 2.

<sup>5</sup> *Ibid.* art. 3; F. Yamin, “Biodiversity, Ethics and International Law” (1995) 71:3 *International Affairs* 529 at 540-541.

<sup>6</sup> 29 January 2000 (entered into force 11 September 2003) [Cartagena Protocol or Biosafety Protocol].

<sup>7</sup> *Ibid.*, art. 1.

<sup>8</sup> *General Agreement on Tariffs and Trade 1994*, 15 April 1994, being part of Annex IA to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144.

<sup>9</sup> 15 April 1994, being part of Annex IA to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144.

the Application of Sanitary and Phytosanitary Measures<sup>10</sup>, the Agreement on Technical Barriers to Trade<sup>11</sup>, and the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>12</sup>. The first four of these can be discussed together and indeed all four are at issue in the pending dispute between the United States and the European Community over the EC's moratorium on the approval of biotechnology products.<sup>13</sup> This dispute raises a variety of broader questions concerning trade and biodiversity. What role should the precautionary principle have in the application of the SPS Agreement? To what extent are different states able to set culturally-appropriate levels of environmental and health protection? How will trade rules on sanitary or phytosanitary measures affect markets for genetically modified organisms or products thereof? Do laws requiring the labeling and trazability of GMOs constitute technical barriers to trade? How will the entry into force of the Cartagena Protocol affect the application and interpretation of the WTO texts?

The last round of GATT trade negotiations also introduced *intellectual property rights* (IPRs) to the realm of international trade agreements.<sup>14</sup> The role of intellectual property regimes in the protection of biodiversity and the development of biotechnology has been the subject of substantial commentary.<sup>15</sup> IPRs have the potential to make important contributions to the promotion of technology and innovation, transfer of environmentally-sound technologies, health care, and access to medicines. The question remains, however, whether the current corpus of IPRs is sufficient to realise the environmental and social objectives that, together with the predominant economic motive of intellectual property regimes, underlie sustainable development.

A related concern is whether the TRIPs Agreement and the CBD are compatible or whether they are in conflict. One of the outcomes of the WTO Doha ministerial meeting in 2001 was that the TRIPs Council was mandated to examine the relationship between TRIPs and the CBD.<sup>16</sup> That said, the Secretariat of the CBD has yet to be granted observer status at the TRIPs Council. The WTO's Committee on Trade and Environment also received instructions in the Doha Declaration to give "particular attention" to the relevant provisions in TRIPs.<sup>17</sup> The sorts of questions these bodies could address in their work include whether IPRs promote research and development in areas relevant to the sustainable development of biodiversity. How do IPRs contribute to the protection or destruction of biodiversity? Should the origins of source material be disclosed in patent applications? How should indigenous knowledge be protected and biopiracy prevented? What are the scope and implications of the exclusions for plants and animals from intellectual property regimes? How can the benefits from patents based on biological resources be shared with the communities and countries of origin?

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<sup>10</sup> 15 April 1994, being part of Annex IA to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144 [SPS Agreement].

<sup>11</sup> 15 April 1994, being part of Annex IA to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144.

<sup>12</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 15 April 1994, 33 I.L.M. 1197, being Annex 1C to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144 [TRIPs].

<sup>13</sup> WTO, *European Communities – Measures Affecting the approval and marketing of biotech Products: Request for Consultations by the United States*, WTO Doc. WT/DS291/1 (20 May 2003). Argentina and Canada have also launched parallel 'requests for consultations' with the EC. For background information on the dispute, see Pew Initiative on Food and Biotechnology, *U.S. vs. EU: An Examination of the Trade Issues Surrounding Genetically Modified Food* (August 2003), online: Pew Initiative on Food Biotechnology <<http://pewagbiotech.org/resources/issuebriefs/europe.pdf>> (date accessed: 19 September 2003).

<sup>14</sup> See D. Gervais, *The TRIPs Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 1998) for more information on the relationship between intellectual property rights and GATT.

<sup>15</sup> See e.g. G. Dutfield, *Intellectual Property Rights, Trade and Biodiversity*, (London: Earthscan, 2000); and Crucible Group II, *Seeding Solutions, Volume 1. Policy Options for genetic resources, People, Plants, and Patents revisited*, (IDRC and IPGRI, 2000).

<sup>16</sup> WTO, *Ministerial Declaration*, WTO Doc. WT/MIN(01)/DEC/1 at para. 19.

<sup>17</sup> *Ibid* at para. 32.

One type of intellectual property right is *plant variety protection*, the most widespread form of which is plant breeders' rights (PBRs) as embodied in the UPOV Conventions<sup>18</sup>. These Conventions grant exclusive rights to breeders who develop distinct, uniform and stable varieties of plants.<sup>19</sup> They also allow farmers to save seeds from protected varieties to replant the following year and allow researchers to use protected varieties for research purposes.<sup>20</sup> The most recent version of the Convention increases the scope and strength of the breeder's right – bringing PBRs much closer to patent protection – while weakening the exemptions for farmers and researchers.<sup>21</sup>

The TRIPs Agreement does not specifically mention UPOV, however article 27(3)(b) requires members to “provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.” This *sui generis* provision has been widely equated with the UPOV Convention but the issue has yet to be decided by a dispute settlement panel. Other bilateral trade agreements have been more explicit, requiring signatory states to join UPOV thus creating ‘TRIPs-plus’ obligations for the countries involved.<sup>22</sup> The chapter on IPRs from the November 2002 draft text of the Free Trade Area of the Americas tentatively requires parties to implement parts of either the 1978 or 1991 version of the UPOV Convention, but the provision remains in square in brackets.<sup>23</sup> Other relevant articles in square brackets include a provision requiring parties to give effect to much of the CBD<sup>24</sup> and article 1.1 of section 9 that includes the UPOV system of Plant Breeders' Rights as one possible definition of “effective *sui generis* system”.

In addition to these international texts, there are several regional and national measures – such as the Andean Pact's Decision 345 and the Organisation for African Unity's Model Plant Law – creating non-UPOV forms of plant variety protection.<sup>25</sup> The interplay of these different levels of law raises a variety of questions. What constitutes effective *sui generis* protection for plant varieties? Do TRIPs-plus agreements threaten biodiversity by requiring more stringent forms of intellectual property protection for life forms? Will the FTAA come into conflict with TRIPs if the former incorporates parts of the CBD?

The final economic issues to be explored by a research agenda on sustainable international biodiversity law are *competition and investment concerns*. Most of the research and development, patents, and market share in the life sciences industry is dominated by a handful of multinational corporations, predominantly from Western industrialized countries.<sup>26</sup> In some cases, these MNCs have collaborated with government, universities or research institutions in developing countries, as encouraged under the CBD.<sup>27</sup> While the domination of the life sciences by a few multinationals is not necessarily bad in and of itself, these companies may have research and market interests

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<sup>18</sup> The acronym ‘UPOV’ is derived from the French name of the organization, *Union internationale pour la protection des obtentions végétales*. There have been three versions of the UPOV Convention, two of which are of concern here: *International Convention for the Protection of New Varieties of Plants*, 2 December 1961, as revised on 23 October 1978, U.K.T.S. 74 (1984) (entered into force 8 November 1981); *International Convention for the Protection of New Varieties of Plants*, 2 December 1961, as revised on 23 October 1978 and 19 March 1991 (entered into force 24 April 1998).

<sup>19</sup> Art. 6(1) of UPOV 1978. The 1991 version of the Convention requires that plant varieties be novel in addition to distinct, uniform and stable, art. 5(1) & 6.

<sup>20</sup> Art. 5(3) of UPOV 1978.

<sup>21</sup> UPOV 1991, art. 15(1), (2) & 14(5).

<sup>22</sup> Genetic Resources Action International, “‘TRIPs-plus’ Through the Back Door” (July 2001), online: GRAIN <<http://www.grain.org/publications/trips-plus-en.cfm>> (date accessed: 9 November 2002). Some of these bilateral agreements go even further and require states to grant patent protection for plants.

<sup>23</sup> Free Trade Area of the Americas Draft Agreement, chapter on Intellectual Property Rights, document FTAA.TNC/w/133/Rev.2, online: FTAA <<http://www.ftaa-alca.org/>> (date accessed: 9 November 2002), Part I, art. 5.2(f).

<sup>24</sup> *Ibid* at art. 5.2(p).

<sup>25</sup> See the website of Genetic Resources Action International <[www.grain.org](http://www.grain.org)> and the section on biodiversity rights legislation in particular for texts of the various measures.

<sup>26</sup> ETC Group, Communiqué Issue #71, “Globalization, Inc. Concentration in Corporate Power: The Unmentioned Agenda” (July/August 2001).

<sup>27</sup> *Biodiversity Convention*, *supra* note 153 art. 15.

that do not coincide with the needs of developing countries or the conservation of biodiversity. The dominant position of these companies can make it hard for these other needs to be met.

International trade law is still grappling with how best to address competition and investment issues. There is no specific chapter from the Uruguay Round agreements that discusses competition law and the *Agreement on Trade-Related Investment Measures*<sup>28</sup> is very brief. TRIPs does contain provisions allowing member states to take action where intellectual property rights lead to anti-competitive behaviour but when and how these provisions should be applied is still in dispute.<sup>29</sup> At the Singapore ministerial in 1996, the WTO created a Working Group on the Interaction between Trade and Competition Policy which continues to explore different topics related to these themes. To date, however, the Working Group has not been authorized to develop a text for inclusion in the Doha round of negotiations. The most recent draft text for the Free Trade Area of the Americas does include a chapter on competition policy but much of the wording remains in square brackets.<sup>30</sup>

In the context of sustainable international biodiversity law, issues for consideration relating to competition and investment include consolidation in the life sciences and agro-chemical industries; the effect of broad patent claims and their negative consequences for research and development; chain of control from seed to processing to distribution and marketing; and barriers to entry for new competitors, amongst others. Against this backdrop of the patterns of investment in the biotechnology industry, an ISDL agenda could focus on discovering and testing new legal tools that may serve as incentives for technology transfer and research and development.

## **Sustainable International Biodiversity Law in Environmental Regimes**

At first glance, it would appear as though the relationship between environmental regimes and sustainable international biodiversity law should be straightforward. In reality, however, this is not the case. The number of international organizations and multilateral agreements whose purposes pertain to the environmental dimension of biodiversity means that a great deal of cross-referencing must be done. In addition to the Convention on Biological Diversity and the Cartagena Protocol on Biosafety, the international community has now agreed to the *International Treaty on Plant Genetic Resources for Food and Agriculture*<sup>31</sup>. This Treaty was created under the auspices of the Food and Agriculture Organization and its objectives are “the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security”.<sup>32</sup> While the IT aims to be in harmony with the CBD, it takes quite a different approach to the sustainable use aspect of its mandate, and, as we shall see below, this creates friction between the two agreements. Adding to the

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<sup>28</sup> *Agreement on Trade-Related Investment Measures*, 15 April 1994, being part of Annex 1A to the *Agreement Establishing the World Trade Organization*, 15 April 1994, 33 I.L.M. 1144.

<sup>29</sup> See e.g. *Brazil – Measures Affecting Patent Protection* and the U.S. request for a panel in relation to Brazil’s domestic working and compulsory licensing scheme, WTO document WT/DS199/3 9 January 2001; as well as *The Pharmaceutical Manufacturers’ Association of America et al. and The President of the Republic of South Africa, The Honourable Mr. N.R. Mandela, N.O. et al.* which was the lawsuit by 39 pharmaceutical firms against the Government of South Africa and its 1997 *Medicines and Related Substances Control Amendment Act* which allows the use of compulsory licensing and parallel imports, online: The Consumer Project on Technology <<http://www.cptech.org/ip/health/sa/pharma-v-sa.html>> (last modified: 22 August 2002).

<sup>30</sup> Free Trade Area of the Americas Draft Agreement, chapter on Competition Policy, document FTAA.TNC/w/133/Rev.2, online: FTAA <<http://www.ftaa-alca.org/>> (date accessed: 9 November 2002).

<sup>31</sup> 3 November 2001 [IT].

<sup>32</sup> Art. 1.1.

complexity is the fact that none of these agreements are purely environmental.<sup>33</sup> All involve both economic and social concerns, tying them to the other questions raised in the international biodiversity law research programme.

The first two objectives of the Convention on Biological Diversity are the *conservation of biodiversity* and the *sustainable use of its components*. The Convention sets out fairly detailed provisions on *in-situ* and *ex-situ* conservation<sup>34</sup> and rather general guidelines for sustainable use<sup>35</sup>. The first two objectives of the IT similarly concern conservation and sustainable use, although in the more limited category of plant genetic resources for food and agriculture. Articles 5 and 6 of the Treaty elaborate as to what sorts of measures may be taken to encourage conservation and sustainable use. The relatively brief nature of these articles raises a variety of questions. To what extent are the provisions of the CBD and the IT appropriate for the realisation of two of their principal objectives? What legal mechanisms could be introduced to facilitate the realisation of these objectives? What are some of the constraints? Do other legal regimes, such as TRIPs, for example, help or hinder the goals of conservation and sustainable use?

The third objective of the CBD is *access to genetic resources and benefit sharing*. Article 15 of the Convention encourages state parties to enter into bilateral agreements with other states or private parties in order to ensure access and benefit-sharing. These agreements are to be on mutually agreed terms and subject to prior informed consent. The provisions in article 15 have now been used to develop the *Bonn Guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising out of their Utilization*<sup>36</sup>. While not legally binding, the Guidelines were unanimously adopted at the sixth Conference of the Parties to the CBD in April 2002. Subsequently, the Guidelines were referred to in the Plan of Implementation of the World Summit on Sustainable Development as agreed to by world leaders in Johannesburg in September 2002. Paragraph 44 of the Plan focuses on biodiversity, and subsection (n) encourages the implementation and further development of the Guidelines. Subsection (o) goes further and calls for action to “[n]egotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources”.

Access to genetic resources and benefit-sharing must also be examined in the context of the new IT. The Treaty attempts to establish a multilateral system of access to plant genetic resources as well as create a means to share the benefits arising from use of the resources in the system. Because of the principle of state sovereignty over natural resources, the Treaty contains an appendix listing the types of crops states were willing to include in the multilateral system. The possibility of separate, bilateral access and benefit-sharing agreements under the CBD, however, meant that some of the gene-rich countries were unwilling to include certain species in the multilateral system in the hope that these species could generate more revenue through bilateral contracts.<sup>37</sup>

The current status of access to genetic resources and benefit-sharing raises a number of questions. Is a bilateral or multilateral system of ABS a better approach or can the two co-exist harmoniously? What should an international regime on benefit-sharing look like? What sorts of benefit sharing mechanisms should exist for the use of *ex-situ* collections?

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<sup>33</sup> U.P. Thomas, “The CBD, the WTO, and the FAO: The Emergence of Phyto-genetic Governance” in P.G. LePrestre, ed., *Governing Global Biodiversity: The Evolution and Implementation of the Convention on Biological Diversity* (Burlington, VT: Ashgate, 2002) 177 at 180.

<sup>34</sup> Biodiversity Convention, art. 8 & 9.

<sup>35</sup> Biodiversity Convention, art. 10 & 11.

<sup>36</sup> Being the Annex to *Access and benefit-sharing as related to genetic resources*, CBD COP Dec. VI/24 A, 2002, UN Doc. UNEP/CBD/COP/6/20 [Bonn Guidelines].

<sup>37</sup> H. David Cooper, “The International Treaty on Plant Genetic Resources for Food and Agriculture” (2002) 11 *RECIEL* 1 at 5.

According to the Secretariat of the Convention on Biological Diversity, the term biosafety is “used to describe efforts to reduce and eliminate the potential risks resulting from biotechnology and its products.”<sup>38</sup> A variety of recent world events has focused attention on biosafety issues. In 2001, reports emerged that genetically modified corn had appeared in remote parts of Mexico despite a ban on planting GM corn in the country.<sup>39</sup> Mexico is a centre of diversity for corn and concerns focused on the potential for GM varieties to out-compete and reduce the biodiversity of local varieties. If this did indeed come to pass, the repercussions would be felt well beyond Mexico as the country’s corn biodiversity is used as a source of genetic variability by international crop breeders. A second event was the refusal of several southern African countries to accept American food aid to help relieve famine. The countries were concerned that the food would be genetically modified and they were not prepared to accept the perceived risks to public health or their access to European agricultural markets, which are largely closed to GM foods.

The negotiation of the Cartagena Protocol on Biosafety is meant to remedy some of these difficulties. The Protocol creates different procedures for notification and approval by both exporting and importing countries for different types of living modified organisms (LMOs).<sup>40</sup> The main division is between LMOs destined for intentional release into the environment, which are subject to an Advance Informed Agreement procedure,<sup>41</sup> and LMOs that are not intended for release into the environment and are instead to be used as food, feed or processing.<sup>42</sup> The Protocol allows importing states to make their own decisions about whether or not to allow the importation of specific types of LMOs. These decisions can be based on domestic regulatory frameworks or states can use the procedural requirements set out in the Protocol. Decisions are to be based on sound science and the use of precaution is allowed where the science is insufficient or non-existent.<sup>43</sup> States are also allowed to include some socio-economic considerations in their decision-making.<sup>44</sup>

The Protocol is very new, however, so many questions remain. Can the concepts of precaution in the Biosafety Protocol and the SPS Agreement be reconciled? How well can the Protocol function without the participation of the United States, the largest exporter of genetically modified organisms? Can states truly consider socio-economic factors in their decision-making about the importation of living modified organisms as allowed under the Protocol or will this bring them into conflict with provisions in the WTO Agreements?

## **Sustainable International Biodiversity Law in Social Regimes**

The social aspect of sustainable international biodiversity law is probably the least developed in national and international law. It includes some areas that overlap with other research programmes of ISDL – the right to food, access to medicines, the right of access to innovations. It also includes relatively new concepts that have arisen largely in response to the growing commercialization of biodiversity – Farmers’ Rights and protection of traditional knowledge. The newness of these areas means their content is still being developed, making them perfect subjects for inquiry in a sustainable international biodiversity law programme.

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<sup>38</sup> “Frequently Asked Questions on the Biosafety Protocol”, online: Convention on Biological Diversity, <<http://www.biodiv.org/biosafety/faqs.asp?area=biotechnology&faq=2>> (date accessed: 19 September 2003).

<sup>39</sup> D. Quist and I. Chapela, “Transgenic DNA Introgressed into Traditional Maize Landraces in Oaxaca, Mexico” *Nature* 414:6863 (29 November 2001) 541.

<sup>40</sup> For a thorough overview of the provisions of the Protocol see IUCN, *An Explanatory Guide to the Cartagena Protocol on Biosafety* (Cambridge, UK: International Union for Conservation of Nature and Natural Resources and FIELD, 2003).

<sup>41</sup> Protocol, art. 7-10.

<sup>42</sup> Protocol, art. 11.

<sup>43</sup> IUCN, at para. 340.

<sup>44</sup> Protocol, art. 26.

The protection of **traditional knowledge** has gained increasing importance in the face of ever expanding intellectual property rights regimes. Traditional knowledge includes things like information on the medicinal qualities of plants and animals, or the years of selective breeding that have produced particular varieties of crops. For the most part, traditional knowledge does not fit well within the Western systems of patents, copyrights, trademarks, etc. If the value of traditional knowledge is ignored, however, it gives the knowledge-holders little incentive to share, protect, and develop their insights.

The World Intellectual Property Organization (WIPO) has been actively working on three main issues in this area: folklore, protection of traditional knowledge, and genetic resources.<sup>45</sup> To date, no agreement has been reached to recommend to the next WIPO General Assembly that it initiate negotiations towards a legally-binding international treaty for the protection of traditional knowledge. In addition, the TRIPs Council has been unable to agree as to whether it should discuss protection of traditional knowledge in the context of its work.<sup>46</sup>

This lack of agreement means there are many questions to be considered in the area of sustainable biodiversity law. How can the contributions of traditional communities be acknowledged and valued in the intellectual property system? Can and should there be an international regime for the protection of traditional knowledge? How do we address cultural values that balk at the conceptualization of traditional knowledge as property?

*Farmers' Rights* have already been alluded to in other parts of the biodiversity research programme. The concept arose in response to the development of the UPOV Convention and the idea of Plant Breeders' Rights. According to the IT, Farmers' Rights are based in "the past, present and future contributions of farmers in all regions of the world, particularly those in centres of origin and diversity, in conserving, improving and making available these resources".<sup>47</sup> Despite the IT's affirmation that the rights recognized in the Treaty to, amongst other things, "save, use, exchange and sell farm-saved seed and other propagating material" are fundamental to the realization of Farmers' Rights, the actual text of the Treaty leaves the implementation of Farmers' Rights up to national governments.<sup>48</sup>

As the concept of Farmers' Rights begins to take greater shape, the types of questions that need to be answered include whether the national recognition of Farmers' Rights is sufficient or whether an international treaty is necessary to assure their adequate protection. What is the relationship between Farmers' Rights and other international human rights treaties? To what degree are Farmers' Rights threatened by international trade and intellectual property agreements?

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<sup>45</sup> For an overview of the work to date, see WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 5<sup>th</sup> sess., Doc. WIPO/GRTKF/IC/5/12 (2003).

<sup>46</sup> "TRIPs, Biodiversity and Traditional Knowledge" (2003) 7:5 Bridges 11 at 11-12, online: International Centre for Trade and Sustainable Development <<http://www.ictsd.org/monthly/bridges/BRIDGES7-5.pdf>> (date accessed: 19 September 2003).

<sup>47</sup> IT, preamble, para. 7.

<sup>48</sup> IT, art. 9.