

# Access Versus Incentives: Analysing Intellectual Property Policies in Four UN Specialized Agencies by Emphasizing the Role of the World Intellectual Property Organization and Human Rights

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Concerns have been expressed over the role of the World Intellectual Property Organization (WIPO) in influencing the intellectual property policies of other specialized agencies of the United Nations. This article reviews the policies of the Food and Agricultural Organization (FAO), World Health Organization (WHO) and United Nations Educational, Scientific and Cultural Organization (UNESCO), in addition to WIPO itself, and finds very interesting patterns of cooperation. While intellectual property law is primarily concerned with providing incentives for the production of new, creative and applicable arts and knowledge, human rights law is primarily concerned with providing improved access to goods crucial for human well-being and survival. While UNESCO has paid less attention to intellectual property rights over the last decades, rather emphasizing cultural preservation, both FAO and WHO have increased their focus on intellectual property rights. The latter two have increased their cooperation with WIPO, but without a formal agreement with WIPO. The article finds that WIPO, as a specialized agency, has to cooperate with specialized agencies, and there is no reason to believe that the cooperation will be in the form of a “one-way” process in which WIPO instructs the other agencies. At the same time, it must be acknowledged that intellectual property rights can also hamper research, in addition to impacting on the access to the crucial goods.

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Over the last 15 years, the prominence of intellectual property rights on the international agenda, including on the international human rights agenda (United Nations (UN), 2000a; 2001a; 2001b; 2006a), cannot be compared with any previous period. The triggers for the generally increased attention were stories on biopiracy—companies or institutions exploiting the genetic resources and traditional knowledge of indigenous and other peoples—and the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>1</sup> of the World Trade Organization (WTO) in 1995, which established minimum standards of protection, and specific provisions on enforcement.

The triggers for the increased awareness among human rights bodies were the shift in emphasis from focusing primarily on the amounts of good (availability) toward an equally strong focus on the actual access to the goods (accessibility) (UN, 1999a, paragraph 8; 1999b, paragraph 2; 2000b, paragraph 12). Moreover, there was a rediscovery of human rights provisions, primarily of paragraphs 15.1(c) and 15.1(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>2</sup> on the human rights of those being literary, artistic and scientific producers (in brief termed “authors”)<sup>3</sup> and the human rights to enjoy the benefits of scientific progress and its applications,<sup>4</sup> respectively. Other provisions that were given more prominence in the context of the

expanding intellectual property rights regime were the human rights to participate in cultural life (paragraph 15.1(a) of the ICESCR)<sup>5</sup> and the human rights that peoples exercised over their natural resources (paragraph 1.2 of the ICESCR).<sup>6</sup>

Human rights can be defined as “The freedoms, immunities and benefits that, according to modern values, all human beings should be able to claim as a matter of rights in the societies in which they live” (Haugen, 2005a, p. 449). Moreover, human rights are derived from human dignity, as evidenced in the first preambular paragraph and article 1 of the Universal Declaration of Human Rights.

In order to have a precise understanding of the policies of the specialized agencies of the UN, there will first be an analysis of the mandate and policies of the World Intellectual Property Organization (WIPO). More specifically, it will be analysed how WIPO, through its secretariat, actually cooperates with the other UN agencies, and how the WIPO itself responds to the call made at several occasions, on the “further mainstreaming of human rights throughout the UN system, as well as closer cooperation between the Office of the United Nations High Commissioner for Human Rights and all relevant United Nations bodies” (UN, 2005a, paragraph 126). In the *Delivering as One* report from the high-level panel on UN system-wide coherence, this is said even stronger: “All UN agencies and programmes must further support the development of policies, directives and guidelines to integrate human rights in all aspects of the UN’s work” (UN, 2006b, p. 27) and “assess the impact of their strategies and policies on the enjoyment of all human rights” (UN, 1993a, II:1). WIPO is, as a specialized agency, required to comply with such demands.

Moreover, as a specialized agency, WIPO is subject to the Charter of the UN (UN Charter),<sup>7</sup> which specifies, *inter alia*, that promotion and protection of human rights is one of the purposes of the UN. WIPO is also subject to the decisions by its member states and must be a member-driven organization (WIPO, 2005, paragraph 27). Christopher May has questioned whether WIPO is actually a member-driven organization, finding that WIPO exercises “political leadership ... moving beyond the mere enacting of state governmental instructions and interests” (May, 2007, p. 55; see also pp. 47–8). The article does not intend to challenge this finding, but take it for granted that an international organization, in this case WIPO, can persuade states to adopt changes in their policies, based on an understanding that international organizations are principals and states are agents (Finnemore, 1993, p. 566). Moreover, a constructivist approach within international relations understands that interests and identities of states are socially constructed, and international organizations obviously constitute the social context within which states operate (Finnemore, 1993; see also Fearon and Wendt, 2002; Hurd, 2008).

This article investigates whether WIPO, through its relationship with other UN specialized agencies, actually pursues an agenda that makes it more difficult for states to comply with their human rights obligations. These are the Food and Agricultural Organization (FAO), the World Health Organization (WHO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), focusing on the human rights to food (access to inputs for food production), health (access to medicine) and cultural life (access to material associated with intellectual property, both in a protected form [copyrighted material] and in a non-protected form [traditional cultural expressions]), respectively. On the one hand, the enhanced protection by intellectual property rights is the opposite of providing for enhanced access (Grosheide, 2010), but, on the other hand, enhanced protection is for the purpose of providing incentives for the general availability of new and applicable knowledge and creative expressions.

This article will also analyse how these other UN specialized agencies whose mandates will be affected by enhanced intellectual property rights acquisition and enforcement have responded to this situation. In particular, it will be analysed to what extent these UN specialized agencies refer to

human rights norms as part of their response to the expanding intellectual rights regime, keeping in mind that *some* forms of intellectual property rights are also legitimately considered as being human rights (Haugen, 2007a, pp. 177–83; Haugen, 2007b; UN, 2006a, paragraphs 2, 3, 7–17). Regarding patents, specifically, there is a growing acknowledgement that patent rights should not be understood as constituting human rights (Cooper Dreyfuss, 2010; Gordon, 2010). Yu (2008, p. 80) says that some attributes or forms of intellectual property rights have a human rights basis. There is an acknowledgement that human rights could counter-balance patent rights (Van Overwalle, 2010). Moreover, a convincing argument has been made that the instrumental linkage between intellectual property rights and trade law that was done through TRIPS implies that it is harder to justify intellectual property rights as human rights or natural rights (Gervais, 2008) and that the intellectual property system is in need of a new legitimacy, and that “fundamental rights can offer a suitable basis for a balanced system” (Geiger, 2008, p. 131).

This article starts from the premise that the human rights that ICESCR does recognize do not necessarily fall within standard intellectual property rights protection and that the claim that *all* intellectual property rights are human rights are too broad and non-specified to be appropriate. Nevertheless, intellectual property rights are recognized as legitimate rights by the 1974 Agreement between the UN and WIPO (1974 UN Agreement),<sup>8</sup> which established WIPO as a specialized agency of the UN.

The first section will, hence, analyse the mandate and cooperation agreements of WIPO. Then the second section will seek to explain the different trends in the WIPO secretariat’s cooperation, based on the mandates and intellectual property rights policies of the FAO, WHO and UNESCO, respectively. The third section will provide a comparison of and an explanation for the different patterns, and the fourth section gives some recommendations on how a human rights approach can better guide the actual activities of the specialized agencies also in the areas of intellectual property rights, taking into account their respective mandates.

### **WIPO’s Mandate and Outreach**

In this section, there will first be an analysis of WIPO’s mandate, both by analysing the 1967 convention establishing WIPO (1967 WIPO Convention)<sup>9</sup> and the 1974 UN Agreement, as well as the most recent documents from the Standing Committee on the Law of Patents (SCP). There will also be an investigation of the extent to which WIPO has taken on board a human rights approach in its activities, and how the various constitutive documents of the WIPO regulates cooperation with other UN bodies.

This latter analysis will be embedded in the framework of the International Law Commission’s (ILC’s) draft articles on responsibility of international organizations (UN, 2008, pp. 262–81). The ILC’s draft articles say in article 8.1 that an international organization is in “breach of an international obligation . . . when an act of that international organization is not in conformity with what is required of it under that obligation . . .”. An international obligation is established by “a customary rule of international law, a treaty or a general principle applicable within the international legal order” (UN, 2005b, p. 86). An international organization, having international legal personality, can violate an international obligation only if it is bound by that obligation, as specified in article 9 of the draft articles (UN, 2008, p. 265). The UN Charter must be understood as constituting those international obligations to which WIPO as a specialized agency is bound.

### ***WIPO’s Explicit Recognition of the Social Functions of the Intellectual Property System***

In the 1967 WIPO Convention its “Objective” is given in article 3(ii), namely “to promote the protection of intellectual property throughout the world. . .”. There are no references to the social

functions of the intellectual property system in article 3, and neither are there any such references in the subsequent article 4 on “Functions”.

This strong emphasis on the promotion of the protection can justifiably be criticized for being too one-sided, and ensure the interests of the producers of new, creative and technically applicable contributions, over the interests of the users of these contributions (May, 2007, pp. 35, 61, 83, 87). Moreover, none of the 24 adopted treaties that WIPO administers include formulations that identify objectives of the treaties other than enhanced protection.

The emphasis on the social function of the intellectual property rights system is, however, explicitly included in article 1 of the 1974 UN Agreement, saying that WIPO is responsible for:

promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development . . .

These positive formulations on the expected outcome of the intellectual property systems in terms of access are emphasized also in articles 5 (recommendations of the United Nations), 8 (assistance to the United Nations) and 10 (transfer of technology) of the 1974 UN Agreement.<sup>10</sup>

Concerns over the issue of access are, however, expressed by the WIPO secretariat when seeking to explain the rationale of intellectual property systems. It does recognize that the possible benefits of these systems are not obvious by applying the term “fundamental paradox”, which applies particularly to the patent system, simply as patents “seeks to promote the production of public goods, yet it does this by creating exclusions from the public domain . . .” (WIPO, 2009a, paragraph 286).

While this paradox between incentives and access is clear to those familiar with the patent system, the public opinion can be seen as being overwhelmingly concerned with the enclosure of the public domain, not accepting the justifications for this enclosure. WIPO would most likely benefit from explaining this fundamental paradox more clearly, as was done at the Conference on Intellectual Property and Public Policy Issues, which included the issues of health, the environment, climate change and food security (WIPO, 2009c). Such conferences, however, do not have a wide public outreach.

Moreover, the current negotiations in WIPO do emphasize flexibility in the patent system (WIPO, 2007a, annexure, paragraph 22; WIPO, 2009a, paragraphs 172, 285). This does not necessarily imply that the pressure toward harmonization of the patent system that was sought in the currently abrupt negotiations on the Substantive Patent Law Treaty<sup>11</sup> will diminish. Among four “threats to an effective and efficient patent system” identified (WIPO, 2009a, paragraph 285), flexibility stands against harmonization, the latter of which is operationalized as “enhance accessibility, legal certainty and quality of the system and promote international cooperation” (WIPO, 2009a).

In the debate over this document at the twelfth session of the SCP, India wondered “whether flexibility and harmony could exist together . . .” (WIPO, 2009b, paragraph 61). This is a legitimate observation. Okediji (2008) gives a critical analysis on whether WIPO—as a UN specialized agency—have conducted their activities in the realm of intellectual property norms in an appropriate manner; for an opposite view, preferring WIPO—and *not* the WTO—to take intellectual property norms further, see Cooper Dreyfuss (2009).

### *WIPO's Human Rights Awareness*

There will now be an analysis of how WIPO has included a human rights approach, including how it has sought cooperation with the Office of the High Commissioner for Human Rights (UN,

2005a, paragraph 126). Human rights are not frequently referred to by WIPO. This can be illustrated by the 2009 Conference on Intellectual Property and Public Policy Issues (WIPO, 2009c), which did not apply a human rights terminology.

An article on the human rights policies of the agencies, funds and programmes of the UN places WIPO in the very outer (fifth) circle, finding that WIPO displays “negligence” of human rights (Oberleitner, 2008, p. 385). Haugen (2005b) analysed human rights within the context of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Human Rights (ICG), and found very few references to human rights in the documents produced by the WIPO secretariat for the sessions of the ICG; with one exception, stating that human rights might have “potential bearing on a comprehensive international law of intellectual property” (WIPO, 2003a, paragraph 22). More recent documents from the ICG use the term “human rights”, but only in the context of referring to the international human rights regime as providing a plethora of various options regarding choice of instrument for the protection of traditional knowledge (WIPO, 2008b, paragraph 5).

The Committee on Development and Intellectual Property (CDIP) (WIPO, 2007a, paragraph 334) has not been provided with any human rights basis for its work, even if the context of development and intellectual property would be relevant in order to introduce some form of human rights mainstreaming within WIPO (UN, 2005a, paragraph 126).<sup>12</sup> Relevant provisions from the ICESCR that could provide a basis for this mainstreaming would be the three human rights recognized in article 15.1.<sup>13</sup> Moreover, international cooperation for the realization of human rights is recognized in the ICESCR, article 2.1 (emphasizing, *inter alia*, “international assistance and co-operation”), article 15.4 (acknowledging “international contacts and cooperation in the scientific and cultural fields”), article 22 (specifying that the tasks of UN bodies includes deciding on “international measures”) and article 23 (identifying international actions, such as “conclusion of conventions” and “technical assistance”).

WIPO staff have over the years made a general claim that intellectual property rights are human rights (Castello, 1999, p. 2; Idris, 2004, p. 241; Pires de Carvalho, 2005, p. 242, footnote 654). Subsequently, General Comment No. 17 (UN, 2006a) has clarified when and under which conditions intellectual property rights might also be recognized as human rights.<sup>14</sup> Moreover, human rights have been visualized by WIPO in four ways. First, a seminar and subsequent report (WIPO, 1999a) on intellectual property and human rights was held to commemorate the fiftieth anniversary of the Universal Declaration of Human Rights, held in cooperation with the UN Office of the High Commissioner for Human Rights. WIPO’s Deputy Director General Robert Castello’s only substantive remark was that the “character of intellectual property rights as human rights, as well as the relationship between intellectual property and other human rights, have not been fully explored” (Castello, 1999, p. 2).

Second, a short notice is posted on the WIPO homepage. The substantive part of the notice says that:

the relationship between intellectual property systems and human rights is complex and calls for a full understanding of the nature and purposes of the intellectual property system. It is suggested by some that conflicts may exist between the respect for and implementation of current intellectual property systems and other human rights, such as the rights to adequate health care, to education, to share in the benefits of scientific progress, and to participation in cultural life (WIPO, undated(i)).

This observation addresses the same concerns as those outlined in the document from the WIPO secretariat to the thirteenth session of the SCP, between “access” and “incentives” (WIPO,

2009a, paragraph 286). The phrase “conflicts may exist” is open and indicative. It must be noted that while health and education are mentioned as human rights on the WIPO homepage, food is not referred to. It cannot be derived from this omission that WIPO considers that the right to food is not a human right.

Third, in a reply to the UN’s Secretary-General, the WIPO secretariat said that “exercise of the latter rights [ICESCR Article 15.1(c)—see note 3] may, in certain circumstances, appear to hinder or frustrate realization of the former rights [ICESCR Article 15.1(a)—see note 5—and 15.1(b)—see note 4]” (UN, 2001d, p. 13). This wording is similar to the latter part of the information on WIPO’s homepage.

Fourth, in a WIPO pamphlet on intellectual property rights and health, WIPO states: “International intellectual property treaties, including those relating to patents, fully comply with the [Universal] Declaration [of Human Rights]” (WIPO, 2001). Moreover, WIPO states that authors’ rights and the right to health “are not contradictory but should be seen as complimentary because the former rights afford the enjoyment of the latter rights through progress and innovation in science” (WIPO, 2001). The relationship between the human rights-based authors’ rights, on the one hand, and the international economic law-based patent rights, on the other, are not analysed, but this pamphlet was written before the clarification of article 15.1(c) of the ICESCR by General Comment No. 17 (UN, 2006a).

Hence, while the latter document does not problematize the relationship between patent rights and human rights, WIPO does recognize the potential conflicts that exist between the social and cultural human rights and the present intellectual property system.

A more serious omission is that the clarification for when intellectual property rights can be termed human rights, made in General Comment No. 17 on ICESCR, article 15.1(c) (UN, 2006a), has not been referred to or made visible by WIPO, with some exceptions (WIPO, 2007c, paragraph 120).

In conclusion, it is fair to say that WIPO has not made use of the opportunities that have arisen with the establishments of the ICG and the CDIP to integrate human rights in its work, either through substantive human rights provisions or by human rights principles.<sup>15</sup> Moreover, the WIPO secretariat has not sought to disseminate the important clarification made in General Comment No. 17 on the requirements for *when* intellectual property rights can be termed human rights. The observation made at the introduction of this subsection that WIPO shows “negligence” of human rights (Oberleitner, 2008, p. 385) is therefore supported.

Nothing in the WIPO mandate prevents WIPO from emphasizing human rights to a greater extent. WIPO’s mandate, as identified in the 1974 UN Agreement and the ICESCR’s references to the specialized agencies in articles 20–22, does establish a basis for a clearer human rights focus in several of WIPO’s activities. Expectations for more explicit human rights references by WIPO are also justified by the simple fact that human rights and intellectual property rights have no other option than “learning to live together” (Gervais, 2008), but with an understanding that intellectual property rights are merely tools for the higher purpose of human rights fulfilment (Brinkhof, 2010; Van Overwalle, 2010).

### ***Basic Documents on WIPO’s Cooperation with Other UN Bodies***

As stated initially in this section, the ILC’s draft articles on responsibility of international organizations (UN, 2008) provide a background for the analysis, and it was established that the UN Charter establishes obligations to which WIPO as a specialized agency is bound.

Initially, it must be observed that in accordance with article 58 of the UN Charter, there shall be a “co-ordination of the policies and activities of the specialized agencies”,<sup>16</sup> see also article 63,

paragraph 2 on the role of the United Nations Economic and Social Council in this regard. These provisions are referred to in article 5 of the 1974 UN Agreement. Hence, being a specialized agency, WIPO would actually not be complying with the UN Charter if it were to isolate itself from the other UN specialized agencies.

Cooperation with other international organizations is provided for in articles 3 and 13 of the 1967 WIPO Convention. Actually, these provide for three levels of cooperation with international organizations. First, article 3(i) applies the terms “collaboration with” without any explicit formalities. Second, article 13(1) applies the terms “establish working relations and cooperate with”. Third, article 13(2) provides for “arrangements for consultation and cooperation” with international organizations. Both of the two latter make clear that such cooperation has to be approved by WIPO’s Coordination Committee, while “collaboration”, in accordance with article 3(i), does not have any such formalities. Hence, there are different forms of cooperation with other organizations.

It must also be observed that article 2 of the 1974 UN Agreement provides stronger requirements on the cooperation, as the coordination between WIPO and “the organs and agencies within the United Nations system” is to be “fully effective”.<sup>17</sup>

The cooperation is specified in article 1 of the 1974 UN Agreement to include the United Nations Conference on Trade and Development, the United Nations Development Programme, the United Nations Industrial Development Organization, as well as the UNESCO and “other agencies within the United Nations system” (the three former are also listed in article 10 of the 1974 UN Agreement). Hence, neither WHO nor the FAO are explicitly included. One reason for this is that at the time of the 1974 UN Agreement, intellectual property rights did not have any direct relationship to food, as patents on biological material were not granted before the 1980s, notwithstanding the “red dove” patent (German Federal Supreme Court, 1969). Moreover, in many states only process—and not product—patent protection was allowed on medicines. The entry into force of TRIPS changed this.

Another explanation of this bias in the selection of UN bodies that were explicitly mentioned in the 1974 UN Agreement is the formulation preceding the listing of the four UN bodies on “accelerate economic, social and cultural development”. While both WHO and FAO are crucial for such development, the four bodies mentioned have an explicit mandate relating to industrial and scientific development. It is reasonable to state that the understanding of development that dominated in the early 1970s emphasized capital-led industrial development more than development through investments in human beings, and in health and agriculture.

### *WIPO’s Actual Cooperation with WHO, FAO and UNESCO*

There will now be a brief analysis of the cooperation between WIPO and the three other specialized agencies under study.

As a background, it must be observed that in the 2008–9 WIPO Programme, WIPO refers to the “valuable cooperation” with WHO, UNESCO, the FAO, the WTO and other programme partners (WIPO, 2008a, pp. 116–7).<sup>18</sup> The fact that WHO, UNESCO and the FAO are mentioned on a similar level of cooperation as the WTO should not be overemphasized.<sup>19</sup> More interesting, however, is the strong emphasis on the cooperation with WHO, which is referred to four times, without having any formal agreement with WIPO, while UNESCO—which has a formal agreement (UNESCO, 1973, p. 39)—is referred to only twice.

The analysis will seek to identify what this cooperation actually includes, for each of the three agencies, starting with WHO, before turning to the FAO and UNESCO.

There is no formal agreement between WIPO and WHO approved by the WIPO Coordination Committee, but during the work of the WHO Commission on Intellectual Property Rights,

Innovation and Public Health (WHOa, 2006), WIPO presented input that sought to provide a proper balance between incentives and access (WIPO, undated(ii); undated(iii)). In the first document, WIPO states: "WIPO is responsive to the call for the fruits of innovation to be more widely available in developing countries" (WIPO, undated(ii), paragraph 3), hence emphasizing access. The second document concludes by stating that "many follow-up and patented innovations might contribute in a positive way to the improvement of public health and also to economic development . . ." (WIPO, undated(iii), p. 19). This document must be understood to emphasize incentives.

When the 2008 World Health Assembly (WHA) received and finalized the "Global Strategy on Public Health, Innovation and Intellectual Property" (Global Strategy) (WHO, 2008b, annexure), the WHA said that in the implementation of the Global Strategy, the WHO had to "coordinate with other relevant international intergovernmental organizations, including WIPO, WTO and UNCTAD, to effectively implement the global strategy and plan of action" (WHO, 2008b, paragraph 4(5)).

WIPO is mentioned explicitly in 18 different action points (elements) in the Global Strategy.<sup>20</sup> This strong emphasis on WHO's cooperation with WIPO is very recent. There is no mention of any cooperation between WHO and WIPO in any of the annual reports on "Collaboration within the United Nations system and with other intergovernmental organizations" presented to the WHA (WHO, 2009, paragraph 10).

In an appendix to the Global Strategy, the relationship to other international organizations is outlined. The Director-General is requested to bring the Global Strategy and plan of action to the attention of all relevant international organizations and invite them to consider the relevant provisions of this Global Strategy and plan of action (WHO, 2008b, p. 22). The many references to coordination with WIPO is demanding on WHO, in particular seen in light of the limited cooperation in the past.

There is also a cooperation between WIPO and WHO relating to international nonproprietary names for pharmaceutical substances, but this will not be analysed here.<sup>21</sup>

Regarding the FAO, the analysis will focus on its cooperation with WIPO, notwithstanding the relationship between the FAO and the International Union for the Protection of New Varieties of Plants (UPOV). UPOV is not formally a part of the UN, even if UPOV is a part of WIPO.<sup>22</sup>

On the FAO-WIPO relationship, the most noteworthy process related to a proposed agreement between the FAO and WIPO (WIPO, 2006a, annexure I). The approval of the agreement was postponed at a WIPO Coordination Committee meeting, after critical interventions by several developing member states (WIPO, 2006b). Brazil said that the draft agreement addressed very sensitive issues, "such as agricultural biotechnology, farmers' rights and traditional knowledge, food and agriculture" (WIPO, 2006b, paragraph 6). These issues were included in article III(e) of the draft agreement. Brazil also noted that the formulations on WIPO's objectives in the draft FAO-WIPO Agreement did not include the wording from article 1 of the 1974 UN Agreement (WIPO, 2006b, paragraph 7).

An earlier draft agreement had included 13 preambular paragraphs; the third emphasized (extracts) "the importance of taking into account the specific nature and needs of agriculture, including fisheries and forestry, in the development and implementation of relevant intellectual property policies" and the eighth underlined the need to "ensure that WIPO's work continues to be consistent with and complementary to the work. . ." of the FAO and the Convention on Biological Diversity (FAO, 2005, appendix II; see also Tansey, 2007). The document was subsequently amended, and these preambular paragraphs were deleted.



Interestingly, in the debate in WIPO's Coordination Committee, Nigeria, on behalf of the African Group, said: "WIPO should broaden its reach to cooperate with United Nations agencies and international organizations to widen the development programs in order to increase benefits to the developing and least developed countries" (WIPO, 2006b, paragraph 9). This very positive assessment made by a representative of African States, which would be expected to be critical of a closer cooperation in the field of intellectual property rights in agriculture, implies that it cannot be excluded that an FAO–WIPO Agreement will be presented once again, but when and in which form is impossible to say.

In the absence of a Coordination Committee-approved agreement, the cooperation between the WIPO and FAO secretariats has proceeded nevertheless. A "cooperation program between the FAO and WIPO on patent landscaping for policy makers" has been established, and one concrete result of this programme is the 2008 Symposium on Public Policy Patent Landscaping in the Life Sciences (WIPO, 2008d; see also WIPO, 2008e). WIPO wants to be a part of the promotion of the Green Revolution in Africa (see WIPO, 2009d).<sup>23</sup> The emphasis, however, of the Alliance for a Green Revolution in Africa (AGRA; chaired by Kofi Annan) is on "African Farmer Knowledge", and AGRA does not promote intellectual property rights.<sup>24</sup>

Regarding UNESCO, there is a WIPO–UNESCO cooperation agreement, as revised in 1974 (UNESCO, 1973, p. 39). It will be analysed if the cooperation has changed after the negotiations and entry into force of TRIPS. Three areas of cooperation will be analysed: first, the long-standing cooperation regarding folklore—now termed "traditional cultural expressions/expressions of folklore" (TCE/EoF)—and intellectual property rights that was revitalized from 2000 onwards, but now with WIPO in the driver's seat, through the ICG; second, the establishment of the Joint UNESCO/WIPO Consultative Committee on the Access by Developing Countries to Works Protected by Copyrights (Joint Consultative Committee); third, the cooperation—with the International Labour Organization (ILO)—to administer the Intergovernmental Committee under the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961 Rome Convention)<sup>25</sup> and the 1971 Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971 Phonogram Convention).<sup>26</sup>

First, the most important in the realm of protection of folklore is the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action (Model Provisions) (WIPO/UNESCO, 1982). Paragraph 14 in the text introducing the Model Provisions says that:

it appears to be necessary to establish, as regards intellectual property aspects of protection of folklore, a special (*sui generis*) type of law for an adequate protection against unauthorised exploitation.

While there is one treaty that explicitly recognizes performers of expressions of folklore as having rights under the treaty,<sup>27</sup> slow progress is taking place in the context of the ICG. An important impetus for the establishment of the ICG in 2000 was the 1997 World Forum on the Protection of Folklore, convened by WIPO and UNESCO (WIPO/UNESCO, 1997). UNESCO has continued to be active in international endeavours for the adequate protection of traditional cultural expressions, most substantively through the negotiation and adoption of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CICH)<sup>28</sup> and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD).<sup>29</sup> The details on the content of these two conventions will be provided in the subsection on UNESCO below.

At this stage, it is relevant to observe that the proposed text of the “Policy Objectives and Core Principles” of a “draft instrument” on protection of TCE/EoF does not include any references to these two UNESCO Conventions. The text *introducing* the “Policy Objectives and Core Principles” does, however, refer to these two conventions as “cognate policy areas” to intellectual property protection (WIPO, 2007b, paragraph 16) and there are also references made to the 2003 Convention in the “Commentaries” to draft articles 7 and 10 (WIPO, 2007b, annexure, pp. 34, 43). There are at least three paragraphs of the draft “Objectives” that would benefit from a reference to the two UNESCO conventions: draft objective (viii) (encourage community innovation and creativity), draft objective (x) (contribute to cultural diversity) and draft objective (xii) (preclude unauthorized intellectual property rights).

A second area of cooperation, which has been formally discontinued, is the former Joint Consultative Committee, established in 1981 (WIPO, 1981, annexures 1b, 2). There are no traces of this committee after 1989 (UNESCO, 1989). The emphasis on access by developing countries to works protected by copyright, hence, seems to have become weaker.

A third area of cooperation is the joint administration—with the ILO—of the 1961 Rome Convention and the 1971 Phonograms Convention, but the equal responsibility of the three organizations is more clearly outlined in the former than in the latter.<sup>30</sup> By analysing the manner in which WIPO presents the cooperation with the two other organizations on its homepage, this cooperation is not strongly emphasized. With regard to the 1971 Phonograms Convention, even if article 8.3 says that the functions shall be “in cooperation” with UNESCO and the ILO, the text on the WIPO homepage is “The Secretariat of WIPO exercises the function of secretariat for this Convention” (WIPO, undated(iv)). Hence, the role of UNESCO and the ILO is simply ignored, and one author observes that this has happened “in the last decade” (May, 2007, p. 84).

Moreover, the WIPO homepage does not refer to relevant UNESCO treaties under “other treaties”, while treaties administered by seven other international organizations are listed.<sup>31</sup> The Universal Copyrights Convention as revised in 1971<sup>32</sup> is *not* listed on WIPO’s homepage, even if the treaty text mentions WIPO both in the context of “study” (article XI.1(c)) and in the context of “attend meetings”(article XI.4), which WIPO actually does (UNESCO, 2005b).

Finally, there are no references to UNESCO or the UNESCO-administered treaties in those copyright treaties adopted under the auspices of WIPO in the 1990s: the 1996 Performances and Phonograms Treaty<sup>33</sup> and the 1996 Copyright Treaty,<sup>34</sup> and UNESCO is also sidelined in the negotiations on a treaty on the protection of audiovisual performances (WIPO, 2008f, paragraphs 5–10).

Hence, there is a tendency toward less cooperation between UNESCO and WIPO, and this seems to have taken place in the years when TRIPS was negotiated and entering into force. In the subsection on UNESCO below, it will be analysed whether this reduced cooperation can also be explained by the shifting priorities in UNESCO, by analysing whether UNESCO currently has less emphasis on intellectual property protection.

In conclusion, while there is increased cooperation between WIPO, the FAO and WHO, respectively, there seems to be less cooperation between WIPO and UNESCO, albeit from a much higher level of cooperation than for the two former.

### Explaining the Different Patterns

This section will seek to identify the explanations for the different patterns of cooperation, by analysing the intellectual property mandates, treaties and policies of the WHO, FAO and UNESCO, respectively. Are there any treaties, strategies or policy documents recently adopted

which explain the changing forms and levels of cooperation between WIPO and these other specialized agencies?

In the context of WHO, the emphasis will be on WHA resolutions, as there has not been any binding documents in the area of human rights and intellectual property rights. The most relevant FAO legal material is the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA; 120 ratifications),<sup>35</sup> and the 2004 “Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security” (Voluntary Guidelines) (FAO, 2004). When analysing UNESCO, the focus will be on the CCD (103 ratifications)<sup>36</sup> and the CICH (117 ratifications).<sup>37</sup>

Two questions will provide the structure for the following analysis on the three specialized agencies. First, how do the organizations address the balance between access and incentives? Second, is accessibility understood in terms of human rights protection? There will not be a counting of how many times the term “human rights” is applied, but rather an analysis of the basic approach of relevant treaties and resolutions.

Accessibility is understood both as economic and physical accessibility (UN, 2000b, paragraph 12b; 1999a, paragraph 13; 1999b, paragraph 6b). The former of these documents also includes “information accessibility”. As information can be said to be covered by the human rights principles transparency and participation,<sup>38</sup> this aspect of accessibility will be relevant for all substantive human rights, not only for the right to health. In this context, it is important to acknowledge that intellectual property rights can facilitate information dissemination, as in the case of patent protection (TRIPS, part II, section 5), and the term “patent” comes from the the latin term “patere” that means “open”, “accessible”. There is, however, a difference between having access to information and being able to *use* this information (Van Overwalle, 2010). Intellectual property rights can also be applied in order to keep information away from the public, as in the case of protection by means of undisclosed information (TRIPS, part II, section 7). While acknowledging the relevance of the emphasis on access to information or to knowledge (A2K) in the context of intellectual property rights, including for further research, the emphasis of this article is on the actual accessibility to those goods and resources that incorporate intellectual property. It is acknowledged that this emphasis is more evident in the context of the tangible resources relating to food and health, as compared to the intangible resources relating to culture, but the material basis for cultural preservation is widely acknowledged, at least as applying to minorities and indigenous peoples.<sup>39</sup>

### ***Mandate of, Resolutions Adopted by and Policies of WHO in the Realm of Intellectual Property Rights***

The first operative article of the WHO Constitution says that “the objective of WHO shall be the attainment by all peoples of the highest possible level of health”. Moreover, among the functions of WHO, article 2(g) says that WHO shall “stimulate and advance work to eradicate epidemic, endemic and other diseases”. This formulation is more explicit than ICESCR, article 12.2(c), which requires states to take steps necessary for the “prevention, treatment and control of epidemic, endemic, occupational and other diseases”. Eradicate is obviously stronger than prevent. To make appropriate medicines effective in order to eradicate diseases, these medicines have to be produced, tested and made accessible.

As WHO does not administer any relevant treaty in the realm of intellectual property rights, some recent resolutions adopted by the WHA will be analysed, with an emphasis on whether the WHA recognizes human rights concerns in the balance between access and incentives.

First, according to WHO's homepage, the first WHA resolution on TRIPS was adopted in 2001 (WHO, undated). This must be considered to be late for a UN specialized agency operating under statutes that are as explicit as those found in the WHO Constitution. This does not imply that nothing was said about access to medicines in the context of intellectual property rights before 2001, but the formulations applied were vague (WHO, 1999a, paragraph 2(7)<sup>40</sup> and preambular paragraphs 7–9).<sup>41</sup>

The vagueness of the WHA resolutions also implies that the resolutions are not addressing in any clear manner the balance between access and incentives. As an example, the 1999 resolution includes one sentence on TRIPS, in preambular paragraph 8, stating (extracts): "TRIPS provides scope for the protection of public health". Whether this statement is about the flexibilities of TRIPS *provisions* or if it rather addresses the intended *effect* of TRIPS is not clear. Issues relating to identifying an appropriate balance between incentives (innovation in new medicines) and access (public health) are made more explicit in the Global Strategy adopted in 2008, in particular regarding the price of medicines (WHO, 2008b, annexure, paragraphs 11, 24). Several paragraphs of the WHO's Global Strategy (WHO, 2008b, annexure, paragraphs 8, 9, 12, 14(e), 18) must be understood to encourage making use of the flexibilities of intellectual property treaties, but as documented by Hestermeyer (2007), the flexibilities of TRIPS are not adequately applied.

Second, the issue of accessibility is addressed in these resolutions, but not explicitly in the context of intellectual property rights. The WHA has urged member states "to encourage the pharmaceutical industry and other relevant partners and organizations to make essential drugs more widely available and affordable by all who need them in developing countries" (WHO, 2002, paragraph 1(7)). The terms "widely available" and "affordable" must be said to encompass accessibility. Even if the terms intellectual property rights or patent rights are not explicitly applied, it must be presumed that this is what the WHA had in mind, in particular as the pharmaceutical industry is mentioned explicitly. This lack of explicit language in resolutions adopted before 2000 can also be explained by the fact that the UN Commission on Human Rights only started to address the issue of access to medicines in 2001 (UN, 2001c) and that the interpretation of article 12 of the ICESCR through General Comment No. 12 was done in 2000 (UN, 2000b). WHO had, however, already commissioned studies on the impact of TRIPS (WHO, 1997; 1999b).

Human rights were addressed in resolutions adopted from the late 1980s onwards, in the context of how HIV-positive persons should be treated, *not* in the context of understanding access to medicines as a human right (WHO, 2000, paragraph 2(11)).

The issue of access to drugs as a human rights issue has become somewhat more explicit in the subsequent resolutions, but a stronger emphasis on human rights in WHO in the context of access to medicines is not without objectors. The finalization of the Global Strategy on public health, innovation and intellectual property (WHO, 2008b, annexure) resulted in deletion of paragraphs of the original report which referred to the human right to the highest attainable standard of health, as recognized in article 12 of the ICESCR (WHO, 2008a, paragraph 17), but paragraph 16, which reiterates preambular paragraph 2 of the WHO Constitution, confirming health as a one "of the fundamental rights of every human being",<sup>42</sup> was kept. The fact that the WHA could only agree on a formulation identical to a provision agreed upon in 1945 can, on the one hand, be said not to represent any achievement at all. On the other hand, it is important to acknowledge that the WHO Constitution is indeed a document containing very ambitious formulations.

In summary, it is reasonable to state that WHO is a part of a UN-wide trend to emphasize human rights, but WHO's resolutions and policy document do not contain particularly explicit references to human rights treaties or provisions of those treaties. The evidence of a stronger emphasis on human rights is witnessed by the establishment of the WHO's "Health and human

rights team” and by WHO’s commitment to the enhanced UN coordination, which is explicitly building on a human rights approach (WHO, 2009).

A recent study comparing human rights approaches of various UN bodies found, however, that in WHO “rhetoric is giving way to a more concrete engagement with human rights only slowly” (Oberleitner, 2008, p. 376). This is an observation with which the current author agrees, but the explanations for this must be found among WHO’s members states, which seemingly do not want too strong an emphasis on human rights in WHO’s operational work.

### *Mandate of, Treaties Administered by and Policies of the FAO in the Realm of Intellectual Property Rights*

In the FAO Constitution, improved methods of food production are considered to be of such importance that they are included in no less than three out of six paragraphs in the first article of the FAO Constitution.<sup>43</sup> Article 1.2 (functions of the organization) addresses research,<sup>44</sup> improved methods of agricultural production<sup>45</sup> and improvement of processing,<sup>46</sup> respectively. These provisions were written in a time when technological solutions were seen as a panacea to the hunger problem and when intellectual property protection was only granted—in the form of plant breeders’ rights—on new and distinct plant varieties. Issues relating to intellectual property are not part of the FAO Constitution.

The FAO administers one treaty in the realm of intellectual property rights, the ITPGRFA.<sup>47</sup> This is not an intellectual property treaty, but one notable innovation of ITPGRFA is the recognition of farmers’ rights in article 9. The specific measures are, however, introduced by the formulation “as appropriate, and subject to its national legislation . . .”. On a national level, farmers’ rights are recognized as a *sui generis* intellectual property right in India, Thailand and Malaysia. As an example, the Malaysian Protection of New Plant Varieties Act 2004 recognizes in articles 13 and 14 “farmers, local community and indigenous people” as breeders, giving in article 14.2 the requirements for protection that the variety is “new, distinct and identifiable” (the latter replacing the standard requirements “uniform and stable”).

The analysis will focus on whether the ITPGRFA seeks to identify a balance between access and incentives. The ITPGRFA, while confirming in article 10.1 “the sovereign rights of States over their own plant genetic resources for food and agriculture” does in article 10.2 “establish a multilateral system to facilitate access to plant genetic resources for food and agriculture”. Hence, ITPGRFA both confirms states’ sovereignty over their resources and provides for a system for facilitating exchange of these resources.

Article 12.3(d) of the ITPGRFA addresses intellectual property rights:

Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System.

This implies that the ITPGRFA does not categorically reject intellectual property rights. The formulation “in the form received” must be understood to imply that a substantive modification must have been undertaken before any form of protection on the biological material coming from the multilateral system can be granted, but the ITPGRFA cannot be understood categorically to reject intellectual property rights on this material (Fowler *et al.*, 2004). Most developed countries allow for patent rights on biological material that is isolated from its natural environment.<sup>48</sup> The present author agrees, however, with Gerstetter *et al.* (2007, pp. 271–2) that granting patents on the mere isolation of the genetic material received from the multilateral system can potentially lead to conflicts with article 12.3(d) of the ITPGRFA, as the latter prohibits patents on this material.

Moreover, there is nothing in TRIPS that requires the WTO member states to grant patents on isolated genes and substances.

Therefore, ITPGRFA, article 12.3(d) balances access and incentives, as it restricts the basis on which intellectual property rights can be granted, but, at the same time, does not reject improvements or innovations on the plant genetic resources obtained from the multilateral system, and these innovations *might* be protected by some form of intellectual property rights.

Moreover, the ITPGRFA states in article 13.2(d)(ii) (extracts) that:

a recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay . . . an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment.

While the term “commercialization” is applied, and the term “intellectual property rights” does not appear, it is evident that a strategy of commercialization will most likely involve intellectual property protection. This must be read out of the phrase “available without restriction”, which is the alternative to “commercialization”. The operationalization of the term “equitable share” and the overall funding strategy of the ITPGRFA are on the agenda of the governing body of the ITPGRFA.<sup>49</sup>

While the issue of access to plant genetic resources is complex, and has not been solved by the entry into force by the ITPGRFA, it is reasonable to state that the ITPGRFA has sought to provide for adequate access, without compromising neither on the sovereignty over natural resources, nor on the recognized forms of intellectual property rights, nor the new and emerging concept of farmers’ rights. McManis (2010), analysing patents and plant genetic resources in a human rights context, is sceptical of *sui generis* forms of protection, but endorses the ITPGRFA approach and also calls for a revision of TRIPS to include a disclosure requirement.

While ITPGRFA recognizes farmers’ rights, the ITPGRFA does not include any human rights provisions. Hence, the issue of accessibility, which is recognized by the ITPGRFA, is not formulated in a human rights language. Space does not allow for any analysis on the relationship existing between farmers’ rights and the human right to food (see Haugen, 2007a, p. 273, note 58). For a sceptical view on the relationship between farmers’ rights and innovation, see Srinivasan (2003, p. 445); for success stories on traditional knowledge related to farmers’ rights, see Andersen and Winge (2008, pp. 21–30).

When analysing whether accessibility is recognized by the FAO in more explicit human rights terms, we, therefore, have to analyse non-binding FAO documents, namely the Voluntary Guidelines, adopted in 2004. The Voluntary Guidelines have several references to the right to food as recognized in the ICESCR and also refer to General Comment No. 12 (UN, 1999a); a reference to the relevant General Comment (UN, 2000b) is not given in the WHO’s Global Strategy (WHO, 2008b, annexure).

The most relevant paragraph of the Voluntary Guidelines for the purpose of this article, addressing both farmers’ access to biotechnological research results and intellectual property rights, is paragraph 8.5, which reads:

States should, within the framework of relevant international agreements, including those on intellectual property, promote access by medium and small-scale farmers to research results enhancing food security.

This paragraph has a relatively vague wording and applies the term “should” and not “shall”, as is found in article 11.2 of the ICESCR. Moreover, paragraph 8.5 of the Voluntary Guidelines has what can be termed a “respectful approach” toward intellectual property rights. By saying that any policy measures have to be taken “within the framework” of these agreements, without calling for an application of the flexibilities inherent in these agreements, the Voluntary Guidelines can be interpreted to provide a weak basis for the balancing of intellectual property rights between right holders and third parties, or between “producers and users of technological knowledge” in the words of article 7 of TRIPS. As seen above, several paragraphs of WHO’s Global Strategy emphasize using the TRIPS flexibilities, and a similar encouragement is included in a UN General Assembly resolution on the right to food (UN, 2009, paragraph 25). Such wording is not found in the Voluntary Guidelines.

While human rights or the right to food is not explicitly mentioned in paragraph 8.5, this is not detrimental, as the whole document is embedded in human rights, and its wording encompasses both ICESCR, article 15.1(b)<sup>50</sup> and article 11.2(a), which outlines measures to “improve methods of production, conservation and distribution of food”. These measures must also include distribution of “resources for food” (UN, 1999b, paragraphs 25, 26, 27).

The human rights basis of the Voluntary Guidelines has not resulted in paragraphs that are explicitly critical of intellectual property rights. The ITPGRFA, which is not explicitly embedded in human rights, can be said to be generally sceptical of intellectual property rights, even if both the United States and Japan abstained from voting when the ITPGRFA was adopted, as they considered that ITPGRFA provisions on intellectual property lacked clarity.<sup>51</sup> Moreover, the lack of a human rights basis in the ITPGRFA cannot be interpreted to imply that the FAO is ignorant with regard to human rights. The FAO has played a leading role among the UN specialized agencies in clarifying the scope of the human right falling implicitly within its mandate. The relationship between the FAO Constitution and the wording of the ICESCR is direct: as explained above,<sup>52</sup> the revision of the FAO Constitution in 1965 was carried out based on the wording of ICESCR, article 11.2, agreed upon 2 years earlier.

The FAO has its own unit seeking to make the right to food visible and relevant in the overall activities of the FAO. According to an analysis on the UN specialized agencies and human rights, the FAO “withdrew from human rights until the World Food Summit in 1996 . . .” (Oberleitner, 2008, p. 378). The subsequent work has led to publications and information material, but, as has been seen above, it is still some way to go before human rights actually provides specific guidance in various policy areas, including in intellectual property rights, and is not subject to implementation and realization “within the framework” of intellectual property treaties.

### ***Mandate of, Treaties Administered by and Policies of UNESCO in the Realm of Intellectual Property Rights***

Article 1.2(a) (functions) of the UNESCO Constitution says that UNESCO shall (extracts): “recommend such international agreements as may be necessary to promote the free flow of ideas by word and image”. This must be considered to be a strong emphasis on the access dimension. Nothing is said in the UNESCO Constitution on intellectual property rights, but article 1.2(c) is on “intellectual activity”.

Among the first treaties to be negotiated under the auspices of UNESCO was the 1952 Universal Copyright Convention (revised in 1971),<sup>53</sup> which must be understood to emphasize the incentives dimension, but which also states in the third preambular paragraph: “Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding”.

Hence, it seems reasonable to state that UNESCO does not consider that there is a conflict between incentives and access. This understanding can be challenged, however, as the issue of incentives continues to be the dominant motivation for the adoption of intellectual property, and access is an expected long-term effect of there being more original creative and applicable new expressions and knowledge being produced.

The copyright treaties administered by UNESCO—in cooperation with WIPO and the ILO<sup>54</sup> or alone<sup>55</sup>—can be characterized as standard copyright treaties that do not substantively alter the balance between right holders and the public, or between incentives and access, but the Universal Copyright Convention<sup>56</sup> has been identified as being “the only IP treaty to balance protection and access to knowledge goods” (Okediji, 2008, p. 116; see also p. 76). The emphasis in this section will rather be on two recent treaties negotiated under the auspices of UNESCO, both of which regulate “cognate policy areas” to intellectual property protection (WIPO, 2007b, paragraph 16): the CICH<sup>57</sup> and the CCD.<sup>58</sup>

The reason for this emphasis is that these two treaties do regulate the relationship between “dominant” cultural expressions over “traditional” cultural expressions and the issue of traditional knowledge. The issue of access in this context is not only about the universal unimpeded access to new creative expressions. Access in this context must also be considered to have an additional dimension, namely whether these treaties provide for access for the members of a community to the knowledge and expressions developed and preserved by this community, and the unimpeded access to the natural resources relating to these knowledge and expressions as a means to maintain the communities’ culture.<sup>59</sup> Hence, the two treaties can be considered as legal instruments to achieve an appropriate balance between the rights and interests of commercially strong actors versus commercially weak actors.

There will first be a brief emphasis on intellectual property considerations of these two treaties, before analysing how these two treaties seek to promote human rights.

The CICH states in article 3(b):

Nothing in this Convention may be interpreted as ... affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.

Hence, intellectual property rights treaties shall not be affected by the CICH.

The CCD does not address intellectual property in any of the substantive articles (Wouters and de Meester, 2008), but intellectual property is referred to in the preambular paragraphs. First, preambular paragraph 17 reads: “*Recognizing* the importance of intellectual property rights in sustaining those involved in cultural creativity”. Moreover, preambular paragraph 8 reads (extracts): “*Recognizing* the importance of traditional knowledge as a source of intangible and material wealth, ... as well as the need for its adequate protection and promotion”. While these formulations are vaguer than those found in the CICH, and do not belong to its operative part, the CCD cannot be said to affect the functioning of the intellectual property regime. Therefore, the CCD should not negatively affect the incentives for the creation of new knowledge, arts and expressions.

Regarding human rights, it is clear that both of these treaties have a human rights basis. An author says about the CICH that it “moves further towards an alternative system for the protection of cultural heritage ... and place cultural heritage within the rubric of human rights” (Xanthaki, 2007, p. 218). The CCD has been found to represent a contribution to the freedom of expression and information (Beat Graber, 2006, p. 560). UNESCO itself says that it creates “the



right conditions for artistic creation, production, dissemination, distribution and enjoyment . . . so as to make cultural expressions benefit all societies” (UNESCO, 2007, p. 134). The United States said, on the other hand, that the CCD “might impede the free flow of ideas” (UNESCO, 2005a, p. 221; see also contra: Beat Graber, 2006, p. 563; Burri-Nenova, 2008).

The CICH states in article 2.1 that “consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments . . .”. Moreover, it is recognized that individuals, groups and communities are involved in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, in accordance with article 1(c) and preambular paragraph 6. While it cannot be excluded that there might be conflicts between these three levels in individual cases, based on diverse opinions on who is actually responsible for the existence and maintenance of this cultural heritage, and therefore is to be rewarded, the protection of cultural human rights needs to operate at different levels. Two examples will be given in support of this observation. First, article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>60</sup> embeds individual rights in a larger community, where these persons belong to ethnic, religious or linguistic minorities.<sup>61</sup> Second, the Committee on Economic, Social and Cultural Rights acknowledges that the scope of ICESCR, article 15.1(a)<sup>62</sup> has collective dimensions in the context of minorities (UN, 1993b, pp. 57–9). Hence, the recognition of the interplay between these different levels implies that cultural heritage and traditional knowledge must be respected (defensive protection) and actively preserved (positive protection) (WIPO, 2002, paragraph 13), even if there might be situations where conflicts could arise within a community.

The CCD states in article 2.1:

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights . . . or to limit the scope thereof.

The emphasis on the “ability of the individuals to choose” is important, as this implies that nobody can be forced to act in compliance with any traditional norms of a community. Human rights is also referred to in article 5.1, in the context of state policies. Except for these two qualifications, the CCD does not include any restrictions or limitations clauses to prevent inappropriate policy measures claimed to ensure cultural diversity. Nevertheless, it is clear that the CCD cannot be applied in a way that impedes the individual’s enjoyment of human rights.

It must be acknowledged, however, that there are no provisions of the CCD that distinguish between licit and illicit measures for the protection of cultural diversity (Beat Graber, 2008, pp. 153–5), but it is reasonable to state that the CCD does not include a restrictive approach on the free flow of ideas (UNESCO Constitution, article 1.2(a)). Article 16 on preferential treatment of developing countries does establish a specific requirement, but this requirement can be said to have a legitimate purpose.<sup>63</sup> The CICH, on the other hand, can be understood to ensure preservation of intangible cultural heritage rather than free flow of ideas, as a result of its specific subject matter.

In both, the CICH and the CCD, there is an emphasis on the compliance with both intellectual property rights and human rights, and on cultural preservation. While UNESCO applies a human rights rhetoric, it must nevertheless be asked if human rights are adequately integrated in all aspects of UNESCO’s work (Oberleitner, 2008, p. 376; UN, 2006b, p. 27).

While UNESCO has focused on policy areas that are “cognate” to intellectual property protection (WIPO, 2007b, paragraph 16), UNESCO has not developed any new instrument in the

area of copyrights since the 1970s. We saw above a clear trend of less WIPO–UNESCO cooperation in the area of TCE/EoF and access to works protected by copyrights. Moreover, WIPO's general lack references to UNESCO-administered copyright treaties and the few references to UNESCO in the present WIPO Programme (WIPO, 2008a) were noted.

It will now be analysed to what extent UNESCO has reduced its emphasis on intellectual property rights, more specifically copyrights, to such an extent that UNESCO has been less relevant in the area of copyrights, and therefore less relevant for WIPO's activities.

Three trends are evident with regard to UNESCO's activities in the realm of copyrights. First, while UNESCO continues to administer treaties in the realm of intellectual property rights, the issue of copyrights has received gradually less attention by UNESCO. Earlier, the Executive Board addressed "copyright" under the item "Execution of the Programme" at the 124th session in 1986. From the 125th Session of the Executive Board, however, there is an absence of the section "copyright" in all subsequent "Decisions adopted by the Executive Board".<sup>64</sup> Second, from 2007, UNESCO has discontinued its publication of the *Copyright Bulletin*, which used to be an electronic journal. Third, copyrights belong to a "third level" category on the UNESCO homepage, as the theme "copyrights" is found under the section on "creativity", which is again found under the main title "culture".

UNESCO, therefore, can be said to emphasize copyrights to a lesser extent than some decades ago. As was seen above, the issue of copyrights is not mentioned in the UNESCO Constitution, but rather the "free flow of ideas by word and image". As copyrights do not belong to the absolute core activities of UNESCO as read out from the Constitution, and as the intellectual property regime has changed by the entry into force of TRIPS and the closer cooperation between WIPO and WTO, it is understandable that a preservation of cultural diversity and intangible cultural heritage is emphasized more by UNESCO in the last decade—at the expense of activities relating to standard copyrights.

### General Observations on WIPO's Involvement with Other UN Bodies

We have seen that WIPO prioritizes its cooperation with WHO and the FAO, while there is less cooperation between WIPO and UNESCO. The overall tendency, however, is that WIPO expands its cooperation with other UN bodies. This has caused concerns. First, this closer cooperation might imply that WIPO might influence the policies of these specialized agencies, as was expressed in the context of the proposed FAO–WIPO cooperation agreement (WIPO, 2006b, pp. 2–5). Second, extending the areas of work will divert resources away from the implementation of the WIPO's development agenda (Third World Network, 2008).

These concerns are legitimate. WIPO has as its mandate to promote the protection of intellectual property throughout the world, in accordance with the 1967 WIPO Convention, article 3(ii). The decision to adopt a Development Agenda (WIPO, 2007a, annexure A) does not change this. Actually, in the 2008–9 programme, the "International Cooperation on Building Respect for IP" is directly linked to the Development Agenda (WIPO, 2008a, p. 111), but the Development Agenda must be considered to be something different from "building respect for IP".

On the other hand, if WIPO, through its secretariat, had not been involved in any cooperation with other UN specialized agencies, this would actually constitute a failure to observe properly articles 58 and 63(2) of the UN Charter, the 1974 UN Agreement and articles 3 and 13 of the 1967 WIPO Convention. On this basis, therefore, there are those who argue against WIPO's cooperation with other parts of the UN system that have the burden of proving that such cooperation is counter-productive, in order to achieve the objectives as outlined in articles 55 and 56 of the UN Charter.

A related question is whether WIPO would actually be able to influence the policies of the other UN bodies, including WHO, the FAO and UNESCO. This question might be difficult to answer empirically, but May (2007, p. 85) finds that only by working closer with other UN bodies and letting the principles of the UN influence its policies, including in the context of the development agenda, can WIPO shift its focus from acting primarily as a promoter of intellectual property protection, considering itself merely as a “technical agency”. Based on this observance, the article will now provide elements of an answer on how WIPO’s cooperation with the UN bodies will actually take place.

First, it is relevant to point out that article 1 of the 1974 UN Agreement also says explicitly that the cooperation shall be “subject to the competence and responsibilities of the United Nations and its organs . . .”. Hence, if the WIPO secretariat sought to interfere in the competences of the FAO, WHO or UNESCO with the explicit aim of adopting a more pro-intellectual property rights policy in these specialized agencies, WIPO would actually act contrary to the 1974 UN Agreement.

Second, the WIPO secretariat itself expresses at least an awareness on “respecting the distinct policy expertise and competence of other specialized agencies” (WIPO, 2008a, p. 115). While such statements should not be taken as evidence, it does at least indicate that WIPO wants to apply a cautious approach.

Third, the draft agreement between the FAO and WIPO was approved by the FAO, but was subsequently stopped by WIPO (Tansey, 2007, p. 56; WIPO, 2006b, paragraph 25). The explanations for this might be several, but it might be that the awareness on intellectual property rights is simply stronger among both state representatives meeting in WIPO forums, and among those non-governmental organizations monitoring the developments in WIPO and providing advice to the state representatives.

Both with regard to developments within WIPO and in intellectual patent legislation in general, there is a need to be vigilant. Reports that the impact of the patent system is actually a serious curtailment of research, leading to “blockages”, are given regularly (European Intellectual Property Organization [EPO], 2007, p. 9; see also pp. 71, 91). A recent report by US crop scientist warns against the wide patent scope in patents granted to seed companies (Pollack, 2009). It must be acknowledged that intellectual property legislation is primarily concerned with providing incentives. This is done by prohibiting other actors from using the protected material commercially—without the right holders’ consent—in the protection period. Alternative incentives include the right to receive remuneration for others’ use (licences of rights), without prohibiting others’ use (EPO, 2007, pp. 95–6).

Nevertheless, the main trend is toward greater harmonization, most clearly evidenced during the negotiations of the Substantive Patent Law Treaty (WIPO, 2003b), which was started with the aim of “reducing the cost of obtaining and maintaining patent protection, as well as the need to consider the possibility to introduce a global patent” (WIPO, 1999b, p. 3). Whether it will be possible in the future to press through a similarly worded treaty is an open question, but it is obvious that developing countries are able to coordinate themselves better, even if they also have diverse interests.

The general awareness of intellectual property issues in the various policy areas is, however, relatively weak. The present author would argue that the problem in UN documents is not the over-emphasis on intellectual property rights, but rather the lack of emphasis when addressing issues that obviously will be affected by intellectual property rights, most prominently patent rights. If patent rights are not addressed adequately, the policies that are recommended in various UN documents are simply not comprehensive enough.

As an example, a report on biotechnology from the UN Secretary-General to the General Assembly had one of the concluding paragraphs reading (extracts): “It is in the interest of humanity, in developed and developing countries, that safe biotechnology applications are used as widely as possible” (UN, 2003, paragraph 76). In the subsequent resolution from the General

Assembly, the states encouraged “the promotion of biotechnology within the United Nations system” (UN, 2004, paragraph 2).

While this encouragement might have its merits, it must also be remembered that the present biotechnology frontiers are very closely relating to patent rights. When both the report and the resolution failed to see biotechnology and patent rights together, the strong support of biotechnology expressed in these two documents simply ignores an influential factor that affects how this biotechnology is to be made accessible—and on which conditions. If patent rights had been more integrated in the documents, it is not given that the wording in the quoted paragraphs would have been different. The documents would, however, have provided a more correct understanding of the actors and policies influencing how such biotechnology is actually becoming physically and economically accessible.

## Conclusion

The enhanced cooperation between WIPO and other UN bodies is first and foremost evidenced with regard to the FAO and WHO, respectively. This cooperation takes place even if there is no formal cooperation agreement, as approved by the mandated bodies in these specialized agencies. On the other hand, the relation between WIPO and UNESCO seems to be less intensive than some decades ago. The reasons for this are three: first, the entry into force of TRIPS, enhancing the cooperation between WIPO and the WTO; second, the extension of patent protection to biotechnologies in the realm of food plants and medicines; third, UNESCO’s own decreased emphasis on copyright in its overall work, while emphasizing the strengthening of protection of cultural expressions that do not enjoy intellectual rights protection, but which nevertheless are found by WIPO to be “cognate policy areas” to intellectual property protection (WIPO, 2007b, paragraph 16).

This article has also shown that identifying an appropriate balance between access and incentives with regard to new, creative and applicable expressions and knowledge is present in all the four UN specialized agencies analysed—WIPO, WHO, the FAO and UNESCO—but the article has also shown that WIPO is still reluctant to apply a human rights-based approach in its activities. On the other hand, it is not found that WIPO is less concerned with issues of access than are the other specialized agencies. Neither is it found that WIPO seeks to push its agenda onto the other agencies, to a greater extent than would be expected based on the provisions on cooperation between the specialized agencies, as formulated in the UN Charter and the 1974 UN Agreement. It cannot be considered illegitimate that an agency actually seeks to enter into cooperation with other specialized agencies, based on its mandate and competences, as long as the competence and responsibilities of the other specialized agencies are respected. Therefore, while it must be understood that WIPO is active in promoting intellectual property rights in the member states, hence acting as a principal in relation to its member states, its cooperation with the respective UN specialized agencies in the realm of intellectual property policy cannot be understood to go beyond the general obligations of the UN Charter and the 1974 UN Agreement.

The article has applied a human rights approach to investigate issues of accessibility. This is based on the fact that accessibility is considered as a “core content” of the right to health, food and education, respectively. As accessibility should not be curtailed by a too strong emphasis on incentives, it is legitimate to state that intellectual property rights and the rights recognized by ICESCR, article 15.1(c) are tools for the achievement of social objectives (Commission on Intellectual Property Rights, 2002, p. 6) and human rights realization (Brinkhof, 2010; Van Overwalle, 2010; see also Marks, 2003, pp. 296–7). Moreover, TRIPS has provisions on exclusions of patentability, limited exceptions in the enjoyment of patent rights and procedures on issuing compulsory licences, which have been analysed elsewhere (Haugen, 2008).

The article has also found that WIPO has expressed concerns over the effects of intellectual property rights and human rights (UN, 2001d, p. 13; WIPO, undated(i); but see WIPO, 2001). This implies that WIPO cannot be seen as being too one-sided, by only calling for stronger protection of intellectual property rights. Encounters and cooperation with other UN bodies can provide more insight into the social dimensions of intellectual property protection and a better understanding of the adequate balance in intellectual property legislation and enforcement.

Obviously, authors' rights, as recognized in article 15.1(c) of the ICESCR, allow for various solutions in the realm of intellectual property protection, provided that authors of scientific, literary or artistic production and inventors are able to enjoy the moral and material benefit resulting from their production, and provided that the enjoyment of the authors' human rights does not impede the full enjoyment of other human rights.

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### Notes

- 1 TRIPS (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299, annexure 1c. Available at <http://docsonline.wto.org> [Accessed November 2009].
- 2 ICESCR (adopted 10 December 1966, entered into force 3 January 1976) 993 UNTS 3.
- 3 ICESCR, article 15.1(c) recognizes the right of everyone to "... benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".
- 4 ICESCR, article 15.1(b) recognizes the right of everyone to "... enjoy the benefits of scientific progress and its applications".
- 5 ICESCR, article 15.1(a) recognizes the right of everyone to "... take part in cultural life".
- 6 ICESCR, article 1.2 says (extracts): "All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . In no case may a people be deprived of its own means of subsistence".
- 7 Charter of the UN (adopted 24 October 1945) 1 UNTS XVI (UN Charter).
- 8 Agreement between the UN and the WIPO, United Nations General Assembly (UNGA) Resolution 3346 (17 December 1974) UN Doc. A/RES/3346 (XXIX).
- 9 Convention establishing the WIPO (adopted 14 July 1967, entered into force 26 April 1970) 828 UNTS 3 (1967 WIPO Convention).
- 10 Transfer of technology is also emphasized in article 7 of TRIPS, reading:

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.

The Doha Declaration on the TRIPS and Public Health makes clear that "... each provision of the TRIPS shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles" (WTO, 2001, paragraph 5).

- 11 WIPO officially states that the draft Substantive Patent Law Treaty (SPLT) took place from 2001 to 2005 (Thomas, 2009, p. 15). An open meeting on the SPLT took place in March 2006.
- 12 Relationships between IPR, human rights and development are analysed by Wong (2009, pp. 825–31; see also 3D, 2006) on proposals for human rights mainstreaming by applying human rights principles specified under each of the "clusters" structuring WIPO's Development Agenda. The clusters within which the 45 recommendations fall are Cluster A: technical assistance and capacity building; Cluster B: norm-setting, flexibilities, public policy and public domain; Cluster C: technology transfer, information and communication technologies (ICT) and access to knowledge; Cluster D: assessment, evaluation and impact studies; Cluster E: institutional matters including mandate and governance; and Cluster F: other issues. There is no government-adopted list of human rights principles, but the following principles are identified in FAO (2007a, p. 2): "participation, accountability, non-discrimination, transparency, human dignity, empowerment and the rule of law".
- 13 *Supra* nn. 3–5.
- 14 General Comment No 17 reads in paragraph 2 (extracts):

In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person.

- 15 *Supra* n. 12.
- 16 Article 58 of the Charter of the UN reads: "The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies".
- 17 The full text of article 2 of the 1974 Agreement between the UN and the WIPO reads:

In its relations with the United Nations, its organs and the agencies within the United Nations system, the Organization recognizes the responsibilities for co-ordination of the General Assembly and of the Economic and Social Council under the Charter of the United Nations. Accordingly, the Organization agrees to co-operate in whatever measures may be necessary to make co-ordination of the policies and activities of the United Nations and those of the organs and agencies within the United Nations system fully effective. The Organization agrees further to participate in the work of any United Nations bodies which have been established or may be established for the purpose of facilitating such co-operation and co-ordination, in particular through membership in the Administrative Committee on Co-ordination.

- 18 The latter reference specifies the cooperation with several UN bodies in the context of "life sciences issues". See also WIPO (2008a, p. 109), where WHO is listed, together with the WTO and three other intergovernmental organizations (Interpol, World Customs Organizations and OECD), as parts of WIPO's "strategic partnerships". See also p. 111, where WHO is said to have "expertise in specific areas relating to IP enforcement".

- 19 The cooperation between WIPO and the WTO is of a comprehensive nature, formalized through a 1995 Cooperation Agreement to “enhance cooperation in their legal-technical assistance and other technical cooperation activities”, also to those developing countries that are members of one, but not the other, organization (WIPO, 1995, articles 4.1, 4.2).
- 20 WHO (2008b, annexure, appendix, elements 2.4(c) (voluntary open databases and compound libraries); 3.3(a) (health innovation models); 3.5(a) (award schemes for health-related innovation); 4.1(a) (mechanisms to facilitate transfer of technology); 4.2(a) (cooperation for technology transfers); 4.3(a) (voluntary patent pools); 4.3(b) (new mechanisms to promote transfer of and access to key health-related technologies); 5.1(a) (management of intellectual property in a manner that maximizes health-related innovation and promotes access to health products); 5.1(b) (build and strengthen capacity to manage and apply intellectual property in a manner oriented to public health needs); 5.1(c) global databases that contain public information on the administrative status of health-related patents); 5.1(e) (training in the application and management of intellectual property, from a public health perspective); 5.1(h) (coordinate work relating to intellectual property and public health among the secretariats and governing bodies of relevant regional and international organizations); 5.2(a) (adapting national legislation in order to use to the full the flexibilities contained in [TRIPS]); 5.2(b) (take into account, where appropriate, the impact on public health when considering adopting or implementing more extensive intellectual property protection than is required by [TRIPS]); 5.2(e) (prevent misappropriation of health-related traditional knowledge); 6.3(b) (improve access to safe and effective health products); 8.1(c) (monitor the impact of intellectual property rights); 8.1(d) (monitor the impact of incentive mechanisms on innovation of and access to health products)).
- 21 See the WHO’s report to WIPO’s Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications in WIPO (2008c), and the result of the Second WIPO Internet Domain Name Process, particularly annexures 3, 4, 5. Available at (<http://www.wipo.int/amc/en/processes/process2/report/html>) [Accessed May 2009].
- 22 UPOV is located with WIPO and the Secretary-General of WIPO is also Director-General of WIPO. The FAO–UPOV relationship has centred on the relationship between plant breeders’ rights and farmers’ rights (Haugen, 2007a, p. 272, n. 57). UPOV has not been too eager to get involved in issues relating to clarifying the legal scope of farmers’ rights. The FAO did have a presentation at the fortieth session of the UPOV Council in 2006 on the International Treaty on Plant Genetic Resources for Food and Agriculture, which recognizes farmers’ rights in article 9, and which says in article 13.3 that benefits should flow primarily to farmers. The presentation focused primarily on *contracts* relating to plant genetic resources.
- 23 The Green Revolution refers to the efforts to introduce high-yielding varieties in agriculture, in particular in parts of Asia and Latin America in the 1960s and 1970s. The International Agricultural Research Centres (“Future Harvest Centres”) cooperating through the Consultative Group on International Agricultural Research played a major effort in the Green Revolution.
- 24 The presentation of AGRA’s programme for Africa’s Seeds Systems does only refer to “intellectual property rules for plant varieties” among several other factors that influence breeding (see (<http://www.agra-alliance.org/section/work/seeds>) [Accessed November 2009]).
- 25 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (adopted 26 October 1961, entered into force 18 May 1964) 496 UNTS 43 (1961 Rome Convention). The Convention has 26 state parties; article 32.5 specifies that the ILO, UNESCO and Bureau of the International Union for the Protection of Literary and Artistic Works (International Bureau) (now WIPO) shall constitute the secretariat of the Convention. The twentieth session of the Intergovernmental Committee was held in September 2009 (ILO/UNESCO/WIPO, 2009).

- 26 Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (adopted 29 October 1971, entered into force 18 April 1973) 866 UNTS 67 (1971 Phonograms Convention). The Convention has 32 state parties; article 8.3 specifies that the International Bureau “shall exercise the functions enumerated in paragraphs (1) [assemble and publish information] and (2) [conduct studies and provide service] above in cooperation” with UNESCO and the ILO.
- 27 WIPO Performances and Phonograms Treaty (*infra* n. 33), article 2(a).
- 28 CICH (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3.
- 29 CCD (adopted 20 October 2005, entered into force 18 March 2007) 2439 UNTS.
- 30 See the respective paragraphs in *supra* nn. 25 and 26.
- 31 The Collection of Laws for Electronic Access is said to “provide access to treaties on intellectual property”, but if one searches for “other treaties”, no UNESCO-administered treaty appears; see ([http://www.wipo.int/clea/en/search.jsp?cntryorg\\_id=210&cat\\_id=&order=date](http://www.wipo.int/clea/en/search.jsp?cntryorg_id=210&cat_id=&order=date)) [Accessed May 2009]. The Universal Copyright Convention is not found under other databases on the WIPO homepage.
- 32 Universal Copyright Convention (adopted 24 July 1971, entered into force 10 July 1974) 943 UNTS 178. The Universal Copyright Convention has 65 state parties. The thirteenth session of the Intergovernmental Committee for the Universal Copyright Convention was held in June 2005 (UNESCO, 2005b). In annexure, p. 5, UNESCO and WIPO are listed as attending in an “advisory capacity”.
- 33 WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) 2186 UNTS 203.
- 34 WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121.
- 35 International Treaty on Plant Genetic Resources for Food and Agriculture (adopted 3 November 2001, entered into force 29 June 2004) 2400 UNTS.
- 36 *Supra* n. 28.
- 37 *Supra* n. 29.
- 38 *Supra* n. 7.
- 39 See the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), article 4.2 and General Comment 23 “The rights of minorities (Article 27)” (CCPR/C/21/Rev.1/Add.5) (1994) paragraph 7, linking cultural rights and the use of land resources; for more explicit references to indigenous peoples, see ILO Convention 169, acknowledging in article 13 the indigenous peoples’ attachment to their land, for their “cultures and spiritual values” and the 2007 UN Declaration on Indigenous Peoples, article 31, referring to “human and genetic resources, seeds, medicines” in the context of “cultural heritage”.
- 40 Paragraph 2(7) of WHO (1999a) reads:
- Requests the Director-General . . . to cooperate with Member States, at their request, and with international organizations in monitoring and analysing the pharmaceutical and public health implications of relevant international agreements, including trade agreements, so that Member States can effectively assess and subsequently develop pharmaceutical and health policies and regulatory measures that address their concerns and priorities, and are able to maximize the positive and mitigate the negative impact of those agreements.
- 41 The preambular paragraphs 7–9 of WHO (1999a; b) read:
- Noting* that there are trade issues which require a public health perspective; *Recognizing* that the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) provides scope for the protection of public health; *Taking* note of concerns of many Member States



about the impact of relevant international agreements, including trade agreements, on local manufacturing capacity and on access to and prices of pharmaceuticals in developing and least developed countries.

- 42 Preambular paragraph 2 of the WHO Constitution and paragraph 16 of WHO (2008b, annexure) reads: “The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”.
- 43 As explained in greater detail by Mechlem (2004, p. 647, paragraph 1.2) was included at the thirteenth FAO Conference in 1965 as a direct result of the wording of article 11.2 of the ICESCR, which was adopted by the UN General Assembly’s Third Committee in 1963 after a presentation and a draft proposal made by the Director-General of the FAO.
- 44 “The Organization shall promote and, where appropriate, shall recommend national and international action with respect to (a) scientific, technological, social, and economic research relating to nutrition, food and agriculture”.
- 45 “The Organization shall promote and, where appropriate, shall recommend national and international action with respect to . . . (c) the conservation of natural resources and the adoption of improved methods of agricultural production”.
- 46 “The Organization shall promote and, where appropriate, shall recommend national and international action with respect to . . . (d) the improvement of the processing, marketing, and distribution of food and agricultural products”.
- 47 *Supra* n. 35.
- 48 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, article 3.3.
- 49 See the report from the Governing Body’s second session in FAO (2007b, paragraphs 44–53), especially paragraph 49, which noted the “disappointment at the slow pace of implementation of the Funding Strategy . . .”. In this context, see also ITPGRFA, article 13.3 (extracts): “benefits arising from the use of plant genetic resources should flow primarily to farmers . . .”.
- 50 *Supra* n. 4.
- 51 Agriculture and Agri-Food Canada (2002); note that the United States signed the treaty on 1 November 2002, but has not yet ratified.
- 52 *Supra* n. 43.
- 53 *Supra* n. 31.
- 54 *Supra* nn. 25 and 26.
- 55 *Supra* n. 31.
- 56 *Supra* n. 32.
- 57 *Supra* n. 28.
- 58 *Supra* n. 29.
- 59 *Supra* n. 39. This approach must not, however, be understood as an argument to keep human beings “bound” to their own cultural heritage against their own will, without allowing them to develop a separate identity and value base.
- 60 ICCPR (adopted 10 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- 61 Article 27 of the ICCPR reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

62 *Supra* n. 5.

63 Article 16 of the CCD says that developed countries shall grant “preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries”. This wording cannot be said to constitute any substantive restriction on the “free flow”, but implies that developed countries shall have an active and facilitating role to enable entry of persons, goods and services from developing countries, in order to make these exchanges unimpeded and affordable.

64 All reports to and decisions from the Executive Board (from 1980 onwards) can be found at ([http://portal.unesco.org/en/ev.php-URL\\_ID=26601&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=26601&URL_DO=DO_TOPIC&URL_SECTION=201.html)) [Accessed May 2009].

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