Attempts to Protect Indigenous Culture Through Free Trade Agreements

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1. Introduction

The fundamental purpose of most modern Free Trade Agreements (FTAs) is to extend the commitments, which may mean to further liberalise trade, that members of the World Trade Organization (WTO) have made in that multilateral forum. FTAs also frequently include commitments in areas that are outside the WTO obligations. Protection of traditional knowledge and traditional cultural expressions (TCEs) are not specifically part of the WTO framework, in particular the Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement). Some FTAs expressly provide that the parties, or at least one of the parties, retain the ability to protect certain aspects of cultural heritage, including the protection of traditional knowledge. Other FTAs limit the possibilities for protecting traditional knowledge. This chapter analyses how FTAs might affect the aspirations of indigenous peoples, in particular, to protect their traditional knowledge. First, the chapter discusses the problems that have led to a call for the protection of traditional knowledge. The chapter then assesses the international agreements that provide varying protection for traditional knowledge and issues arising from the implementation of those international agreements in domestic law. Next is a discussion about the general approach that FTAs take when they include clauses about protection of cultural heritage. Some specific examples of clauses from FTAs are discussed. The chapter then assesses the purpose and legitimacy of protecting traditional knowledge through FTAs. Unlike TRIPS-plus provisions in FTAs there is no creation, through FTAs, of norms for the protection of traditional knowledge. The chapter concludes with a discussion of some of the consequences if such norms were developed through FTAs. In particular, the effects of national treatment and whether foreign courts can apply the laws of the country of origin of the traditional knowledge owners are discussed. The chapter concludes that countries who wish to protect traditional knowledge do not at present use FTAs effectively for that purpose and that those countries ought to consider closely if FTAs can assist them in creating norms for the protection of traditional knowledge.

2. The Problems that Traditional Knowledge Holders Face

The development and continuing evolution of the international intellectual property system has invigorated, if not arguably created, a debate about the use of traditional

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knowledge sourced from either developing countries or indigenous peoples.² In short, these groups have sought to protect their knowledge and associated resources from exploitation in developed countries. The ways in which people and businesses in developed countries copy or use traditional knowledge to innovate or create are many and the literature is replete with examples.³ The terminology used in a variety of international fora, and discourse about those fora, include traditional knowledge, folklore, traditional cultural expressions and biological and genetic resources.⁴ This terminology is in part a matter of convenience, but it also reflects a categorisation analogous to that found in intellectual property law. Copyright and expressive uses of trade marks, on the one hand, might be analogous to traditional cultural expressions and, on the other hand, biological and genetic resources are associated with patents and plant variety rights. The traditional knowledge element is relevant to both. These categories, however, do not necessarily reflect the ways that communities, from which traditional knowledge comes, see the boundaries. This chapter discusses traditional knowledge that is connected to both traditional cultural expressions and biological and genetic resources.⁵

The central concern of the peoples who are the source of traditional knowledge, conveniently described as traditional knowledge holders, is that they frequently do not benefit from others’ use of their knowledge. They neither receive a share directly from the products or services that result from the use, nor are they acknowledged or compensated for the contribution that their traditional knowledge has made. This can occur where traditional knowledge relates to the uses of biological or genetic resources. Examples of unpermitted and unrewarded uses of genetic resources and traditional knowledge are central to the international debate over the protection of traditional knowledge and indigenous culture.⁶

Broadly, those who have the relevant knowledge may convey it to someone who enquires about the uses of a plant, or aspects of the knowledge may be well known or recorded in publicly available literature. Perhaps a particular plant is known for its antibacterial properties. Researchers, such as pharmaceutical companies, may use the knowledge to assist in selecting that plant to research or the knowledge could form part of the research process. In such situations, the pharmaceutical researchers could isolate the plant’s active ingredient, then synthesise the active ingredient and potentially reproduce it for use as a consumer product. The problems that this sort of scenario can create are many. The benefits resulting from the use of the knowledge may not be shared with the knowledge holders and there can be negative effects on sustainability of both the

² There is an important difference between developing countries and indigenous peoples in this context. Internationally, and particularly at the World Trade Organization, the debate is focussed on a general developing versus developed country paradigm. However, many indigenous peoples are minority populations in either developing or developed countries (eg New Zealand, Australia, Canada and USA). Therefore, indigenous peoples’ interests are frequently different from the interests of large developing countries, such as India and Brazil.


⁴ See for example World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection of Traditional Knowledge: Factual Extraction, WIPO/GRTKF/IC/12/S(b), February 18, 2008, pp 14-34.


communities who provide the knowledge and the biological and genetic resources themselves. This sort of situation arises largely because those using the knowledge treat it as freely available for anyone to use in any way. However, even if the holders of the traditional knowledge made the knowledge publicly available, that does not necessarily mean that their intention was that it be freely available for use in any way. From the holders’ perspectives, the values of the community should guide uses of that knowledge. Those values include guardianship of the knowledge for the benefit of future generations. The concept of guardianship for future generation indicates why indigenous peoples may consider themselves as temporary custodians or holders, rather than owners, of traditional knowledge.

Another related problem is that the production of a synthetic active compound may be cheaper and more efficient than either extracting the compound from plants found in the region from where the traditional knowledge comes or growing enough of the plant to extract a commercially usable volume of any active ingredient. Thus, if the knowledge holders already had a market for their natural plants that market may be undercut or future development of it curtailed. A further problem might be that indigenous peoples stop using their traditional knowledge, if they have access to synthetic and potentially cheaper products as substitutes for the traditional forms. Some may see this as integrating into the modern world and that therefore all have benefited, but it is not so simple. Where the traditional knowledge is related to plants this some claim may have a negative effect on biodiversity and where those plants are used in medicinal practices there might be negative effects on cultural diversity and indigenous peoples cultural identity and even their health.

I do not intend this chapter to be a summary of the problems that global trade brings to traditional knowledge holders, but the above shows how the problem has emerged where biological and genetic resources are connected to traditional knowledge. Intellectual property law comes face-to-face with traditional knowledge because uses of biological and genetic resources, associated with traditional knowledge, can end up as patents or plant variety rights. The traditional knowledge associated with biological and genetic resources is, however frequently about much more than the properties of a plant. It can be, for example, about the history and genealogy of people and their connection with the plant and the land on which it is found. The same or related knowledge might be shown in traditional cultural expressions. Thus, while intellectual property would

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8 See for example the discussion of the role of Maori as kaitiaki (guardians) of their matauranga Maori in Waitangi Tribunal Report, Ko Aote Aro Atenei A Report Into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity Te Tauamata Tuarua Volume 1, Chapters 1 and 2.

9 This issue has arisen in relation to neem, see Oliver Kachhrad “Beyond the Neem Tree Conflict: Questions of Corporate Behaviour in a Globalised World” (2005) 21 NZULR 347.


11 See for example, the discussion of the prevention of the use of rongoā Māori (traditional Māori medicinal practices) in New Zealand and associated effects on Māori health in Waitangi Tribunal Report, Ko Aote Aro Atenei A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity Te Tauamata Tuarua Volume 2, Chapter 7.

distinguish the patentable from the knowledge and culture, the holders of traditional knowledge do not make such a distinction.

Indigenous communities often produce works of art or craft that reflect traditional knowledge and are representations of their culture. The art of the weaver, for example, is not just the skill of the woven product, but the woven product is an expression of culture and knowledge. The products used to create the weaving (perhaps a biological resource such as flax) may also have special cultural significance. A problem arises if someone then uses that woven creation in a way that ignores, or worse, is offensive to that culture.

Intellectual property law does a very poor job of addressing the concerns of traditional knowledge holders. Indeed, the designers of international intellectual property law standards never had as a broad goal to protect cultural integrity or to recognise guardianship interests that holders of traditional knowledge seek to protect. Intellectual property is not divorced from cultural concerns, far from it. Intellectual property is a strong legal tool that protects many products of culture. However, the law is structured in a way that values the use of culture through certain property style rights. The law give exclusive rights to owners over a certain set of uses. Intellectual property law was not and is not designed to directly protect the relationship of peoples with their culture.

3. The International Dimension and National Implementation

Member states of various multilateral fora have made the link between intellectual property and traditional knowledge. Two of the most significant fora for the protection of indigenous culture, which are not primarily about intellectual property rights, are the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) and the

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13 See for example the discussion about flax in Murdoch Riley, Māori Healing and Herbal: New Zealand Ethnobotanical Sourcebook (Paraparaumu: Viking Sevenseas N.Z. Ltd, 1997) p. 126.
14 This is true of both national intellectual property regimes and international intellectual property regimes. In, for example, Robert Merges Justifying Intellectual Property (Harvard University Press, 2011) he refers to first order principles of intellectual property, which he describes as (91) lockean appropriation (2) Kantian (liberal) individualism and (3) Rawlsian attention to distributive effects of property. See also, Christoph Beat Graber “Institutionalization of Creativity in Traditional Societies in International Trade Law”, IT-ICH i-call Working Paper No. 01, Lucerne, Switzerland: University of Luzern, p11.
16 In addition to those discussed in this chapter other fora include the Food and Agriculture Organization, the International Union for the Protection of New Varieties of Plants and the United Nations Educational Scientific and Cultural Organization. For a general discussion about the relevant work in these institutions see Christoph Antons ‘The International Debate about Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property’ in Antons C(ed), Traditional Knowledge, Traditional Cultural Expressions And Intellectual Property Law in the Asia-Pacific Region, (Kluwer Law International, The Netherlands 2009) pp 39-48.
17 United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007, article 31 provides:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.
The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) is a supplementary agreement to the Convention on Biological Diversity. It was adopted on 29 October 2010 in Nagoya, Japan and will enter into force 90 days after the fiftieth instrument of ratification. According to the CBD website “Its objective is the fair and equitable sharing of benefits arising from the utilization of genetic resources, thereby contributing to the conservation and sustainable use of biodiversity.” Available at <www.cbd.int> (Nagoya Protocol).

TO use only the intellectual property system to protect traditional knowledge is not only impossible, but some describe this as a purely defensive strategy. See Christoph Beat Graber “Institutionalization of Creativity in Traditional Societies in International Trade Law”, IT-ICH i-call Working Paper No. 01, Lucerne, Switzerland: University of Luzern, p17.

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18 Convention on Biological Diversity, article 8(j) provides:

Each contracting Party shall, as far as possible and as appropriate:

Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

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20 Nagoya Protocol, Articles 5 and 6.

21 Nagoya Protocol, Article 7.


Disclosure as an interface is only likely to be effective if there are consequences for a patent applicant’s failure to disclose.25 Having consequences, such as a requirement for re-examination or invalidity, flowing from a failure to disclose should incentivise compliance with access and benefit sharing laws.26 However, there is no international agreement on any kind of disclosure obligation in the patent system.

Traditional knowledge has become a tradable commodity. Some traditional knowledge creators and holders have taken up a fight against the exploitation and commodification of their knowledge. Others, because perhaps that fight is in part lost, seek benefits from the exploitation of their knowledge. Consequently, the World Trade Organization (WTO) TRIPS Council had on its agenda a discussion about the relationship between the CBD and the TRIPS Agreement.27 The focus of the discussion has been about the interface described above and whether the WTO should amend the TRIPS Agreement to include a disclosure requirement.28 At the time of writing, this discussion has ceased and looks like it will not progress any further within the Doha round negotiations of the WTO.29 In 2010 the TRIPS Council limited its agenda to negotiations relating to a multilateral register for geographical indications, but not the traditional knowledge negotiations.30 It is beyond the scope of this paper to discuss fully the debate over which topics the TRIPS Council should negotiate, but any protection of traditional knowledge in the WTO through the TRIPS Agreement seems unlikely at present.

The other major international body dealing with traditional knowledge and its relationship with intellectual property issues is the World Intellectual Property Organization (WIPO). The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC) has a mandate to draft a treaty on the protection of traditional knowledge and traditional cultural expressions.31 At the time of writing, it seems unlikely that such a treaty will in the near future become an extensive international agreement.

As neither WIPO nor the WTO seem likely to conclude any agreement that protects traditional knowledge then those nations who seek to protect traditional knowledge, in one form or another, have resorted to using fora such as the DRIP and CBD outlined above. Those fora are considerably less strong than the WTO with its dispute settlement

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24 For a discussion outlining types of disclosure obligations and consequences see WIPO Technical Study on Disclosure Requirements Concerning Genetic Resources and Traditional Knowledge (WIPO Publication No. 786), WIPO/GRTKF/WG/3/14.
25 If a failure to disclose the origin of genetic resources meant that the patent was revoked or invalidated in some way then it is likely that parties would comply with access benefit sharing laws so that there would not be opposition to the patents.
28 For summary on the different proposals from member states see World Trade Organisation ‘TRIPS: reviews, Article 27.3(b) and related issues, Background and the current situation’, at http://www.wto.org/english/tratop_e/dda_e/meet08_brief05_e.htm and Alison Hoare and Richard Tarasovskys Chatham House Report, Disclosure of Origin in IPR Applications: Options and Perspectives of Users and Providers of Genetic Resources (London: Royal Institute of International Affairs, 2006).
30 Many members of the TRIPS Council take the position that the Council only has a mandate to discuss the multilateral register. See the statement of the Chair of the Special session of the TRIPS Council, Ambassador Darlington Mwape in Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits http://www.wto.org/english/tratop_e/ipip20/22, 22 March 2010.4
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mechanism.\textsuperscript{32} In addition to these other fora some nations have also included references to traditional knowledge in FTAs.\textsuperscript{33}

4. The FTA Approach

Since the TRIPS Agreement came into force, there has been a steady rise of FTAs. Intellectual property chapters in FTAs vary in their scope and depth. Such chapters may contain a variety of terms that are consistent with the TRIPS Agreement, provide a greater level of protection than the minimum standards of the TRIPS Agreement (frequently known as TRIPS-plus), or include terms that are not even contemplated by the TRIPS Agreement.\textsuperscript{34} Terms that the TRIPS Agreement does not contemplate are not TRIPS –plus, as such, but rather fall outside the scope of the TRIPS Agreement. Protection of traditional knowledge, where that protection is \textit{sui generis}, is often likely to be outside the scope of the Agreement. Whereas protection of aspects of traditional knowledge, by means of intellectual property rights, which fall within the coverage of the TRIPS Agreement,\textsuperscript{35} are likely to be TRIPS-plus. A requirement that a patent applicant disclose use of genetic resources or traditional knowledge used in the inventive process, for example, arguably is a requirement in addition to the disclosure requirements that exist under the TRIPS Agreement\textsuperscript{36} and is thus TRIPS-plus.\textsuperscript{37} This is not a mere matter of labelling, but it is important because it has implications for whether the protection at domestic law is available to WTO members on a national treatment basis.\textsuperscript{38} Part 6 below discusses national treatment related issues.

The TRIPS Agreement does not address traditional knowledge of indigenous peoples directly and as discussed below this arguably means that such protection falls outside of the TRIPS Agreement rather than being TRIPS –plus.\textsuperscript{39}

\textsuperscript{32} WIPO, which although it does not have a dispute settlement mechanism has a much closer relationship with the WTO than the other forums. There is an agreement of cooperation between the two (Agreement Between the World Intellectual Property Organization and the World Trade Organization, December 22, 1995.\textsuperscript{32} and a WTO dispute settlement panel consulted WIPO on copyright (WTO Panel Report, \textit{United States – \textsection 110 (b) Copyright Act of the United States, WT/DS160/R, 15 June 2000.}) WIPO is also predominant an intellectual property organisation and has very similar membership to the WTO.

\textsuperscript{33} In this chapter I use free trade agreements as a term covering agreements by that name and also so-called Economic Partnership Agreements (a term used in EU agreements), Regional Trade Agreements (RTAs) and Preferential Trade Agreements (PTAs).

\textsuperscript{34} For a discussion of these types of FTAs see Susy Frankel “The Legitimacy and Purpose of Intellectual Property Chapters in FTAs” in Challenges to Multilateral Trade The Impact of Bilateral, Preferential and Regional Agreements Ross Buckley, Vai Io Lo and Laurence Boullie (eds) (Wolters Kluwer, The Netherlands, 2008) 185.

\textsuperscript{35} Article 1.2 of the TRIPS Agreement, above n1, states: ‘For the purposes of this Agreement, the term “intellectual property” refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.’ The categories by heading in Part II are: Copyright and related Rights, Trademarks, Geographical Indications, Industrial designs, Patents, Layout-designs (Topographies) of Integrated circuits, Protection of Undisclosed Information and Control of Anti-Competitive Practices in contractual licenses.’

\textsuperscript{36} TRIPS Agreement, Article 29(1) provides that “Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.” Depending on the nature of the disclosure requirement it could also be regarded as an exception to patentability and consequently justified under the \textit{ordre public} exception. article 27:2 of TRIPS. See also Susy Frankel “The TRIPS Agreement and Traditional Knowledge”(2011 forthcoming).

\textsuperscript{37} See discussion below.

\textsuperscript{38} Berne 15(4) of the Berne Convention, which is incorporated into the TRIPS Agreement via Article 9(1), provides: (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

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FTAs that address traditional knowledge do not, for the most part, include norms to protect traditional knowledge, such as the objectives and principles found in the discussion documents of WIPO. Rather, the agreements purport to reserve the right of the parties to protect traditional knowledge or they have mere aspirational statements about the parties agreeing to discuss the protection of traditional knowledge. Alternatively, they entrench negotiation positions of the more powerful members of the FTA that are not particularly supportive of traditional knowledge protection. Part 5 of this chapter discusses examples of traditional knowledge related provisions in FTAs.

Many commentators argue that TRIPS-plus is imbalanced and favours large developed countries at the expense of the interests of developing countries. Those seeking increased intellectual property protections use FTAs when the multilateral process is not progressing or when the more powerful party in the FTA cannot achieve its goals through the multilateral process. These are two key reasons why FTAs are an undesirable way to achieve intellectual property norms outside of the multilateral system. Indeed this may be so of many parts of FTAs. However, the protection of traditional knowledge through FTAs may not be so undesirable. The traditional knowledge FTA provisions do not create the same kinds of obligations as some other intellectual property related FTA provisions. This is because such protection is not a result of the developed world imposing its standards on the developing world. Rather, traditional knowledge protections, in FTAs, are a method of gaining or preserving some kind of international protection in the face of powerful countries, primarily the United States, refusal to entertain the traditional knowledge discussion at the WTO.

5. Examples of FTAs that include Provisions Relating to Traditional Knowledge

As discussed above, the TRIPS Council began a discussion about the relationship between the CBD and the TRIPS Agreement. Some countries that proposed substantial changes to the TRIPS Agreement, in the course of that discussion, have included articles relating to traditional knowledge in their FTAs. Peru is an example. However, Peru’s FTAs do not

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

This was incorporated into the Berne Convention primarily to protect so-called folklore, which might not otherwise be protected under Berne because of the requirements of identified authors. See discussion of this provision in Sam Ricketson and Jane C. Ginsburg International Copyright and Neighbouring Rights: The Berne Convention and Beyond (2nd Ed, Oxford University Press) paras 8.117-8.118. It could, therefore, appear that the Berne Convention and the TRIPS Agreement do address traditional knowledge. However, Article 15(4) of Berne only provides a mechanism for the protection of folklore as copyright works. This is not the protection that indigenous peoples seek for their traditional knowledge.


41 See generally Carlos M. Correa Intellectual Property Rights, the WTO and Developing Countries The TRIPS Agreement and Policy Options (Zed Books, 2010).

42 Jagdish Bhagwati has commented that “Acting like termites, [F]TAs are eating away at the multilateral trading system relentlessly and progressively”, see Jagdish Bhagwati Termites in the Trading System How Preferential Agreements Undermine Free Trade (Oxford University Press, USA,2008).

43 FTAs are often undesirable because the power imbalance is extreme. Although there is a power imbalance in some multilateral fora, small or less powerful countries can group together to negotiate for common interests. This is exactly why multilateral processes are frequently slower or unsuccessful. For a discussion of FTAs see Susy Frankel “Challenging TRIPS - Plus FTAs - the Potential Utility of Non-Violation Complaints” (2009) 12(4) Journal of International Economic Law 1023.
include provisions that reflect the position it has taken in the TRIPS Council. In the TRIPS Council Peru has advocated for a requirement to disclose the origin of any biological or genetic resources with consequences for non-disclosure that would make the patent invalid. In Peru’s FTA with the USA the position on traditional knowledge reflects the US position taken in the TRIPS Council that any connection between traditional knowledge and intellectual property can be resolved through contracts, rather than traditional knowledge requiring any recognition in international agreements. The United States is not a member of the CBD, so unsurprisingly it does not agree to comply with the CBD. An annex to the US-Peru FTA states:

44 See World Trade Organisation, TRIPS issues: “Traditional Knowledge and Diversity” available at: http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm


The Governments of the United States of America and the Republic of Peru have reached the following understandings concerning biodiversity and traditional knowledge in connection with the United States – Peru Trade Promotion Agreement signed this day:

The Parties recognize the importance of traditional knowledge and biodiversity, as well as the potential contribution of traditional knowledge and biodiversity to cultural, economic, and social development.

The Parties recognize the importance of the following: (1) obtaining informed consent from the appropriate authority prior to accessing genetic resources under the control of such authority; (2) equitably sharing the benefits arising from the use of traditional knowledge and genetic resources; and (3) promoting quality patent examination to ensure the conditions of patentability are satisfied.

The Parties recognize that access to genetic resources or traditional knowledge, as well as the equitable sharing of benefits that may result from use of those resources or that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers.

Each Party shall endeavor to seek ways to share information that may have a bearing on the patentability of inventions based on traditional knowledge or genetic resources by providing:

(a) publicly accessible databases that contain relevant information; and

(b) an opportunity to cite, in writing, to the appropriate examining authority prior art that may have a bearing on patentability.

Both Peru and China provide certain protections for traditional knowledge in their respective domestic laws. Yet the FTA between them does not reflect this. Rather, the
FTAs provides that the parties “establish a mutually supportive relationship between the TRIPS Agreement and the Convention on Biological Diversity, regarding genetic resources and the protection of traditional knowledge and folklore”. The Peru-China Agreement also allows the parties to “place appropriate measures to protect traditional knowledge, folklore and genetic resources in accordance with international and national legislations”. The FTA also provides that subject to any future national developments the parties will “discuss disclosure of origin or source of genetic resources and/or prior informed consent obligation in patent applications.” One wonders why these parties did not take the opportunity to create an agreement that gives greater protection to each other’s traditional knowledge. It seems likely that because standards for the protection of traditional knowledge are evolving and there is no international norm for such protection that the FTA parties wanted to avoid being too prescriptive. Even so, the fact that both China and Peru protect traditional knowledge means that there are some common norms between the countries’ laws and, therefore, they could have embedded some of those norms in an agreement. They could have, for example, agreed to a general norm not to allow for the unfair use or misappropriation of traditional knowledge.

Also, both countries support the development of the WIPO principles. If the concern is to preserve differences in their laws, then retaining those differences is possible. A broad norm preventing the misappropriation of traditional knowledge in accordance with the WIPO principles is possible because the WIPO principles are not completely prescriptive; rather they are minimum standards for protection that countries can implement in a variety of ways. The WIPO principles do not prescribe detailed national laws and if they become a binding treaty, in anything like their current form, they will provide considerable scope for national autonomy over implementation.

Apart from the Peru-China Agreement, discussed above, China’s FTAs have a conspicuous lack of traditional knowledge protection. That is probably because China’s FTAs for the most part do not include intellectual property chapters. One exception is the China-Costa Rica FTA, which includes provisions for the protection of genetic resources, traditional knowledge and folklore. The parties broadly note the contribution of genetic resources, traditional knowledge and folklore to scientific, cultural and economic development. The parties also provide:

**[They]** acknowledge, reaffirm and encourage the effort to establish a mutually supportive relationship between the TRIPS Agreement and the Convention on Biological Diversity regarding genetic resources and the protection of traditional knowledge and folklore.

Subject to the parties international and domestic laws the parties are able to adopt or maintain measures to promote and share the benefits which arise from the use of

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48 Peru-China FTA, Chapter 11 – Intellectual Property, Article 145: Genetic Resources, Traditional Knowledge and Folklore.
49 Peru-China FTA, Chapter 11 – Intellectual Property, Article 145(3).
50 Peru-China FTA, Chapter 11 – Intellectual Property, Article 145(4).
51 A general international norm along these lines has been discussed in the WIPO-IGC. See Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, (2003), at 58.
52 This is related to the way national treatment functions, see discussion in part 7 of this chapter below.
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traditional knowledge, innovations and practices relevant to the conservation of biological diversity.\(^{56}\)

Finally, the parties agree to discuss disclosure of origin of the source of genetic resources and prior informed consent subject to developments in domestic law and the international multilateral fora.\(^{57}\)

New Zealand does not have protections for traditional knowledge in a way that is directly comparable to the laws of Peru or China.\(^{58}\) Under New Zealand’s trade mark law the Commissioner of Trade Marks must not register a sign that is contrary to Maori values.\(^{59}\) However, this is a law that creates an interface between intellectual property law and traditional knowledge protection. It is not a protection of traditional knowledge per se.\(^{60}\) It remains to be seen whether New Zealand will enact laws to protect traditional knowledge. However, within most of New Zealand’s FTAs there are provisions relating to traditional knowledge, folklore and genetic resources.\(^{61}\) Other FTAs only refer to traditional knowledge.\(^{62}\) An example is the Trans-Pacific Strategic Economic Partnership Agreement, which provides, “Subject to each Party’s international obligations the Parties affirm that they may... establish appropriate measures to protect traditional knowledge”.\(^{63}\) All of New Zealand’s FTAs qualify these apparently permissive provisions with reference to such measures only being permissible if they are consistent with the TRIPS Agreement.

In addition to provisions relating directly to traditional knowledge, New Zealand’s FTAs somewhat uniquely include provisions that refer to the Treaty of Waitangi. The Treaty of Waitangi is the Treaty that was entered into between Maori, New Zealand’s indigenous people, and the British Crown when New Zealand was colonised.\(^{64}\) These FTA provisions state that New Zealand may adopt measures that are necessary for it to honour its obligations under the Treaty of Waitangi.\(^{65}\) An example of this sort of provision appears in the New Zealand China FTA, which provides:\(^{66}\)

\(^{56}\) China-Costa Rica FTA, Chapter 10 – Intellectual Property, Article 111 (3): Genetic Resources, Traditional Knowledge and Folklore.

\(^{57}\) China-Costa Rica FTA, Chapter 10 – Intellectual Property, Article 111 (4): Genetic Resources, Traditional Knowledge and Folklore.

\(^{58}\) See chapter XX for a discussion of the WAI 262 claim in New Zealand.

\(^{59}\) Trade Marks Act 2002 (NZ), s17, see also Susy Frankel "Third Party Trade Marks as a Violation of Indigenous Cultural Property: A New Statutory Safeguard" (2005) 8 Journal of World Intellectual Property 83.

\(^{60}\) See also chapter XX in this book.


\(^{62}\) NZ – Malaysia FTA, Chapter 11 – Intellectual Property, Article 11.6 – Only refers to the protection of traditional knowledge. It does not make any reference to protection of folklore or genetic resources; NZ – Malaysia FTA, Chapter 11 – Intellectual Property, Article 11.4(2)(e): Cooperation on Notification and exchange of information article only refers to promoting cooperation between parties so as to promote any measures necessary to protect traditional knowledge. Trans-Pacific Strategic Economic Partnership NZ, Chapter 10 - Intellectual Property, Article 10.3(3)(e) – enables for the protection of TK generally subject to the international obligations of both parties.

\(^{63}\) Trans-Pacific Strategic Economic Partnership Agreement, Article 10:3.

\(^{64}\) See generally Claudia Orange The Treaty of Waitangi (Bridget Williams Books 1987).

\(^{65}\) NZ and Thailand Closer Economic Partnership, Chapter 15 – General Exceptions, Article 15.8; NZ and Malaysia FTA, Chapter 17 – General Exceptions Article 17.6; Trans-Pacific Strategic Economic Partnership NZ, Chapter 19 – General Exceptions, Article 19.5; NZ and China FTA, Chapter 17 – General Exceptions, Article 205; ASEAN - Australia/NZ FTA, Chapter 15 – General Provisions and Exceptions, Article 5; NZ and Singapore FTA, Part 11 – General Provisions, Article 74.

\(^{66}\) NZ- China FTA, Article 205.
1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 16 (Dispute Settlement) shall otherwise apply to this Article. An arbitral tribunal established under Article 188 may be requested by China to determine only whether any measure referred to in paragraph 1 is inconsistent with their rights under this Agreement.

Another kind of an example of traditional knowledge protection is found in the European Union Agreement with the Caribbean, known as the CARIFORUM states. In this agreement references are found to the CBD because all members of the agreement belong to the CBD. The agreement provides:

1. Subject to their domestic legislation the [parties] shall respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the involvement and approval of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

2. The [parties] recognise the importance of taking appropriate measures, subject to national legislation, to preserve traditional knowledge and agree to continue working towards the development of internationally agreed sui generis models for the legal protection of traditional knowledge.

3. The [parties] agree that the patent provisions of this sub-section and the Convention on Biological Diversity shall be implemented in a mutually supportive way.

4. The [parties] may require as part of the administrative requirements for a patent application concerning an invention which uses biological material as a necessary aspect of the invention, that the applicant identifies the sources of the biological material used by the applicant and described as part of the invention.

The parties also agree to exchange views and information on the multilateral discussions and to review their agreement in light of developments at WIPO and at the WTO.

There is no uniformity in the way the above sorts of FTA provisions are included in FTAs. In one sense that is not surprising in view of the lack of international agreement on traditional knowledge issues, but in another way this makes little sense when viewed from the perspective of why countries enter into FTAs. The reasons for this are many, but broadly countries enter into FTAs to obtain a better position than that which is currently available at a multilateral level. It could be said that the Peru-US FTA puts the US in a better position as its view that contract law should be relied on has not been adopted.

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67 Economic Partnership Agreement between the CARIFORUM States and The European Community and its Member States Article 1, Genetic resources, traditional knowledge and folklore.
68 Economic Partnership Agreement between the CARIFORUM States and the European Community and its Member States Article 1, Genetic resources, paras 5-6.
This is a pre-copy-editing, author-produced PDF of a chapter accepted for publication in Christoph Graber, Karolina Kuprecht Jessica Lai (eds) International trade in indigenous Cultural Heritage (Edward Elgar forthcoming).

internationally. However, Peru in making this concession is not in a better position. It is in a worse position having conceded in a bilateral forum its international negotiating position. The Peru and China FTA also illustrate a failure to seize an opportunity to adopt the WIPO-IGC traditional knowledge related objectives and principles, which both parties broadly support.\(^{69}\) The EU-CARIFORUM Agreement contains a voluntary approach to disclosure of biological and genetic resources in patent applications. This reflects the voluntary approach to this in Europe. The CARIFORUM simply agrees to follow international developments. The New Zealand’s FTAs appear to be statements preserving national autonomy over traditional knowledge protection. Whether such clauses are necessary is debatable, but they perhaps clarify the position.

None of the above examples of traditional knowledge in FTAs are substantive obligations to protect traditional knowledge and as such their effectiveness is questionable. However, their effectiveness depends, in part, on the FTA provisions’ relationship with the TRIPS Agreement and how that relationship is, or might be, interpreted. The next part discusses the relationship between traditional knowledge and the TRIPS Agreement.

6. The TRIPS Agreement and Traditional Knowledge

The TRIPS Agreement is silent on the protection of traditional knowledge, traditional cultural expressions and cultural heritage.\(^{70}\) It does not directly address the protection or non-protection of these things. However, the TRIPS Agreement is not without impact on the protection of traditional knowledge and matters relating to cultural heritage. The relationship between intellectual property protection and traditional knowledge is such that the subject matters overlap. A traditional cultural expression, for example, can be analogous to a copyright work or a trade mark, although the legal protections, if any, may be very different. The TRIPS Agreement provides for worldwide minimum standards of intellectual property and those standards do not protect traditional knowledge, but rather protect copyright works, trade marks and patented inventions\(^{71}\) that in some instances exploit that traditional knowledge. It is not accurate, therefore, to suggest that the TRIPS Agreement has no impact on the protection of traditional knowledge, but it certainly does not provide any minimum standards for the protection of traditional knowledge.

6.1. TRIPS-plus or outside of TRIPS

Article 1.1 of the TRIPS Agreement allows parties to provide more extensive protection than that provided for in the Agreement, if additional protection does not conflict with the TRIPS Agreement.\(^{72}\) One example of where many countries have provided protection that is more extensive is copyright term. The TRIPS Agreement minimum is that copyright shall last of the life of the author plus 50 years or 50 years where the calculation of the term of protection is not dependent on the author.\(^{73}\) Many countries provide

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\(^{69}\) See generally World Trade Organisation, TRIPS issues: Art 27.3(b) “Traditional Knowledge and Diversity” (<http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm>.)

\(^{70}\) See discussion in footnote above n 39.

\(^{71}\) TRIPS Agreement, Article 1(2) provides, “For the purposes of this Agreement, the term ‘intellectual property’ refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.” Those categories are: 1. Copyright and Related Rights, 2. Trademarks, 3. Geographical Indications, 4. Industrial Designs, 5. Patents, 6. Layout-Designs (Topographies) of Integrated Circuits, 7. Protection of Undisclosed Information and 8. Control of Anti-Competitive Practices in Contractual Licences.

\(^{72}\) I have argued elsewhere that there must be a limit to this more extensive protection in the TRIPS Agreement is to fulfil its object and purpose, see Susy Frankel “Challenging TRIPS - Plus FTAs - the Potential Utility of Non-Violation Complaints” (2009) 12(4) Journal of International Economic Law 1023.

\(^{73}\) This applies to copyright works such as films and sound recordings.
copyright protection for the more extensive period of life plus 70 years.\textsuperscript{74} The more extensive term is undoubtedly TRIPS-plus.

The TRIPS Agreement requirements of protections relating to trade marks and geographical indications provide another example. The Agreement does not provide any minimum protection with regard to internet domain names. Such protection may sometimes be related to trade marks, but there is no requirement to protect internet domain names. In the Australia United States FTA (known as AUSFTA) the parties agreed to certain protection for domain names.\textsuperscript{75} This is a wholly new area of protection that the TRIPS Agreement does not directly address and, therefore, it could be more accurately described as outside of TRIPS, that is a \textit{sui generis} regime, rather than TRIPS-plus. Drawing a line between what is within or outside of TRIPS is sometimes difficult and is controversial. The controversy arises broadly for two reasons. First, if the protection is within the subject matter coverage of the TRIPS Agreement it must not conflict with other parts of the TRIPS Agreement. If it does conflict with part of the Agreement it may require an exception that is TRIPS compatible.\textsuperscript{76} Secondly, if a matter is outside of the scope of TRIPS and outside of any international intellectual property agreement then at domestic law additional protection does not have to be available on a national treatment\textsuperscript{77} basis. A controversial example of whether something is within or outside of the scope of the TRIPS Agreement is the European database unfair extraction right. The European Union treats this as outside the ambit of the TRIPS Agreement, and consequently not subject to national treatment, because the Agreement does not require the protection of data.\textsuperscript{78} The alternative argument is that the database rights ought to be subject to national treatment because protecting data from unfair extraction is a greater level of database protection than the TRIPS Agreement requires. The TRIPS Agreement requires that the selection and arrangement of databases that are intellectual creations are protected.\textsuperscript{79} This issue becomes particularly difficult when countries protect data not as a \textit{sui generis} unfair extraction right, but as part of copyright.\textsuperscript{80}

Another example that illustrates the difficulty of defining the TRIPS Agreement subject matter boundaries is the requirements of trade mark protection. The TRIPS Agreement requires protection of trade marks that are ‘words including personal names, letters, numerals, figurative elements and combinations of colours’.\textsuperscript{81} Many countries have sound and smell marks and some FTAs require protection of these sorts of trade marks.\textsuperscript{82} The TRIPS Agreement does not require protection of smell and sound marks because it states that ‘members may require, as a condition of registration, that signs be visually

\textsuperscript{74} The longer term is found, for example, in the European Union, the USA and Australia.

\textsuperscript{75} United States-Australia Free Trade Agreement (AUSFTA), 18 May 2004, 43 ILM 1248.

\textsuperscript{76} TRIPS compatible exceptions are ones that comply with the 3 step tests found in article 13, 17 and 30 of the TRIPS Agreement, relating to copyright trade marks and patents respectively.

\textsuperscript{77} The principle of national treatment requires that countries provide the same intellectual property protection to foreigners as that available to its own nationals. See TRIPS Agreement, Article 3.


\textsuperscript{79} See Article 10.2 of the TRIPS Agreement.

\textsuperscript{80} In Desktop Marketing Systems v Telstra Corporation Limited 119 FCR 491 in the High Court of Australia (its highest court) held that industrious collection of telephone directory data in electronic form was sufficiently original to amount to originality for copyright purposes. Subsequently in IceTV Pty Limited v Nine Network Australia Pty Limited [2009] HCA 14, the High Court of Australia held that certain listings of TV programmes might not be original. See also a discussion over the scope of minimum rights and national treatment in Ricketson & Ginsburg, \textit{The Berne Conventions and Beyond} (2nd ed, Oxford University Press, 2005), para 6.97.

\textsuperscript{81} TRIPS Agreement, Article 15:1.

\textsuperscript{82} For a discussion of trade mark provisions in FTAs, see Burton Ong, ‘The Trademark Law Provisions of Bilateral Free Trade Agreements’, in Graeme B. Dinwoodie and Mark D. Janis (eds), \textit{Trademark law and Theory a Handbook of Contemporary Research} (Cheltenham, UK: Edward Elgar, 2008) at 229.
The main reason is characterised by the fact that it is provided more extensive protection. A sui generis type of protection for traditional knowledge (that is, a regime that provides a form of protection outside of the scope of intellectual property law) is arguably outside of the scope of the TRIPS Agreement and not subject to national treatment, unless the country with such a law chooses to apply it on a national treatment basis. However, as discussed above, within the TRIPS Council and at WIPO there is ongoing discussion about the link between intellectual property law and the protection of traditional knowledge. Accordingly, some aspects of traditional knowledge protection may be TRIPS-plus or they may be legitimate exceptions to TRIPS protection as provided for in the Agreement.

6.2. The Interface of TRIPS Agreement Protection and Traditional Knowledge Protections

The discussion at the WTO about the relationship between the CBD and the TRIPS Agreement although now stalled, had largely centred on whether the TRIPS Agreement should include a requirement that a patent applicant should disclose the origin of any biological or genetic resources involved in the development of an invention. There are many complexities to this discussion, including what the disclosure obligation should be and what if any consequences there should be for a failure to disclose. The negotiations about any sort of disclosure requirement do not look likely to succeed in the WTO, but there have been developments in the CBD context. Failing any multilateral agreement, the question arises whether countries that enact a disclosure requirement in their domestic law, in any event, are compliant with the TRIPS Agreement. The disclosure requirement is relevant here because it is an example of a method of protection of traditional knowledge that is arguably within the scope of the TRIPS Agreement. It is arguably TRIPS-plus because it is more extensive protection than the required minimums of the TRIPS Agreement. Additionally, a disclosure requirement that resulted in a patent being invalid or revoked in some way could be characterised as a legitimate exception under the TRIPS Agreement.

Where countries seek to address protection of traditional knowledge through the intellectual property regime, questions of TRIPS Agreement compliance are relevant. Sui generis regimes that do not directly utilise intellectual property rights, covered by TRIPS, do not trigger issues of TRIPS Agreement compliance. Against this background, this chapter now assesses the effects of traditional knowledge protections in FTAs.

7. The Effects of Traditional Knowledge Protections in FTAs

As discussed above, the main reason that any party enters into a FTA is to achieve something different from that which is achievable in the multilateral process. Broadly, in relation to traditional knowledge, this might be any recognition that traditional knowledge

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83 TRIPS Agreement, Article 1.2.
84 TRIPS Agreement, Articles 27 and 30.
85 See above n22.
86 See above discussion in Part 3 about the Nagoya Protocol.
87 TRIPS Agreement, Article 1 provides that parties may provide more extensive protection.
88 TRIPS Agreement, Article 27(2) and (3) would be relevant.
might be protectable at all. However, the nature and variety of traditional knowledge related provisions in FTAs may not have any significant effect. In order to consider this further it is first useful to explain the role of non-discrimination provisions in the WTO agreements and how that relates to why the WTO allows FTAs at all and, in particular, the legitimacy of intellectual property chapters in FTAs.

7.1. Intellectual Property in FTAs

7.1.1. National Treatment

National treatment requires that foreign nationals must be treated the same as domestic nationals under domestic intellectual property law. National treatment does not work alone and is coupled with minimum standards. The TRIPS Agreement requires that minimum standards are enacted into national laws. A country must apply those minimum standards on a national treatment basis. International intellectual property agreements are framed around a combination of minimum standards and national treatment.

FTA parties might agree to enact domestic laws of a higher standard than the TRIPS Agreement. In most domestic intellectual property laws, there will be one law and national treatment will operate, for the most part, to ensure one law applies to all. National treatment, therefore, provides the means through which most possible sorts of intellectual property discrimination are avoided. In addition, to national treatment, the TRIPS Agreement was the first multilateral intellectual property agreement to introduce MFN. The most-favoured nation principle ensures that a country cannot give better protection to some foreigners than others.

7.1.2. Most Favoured Nation

Intellectual property chapters in FTAs are one aspect of a bigger picture that relates to FTAs between World Trade Organization members more generally. The GATT and GATS provide certain most-favoured-nation (MFN) exemptions that are part of the economic incentives for FTAs. In essence, the MFN exceptions allow FTAs to apply only to the parties to those FTAs. That is concessions do not have to apply to non-parties. The equivalent MFN exception does not exist in the TRIPS Agreement. The most-discussed consequence of this is that the USA and the EU, in particular, use FTAs to increase intellectual property standards. The consequences of TRIPS-plus standards have been far-reaching and, therefore, the reasons for the absence of an MFN exception in TRIPS merit scrutiny.

In the goods context, MFN functions as a tool to drive tariffs and other barriers down, but the TRIPS agreement is not an agreement that has tariffs or other market access

90 TRIPS Agreement, Article 3 contains the national treatment provision.
91 For the most part MFN is not necessary to have the domestic law apply to foreigners. The only exception would be where a foreigner has a better intellectual property right than domestic nationals. Such instances are rare. However, in those instances, MFN operates to make sure there is equal treatment between foreigners. For further discussion of this, see Susy Frankel 'The WTO’s Application of “the Customary Rules of Interpretation of Public International Law” to Intellectual Property’ (2006) 46 Va. J. Int’l L. 365, 382.
92 Although MFN allows for FTAs to increase intellectual property standards, the possibility of increases through bilateralism existed before the TRIPS Agreement. Indeed, out of control, bilateralism is often credited as being the cause of the Berne and Paris Conventions, See Ginsburg and Ricketson, above n 37, Chapter 1.
95 TRIPS Agreement, article 4 contains the relevant MFN provision.
96 See, for example, Peter Drahos ‘Expanding Intellectual Property’s Empire: the Role of FTAs’, available at <www.grain.org>, where he coins the phrase ‘the global ratchet for intellectual property’.
In essence all intellectual property is a kind of trade barrier and the TRIPS Agreement is a recognition that a certain level of intellectual property protection has been agreed to in the trade context. In that context MFN has functioned as a tool to increase protection. There is no express indication in the TRIPS Agreement that the purpose of the MFN provision is to increase protection. The drafting history of the TRIPS Agreement suggests that primarily the inclusion of MFN in the TRIPS context was justified in order to apply ‘GATT discipline’ to intellectual property.

The Brussels draft and Chairman’s draft, of 1990, included in the MFN provision something which was close to an MFN exemption. The relevant draft exemption from the application of MFN stated:

Exempted from [the MFN] obligation are any advantage, favour or privilege accorded by a Party...

exceeding the requirements of this Agreement and provided in an international agreement to which the party belongs, provided that such agreement is open for accession by all parties to this Agreement, or provided that such Party shall be ready to extend such advantage, favour, privilege or immunity, on terms equal to those under the agreements, to the nationals of any other party so requesting and to enter into good faith negotiations to this end.

This provision was not included in the Uruguay Round ‘Dunkel draft’ of 1991. There were likely to have been differing views as to inclusion or not of a MFN exemption. Drafting history aside, the role of MFN in GATT and GATS related aspects of FTAs does not transfer easily to intellectual property. MFN was not a tool of multilateral intellectual property agreements before the TRIPS Agreement. Neither of the main intellectual property treaties incorporated into the TRIPS Agreement (the Berne Convention and the Paris Convention) include MFN clauses.

The main effect of the TRIPS Agreement MFN, combined with national treatment and minimum standards, is that intellectual property standards only increase, they cannot come down. This creates a spill-over effect from TRIPS-plus FTAs to create new international norms outside of the multilateral process. Because of the absence of the MFN exception, this spill-over effect is greater than in either of the GATT or GATS contexts. Whether or not this MFN effect is appropriate is questionable because it transforms the universally understood role of MFN into a tool to increase intellectual property norms without multilateral negotiations.

In the context of traditional knowledge the FTA provisions do not have this increasing standards and norm-pushing effect. This is because there is no uniformity between the provisions and, as outlined above, the provisions are not substantive obligations, but are

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97 In the GATS context there seems to be a growing body of FTAs that detract from GATS obligations, see Rudolf Adlung and Peter Morrison “Less than the GATS: ‘Negative Preferences’ in Regional Services Agreements” (2010) 13(4) Journal of international Trade Law 1103.
99 The preamble of the TRIPS Agreement provides ‘Recognising ... the applicability of the basic principles of GATT 1994’.
100 For an explanation of the drafting history of TRIPS and the significance of each of these drafts, see Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis (3rd ed, London, Sweet & Maxwell, 2008), pp. 10–26.
primarily aspirational. Many of the traditional knowledge related provisions from FTAs are an agreement to discuss the issues in the future or declare a kind of national autonomy over the space to make traditional knowledge laws in the future. If the traditional knowledge articles in FTAs amounted to substantive obligations, as discussed in the next section, several interesting issues arise in relation to which international regulatory model, national treatment or something else is appropriate.

7.2. National Treatment and Other International Regulatory Regimes

This applicability of national treatment to traditional knowledge protection raises some interesting issues. If FTA parties agree to protect each other’s traditional knowledge this protection would effectively be at domestic law. The entire point behind protecting traditional knowledge is to “recognize a vast array of different customs and practices that exist amongst the indigenous peoples of the world”. National treatment does not readily lend itself to recognizing traditional knowledge differences because national treatment is premised on applying a common set minimum of legal standards.

An example illustrates the potential difficulties of applying national treatment to traditional knowledge protection at domestic law. If Peru agreed to protect traditional knowledge, including traditional knowledge that is connected to China, how would such an agreement work? Does Peru provide protection based on Peruvian traditional knowledge or based in Chinese traditional knowledge protection? Somehow, a Peruvian court or other relevant authority would need to ensure that protection of Chinese traditional knowledge is based on Chinese law. This is because as traditional knowledge protection at national law, where it exists, is often based on rules that relate to communities and their customs and norms, which might even derive from customary law. Therefore, protection should be based on those norms rather than foreign norms. Say, for example, the reason one country (A) protects it peoples traditional knowledge is because of the relationship between indigenous people and that knowledge and some kind of proof of that relationship is required; however, the reason for protection of traditional knowledge in another country (B) is proof of habitation in a particular area. In such a situation it makes no sense to apply country A’s requirements to protect traditional knowledge that comes from country B. The reason for the protection should be the reason that the traditional knowledge is protected in country B. This might require country A to recognise a foreign standard as to why some thing is protectable traditional knowledge.

The international regulatory mechanism that often is used to recognise foreign standards is not national treatment, but is mutual recognition. The essence of mutual recognition is that two countries recognise each others standards, where those standards are not necessarily the same. One possible defect of mutual recognition is that countries may be required to recognise very different standards from its own. However, countries do not tend to enter into mutual recognition arrangements unless they have at least some commonality of norms. Mutual recognition can become a stepping-stone to increase the amount of common norms to a level of detail that may eventually lead to greater

106 Mutual recognition is often thought to be an effective way to achieve greater harmonisation in trade agreements relating to goods. This is the model used between Australia and New Zealand. See Australian Productivity Commission “Bilateral and Regional Trade Agreements Research Report”, 13 December 2010, http://www.pc.gov.au/projects/study/trade-agreements.
This is a pre-copy-editing, author-produced PDF of a chapter accepted for publication in Christoph Graber, Karolina Kuprecht Jessica Lai (eds) International trade in indigenous Cultural Heritage (Edward Elgar forthcoming).

commonality of standards or even harmonisation of laws. Mutual recognition is, however, applicable to the existence of the standard that grants the right. So for example, if there is a register of traditional knowledge holders and associated traditional knowledge then mutual recognition might allow recognition of what is on the register. 107

Apart from national treatment or mutual recognition, there is reciprocity. That, however, may be the least desirable model because it provides less incentive and, in the traditional knowledge context, less likelihood of any international norms developing. 108

National treatment and mutual recognition represent the ways in which international agreements are structured to achieve a level of norms. Mutual recognition allows for the recognition of foreign standards or laws in ways that national treatment usually does not because national treatment requires the same standards are applied to domestic and foreign nationals.

There is, however, another way to achieve recognition of foreign standards in domestic law and to retain the broad principle of national treatment. That involves having local laws, that are based on international norms, applied on a national treatment basis, but including in those laws something along the lines that for the purposes of laws protecting traditional knowledge the law of the people whose knowledge is used will apply. This has the effect of recognising diversity at the enforcement, rather than standard settings part of the law. Courts can then consistent with principles of territoriality apply local laws to infringement, but that local law can effectively be the foreign law for certain purposes.

The Peru and China example above can illustrate how this might work. A misappropriation in Peru of Chinese traditional knowledge, for example, would be a matter that the Chinese complainant could bring before the Peruvian Courts and the Court could apply the relevant Chinese traditional knowledge law because that is what Peruvian law requires it to do.

Another approach, which relates more to jurisdiction than choice of law, would be for the Chinese courts to hear a dispute relating to an alleged violation of Chinese traditional knowledge, where that violation took place in Peru. In other words the Chinese court could hear a foreign infringement claim. The hearing of foreign infringements is controversial under the private international law of intellectual property. 109 There is also the difficulty of whether the defendant has any connection to the foreign forum and if that connection is absent whether the court can take jurisdiction.

One advantage of a choice of law approach is that it is consistent with the principle of territoriality. 110 Territoriality is particularly strong in patent law, where there is a clear rule that any determinations of validity of patents must be undertaken by the country where the patent was granted. 111 This approach has its roots in the belief that to do otherwise would be an unjustified encroachment on a country’s sovereignty. 112 The approach of the law providing for application of foreign law would not require the country in which the

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107 The WIPO –IGC principle suggest the creation of registers, see
108 Peter Drahos discusses how reciprocity worked to internationalise semi-conductor chip protection but it is not likely to work in relation to traditional knowledge. See above n 104, pp28-29.
111 See GA T v Luk: Case C-4/03 and Roche v Primus: Case C-539/03.
112 See for example Potter v The Broken Hill Proprietary Company Ltd (1906) 3 CLR 479. This approach of the Australian courts was followed for a long time in New Zealand and in the United Kingdom also.
litigation took place to accept any determinations of a foreign institution, such as a Patent Office, such that the misappropriation of traditional knowledge invalidates a patent. This is particularly relevant to traditional knowledge issues because of the proposals to protect traditional knowledge through the requirement of disclosure of the origin of genetic resources in the patent system.\textsuperscript{113}

These details will be important. At present, however, the international norms for the protection of traditional knowledge are a long way from being agreed and in both the WTO and WIPO-IGC environments are set against a backdrop of national treatment being the most usual model.\textsuperscript{114}

8. Conclusion

Countries that are serious about protecting traditional knowledge have not been able to gain agreement over norms in the trade forum of the WTO. Outside of the multilateral system there is an opportunity to agree norms through FTAs. Although FTAs are imperfect instruments and have been shown to do some harm to aspects of international intellectual property law, they do provide an opportunity to start the spread of some norms for the protection of traditional knowledge. Parties to FTAs have not taken this opportunity most probably because they have not generally favoured FTAs as norm setting instruments, but have strived to use multilateral forums.

In some FTAs, the negotiating parties may have resisted creation of norms for the protection of traditional knowledge, such as illustrated by the USA- Peru Agreement. Advocates of traditional knowledge do not only enter into FTAs with countries who will not agree to protect traditional knowledge and seek TRIPS- plus, they enter into FTAs with like minded parties. It is difficult to see why like-minded parties such as Peru and China, or even Chile or Brazil, do not seize the opportunity to start agreeing to certain norms. There may be difficulties with turning this into an international norm development story in the same way that TRIPS-plus has created norms of increased protection. However, an opportunity seems to have been and continues to be missed. In any event, such countries should not agree to conditions that undermine the protection for traditional knowledge protection in the future and will no doubt continue to progress the debate over the protection of traditional knowledge in multilateral fora other than the WTO, such as WIPO.

\textsuperscript{113} See discussion in Graeme B Dinwoodie, above n 104.
\textsuperscript{114} This issue has been generally raised in the WIPO IGC see WIPO -IGC, Practical Means of Giving Effect to the International Dimension of the Committee’s Work, Eighth Session Geneva, June 6 to 10, 2005, WIPO/GRTKF/IC/13/9.