

**The University of Nottingham**

**School of Law**

**Implementing the WIPO Development  
Agenda Country Specific  
Recommendation: A Comprehensive  
Approach**

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## **Abstract**

This research looks into the implementation of the WIPO Development Agenda recommendation that intellectual property technical assistance (IPTA) programs to developing countries should be country-specific in their design, process of evaluation and delivery.

Using the example of Malaysia and Kenya, this thesis identifies and examines local factors in Malaysia and Kenya to determine what makes them specific to these countries and how significant they are to the effectiveness of IPTA programs.

Developing countries' struggle in adapting their national systems to meet the global IP standards resulted in the provision of IPTA programs that have been criticized as ineffective due to the former one size fits all approach that did not tailor the programs to each developing country's needs.

The WIPO Development Agenda recommended a country-specific approach to address the previous approach. Although this recommendation has the potential to significantly revise the way WIPO provides technical assistance (TA) to developing countries, this research states that without proper implementation there is the possibility that WIPO IPTA programs will fall back into its old ways.

This research tests the country-specific recommendation in Malaysia and Kenya by using a historical approach into understanding why these countries have local factors that permeate almost every aspect of their development, what makes these factors country-specific and how these factors could impact IPTA programs.

The research finds that even though the local conditions in Malaysia and Kenya appear similar, the historical perspective show how the local conditions evolved into factors specific to each country with varying degrees of impact on IPTA programs.

The findings suggest that implementing this recommendation would need to go beyond identifying the relevant local conditions, it requires an

understanding of what makes them country-specific to help determine how to factor them into the design and delivery of IPTA programs.

## **Dedication**

I would like to dedicate this thesis to God who made it possible. I would also like to dedicate it to my parents for their emotional and financial support and my daughter for her love and patience over the years. You all mean the world to me.

## **Acknowledgement**

I am indebted to my supervisor Dr Derclaye for her commitment, advice, immense support, guidance and patience throughout my PHD. She saw me through every step of my research and I could not wish for a better supervisor.

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I am also grateful to the staff of Kenya Copyright Board and Malaysia intellectual property office for taking time out of their busy schedule to contribute to my research.

## **List of Acronyms**

AIPPI	International Association for the Protection of Intellectual Property
ASEAN	Association of Southeast Asian Nations
BIRPI	Bureaux Internationaux réunis pour la protection de la propriété intellectuelle
CBD	Convention on Biological Diversity
CDIP	Committee on Development and Intellectual Property
CEO	Chief Executive Officer
COP	Conference of the Parties
CSTD	ECOSOC Commission on Science and Technology for Development
CIPR	Commission on Intellectual Property Rights
DA	Development Agenda
DACD	Development Agenda Coordination Division
DAG	Development Agenda Group
DESA	UN Department of Economic and Social Affairs
ECOSOC	United Nations Economic and Social Council
EPO	European Patent Office
FAO	Food and Agriculture Organization
FFM	Fact Finding Mission
FoD	Friends of Development
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GIPID	Global Intellectual Property Issues Division
ICC	International Chamber of Commerce
ICT	Information and Communication Technology
ICTSD	International Centre for Trade and Sustainable Development
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

IIM	Inter-sessional Inter-governmental meetings
ILO	International Labour Organisation
IP	Intellectual Property
IPR	Intellectual Property Rights
IPRTA	Intellectual Property Related Technical Assistance Program
IPTA	Intellectual Property Technical Assistance
IP-TAD	Intellectual Property Technical Assistance Database
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
ITU	International Telecommunication Union
IUCN	International Union for Conservation of Nature
JHEOA	Jabatan Hal Ehwal Orang Asli (Malaysian: Department of Orang Asli Affairs;Malaysia)
KIPI	Kenya Industrial Property Institute
LDC	Least Developed Countries
MyIPO	Malaysia Intellectual Property Office
NGO	Non-governmental Organisation
PCDA	Provisional Committee on Proposals Related to a WIPO Development Agenda
PCT	Patent Cooperation Treaty
R&D	Research and Development
RTPC	Regional Trade Policy Courses
SME	Small and Medium-sized Enterprises
SSA	Special Service Agreements
SWEEDO	Samburu Women for Education and Environment Development Organisation
TA	Technical Assistance
TCE	Traditional Cultural Expression
TK	Traditional Knowledge
TPC	Trade Policy Courses

TRIPs	The Agreement on Trade-Related Aspects of Intellectual Property Rights
TRTA	Trade Related Technical Assistance
UCC	Universal Copyright Convention
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIDO	United Nations Industrial Development Organisation
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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# **1. INTRODUCTION**

## **1.1 Context of Research**

Developing countries have since their introduction to IP dedicated their efforts and resources towards exploiting their creative industry to contribute to their development using IP like developed countries. Unlike developed countries however, developing countries have special needs in developing the IP system they need to achieve their IP goals<sup>1</sup>. This brought about the need for IPTA.

IPTA programs are designed to assist developing countries in developing coherent national IP policies linked to their development objectives and also to assist them in implementing their international IP commitments<sup>2</sup>.

IPTA began during the early independence years of developing countries and has over the years become significant with developing countries increased participation in global IP such as their signing up to the The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs agreement). The resources devoted towards the programs also increased with the involvement of international institutional providers such as the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO)<sup>3</sup>. The IPTA programs provided are said to have improved the negotiating capacities of developing countries and improved their national IP

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<sup>1</sup> Pengelly T, 'Technical Assistance for the formulation and implementation of Intellectual Property policy in developing countries and transition economies'(2005) ICTSD Issue paper No. 11 pg2

<sup>2</sup> Correa C, 'Principles and Guidelines for the Provision of Technical Cooperation on Intellectual Property :Elements for Consideration' (2005) ICTSD Dialogue pg 5

<sup>3</sup> Musungu S F, 'Designing Development-Oriented Intellectual Property Technical Assistance Programme' (2003) ICTSD-UNCTAD Dialogue pg 1

policies however they have also been criticized for not being development oriented and being ideological<sup>4</sup>.

These were part of the concerns that resulted in the proposal by a group of 14 developing countries known as the Group of Friends of Development (FOD) for the establishment of a Development Agenda (DA) for WIPO. The Agenda was established towards a detailed reform to ensure that WIPO activities and IP discussions are driven towards development oriented results<sup>5</sup>. The WIPO Development Agenda contains 45 recommendations which fall within six clusters A to F. The recommendation on TA and capacity building is contained in cluster A, the recommendation contains key features towards revamping the former approach to TA such as development oriented programs, demand driven programs and country specific programs in their design and delivery<sup>6</sup>. WIPO stated that effectively implementing the recommendations of the DA is “a key priority”<sup>7</sup>; this research therefore focuses on how to effectively implement one of the goals of the TA recommendations which is for IPTA programs to be country specific in their design and delivery.

Towards implementing this recommendation, WIPO already has activities in place such as customizing its IP publications in local languages and a comprehensive approach by keeping in view special needs and interests in reaching out to developing countries societies<sup>8</sup>. However the complexity and

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<sup>4</sup> Ibid

<sup>5</sup> Shashikant S, 'Intellectual Property and the WIPO Development Agenda' (2005) Third World Network pg6. Available <http://www.choike.org/documentos/wsis/book10.pdf> accessed [16/12/14] pg175-177p6

<sup>6</sup> See the details of the 45 adopted recommendations under the WIPO Development Agenda. Available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html> accessed [22/10/2014]

<sup>7</sup> WIPO , Development Agenda for WIPO [Online] Available at <http://www.wipo.int/ip-development/en/agenda/> accessed [03/02/15]

<sup>8</sup> WIPO document, Initial Working Document for the Committee on Development and Intellectual Property (CDIP): Revised Text in Respect of Recommendations Considered During Informal Consultations (2008) CDIP/2/3 Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_2/cdip\\_2\\_3.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_2/cdip_2_3.pdf) accessed [03/02/2015]

the heterogeneous nature of developing countries societies mean that comprehensively taking account of developing countries special needs and priorities also require identifying and understanding local conditions within developing countries societies that may hinder the effectiveness of IPTA programs. This research attempts to do this by adopting a historical approach.

Proponents of this method point out that studying a subject's earliest phases and evolution will help to sharpen one's view of the present<sup>9</sup>. This method has been used and proved beneficial to understanding developing countries participation in the international IP system. For example it was used to understand developing countries responses to the TRIPs Agreement by tracing their participation in the international IP system starting from the colonial era<sup>10</sup>, it was also used to provide an explanation for the characteristics of the nature and form of developing countries participation in the present global IP system by focusing on the principal developments over time in the international context<sup>11</sup>.

A similar attempt is made in this research by using the historical perspective in two phases. First it is used to trace developing countries participation generally in global IP to explain and understand the reasons for their IPTA needs. Second it is used to identify and understand how the local factors in Malaysia and Kenya which interact with IP developed, how they may impact the effective implementation of IPTA programs and in particular what makes these local factors country-specific to each country.

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<sup>9</sup> Lawrence B S, 'Historical Perspective: Using the Past to Study the Present' (1984) *The Academy of Management Review* Vol. 9, No. 2 (Apr., 1984), pp. 307-312 pg 307.

<sup>10</sup> See Deere C, *The Implementation Game - The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (2008) Oxford: Oxford University Press. Oxford Scholarship Online. Oxford University Press pg 34-56

<sup>11</sup> See Okediji R L, 'The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System' (2003) *Singapore Journal of International & Comparative Law* 7 pp 315-385 pg 319

Chapter one begins by discussing generally developing countries introduction and participation in global IP which set the scene into understanding developing countries struggles in meeting their obligations under international IP agreements and their need for IPTA programs.

Chapter two and chapter three narrows down the discussion to the provision of TA to developing countries by the two main international providers; the WTO and WIPO and discussed how the programs evolved in the two organisations up till the recommendations of the WIPO DA.

Chapter four discusses the most valuable aspect of developing countries creative industry which is their traditional knowledge (TK) and biological resources; it looks at the relevance of IP to this industry and the value of IPTA in enabling them benefit and protect their resources.

Finally, chapters five and six identify the local factors that could impact the effectiveness of IPTA programs in recipient countries. Due to the word limit of this thesis it is not possible to examine all the developing countries that are recipients of IPTA, therefore using Malaysia and Kenya as case studies, this research examines how these local factors developed and what makes them country-specific.

Malaysia and Kenya are both developing countries from different regions, Malaysia from Asia and the Pacific region and Kenya from the African region, they are both ethnically and culturally diverse countries. They both started out on similar paths, they share similar pre-colonial history of ethnic diversity, dependence on their lands as their primary resource of livelihood, they were both colonised by the British and at independence they were both said to have embarked upon similar development paths<sup>12</sup>.

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<sup>12</sup> van Donge J K, 'Governance and access to finance for development: an explanation of divergent development trajectories in Kenya and Malaysia' (2012) *Commonwealth & Comparative Politics* Vol. 50, No. 1, February 2012, 53–74 pg 53-54

Both countries are now at different stages of their development<sup>13</sup> and different stages of IP development to which some have attributed to their mode of governance<sup>14</sup>.

This research focuses on Malaysia and Kenya for the case study analysis because the similarities they have in their history and development make the local conditions developed over time appear as common issues to both countries. Considering factoring local conditions in both countries in the design and implementation of IPTA programs to these countries, the research therefore examines the local conditions to see if a “one size fits all” solution will be applicable or if the conditions are country-specific enough to impact IPTA in each country in different ways.

## 1.2 Research Questions

The WIPO DA recommends future TA programs to be development-oriented as well as being country specific in their design, delivery mechanisms and evaluation processes.

This research therefore asks:

- (1) What are country specific factors and what makes them specific to developing countries?
- (2) What is the significance of paying attention to country specific factors to IPTA programs?
- (3) In implementing the DA recommendation, WIPO states that the organisation is comprehensively keeping in view the special needs and priorities of developing countries during the design and delivery of IPTA

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<sup>13</sup> According to the Word Bank development data Malaysia is classed as an upper middle income developing country while Kenya is classed as a low income developing country. World Bank Country Data [Online] Available at <http://data.worldbank.org/country> accessed [27/01/2015]

<sup>14</sup> See Okombo O, Kwaka J, Muluka B, Sungura-Nyabuto B, *Challenging the Rulers: A Leadership Model for Good Governance* (2011) East African Educational Publishers Ltd Kenya; van Donge J K (2012) op.cit

programs. What does a comprehensive approach here involve and how can it be achieved?

(4) What impact will the proper implementation of the country-specific recommendation have on moving forward IPTA programs in developing countries?

### **1.3 Methodology**

This research is a socio-legal research. It looks at the effect of social factors on IP development in developing countries. It engages the use of interdisciplinary approach by delving into politics, history and culture to determine the role they play in the effectiveness of IPTA in developing countries.

The purpose of the interdisciplinary approach is to bring into light the social function of global IP transplantation into developing countries societies.

Secondary sources are consulted in form of library based work to understand developing countries participation in global IP by looking into the substantive provisions of some of the international treaties developing countries are signatories to and how these countries have adjusted their national IP systems to meet their obligations under these treaties.

A comparative approach is also used by studying two developing countries, Malaysia and Kenya to draw out country-specific issues associated with the implementation of IPTA. Some empirical work is also carried out in form of web interview, telephone interview and questionnaires to add to the information derived from the secondary sources.

## 1.4 Significance of the research

With the international IP regime calling for stronger protection of IP and developing countries implementing their obligations under various international treaties, the need for the successful implementation of TA programs could not be more crucial.

With the adoption of the WIPO development agenda recommendations on IPTA designed to improve the former approach to TA provision is also the task of meaningfully implementing them.

This research therefore tests the DA country specific approach to IPTA in two developing countries with the aim of understanding what makes local conditions country specific and to assess the impact of these conditions on the effectiveness of IPTA.

The importance of bridging the gap between global IP norms and local conditions in developing countries has been pointed out as the key in achieving the purpose of global IP agreements such as the TRIPs agreement which is homogeneity in IP rules across the globe<sup>15</sup>. The DA recommendation to take account of local conditions in IPTA design and delivery could be seen as an attempt to bridge this gap.

It is therefore hoped that this research will contribute to this process by understanding the development of local conditions in developing countries from a historical perspective, what makes them country specific and the impact they may have on the effectiveness of future IPTA programs to help determine how to factor them into the design and delivery of the programs.

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<sup>15</sup> See Mertus J , 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society' (1998-1999) 14 Am. U. Int'l L. Rev. 1335 pg 1344 ; Birnhack M, 'Global Copyright, Local Speech' (2006) Cardozo Arts & Entertainment Law Journal, Vol. 24 pg 503-504

## **1.4 Research Limitations**

Although the findings in this research address the research questions, the research contains some limitations.

The 14 WIPO DA TA recommendations are to be implemented in all developing countries that benefit from WIPO's TA programs. This research is primarily limited by the sample size which is limited to two developing countries; Malaysia and Kenya.

Future research on the subject could expand on the number of developing countries and an exhaustive list of relevant local conditions could provide a more in-depth assessment necessary for the design of IPTA programs for the developing countries concerned.

The empirical method used was aimed at adding more information to the information derived from the secondary sources consulted. This research was limited by the availability of participants from the relevant IP and social institutions in Malaysia and Kenya which could have provided a greater depth of information on the interaction of IP and social conditions in the two countries.

Empirical research was conducted in Malaysia with the IP office (MyIPO) which was in the form of web interview and follow up questionnaires. The participants however had limited time to spare for the interview and the information given appeared restricted. This research therefore primarily relied on sources from newspaper publications, empirical articles and other secondary sources.

Interview conducted in Kenya was with the Kenya copyright board. Most of the officers were unavailable due to work related commitments. The research was therefore limited to one officer, the principal state counsel who represented the institution.

The officers of the Kenya Industrial Property Institute (KIPI) in charge of patents, industrial property and trademarks registration in Kenya did not respond following subsequent efforts to contact them and the office. Similarly officers of the Ministry of Culture in Kenya described to be the government

ministry representing the indigenous people of Kenya did not respond to several attempts made to contact the office. The contribution of these offices would have provided a greater depth of information valuable to the research.

Similar to the case of Malaysia, the research relied on newspaper publications, empirical articles and other secondary sources for the needed information.

An improvement in the study would include better access to all the relevant institutions which could be achieved by visiting the countries and conducting personal interviews which would elicit more in-depth information from participant's knowledge.

The limitations discussed above do not however detract from the value of the information those who participated in the interviews contributed towards the findings in this thesis. The interview based approach combined with the other sources mentioned above proved to be the most beneficial approach by providing a reasonable understanding of the local factors specific to each country that may challenge the implementation of IPTA programs.

By the very nature of the issue being addressed to find out the impact of local factors on IPTA programs in developing countries, the approach gave the opportunity to explore participants understanding of the research problem relating directly to their country. The interview based approach also enabled the use of open ended questions which encouraged the participants to share more information than would not otherwise have been known if other approaches had been adopted such as the quantitative approach which is more focused on numbers and close ended questions.

## Chapter 1

# Developing Countries Participation in Global Intellectual Property

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### 2.1 Introduction

It is widely acknowledged that the concept of privately held rights as presented by western practices in the form of IP has no cultural or legal roots for many developing countries.<sup>16</sup> . The establishment of IP law in developing countries was as a result of colonization which means that internationally, the movement of IP has been from developed countries to developing countries<sup>17</sup>. Developing Countries are therefore said to participate in global IP systems as ‘second comers’ in a world that has been shaped by ‘first comers’<sup>18</sup>.

Developing countries from being independent states have joined IP agreements and continue to participate in global IP.

The development of IP has however not been even across all developing countries. This could be because of the trajectory of IP systems in these countries. It was said that the push for developing countries to model their IP systems after those of the first world countries such as the United States and United Kingdom resulted in the uneven development of IP in developing

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<sup>16</sup> Deere C(2008),op.cit. Pg34

<sup>17</sup> Drahos P, ‘Developing Countries and International Intellectual Property Standard-Setting. (2002)The Journal of World Intellectual Property, 5 pg 766

<sup>18</sup> Report of the Commission on Intellectual Property Rights, ‘Integrating Intellectual Property Rights and Development Policy’ (2002) Comission on IP Rights. Available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf) accessed [30/04/2014].

countries<sup>19</sup>. The uneven development could also be attributed to the different socio-economic conditions among developing countries and also within some developing countries particularly the larger developing countries<sup>20</sup>. This occurs in cases whereby some developing countries are more technologically and economically developed than others which creates a difference in their ability to develop their IP systems and also affects their capacity to absorb TA programs.

This can be seen in the case of Malaysia and Kenya. Both countries although have similar history of colonisation and started out with similar socio-economic issues, Malaysia today appears to have more economic and institutional capacity to support IPTA programs than Kenya which is discussed in more detail in chapters 5 and 6. This uneven development was also illustrated within China which is a larger developing country. It was pointed out that the economic and technological development in its main cities is significantly higher than in the rural areas. It was observed in 2003 that the patent applications in its rural provinces were about one-twentieth of the figures in the larger provinces. This of course also has wider implications for issues such as the development of traditional knowledge which generally reside in the indigenous people usually located in the rural areas of developing countries.

While it has been pointed out that this uneven development among and within developing countries could pose significant challenges for the existing domestic and international IP system<sup>21</sup>, it also means that developing

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<sup>19</sup> Aoki K, 'Neocolonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection' (1998) *Indiana Journal of Global Legal Studies*: Vol. 6: Iss. 1, Article 2.pg 19

<sup>20</sup> Yu P K, 'The WIPO Journal: Analysis of Intellectual Property Issues' (2014) 6 W.I.P.O.J pg 2-3

<sup>21</sup> This is illustrated in the case of the TRIPs agreement discussed in section 2.3.5. It was also illustrated in the case of a larger developing country like China with the establishment of a national intellectual property strategy launched by State Council in 2008. It was pointed out that their uneven development would require a national wide IP policy designed to provide tighter protection for the larger more developed regions and a weaker policy for the less developed regions which will likely be impractical or a super-size fits all policy which will not work for all the regions. See Yu P K (2014) op.cit

countries have different development needs and require TA tailored to their specific needs to be able to effectively participate in global IP and fulfil their obligations under the international agreements to which they are signatories.

This has made it necessary for international organisations such as WIPO and WTO to provide IPTA programs. These are programs specifically designed to help developing countries develop the IP regime they require in enriching their global and cultural heritage and implementing their obligations under international agreements<sup>22</sup>.

While it is acknowledged that TA programs worth millions of dollars have resulted in the improvement of developing countries IP policy-making and negotiating capacities, these programs have however come under growing criticisms over the years.

The nature of the programs has been criticized as being ideological. It has been said to be mainly about the use of ideas to transform developing countries negotiating positions and telling them what their positions should be<sup>23</sup>. Developing countries have also complained about the programs not taking their different levels of development into consideration.<sup>24</sup>

These were part of the concerns that resulted in the proposal by a group of 14 developing countries known as the Group of Friends of Development (FOD) for the establishment of a Development Agenda (DA) for WIPO. The Agenda contains 45 recommendations towards a detailed reform to ensure that WIPO activities and IP discussions are driven towards development oriented results<sup>25</sup>.

Cluster A, recommendation 1 of the DA uses the words 'development-oriented' and 'demand driven' to describe future TA programs. It states that

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<sup>22</sup> Pengelly T(2005) op.cit pg2

<sup>23</sup> Shaffer G, 'The Role of the Director General and Secretariat :chapter IX of the Sutherland Report' (2005) World Trade Review pg434

<sup>24</sup> ibid

<sup>25</sup> Shashikant S (2005) op.cit pg175-177

the design, delivery mechanisms and evaluation processes should be 'country specific' and there is a plan to take into account the special needs of developing countries.

This research aims to test the country specific recommendation; this will be done by finding out if there are local factors in developing countries that could potentially affect the successful implementation and effectiveness of IPTA programs. This thesis will start by finding out what these factors are and how they developed.

To do this, it is important to first of all understand the development of IP in developing countries and the reasons for their TA needs. It has been pointed out that in order to understand the nature and the future of TA programs in developing countries, it will be beneficial to look at the development of IP and the participation of developing countries in global IP from an historical view<sup>26</sup>. This will be done by discussing how developing countries participation in global IP started from a disadvantaged position. The historical view will present the opportunity to understand the need for the provision of IPTA to developing countries, their struggles for their IP needs to be acknowledged by the global IP community and to see the early forms of IPTA provided. The historical view will also make it possible to see the evolution of these IPTA programs overtime and the developments responsible for shaping the future of IPTA programs.

It should be noted that even though developing countries may share a similar history in the transplant of IP, they are a highly diverse group of countries with varying interests and concerns. However due to the limit of this thesis, it will be impossible to cover all the developing countries.

As previously mentioned, the interaction between IP and development actually dates back to the colonial era when colonial regimes imposed their respective legal regimes in their colonies<sup>27</sup>. The history of IP and

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<sup>26</sup> Yu P K, 'The Global Intellectual Property Order and its Undermined Future' (2009a) The WIPO Journal, Vol. 1, pp. 1-15 pg10

<sup>27</sup> Deere C(2008),op.cit. Pg34

development in this chapter will therefore be done in 2 phases: the pre-colonial/colonial era where developing countries began their first encounter with western concept of IP and International IP rules; and the post-colonial era when developing countries were introduced to International IP regulation.

The post-colonial era will discuss developing countries participation in the two conventions which have been described as the cornerstones of international IP system<sup>28</sup>; The 1883 International Convention for the protection of Industrial Property-The Paris Convention and the 1886 Berne Convention for the Protection of Literary and Artistic works-The Berne Convention.

The chapter will then consider the Universal Copyright Convention- the UCC which is another multilateral copyright convention and then go on to discuss the TRIPs agreement. The TRIPs agreement stems from the Paris Convention and the Berne Convention<sup>29</sup> and it presented a statement of IP standard to which all WTO member countries made a commitment<sup>30</sup> including developing countries. This chapter will therefore examine its impact on developing countries, the resulting need for TA aid and the provision of Article 67 of the TRIPs agreement on Technical Cooperation.

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<sup>28</sup> Yu P K(2009a), op.cit., pg 4

<sup>29</sup> Reichman, Jerome H, ' TRIPs Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?' (2000). Duke Law Faculty Scholarship Paper . pg463. See also Article 1 (3) and Article 2 (1) and (2) and Article 3(1) of the TRIPs Agreement.

<sup>30</sup> Sherwood R M, 'The TRIPs agreement and implications for developing countries' (1997)IDEA: The Journal of Law and Technology 37 IDEA 491 pg494

## 2.2 Pre-colonial /Colonial Period

Developing countries participation in global IP can generally be traced back to the 1500's with the early period of European contact through commercial arrangements. Commercial relationship started mainly in cloth, cowries, palm oil, beads and ivory.<sup>31</sup>

In Africa, trading began in articles of indigenous manufacture, including cloths and this began to play a major role in their dealings with European traders. The Portuguese, the Dutch and the English alike bought them and traded the goods on other parts of the African Coast.<sup>32</sup> As trade intensified between the Europeans and Africans, alliances were formed to prevent piracy, smuggling and illegal trading. This eventually necessitated the negotiation of legal arrangements to govern relations between European merchants and local citizens.<sup>33</sup>

The seventeenth century brought a change in the strategy for European contact with Africa with the territories requiring slave labour, this brought about trade in slaves which at this time displaced earlier trade. Slavery destroyed the established trust and alliances between neighbouring cities and trading partners. Slavery was said to have completely changed the face of the earlier traditional African trading systems.<sup>34</sup>

By the nineteenth century slave trade was abolished and the British engaged in actively cutting off the supply of African slaves to the Trans-Atlantic economy, this resulted in yet another phase of the relations between Africans and Europeans.<sup>35</sup>

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<sup>31</sup>Elias T.O, *Africa and the Development of International Law* (1988) Martinus Nijhoff Publishers. Pg12

<sup>32</sup> Ibid

<sup>33</sup> Okediji R L , op.cit, pg321

<sup>34</sup> Elahi, S. and de Beer, J., with Kawooya, D.,Oguamanam, C., and Rizk, N., 2013. *Knowledge and Innovation in Africa: Scenarios for the Future*. Cape Town: Open A.I.R. Network. Pg33

<sup>35</sup> Ibid

After 1882, there was a revolution in the political relations with Africa as there began a scramble to appropriate 90 percent of the African continent. As early as this period, developing countries were already entering into numerous international treaties, most of which they understood as a form of protection, these treaties also included clauses for annexation of territories to the European powers concerned.<sup>36</sup>

To be able to sign these treaties, the local rulers were styled as 'Kings' but after the execution of the treaties, they were treated and regarded as 'Chiefs' which meant that they had full sovereign powers only to sign the treaties which then turned them into subordinates of the new sovereign deemed to be recognised by the treaties in question. This resulted in mistrust for the European powers in place. An example of such treaty was the Treaty of Monomatapa which the then King of Monomotapa (modern Zimbabwe) signed. This treaty was alleged to have abdicated to the Portuguese all his Kingdom's mining rights. This treaty was later used to support claims to Mashonaland by the Portuguese.<sup>37</sup>

By 1885, the majority of the African dependencies had been established and this marked the effective beginning of the partition of Africa into colonies.<sup>38</sup> Transformations in intra-European commercial relations caused the European powers to regulate their dealings with the local population and their citizens occasioning the formalization of relations through treaties.<sup>39</sup> Many of these treaties included commitments respecting IP.

A brief look at Asia shows that the developing countries share a similar history with the developing countries in Africa. Looking at Malaysia, the presence of Europeans started in the sixteenth century with the Portuguese

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<sup>36</sup> Elias T O(1998) op.cit. pg15-16

<sup>37</sup> ibid

<sup>38</sup> Ibid

<sup>39</sup> Okediji R L (2003) op.cit,pg324

and followed by the Dutch.<sup>40</sup> The Portuguese and the Dutch however did not leave any lasting impact in the legal system like the British. Towards the end of the eighteenth century, the British came to Malaysia while looking for settlements and bases in furthering their trade with China. Like the colonized countries in Africa, the British settled in Malaysia due to trade as there was a need for a better situated intermediate port for English trading ships between India and China than the one they already had.<sup>41</sup>

By the middle of nineteenth century the British became more interested in Malaysia and got settled there properly as a result of the increase in the scale of tin mining. It was the British presence that influenced the introduction and developments of Malaysian legal system including IP law<sup>42</sup>.

The content and process of IP governance in the developing world was said to have begun as an appendage to colonial dictates and preferences<sup>43</sup>. IP was said to have actually started out in developing countries to create a reciprocal protection for IP rights between European countries, to facilitate commercial relations between them as trade occurred within and amongst the various territories on behalf of foreign sovereigns. This means that the treaties relating to IP during the colonial period were not originally directed at the inhabitants of the governed territories. The treaties therefore could not be applied to the local citizens given the colonial treatment of non-European as subjects rather than citizens of the European power<sup>44</sup>. Notwithstanding; this however laid the foundation for a long-standing influence on developing countries legal development<sup>45</sup>.

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<sup>40</sup> Firth A, *The Prehistory and Development of Intellectual Property Systems* (1997) London Sweet&Maxwell pg84

<sup>41</sup> Ibid

<sup>42</sup> Ibid

<sup>43</sup> Gervais D J, *Intellectual property, trade and development : strategies to optimize economic development in a TRIPs-plus era* (2007) Oxford University Press. Pg

<sup>44</sup> Ibid

<sup>45</sup> Deere C (2008) ,op.cit. pg35

When globalization later brought about economic linkages between nations, it brought about mixed feelings about IP. On the one hand, IP rights became a potential tool for developing countries to limit foreign control over access to knowledge goods and technology and on the other hand, it was seen as one of the many ways of controlling the former colonies and subjecting their domestic welfare to the variation in market ideology instead of helping to promote it.<sup>46</sup> The introduction and imposition of colonial IP laws in developing countries was considered a condition for progress. The customary laws of their dominions were held in low regard by the colonial administrators mainly because it did not serve the commercial interests of the colonizers who tried to extract as much wealth from the colonies as possible.<sup>47</sup>

For many of the developing countries in Africa and Asia, the United Kingdom transplanted its IP laws and these laws embodied concepts alien to many traditional and indigenous approaches to the stewardship of ideas, innovation and knowledge. For them, the western concept of privately held right over intellectual assets had no local or cultural roots.<sup>48</sup> This meant that developing countries right from the beginning obviously lacked the local expertise to deal with this new concept, their positions could therefore be described as spectators in the game.

Despite this being the case, there was no documented effort by the colonizers at that time to provide TA to either build IP expertise or IP culture amongst their subjects. With the British for instance, IP was mainly administered from London and they were said to have been disinclined to build innovations and technological capacity in their colonies.<sup>49</sup>

In addition to the introduction of IP, the high IP standards set by colonial powers were also transplanted directly to the colonial territories despite the fact that these territories had neither participated nor signed the international

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<sup>46</sup> Okediji R L(2003) op.cit.pg325

<sup>47</sup> Deere C(2008) op.cit.pg36

<sup>48</sup> Ibid

<sup>49</sup> Ibid

conventions. These standards completely ignored the local conditions in these developing countries<sup>50</sup> while there was limited access to information, knowledge and technology needed for competitiveness, internal growth and development.

The brief history of the transplant of IP in developing countries show that developing countries in Africa and Asia have been exposed in some form or the other to IP through various forms of colonial administration before the formal introduction of IP laws. The colonial period was also known to have expanded the field of copyright to include many developing countries by virtue of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)<sup>51</sup>. Four major colonial powers including the United Kingdom were said to have ratified the Berne Convention in 1887 and they took advantage of Article 19 of the Convention which allowed colonial powers to include the territories they governed in their accession. For example, the United Kingdom included its territories during its accession to the Berne Convention<sup>52</sup>.

Upon independence, many developing countries were keen to be established members of international IP to which they became signatories to international agreements such as the TRIPs agreement. This will be discussed in more detail in the next section.

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<sup>50</sup> Yu P K, 'A Tale of Two Development Agendas' (2009b). Ohio Northern University Law Review, Vol. 34, 2009 pg470

<sup>51</sup> Drahos P (2002)op.cit., pg 767

<sup>52</sup> Ibid

### 2.3 Post-Colonial Period.

Most developing countries were decolonized in the 1950's and 1960's. Even after decolonisation, the evidence of colonization still reflected in the inconsistent and often competing IP laws and institutions in African countries as a result of the European laws that were re-enacted in African colonies without consideration for the practical realities and local conditions<sup>53</sup>. In essence, colonization was said to have accomplished an assimilation that decolonization could not undo.<sup>54</sup> In many newly independent states, IP laws promulgated after independence closely resembled those of their colonizers. This is seen across the IP laws of developing countries like Malaysia and Kenya which even after independence their laws remained based on the British IP laws which had served as the foundation of their colonial laws.<sup>55</sup>

As newly independent states, these countries began to establish their membership of the international society by joining various international organizations and multilateral agreements. The justification for this was that these memberships were meant to provide them with desirable opportunities to exercise their new found independence and sovereignty because for them, their independence was the result of a long struggle of emancipation<sup>56</sup>.

However, as time went on, each review of the international agreements brought with it higher set of IP standards<sup>57</sup>. Unfortunately for developing countries, most of them had low technological development and the general standard of living of their population was much lower than the developed country members. Therefore the standards set by these treaties were too high for them and did not take into consideration the specific economic

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<sup>53</sup> Gervais D J (2007) op.cit., pg

<sup>54</sup> Okediji R L (2003),op.cit., pg327

<sup>55</sup> Deere C (2008),op.cit., pg38

<sup>56</sup> Yu P K(2009b)op.cit.,pg 470

<sup>57</sup> Yu P K(2009b) op.cit, pg 470

conditions and lack of the necessary technological advancement to effectively participate<sup>58</sup>.

During the 1960's and the 1970's, developing countries started to question the international standards of IP set by treaties that had emerged in previous decades, particularly the 1886 Berne Convention for the Protection of Literary and Artistic works and the 1883 Paris Convention for the Protection of Industrial Property. These countries became aware of their international obligations and therefore became more assertive of their rights. They questioned if international standards set were too focused on the appropriation of knowledge rather than its diffusion<sup>59</sup>, they also questioned the standards that were set up primarily for developed countries and their appropriateness for them in the light of their limited economic development and technological shortcomings<sup>60</sup>.

The Berne Convention and the Paris Convention were notably the conventions that began the multilateral phase of international IP co-operation<sup>61</sup> and they also began developing countries journey in international law in the late nineteenth century<sup>62</sup>. These two treaties were originally administered by two separate secretariats but were later merged into one in 1893 called the Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle (BIRPI)<sup>63</sup>. The BIRPI was reputed to facilitate a system whereby even after the newly independent states were no longer

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<sup>58</sup> *ibid*

<sup>59</sup> Drahos P (2002) *op.cit.*, pg 768

<sup>60</sup> Yu P K (2009b) *op.cit.*, pg 472

<sup>61</sup> Drahos P, 'The Universality of Intellectual Property Rights: Origins and Development' in *Intellectual Property and Human Rights* (1999) World Intellectual Property Organization, Geneva, 13-41 pg7

<sup>62</sup> Deere C (2008), *op.cit.*, pg36

<sup>63</sup> Braderman E M, 'The World Intellectual Property Organization and the Administrative Reorganization of BIRPI' (1968-1969) 12 *Pat. Trademark & Copy. J. Res. & Ed.* 673 . pg 674

bound by the clause under colonial rule, they however continued declarations of adherence to the conventions<sup>64</sup>.

The issue with their continued adherence was that being newly independent states, they lacked the capacity and technological advancement to effectively exercise their memberships in the Berne Convention and Paris Convention. Also the two Conventions did not contain special provisions to make participation easier for the underdeveloped countries.

These two Conventions were however known to embody the concept of national treatment. National treatment provided for signatory countries to extend to foreign nationals the same advantages, rights and legal remedies against infringement as enjoyed by their own nationals and has been described as the cornerstone of the both the Paris and the Berne Convention<sup>65</sup>. For developing countries, this was beneficial because it provided for non-discrimination in international IP. The concept was later incorporated into the TRIPs agreement which will be discussed in more detail later on in the chapter.

### **2.3.1 The Paris Convention**

The Paris Convention is an International Law multilateral agreement which constitutes a union for the protection of IP. It has 98 signatory nations which include many developing countries<sup>66</sup>. The purpose of the convention was for the international protection of utility models, patents, trademarks, service marks, industrial designs, trade names, indications of source or appellation of origin and the repression of unfair competition. With the awareness of the

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<sup>64</sup> Deere C (2008),op.cit, pg41

<sup>65</sup> Ibid

<sup>66</sup> Seibeck W E, Evenson R E, Lesser W and Primo Braga C A, 'Strengthening Protection of Intellectual Property in Developing Countries' (1990)International Bank for Reconstruction and Development/The World Bank. Pg 11

various national laws of the members of the convention, the aim was to provide the international protection of these industrial properties while avoiding a united and homogenous industrial property right.<sup>67</sup>

The Paris Convention embodied certain fundamental principles; one is the principle of national treatment. This is provided for in Article 2(1) and it states that

*“Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention...”*<sup>68</sup>

This principle was designed to prohibit any discrimination and inferior treatment of foreigners which then should afford them equal and unrestricted access to national legal protection. In addition, it was meant to address the reciprocity requirement between states and avoid discrimination at the same time preserving the principle of territorial protection<sup>69</sup>.

Regarding the less developed country members, the Paris Convention sought to consolidate the legal reforms made by these countries IP system when they joined the convention such as the promotion of the transfer of technology and the measures taken to prevent patent abuse<sup>70</sup>.

Another principle contained in the Convention which has been described as *“the most debated provision in the history of the Paris Convention”*<sup>71</sup> is the concept of “local working” in Article 5A of the Convention. The original text of

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<sup>67</sup> Kleespies M and Hoffman M, ‘Global protection of intellectual property’(2001) International Company and Commercial Law Review pg2

<sup>68</sup> Goldstein P, *International Legal Materials on Intellectual Property* (2000) Foundation Press, New York. pg 233

<sup>69</sup> Kleespies M, Hoffman M (2001) op.cit.,pg 2

<sup>70</sup> Yu P K (2009b) op.cit, pg 508-509

<sup>71</sup>

the article prevents any member of the Convention from causing the forfeiture of a patent introduced to the country where patent has been granted. However the patent must be worked in conformity with the laws of such country. The text also recognised the grant of compulsory licence although it is not expressly stated in the original text.

The obligation to work a patented invention in conformity with the laws of the country in which the patentee introduced the patented invention has been described as economically beneficial particularly in the case of developing countries since the national industries of countries where the patent is introduced will gain from it. The question has also however arisen whether developing countries actually have any advantage from being bound by this provision since subsequent revisions made to this provision over the years appear to have weakened the local working requirement by limiting the ability of countries to revoke patents due to lack of local working<sup>72</sup>.

As a result of the revisions to the Convention texts, developing countries and less developed countries made efforts to push for the amendment of the provisions of the convention particularly to accommodate their under development. At the revision Conference in Libson in 1958, one of the key issues brought up was the provision of some sort of preferential arrangements for developing countries in meeting their obligations under the convention. In pursuit of this, they also sought to lower the levels of protection in the convention but the developed countries tried to obtain higher standards of protection instead<sup>73</sup>. The developing countries were disadvantaged in their struggles as a result their own economic situations and the aggressive tactics employed by the developed countries<sup>74</sup>.

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<sup>72</sup> The 1934 London Conference further weakened the local working requirement by revising Article 5a(4) *"In any case, the patent may not be subjected to such measures before the expiration of at least three years from the date of grant or if the patentee proves the existence of legitimate excuses. No proceedings for the forfeiture or revocation of a patent may be instituted before the expiration of two years from the grant of the first compulsory licence"*

<sup>73</sup> *ibid*

<sup>74</sup> *ibid*

The proposals for the revisions of the Paris Convention show that developing countries and less-developing countries had started to realise that their participation in International IP was disadvantaged unless the other developed countries recognised their needs and were willing to grant concessions on their behalf.

### 2.3.2 The Berne Convention

The Berne Convention came into existence as a result of the quest for a universal copyright law which was led by France. A meeting was held in Brussels in 1858 which constituted the debates of congress on the need for an international copyright protection. It was attended by delegates and representatives of major European countries and United States<sup>75</sup>. The congress later passed resolutions that constituted a rudimentary outline of the programme for a universal copyright law which later formed the basis of the provisions that were later on incorporated into the convention<sup>76</sup>.

The 1886 Berne Act was later signed by 9 countries: France, United Kingdom, Germany, Belgium, Spain, Haiti, Italy, Switzerland and Tunisia and thereafter took effect in 1887.<sup>77</sup>

It is worth noting here that from the makeup of the membership at the time of signing the Berne Convention, the signatories did not strictly consist of developed countries because at that time, Haiti and Tunisia were regarded as developing countries. The membership therefore comprised countries

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<sup>75</sup> Ricketson S, *Berne Convention for the Protection of Literary And Artistic Works 1886-1986* (1987) Eastern Press Ltd London and Reading. Pg 39-80

<sup>76</sup> *ibid*

<sup>77</sup> Barbosa R G, 'Revisiting International Copyright Law' (2007) *Barry Law Review*, Vol. 8 pg 46-47

which were at differing stages in their economic, social and cultural development<sup>78</sup>.

After its inception, like the Paris Convention, the Berne Convention underwent several successive revisions. These revisions accommodated changes made to the provisions of the convention and were mainly aimed at promoting the overall development of the convention. However with each revision also brought with it a higher set of copyright standards without consideration for the different developmental levels of the member countries. The revisions included the 1896 Paris Revision Conference, the 1908 Berlin Revision Conference, the 1928 Rome Conference and the 1948 Brussels Revision Conference<sup>79</sup>.

Movement for concessions to be made in favour of developing countries crystallised at the African Study Meeting on Copyright held at Brazzaville in 1963<sup>80</sup>. This meeting was convened by UNESCO and the United International Bureaux for the Protection of Intellectual Property and it marked the beginning of developing countries struggles in negotiating their positions under international copyright convention<sup>81</sup>.

This meeting was set up to discuss the special needs of African nations and to provide assistance to these nations in formulating appropriate principles for the drafting of their own copyright laws<sup>82</sup>.

Recommendations made at this meeting included the proposal that African experts put together a model law for the protection of copyright in Africa and there was also a proposal for the revision of the Berne Convention to enable

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<sup>78</sup> Ricketson S, Ginsburg J (2006) op.cit 2<sup>nd</sup> Ed pg 117

<sup>79</sup> Ricketson S(1987) pg 81-117

<sup>80</sup> Ibid

<sup>81</sup> Tocups N M, 'The Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries' (1981-1982) 29 J. Copyright Soc'y U.S.A. 402 pg 411

<sup>82</sup> Ricketson S and Ginsburg J(2006) op.cit, pg117

the reduction of the term of protection and to permit the availability of protected works for educational purposes<sup>83</sup>.

Thereafter there was a joint session meeting held at New Delhi in December 1963 by the governing bodies of the Universal Copyright Convention (UCC)<sup>84</sup> and the Berne Convention which came up with the agreement for both secretariats to conduct a revision of their conventions<sup>85</sup>.

Following this, in 1964 a group of Swedish experts, officials of the BIRPI and the Berne union secretariat met and made a recommendation that during the 1967 Berne revision Conference in Stockholm Sweden, there should be the addition of a new article to the Berne Convention taking special recognition of the special needs of developing countries copyright needs by easing copyright standards for them<sup>86</sup>.

At the 1967 Stockholm Conference, the needs of developing countries which at this time had formed a significant proportion of the membership of the Berne Union became one of the objectives to be addressed,<sup>87</sup> membership of the union had grown to 58, and notably over a third of its membership was in the developing country category.

Up until this meeting, the Berne Convention in its revisions could not be said to have taken particular account of the problems of developing countries and had been more concerned with the high level of protection set by the Convention. As a result developing countries had formed their opinion that the revisions of international agreements such as the Berne and Paris Conventions were opposed to their interests<sup>88</sup>. They contended that major

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<sup>83</sup> Tocups N M (1981-1982 ) op.cit., pg 411-412

<sup>84</sup> The UCC is a multilateral copyright convention which was adopted September 6, 1952 for the copyright protection of literary, scientific and artistic works. Available at [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?treaty\\_id=208](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=208) accessed [30/06/15]

<sup>85</sup> Tocups N M (1981-1982 ) op.cit., pg 411-412

<sup>86</sup> ibid

<sup>87</sup> Ricketson S (1987) pg 81-117

<sup>88</sup> See Berne revisions and local working requirement under Paris Convention section 2.3.1

treaties should be re-examined in the light of the specific needs of the African continent.<sup>89</sup>

Developing countries were pushing for special concessions in relation to their use of copyright works, main concerns were with reproduction and translation rights where developing countries argued that large publishing houses in developed countries had little or no interest in supplying proper translation to developing countries and they charged high prices for the works they controlled. The Stockholm Conference provided the forum for these demands to be considered in the context of the Berne Convention system. To avoid a situation where developing countries would withdraw from the Berne Convention if these concessions were not made, the developed countries were said to have initially paid lip service to the developing countries concerns<sup>90</sup>.

Following this development, a protocol was proposed regarding developing countries which formed the basis for the conference programme. The developing countries saw the protocol as necessary to be able to continue participation in the Berne Convention and also important in meeting their needs for educational materials<sup>91</sup>.

There were several objections to the protocol by developed countries on grounds such as the lack of guarantee that the authors will be paid anything when their copyright works are used in developing countries for educational purposes; the lack of definition of a developing country<sup>92</sup> and the lack of any direct incentive to developing countries to improve the level of protection beyond that offered by the protocol<sup>93</sup>.

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<sup>89</sup> Ricketson Sand Ginsburg J(2006) pg 117

<sup>90</sup> Ibid

<sup>91</sup> Tocups N M (1981-1982) op.cit., pg 413-414

<sup>92</sup> ibid

<sup>93</sup> Yu P K(2009b) pg 480

On the quest for a definition of a developing country, a wide range of proposals were put forward but each seemed to have some form of weakness, the final proposal which resulted in a more flexible formula was by the Scandinavian countries. It provided that “*a developing country*” would be considered to be any country regarded as such in conformity with the established practice of the General Assembly of the UN’. The term “*established practice*” was implied to mean that the country in question received assistance from the UN Development Programme through the UN or its specialized agencies. This however was not expressly stated and it therefore remained vague.<sup>94</sup>

Following the objections raised by the developed countries there was a failure to ratify the protocol which resulted in a lot of tension between the developed countries and the developing countries. The resulting friction was even described as a threat “*to topple the entire structure of international copyright law*”<sup>95</sup>. There was a question whether the needs and interests of developing and developed countries could be accommodated within one multilateral instrument. Non-governmental international organisations therefore pointed out the benefit of formulating a definite strategy for dealing with the concerns of developing countries through other forms of assistance<sup>96</sup>.

Following this development, steps were taken to revise the Stockholm Protocol and a conference was later proposed to be convened for the purpose of revising the Safeguard Clause in Washington<sup>97</sup>. At this point it was apparent that the Stockholm Protocol was unsuccessful; Only Senegal, Romania and Pakistan had ratified the Stockholm Protocol in full while

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<sup>94</sup> Ricketson S and Ginsburg J(2006) pg 117

<sup>95</sup> Tocups N M (1981-1982) op.cit., pg 413-414

<sup>96</sup> Ricketson S (1987) pg 81-117

<sup>97</sup> Ndiaye N, ‘The Berne Convention and Developing Countries’ (1986-1987) 11 Colum.-VLA J.L. & Arts 47. Pg51. The Safeguard Clause is a declaration pertaining to Article XVII of the Universal Convention and it provides that countries which have left the Berne Union cannot benefit from the protection of the Universal Copyright Convention.

Denmark, Canada, Finland, West Germany, Spain, Israel, Sweden, Switzerland and the United Kingdom let known their rejection of the Stockholm revision.<sup>98</sup>

At the meeting in Washington, the UCC Intergovernmental Copyright Committee and the Berne Union permanent Committee formed a joint study group which made recommendations to relax some of the texts of the Berne Convention and eventually combine the two multilateral Conventions for a revision conference in Paris<sup>99</sup>.

These recommendations were described as the package deal and an “acceptable compromise”<sup>100</sup> taking account of the interests of both developed and developing countries. The recommendations were based on the following:

- *“No developing country was to be prevented from leaving the Berne Convention*
- *In regards to foreign works, the same level of protection will be accorded to every developing country whether they are covered by the Berne or the Universal Convention*
- *As a counter balance to the suspension of the safeguard clause in the case of developing countries, the level of minimum protection provided by the UCC was to be raised.*
- *There was a safeguard for developing countries to avoid the repetition of a stalemate similar to that which had arisen after the adoption of the Stockholm protocol.*
- *There was to be no discrimination among developing countries states that were acceding to the conventions after the revision and those that were present members*

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<sup>98</sup> Yu P K (2009b) pg 481

<sup>99</sup> Tocups N M (1981-1982) op.cit., pg 414

<sup>100</sup> ibid

- *There was to be a simultaneous revision of both the UCC and the Berne Convention understood as the revision of the UCC should precede that of the Berne which would follow immediately afterwards.*<sup>101</sup>”

The details of the Paris revision conferences will not be discussed here, however, it will be mentioned that the definition of a developing country was revisited. Under Article I (1) of the Appendix, it provided that the provisions of the Appendix may be invoked by “*Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations...and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act...*”<sup>102</sup> From this provision, it appears that the definition adopted in the Stockholm Protocol was incorporated in this new definition leaving the interpretation of ‘the established practice of the General Assembly of the United Nations’ vague.

However, compared to the Stockholm Conference, the Paris Diplomatic Conferences appeared to have been more successful as it was described as strengthening the structure of International Copyright Law<sup>103</sup>. This time the parties appeared to proceed with a far greater display of goodwill on both sides and there was much wider support for the final result from all parties concerned. The final result was that out of the 49 countries which had ratified the Paris Act and Appendix, as of January 1986, 28 of them were developing countries<sup>104</sup>.

From the discussion above, the Berne Convention took some years to recognise the special needs of developing countries which later the Paris Diplomatic Conferences corrected and resulted in the wide acceptance of the

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<sup>101</sup> Ricketson S (1987) pg 81-117

<sup>102</sup> Ibid

<sup>103</sup> Tocups N M (1981-1982) op.cit., pg 416

<sup>104</sup> Ricketson S(1987) pg 81-117

Paris Act by developing countries. Although the Paris Act itself was not without its criticisms<sup>105</sup>, developing countries struggles within the Berne Convention for the recognition of their needs was significant for creating an awareness of those needs especially in the area of possible technical assistance. The Berne Convention can be accorded some victory in that it enabled the creation of a forum where the parties to the Convention were able to express their views, have an understanding of needs and expectations and found ways to work out some compromise which the parties were able to agree on.

### 2.3.3 The Universal Copyright Convention (UCC)

The UCC is another multilateral copyright Convention which embodies the same basic principle of national treatment similar to the Paris Convention and the Berne Convention and it came into force in 1952. It is described as a “*landmark in the field of copyright law*”<sup>106</sup> because it acknowledged from the onset that divergent intellectual property rights existed in the different national systems therefore its purpose was not to create a new universally accepted copyright law but to harmonise the existing national systems based on reciprocal national treatment<sup>107</sup>.

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<sup>105</sup> Yu P K(2009b),op.cit. pg 481 The Paris Act appendix which has been subsequently incorporated into the TRIPs Agreement and the WIPO Copyright Treaty has been criticized as not addressing the most pressing needs of developing countries in areas like bulk access of creative works being unavailable at reasonable prices and translated to local languages. Another criticism was that premised on traditional printing technologies, it also did not make it possible for developing countries to take advantage of new online modes of delivery which developing countries with large and widespread populations may find attractive.

<sup>106</sup> Dubin J S, ‘The Universal Copyright Convention’ (1954) 42 Cal. L. Rev. 89 pg 89

<sup>107</sup> *ibid*

The UCC was particularly significant at the time because there was a wide representation of countries and it brought together countries who otherwise would not work together to establish a realistic and workable international treaty<sup>108</sup>.

This Convention attracted many developing countries because it provided a lower level of protection than that of the Berne , it was potentially of great assistance to developing countries which wished to obtain protection for their works abroad but felt unable or unwilling to accord to foreign works the high level of protection the Berne Convention required.<sup>109</sup>

The UCC was also significant during this period because there was the first evidence of technical assistance aid for developing countries in the area of intellectual property. The issue of providing special assistance to developing countries in relation to copyright was first raised in the context of UCC rather than The Berne Convention. Initiated by the USA, it took the form of proposals to provide assistance in the form of drafting of copyright legislation and training of personnel to those countries which were not members of either Convention<sup>110</sup>.

After successive meetings at the Intergovernmental Committee of the UCC to discuss the issue of technical assistance and other issues relating to copyright protection, little immediate action followed until at the African Study Meeting on Copyright which was held at Brazzaville in 1963 previously mentioned while discussing the Berne Convention. This meeting made available a forum to discuss the special needs of developing countries in international copyright<sup>111</sup> and included recommendations such as the free use of protected works for educational and scholastic purposes, reduction in term of protection and the protection of folklore which was particularly an

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<sup>108</sup> *ibid*

<sup>109</sup> Ricketson S and Ginsburg J, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2006) 2<sup>nd</sup> Ed pg 117-120

<sup>110</sup> *Ibid*

<sup>111</sup> Tocups N M (1981-1982 ) *op.cit.*, pg 411-412

important issue for developing countries. Following this, experts sought to take account of these issues and the conference program later included a proposal concerning developing countries.<sup>112</sup>

Although the UCC is currently of limited relevance compared to the Berne Convention since most countries are now signatories to the Berne Convention and the Berne Convention has precedence over the UCC<sup>113</sup>, nevertheless the UCC is noteworthy here not only because it recognised the different development levels of the member countries but it also made provisions that made it easier for developing countries to participate in international intellectual property.

### 2.3.4 The TRIPS Agreement

With the evolution of the world trading system and the era of digital technology, there was an urgent need to update the rules of international IP. The Berne Convention and the Paris Convention succeeded in bringing together developed and developing countries in IP negotiations however, their perceived shortcomings which included the lack of an effective and binding system of dispute settlement between member countries served as a backdrop for the negotiations to establish new IP standards<sup>114</sup>. This prompted developed countries to choose the Uruguay round of the General

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<sup>112</sup> Ricketson S and Ginsburg J(2006) op.cit, pg117

<sup>113</sup> The Berne Convention has precedence over the UCC by virtue of Article 17 of the UCC which states that the Convention does not affect any provision of the Berne Convention, and the appendix declaration to the article goes on to state that any country that withdraws from the Berne Convention after 1st January 1951 will not be protected by the UCC in countries of the Berne Convention Union. See [https://www.copyrightservice.co.uk/copyright/p14\\_universal\\_copyright\\_convention](https://www.copyrightservice.co.uk/copyright/p14_universal_copyright_convention) accessed[03/04/2014]

<sup>114</sup> Gervais D J, 'The TRIPS Agreement: Interpretation and Implementation' (1999) European Intellectual Property Review 21(3), 156-162. pg 156

Agreement on Tariffs and Trade (GATT) as the forum for the negotiation of the TRIPs agreement<sup>115</sup>.

GATT was particularly chosen for several reasons amongst which was that it was thought to be more effective in terms of the number of participants compared to other institutions such as WIPO<sup>116</sup>. By April 15 1994, at the Marrakesh meetings of trade ministers, the agreement establishing the World Trade Organisation (WTO Agreement) and the Final Act embodying the result of the Uruguay round (Final Act) were opened for signature by the attending countries. The TRIPs agreement was attached to the WTO agreement as Annex 1C and entered into force on 1 January 1995.<sup>117</sup>

Signatories to the TRIPs agreement must be members of the WTO. A total of 114 countries from both developed and developing countries signed the WTO agreement and membership in the WTO requires approval by member countries and compliance with trade regulations contained in the WTO Agreement<sup>118</sup>.

The TRIPs agreement is described as likely to be the cornerstone of the international system of IP rights in the foreseeable future as it is a major advance in this area<sup>119</sup>. Its objective as stated in the preamble to the agreement aims to *“Reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights...”*<sup>120</sup>

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<sup>115</sup> Adolf H, ‘Trade-Related Aspects of Intellectual Property Rights and Developing Countries’ (2001) The Developing Economies 49-84 pg50

<sup>116</sup> Ibid

<sup>117</sup> Koepsel K M, ‘How do developing countries meet their obligations under Article 67 of the TRIPs Agreement?’ (2003-2004) 44 IDEA pg 167-168

<sup>118</sup> Ibid

<sup>119</sup> Vandoren P, ‘The Implementation of the TRIPs Agreement’ (1999) 2:1 J. of World Int. Prop. 25 pg26

<sup>120</sup> Complete details of the TRIPs Agreement can be found on the WTO website [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm) accessed [29/04/2014]

Before going on to discuss developing countries participation in the TRIPs agreement it is important have an understanding of its purpose by giving a brief overview of its provisions.

The TRIPs agreement consists of three main features which are:

- The standards for IP rights and this set out the minimum standards of IP protection to be provided by each member.
- Enforcement of IP rights which details the guidelines of the procedures and remedies of the right holders in the enforcement of IP rights.
- Dispute prevention and settlement which is based on the respect for the Agreement and subject to the WTO dispute settlement procedures.<sup>121</sup>

The TRIPs agreement contains several provisions covering seven main IP areas which are Copyrights, Trademarks (product and service), Geographical Indication, Industrial Design, Layout-designs of Integrated Circuit and Undisclosed Information (including trade secrets). It also contains a few provisions which are of particular interest to developing countries such as Article 27.3(b) that relates to Agriculture which is a significant sector in most developing and least developed countries economies<sup>122</sup>.

The TRIPs agreement is a result of updating the existing rules contained in the Berne Convention and the Paris Convention and incorporating them into the present agreement. The WTO referred to the TRIPs agreement as “a Berne and Paris plus-agreement”<sup>123</sup>.

The TRIPs agreement provides that the substantive provisions of the Berne Convention and the Paris Convention must be complied with<sup>124</sup>. The

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<sup>121</sup> ibid

<sup>122</sup> Duran E, Michalopoulos C, ‘Intellectual Property Rights and Developing Countries in the WTO Millennium Round’ (1999) *The Journal of World Intellectual Property*, 2: 853–874. Pg 873

<sup>123</sup> See [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm) accessed [29/04/2014]

<sup>124</sup> This is contained in Articles 2.1 and 9.1 of the TRIPs Agreement. Article 9.1 of the TRIPs Agreement provides for member countries to comply with articles (with the exception of the

provision contained in Article 2.1 of the TRIPS Agreement which states that members shall comply with the substantive provisions of the Paris Convention<sup>125</sup> extends the membership of the Paris Union to members of the WTO because the TRIPS agreement is a prerequisite for membership of the WTO<sup>126</sup>.

Also the national treatment principle accorded by the Berne Convention and the Paris Convention was also adopted by Article 3 of the TRIPS agreement<sup>127</sup>.

For the purpose of the TRIPS agreement, members of the WTO and signatories of the TRIPS agreement are classified into developed countries, developing countries and least developed countries. Unlike in the previously discussed Berne Convention, there is no definition for developing countries in the WTO, the WTO provides that the members themselves have to determine the category they fall into and announce it. This however may be challenged by the other members to the agreement<sup>128</sup>. This categorisation is important as the TRIPS agreement contains transitional arrangements for member countries in complying with their obligations under TRIPS depending on which category each country falls under<sup>129</sup>.

Under Part VI, Article 65 of the TRIPS agreement, all the members (developed and developing countries) are given one year in which they are not obliged to apply the provisions of the agreement, after this period developing countries are given a further delay of four years after which they

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provisions of the Convention which relates to moral rights) of the Berne Convention and its appendix.

<sup>125</sup> See [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) accessed [29/04/2014] pg 321

<sup>126</sup> Blakeney M, 'The International Protection of Industrial Property: From the Paris Convention to the TRIPS Agreement' (2003) WIPO National Seminar on Intellectual Property. WIPO/IP/CAI/1/03/2 pg 7-8

<sup>127</sup> *ibid*

<sup>128</sup> See '*Who are the developing countries in the WTO*' available at [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) accessed [29/04/2014]

<sup>129</sup> *ibid*

will be obliged to apply the provisions of the agreement.<sup>130</sup> This gives developing countries generally a 5 year transition period and least developed country members are given a period of 11 years.

The transition period further provides a clause which states that during the transition period, developing countries shall not make changes in their legislation or practices which would result in a lesser degree of consistency with the provisions of TRIPs agreement.<sup>131</sup>

Articles 3, 4&5 of the TRIPs agreement require all WTO members to apply the two core GATT principles of non-discrimination; the most favoured nation principle and the national treatment principles by January 1 2006. This is to prevent WTO members from giving favour to their nationals over foreign nationals concerning IP protection and also to prevent discrimination between different foreign investors and creators<sup>132</sup>.

With the call for stronger protection of IP in the TRIPs agreement meant that developing countries were held to full compliance of agreed standards. Towards meeting their obligations under TRIPs, developing countries were faced with a huge amount of work to do in terms of fine-tuning their domestic judicial systems to ensure TRIPs conformity, ensuring that enforcement procedures and remedies are effective and formally consistent with the specific requirements of TRIPs, introduction of effective border enforcement mechanisms as well as the implementation of the provisions of the agreement within their various legal systems and practices<sup>133</sup>. They therefore needed help in form of extensive TA to meet these obligations. Developing countries were therefore able to secure three main special and differential treatment provisions at the Uruguay round of the TRIPs agreement to assist them in implementing their obligations under the agreement. They were the

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<sup>130</sup> See [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) pg 347-348 accessed [29/04/2014]]

<sup>131</sup> *ibid*

<sup>132</sup> Deere C (2008), *op.cit.*, pg 65

<sup>133</sup> Otten A, 'Implementation of the TRIPS Agreement and Prospects for its Further Development' (1998) *Journal of the International Economic Law* 523-536 pg529

transitional arrangements provided in Articles 65 & 66, technology transfer provided in Article 66.2 and the technical cooperation provision in Article 67<sup>134</sup>. The technical cooperation provision will now be discussed.

#### 2.3.4a Article 67 Technical Cooperation Provision

Article 67 of the TRIPs agreement makes provision for technical and financial cooperation to developing country members and least developed country members. It states that:

*“In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel”*<sup>135</sup>.

Under the above provision, developed countries with the assistance of the WTO secretariat agreed to help developing countries with the preparations of laws and regulations compatible with TRIPs; also the establishment or reinforcement of national offices and agencies including training of personnel. Technical cooperation here also extended to law enforcement and custom authorities who are on the front line of the battle against professional IP infringement<sup>136</sup>.

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<sup>134</sup> A Alavi A, ‘Special and Differential Treatment provision in the TRIPs negotiations’ (2008) Journal of Intellectual Property Law & Practice, Vol. 3, No. 1. Pg 55

<sup>135</sup> See [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) pg 348 accessed [29/04/2014]

<sup>136</sup> Gervais D, *The TRIPs Agreement: Drafting History and Analysis* (2003) 2<sup>nd</sup> ed, London Sweet&Maxwell pg 354

The Article 67 provision has been criticized for not expressly stating that the assistance mentioned is a firm commitment or a bound obligation on the part of the developed countries. The wording of the article has therefore been construed to be more of a gesture of goodwill because of some of the phrases used in the provision such as 'shall consider' and 'mutually agreed terms'<sup>137</sup>.

The provision has also been described as limiting, in that it does not include some form of guideline or best practice for developed countries to follow. This means that all decisions concerning the prioritizing of the activities to financing and also the delivery and implementation of IP related TA rests solely on the developed country providers<sup>138</sup>. This has been said could result in the poor implementation, duplication of efforts and eventually affect the effectiveness of the TA provided. It was also pointed out that the nature of the assistance provided by developed countries may not serve developing countries country specific conditions<sup>139</sup>.

To ensure that the provisions of the agreement are carried out as intended the responsibility of monitoring the operations of the agreement fall under the purview of the TRIPs council and this includes overseeing member's compliance with their obligations under the agreement. The Council's responsibility could also be assumed to include the technical cooperation part of the agreement offered under Article 67. The Council's responsibilities are set out under Article 68 of the TRIPS Agreement which states that:

*"The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other*

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<sup>137</sup> Finger J M, *Implementing the Uruguay Round Agreements: Problems for Developing Countries* (2001) Blackwell Publishers Limited, Oxford. Pg 1102

<sup>138</sup> Matthews D , Munoz-Tellez V, 'Bilateral Technical Assistance and TRIPs: The United States, Japan and the European Communities in Comparative Perspective' (2006) *The Journal of World Intellectual Property* Vol. 9, no. 6, pp. 629–653 pg 632

<sup>139</sup> *ibid*

*responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization”<sup>140</sup>*

The TRIPs Council held its first meeting on March 9 1995 and at this meeting the issue of TA was raised by the representative from Egypt when it was suggested that Article 67 should be given the highest priority. The delegation believed that the Council might play a role by reviewing the TA and financial cooperation provided by developed countries in favour of developing and least developed countries with a view to assisting them in the implementation of the agreement<sup>141</sup>.

It was further suggested that regular review of information submitted to the Council on this matter would make it possible to identify areas where additional efforts might be necessary to respond to the needs of developing and least developed countries. After this meeting, the Council had subsequent meetings where developed countries were asked by the chairman to submit in advance of the meetings and in writing their technical and financial cooperation programmes in the area of IP relevant to the implementation of the TRIPs agreement. Seven members complied with this and thereafter the chairman suggested three themes for the Council's discussion on the subject which were transparency of Information, needs not being fully met and the type of activities that should be sought from the WTO Secretariat.<sup>142</sup>

After several meetings, developing countries still contended that the TA being provided by the developed countries were not in compliance with the clear

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<sup>140</sup> See [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) pg 349 accessed [30/04/2014]

<sup>141</sup> Koepsel K M (2003-2004) op.cit.pg 178-198

<sup>142</sup> Ibid

provision stipulated in Article 67<sup>143</sup>. It has been pointed out that it appeared developing countries by signing the TRIPs agreement accepted bound commitments to implement obligations while they in exchange received unbound promises of assistance to do so<sup>144</sup>.

### 2.3.4b Impact of TRIPS and Compliance in Developing Countries

The TRIPS agreement has impacted developing countries in many ways and there are many publications highlighting the issues which often show that the negative effects outweigh the positive<sup>145</sup>. Some are in fact of the opinion that the agreement was erroneously concluded with the belief that introducing western concept of IP norms will induce development in developing and least developed countries without any actual evidence to support this. The TRIPs agreement was therefore said to have “*put the policy cart before the empirical horse*”<sup>146</sup>.

However, in spite of the impacts of TRIPs, the fact remains that developing countries are signatories to the agreement and are bound by the commitments they have made under it. This is followed by the acknowledgement for the need of assistance such as capacity building to move forward with the agreement.

From the beginning of the TRIPs negotiation, it appeared that developing countries had limited participation which therefore resulted in a poor understanding of the implications of the agreement. Less than 20 of the 106 developing country WTO members that are now bound by the TRIPs agreement were actually involved in the negotiations. It has been pointed out

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<sup>143</sup> Ibid

<sup>144</sup> Finger J M (2001) op.cit. pg 1102

<sup>145</sup> For further details on the impact of the TRIPS Agreement on developing countries see J Shi, ‘TRIPs and Development- A Dilemma facing International Trade Law’ (2004) NPSIA Carelton University, Ottawa Canada and E Duran, C Michalopoulos, op.cit.

<sup>146</sup> Gervais D J, Policy Calibration and Innovation Displacement. Chapter in *The Development Agenda : Global Intellectual Property and Developing Countries*, eds, N Netanel, (2009), Oxford University Press. Pg56

that their participation in the technical aspect of the discussions was limited because developing countries rather concentrated on containing the scope of the agreement<sup>147</sup>.

Since concluding the agreement, developing countries have been racing against time to ensure due compliance at the national level with the provisions of the TRIPs agreement<sup>148</sup>, as previously mentioned, this meant undertaking series of legislative reforms followed by executive actions<sup>149</sup>.

In addition to the race to comply with the agreement, there were several issues developing countries were contending with such as domestic economic constraints and also mounting pressure from developed countries with the risk of trade retaliation and having sanctions imposed on them if they were found to be non-compliant<sup>150</sup>.

One author<sup>151</sup> pointed out that for developing and least developed countries to implement TRIPs meant significant costs for them; their whole domestic system was to be brought into conformance such as their legal systems, the training of officials working in various government departments, judges and police including custom authorities in understanding the new rules. The following process of enforcing the new rules imposed a burden on the administrative and judicial systems of the countries. He further stated that even commentators that favoured high IP protection recognized that developing countries had been hit hard by the impact of introducing TRIPs<sup>152</sup>.

As previously mentioned, developing countries were given a transition period in which they should have implemented their obligations under the TRIPs

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<sup>147</sup> Deere C (2008), op.cit, pg56

<sup>148</sup> Blakeney M (2003) op.cit. pg 17

<sup>149</sup> Deere C (2008), op.cit,pg 71

<sup>150</sup> Ibid

<sup>151</sup> Gervais D J, 'Intellectual Property, Trade & Development: THE STATE OF PLAY' (2005) 74 Fordham L.Rev 505 pg 530-531

<sup>152</sup> Ibid

agreement. Upon the expiry of this period, developing countries were required to submit two documents; one that explained how national laws met the obligations under TRIPs as contained in Article 63.2 of the TRIPs agreement and a second one that responded to a checklist of issues regarding enforcement. Each country was then subject to a process where all the WTO members were able to ask additional questions concerning TRIPs conformity.<sup>153</sup>

The TRIPs Council began the review of each country's compliance with the agreement in 1996. The review began with developed countries and the method used was in form of questionnaires which the countries responded to and other members were able to ask follow up questions based on the responses. When the council was due to review developing countries, the ability of developing countries to send experts to explain their answers to the council and thereafter to answer follow up questions was described as limited<sup>154</sup>.

Developing countries compliance with the agreement consisted of combining their already existing laws with newly adopted pieces of legislation and amendments to address the various aspects of the agreement. In some cases, some developing countries are said to have passed on the legislation knowing that they were not fully compliant and would need further amendments<sup>155</sup>.

By the 1 January 2000 deadline set for developing countries, over half of the developing countries still had laws pending approval in their legislatures and therefore were not able to submit all the necessary laws for consideration. It

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<sup>153</sup> Ibid.

<sup>154</sup> Stoll R L, 'Developing Countries Compliance with the TRIPs Agreement' (2001) CASRIP Symposium Publication series Number 6 pg 236 available at <http://www.law.washington.edu/casrip/symposium/Number6/Stoll.pdf> accessed 01/05/2014

<sup>155</sup> Deere C (2008), op.cit, pg 71

is reported that developing countries generally had not implemented on the average of 4 legislative reforms they needed to be TRIPs compliant<sup>156</sup>.

While the non-compliant developing countries put their lack of compliance down to political issues in their countries and administrative constraints, they however expressed intentions to speed up the approval of pending reforms with an emphasis on their commitment towards implementing TRIPs<sup>157</sup>.

One of the reasons for the failure of many developing countries to be compliant with the agreement by the stipulated deadline has been attributed to the shortcomings of the TA provided under the technical cooperation provision contained in Article 67 of the agreement<sup>158</sup>.

The challenges developing countries have under the TRIPs agreement are not limited to fulfilling the obligations they have committed to, there is also the concern that some provisions of the agreement make it difficult for developing countries to have access to essential medicines to resolve the health crisis in most parts of the developing world<sup>159</sup>.

Most developing countries from before colonisation have relied mainly on traditional medicines which explains why most of these countries have relatively small to no pharmaceutical industries to produce essential medicines<sup>160</sup> for their population. They therefore have to import essential medicines which are not only expensive but have been affected by the

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<sup>156</sup> Ibid

<sup>157</sup> Ibid

<sup>158</sup> See section 2.3.4b under Article 67 technical cooperation provision where the shortcomings of Article 67 were discussed.

<sup>159</sup> Mercurio B C, 'TRIPs, Patents, And Access To Life-Saving Drugs In The Developing World' (2004) 8 Marq. Intell. Prop. L. Rev. 211 pg 212

<sup>160</sup> The WHO defines essential medicines as those drugs that "satisfy the priority health care needs of the population. They are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness". They are also meant to be "available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality and adequate information, and at a price the individual and the community can afford" See [http://www.who.int/topics/essential\\_medicines/en/](http://www.who.int/topics/essential_medicines/en/) [last accessed 14/05/2014]

standards of IP rights imposed by the TRIPs agreement and the TRIPs-plus standards<sup>161</sup>.

IP protection of vaccines is usually through manufacturer's know-how and process or product patenting set for a certain period. This means that the manufacturer's know-how may be held for the period the manufacturer wishes which could be used to prevent access and process patenting could limit access to new future technological development in the field<sup>162</sup>. IP standards in encouraging the exclusion of competitors in this field have been said to allow the title owners the monopoly of raising the prices of medicines substantially above marginal costs<sup>163</sup>. The TRIPs-plus has also been described as imposing far stricter standards than the TRIPs agreement such as the extension of patent life beyond the stipulated 20 years TRIPs minimum<sup>164</sup>.

The TRIPs agreement however contains flexibilities that may give developing countries the access they need to essential medicines which they can take advantage of with the right technical expertise to do so. Such flexibilities include compulsory licencing; parallel importing; provisions relating to data protection; provisions relating to patentable subject matter, competition and control of competitive practices<sup>165</sup>. It should be noted that these flexibilities

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<sup>161</sup> Smith R D, Correa C, Oh C, 'Trade, TRIPS and Pharmaceuticals' (2009) *The Lancet* Vol. 373, Issue 9664, Pages 684-691. Pg 685

<sup>162</sup> Developing countries manufacturers have used the case of the patenting of a combination vaccine that uses aluminium phosphate which is a component of many combination vaccines to illustrate how patents could eventually limit the access to combination vaccines. Because the process of including aluminium phosphate in a vaccine has been patented, producers will now have to discover another way to achieve the same effect. See J Milstien, M Kaddar, 'Managing the Effects of TRIPS on Availability of Priority Vaccines' (2006) *Bulletin of the World Health Organisation* 84; 360-365 pg 362

<sup>163</sup> Ghanotakis E, 'How the U.S. Interpretation of Flexibilities Inherent in TRIPS affects Access to Medicines for Developing Countries' (2004) *JWIP Volume 7*, Issue 4, pgs 563-591. Pg 564

<sup>164</sup> Milstien J, Kaddar M (2006) *op.cit.*

<sup>165</sup> For a full list and overview of flexibilities available to developing countries under the TRIPS Agreement see Musungu S F, Villanueva S, Blasetti R, 'Utilizing TRIPS Flexibilities for Public Health Protection Through South-South Regional Frameworks' (2004) *South Centre South Perspective Series*. Pg 11-12

are not limited for use in accessing pharmaceutical products; they could also be used in the protection of biodiversity and generally in circumstances that may support economic development in developing and least developed countries<sup>166</sup>.

Studies show that despite these flexibilities being in place, not many developing countries have actually taken their full advantage to provide for the public health needs of their population and towards their development priorities<sup>167</sup>.

It has been suggested that one of the reasons for this is due to political pressure from developed countries such as the United States stemming from bilateral and free-trade agreements<sup>168</sup>. In a recent publication by Third World Network<sup>169</sup>, the Geneva based South Centre cautioned the US about continuing to put pressure on India and other developing countries to adopt IP standards that are beyond the minimum standards stipulated by the TRIPs agreement and not make use of the flexibilities available to them. It was further emphasised that the continued pressure would have adverse effect on developing countries development and also prevent measures that would benefit public health<sup>170</sup>.

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<sup>166</sup> See 'Advice on Flexibilities Under the TRIPS Agreement' WIPO publication available at [http://www.wipo.int/ip-development/en/legislative\\_assistance/advice\\_trips.html](http://www.wipo.int/ip-development/en/legislative_assistance/advice_trips.html) last accessed [20/05/14]

<sup>167</sup> See Matthews D, 'TRIPS Flexibilities And Access to Medicines in Developing Countries: The Problem with Technical Assistance and Free Trade Agreements' (2005) EIPR pg 420 ; S.F Musungu, S Villanueva, R Blasetti, op.cit and Third World Network, 'South encouraged to use TRIPS flexibilities for public health' (2014) TWN Info Service on WTO and Trade Issues, TWN Publication. Available at <http://www.twinside.org.sg/title2/health.info/2014/hi140301.htm> accessed [20/05/14]

<sup>168</sup> For a detailed discussion on the effect of bilateral free trade agreements on developing countries see C Correa, 'Implications of Bilateral Free Trade Agreements on Access to Medicines' (2006) Bulletin of the WHO 84(5) 399-405; E Ghanotakis, op.cit.

<sup>169</sup> ibid

<sup>170</sup> ibid

Another reason suggested is the lack of local technical and institutional capacity to understand and make use the flexibilities<sup>171</sup> in some developing countries. It was discussed in chapter 1 section 2.1 that the uneven development of IP across developing countries means that some developing countries are more technologically advanced more than others in making use of IPTA programs which will be beneficial to their understanding and making use of the flexibilities available to them. A close examination of the compulsory licence provision included in the agreement and a look at a few developing countries that have made use of this flexibility illustrates this.

The grant of compulsory licences is one of the flexibilities available to developing countries which could allow developing countries government to produce generic medicines without the authorization of the patent owner. The result is that the medicines would then cost considerably less than patented proprietary medicines<sup>172</sup>. This flexibility is contained in Article 8 (1) and Article 31 of the TRIPs agreement. Article 8(1) provides that *“Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.”*<sup>173</sup>

Article 31 provides for other use of the subject matter of a patent without the authorization of the patent holder by government or third parties authorised by the government subject to set out conditions<sup>174</sup>. It is noted that even though the above article does not particularly use the term compulsory licence, nevertheless this term was expressly used in the text of the Doha

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<sup>171</sup> Matthews D(2005),.op.cit.420

<sup>172</sup> Matthews D, ‘WTO Decision on Implementation of Paragraph 6 of the DOHA Declaration on the TRIPs Agreement and Public Health: A Solution to the Access To Essential Medicines Problems?’ (2003) JIEL Vol7 Issue 1 pg4

<sup>173</sup> See The TRIPs Agreement available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) pg 323

<sup>174</sup> Ibid @pg 333

Declaration<sup>175</sup> and it has been suggested that the fact that it permits the use of the subject matter of a patent without authorization of the patent holder is in effect a compulsory licence<sup>176</sup>. This means that the public interest goal in certain circumstances allowed under the provision outweighs the private rights of the patent holder<sup>177</sup>.

For any country to be able to use the compulsory licence provision, it is pointed out that the provision presupposes that the country already has the capacity and infrastructure in place to exploit it which means that certain conditions must be met which require financial capital and technical expertise<sup>178</sup>. Such conditions include the existence of domestic pharmaceutical manufacturing capacity and local research capability; legal and political infrastructures for the supervision of the licence and regulatory measures to monitor quality control and the use of the medicines<sup>179</sup>.

It has been argued that most developing countries do not have the technical expertise and resources to meet the conditions necessary to take advantage of the compulsory licence provision therefore the need for effective TA in this area continues to be emphasized<sup>180</sup>. The need for technical expertise is illustrated starting with understanding the complexity of the conditions set out in the Article 31 provision itself<sup>181</sup>.

The provision in Article 31(b) states that the use of the flexibility is allowed only *“if prior to such use, the proposed user has made efforts to obtain*

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<sup>175</sup> See the text of the Doha Declaration on the TRIPs agreement and Public Health available at [http://www.wto.org/english/res\\_e/booksp\\_e/ddec\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/ddec_e.pdf) pg25

<sup>176</sup> Matthews D(2003) ,op.cit.

<sup>177</sup> ibid

<sup>178</sup> Abbot F M , ‘WTO TRIPs Agreement and Its Implications for Access to Medicine in Developing Countries’ (2002) Study Paper 2a, United Kingdom Commission on Intellectual Property Rights. Available at SSRN: <http://ssrn.com/abstract=1924420> accessed[21/05/14] pg 13-14

<sup>179</sup> Musungu S F, Villanueva S, Blasetti R(2004),.op.cit pg3

<sup>180</sup> Ibid @ pg24 ; Matthews D(2005) op.cit @420

<sup>181</sup> Matthews D(2005) op.cit, pg 420-421

*authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use...*<sup>182</sup>

The above provision has been criticised as being unclear as it may be difficult for developing countries to have the level of expertise necessary to adequately interpret the exact meaning<sup>183</sup>. This is also the case with Article 31(h) of the agreement which sets out the condition for the payment of remuneration to the patent right holder. It was pointed out that the provision stating the expected remuneration to be “adequate” and to take “into account the economic value of the authorization” could be problematic for developing countries who may find it difficult to calculate what this remuneration should be<sup>184</sup>.

Despite the issues discussed above, some developing countries such as Malaysia, Zimbabwe, Zambia and Mozambique have attempted to use the compulsory licence flexibility<sup>185</sup>. The use of this flexibility in these countries shows that it was not only a challenging experience but thereafter there was the general difficulty in accessing its full impact in relation to access to essential medicines.

The experience in Malaysia showed that as a result of overlapping government agencies such as the Ministry of Health and the Ministry of Domestic Trade and Consumer Affairs which was responsible for the administration of IP system, the process of deliberating and getting the

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<sup>182</sup> The TRIPs Agreement available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) pg 333

<sup>183</sup> Matthews D(2005) op.cit, pg 420-421

<sup>184</sup> ibid

<sup>185</sup> Oh C, ‘Compulsory Licences: Recent Experiences in Developing Countries’ (2006) Int. J. Intellectual Property Management Vol.1. Nos. ½. 2006. Pg 24-31

approval of all those involved for the government use authorisation proved to be a tedious and lengthy process<sup>186</sup>.

In Malaysia and Zimbabwe, the remuneration to be paid the patent holder was not specified which was not in accordance with the condition set out in Article 31(h) providing for the adequate remuneration of the patent holder<sup>187</sup>.

It was also observed that in Mozambique and Zambia there was a difficulty in obtaining current and accurate information regarding the patent status of essential medicines. This is said to be an issue that is common to most developing countries as they often lack the resources and technical expertise required to conduct patent searches<sup>188</sup>. Most of the newer essential medicines are now under patent protection, as a result, the ability to obtain the patent status of medicines in countries and regions plays an important role in the decision making process of obtaining essential medicines<sup>189</sup>. Developing countries therefore need to be equipped to perform the necessary searches needed to make use of the compulsory licence flexibility.

In 2012, the UNDP published a methodology designed to facilitate quick and easy patent searches in developing countries from databases which are publicly available and free. While this is a very positive step towards the informed and effective use of the available TRIPs flexibilities, this methodology however still requires TA in form of training workshops to show the participating developing countries how to use this methodology. The methodology also involves steps that require developing a patent resource database and an analysis of patent claims all of which require some level of technical expertise<sup>190</sup>.

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<sup>186</sup> Ibid

<sup>187</sup> Ibid

<sup>188</sup> UNDP Publication, 'Patent Information and Transparency: A Methodology for Patent Searches on Essential Medicines in Developing Countries' (2012) UNDP New York. Pg 9-10

<sup>189</sup> Ibid @pg3

<sup>190</sup> Ibid

## 2.4 Conclusion

This chapter has discussed the introduction of IP in developing countries and the beginning of their journey in global IP to give an understanding of their need for IPTA.

The historical perspective shows that even though their introduction to IP was as a result of colonisation, after independence most developing countries established their memberships in international IP agreements but they have struggled to be players in the global field since then. The low economic conditions and low technological development in these countries meant that they have participated from a disadvantaged position hence their need for TA.

The chapter also discussed how each review of the Berne and Paris Convention brought higher set of IP standards which caused developing countries to become conscious of their disadvantaged positions as members of these agreements. Developing countries therefore struggled for concessions to be made for them and for the provision of TA that would take their local conditions into consideration with very little success.

Under the TRIPS agreement, some concessions and TA programs were made available to developing and less-developed countries however these countries still struggled not only with fulfilling their obligations but also making use of the available provisions to further their development. As the chapter shows, the Article 67 provision on TA was criticized as not being a firm obligation or commitment to developing countries TA needs and it also lacked internationally shared guidelines for implementation. The result was TA programs that did not take into consideration the specific conditions in the different developing countries and the poor implementation of those programs made available.

In addition to TA provided by developed countries under article 67, international organisations such as the World Intellectual Property Organisation (WIPO), World Trade Organisation (WTO), the World Health Organisation (WHO) and the European Commission have provided TA to

developing countries in various forms since the advent of the TRIPs agreement. The most significant of these efforts have come from WIPO. WIPO has been very active in this area and has over the years made significant contributions to developing countries IPTA needs by increasing its efforts in the provision of tailored TA programs using its considerable resources. The WTO and WIPO secretariats also came together to launch an initiative<sup>191</sup> in the field of technical cooperation in an effort to maximize the assistance provided for developing countries that took up the obligation to conform to TRIPs by the year 2000.

These two organisations have become significant to the development of IP in developing and less-developed countries. Developing countries continue to rely on their support and advice on the use of IP, the next chapter will therefore discuss the development roles of these two organisations, their TA programs, the types of assistance provided and their effectiveness on developing countries IP.

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<sup>191</sup> See the Agreement Between the World Intellectual Property Organization and the World Trade Organization (of December 22, 1995) available at [http://www.wipo.int/export/sites/www/treaties/en/agreement/pdf/trtdocs\\_wo030.pdf](http://www.wipo.int/export/sites/www/treaties/en/agreement/pdf/trtdocs_wo030.pdf) accessed [30/12/14]

## Chapter 2

# Technical Assistance in the WTO and WIPO

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### 3.1 Introduction

Intellectual Property Technical Assistance (IPTA) providers are commonly grouped under International institution providers such as the WTO and WIPO, bilateral providers such as the United States and the European Patent Office (EPO) and non-traditional providers such as non-governmental organisations. These programs usually involve long term or short term skills and capacity development within the recipient country and also in form of financial contributions<sup>192</sup>.

Many TA providers have done a great amount of work generally in providing TA to developing countries over the years in terms of assisting to develop modern IP systems, creating and maintaining effective systems of enforcement and revising current IP policies and legislations<sup>193</sup>. However for the purpose of this thesis, this chapter will focus on the work of the WTO and WIPO in this area. This because of all the IPTA providers WIPO is considered to be the largest TA provider to developing and least developed countries<sup>194</sup>. The WTO TA is also significant here because the TRIPS Agreement which is considered to be the most comprehensive agreement on IP rights is under the auspices of the WTO<sup>195</sup>.

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<sup>192</sup> Sagar R, 'Identifying models of best practices in the provision of technical assistance to facilitate the implementation of the TRIPs Agreement'(2006) IPDEV Work Programme 4:Report. Queen Mary Intellectual Property Research Institute. Pg11

<sup>193</sup> SAANA Consulting, 'Analysing the Impact of IP Technical Assistance' (2011) UK IPO Report pg 5

<sup>194</sup> Ibid

<sup>195</sup> Correa C, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPs Agreement*, 2007, Oxford University Press. pg1

The WTO and WIPO both come under international institution providers and they have both been very significant in financing and delivering TA programs to developing countries with a particular focus on trade and IP matters<sup>196</sup>.

The WTO website states that the development dimension of the multilateral trading system has TA and training as core elements<sup>197</sup>, the WIPO website also states the commitment of the organisation in the delivery of extensive capacity building and training programs<sup>198</sup>. During the early years of TA provision in these two organisations, the programs were said to have been lacking and not particularly development focused or country specific, the programs were said to have been more inclined towards assisting developing and least-developed countries in adjusting to trade rules and fulfilling their obligations under various international agreements rather than a focus on broader development objectives that would benefit them.

Over the years, TA has evolved in these two organisations and many of the earlier criticisms have been addressed or improved upon. It was mentioned in the introduction of chapter 1 of this thesis that WIPO in the recent years established the DA in which TA programs are improved and designed towards development oriented results. The DA therefore presently stands as a significant revision of the previous approach in the design and delivery of TA programs.

Before discussing the DA, this chapter looks at the overview, structure and the delivery of TA programs overtime in these two organisations to understand how TA programs have evolved before the establishment of the DA. The capacity building roles of both the WTO and WIPO will also be discussed before going on to examine the WIPO-WTO cooperation

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<sup>196</sup> Kostecki M, 'What Technical Assistance to Redress the balance in favour of developing nations' (2006) ICTSD paper issue no 12. International Centre for Trade and Sustainable Development (ICTSD) International Environment House 2, 7 Chemin de Balexert, 1219 Geneva, Switzerland pg2

<sup>197</sup> See WTO Technical Assistance and Training [Online] Available at [https://www.wto.org/english/tratop\\_e/devel\\_e/teccop\\_e/tct\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm) accessed [05/08/15]

<sup>198</sup> See WIPO, WIPO Capacity Building [Online] Available at [http://www.wipo.int/cooperation/en/capacity\\_building/](http://www.wipo.int/cooperation/en/capacity_building/) accessed [09/10/14]

agreement in section 3.4 designed to jointly provide TA to developing countries and least developed countries on TRIPs matters.

## 3.2 The World Trade Organisation (WTO)

The World Trade Organisation (WTO) is described as one of the most indispensable organisations today in terms of international trade. It is a system based on the rule of law equipped with the appropriate legal instrument to resolve trade disputes as well as providing a forum for its members to negotiate trade rules and trade liberalization<sup>199</sup>.

The WTO recognises the importance of IP aspects in the sphere of international trade<sup>200</sup> and as mentioned in the introduction, the TRIPs agreement which is described to be the most comprehensive agreement on IP rights brings IP under the auspices of the WTO<sup>201</sup>. Its membership consists of a large number of developing countries which obliges them to comply with the minimum level of IP protection and enforcement stipulated by the TRIPs agreement.

The WTO agreements also contain provisions that call on members to implement the agreements in ways that recognise and safeguard the interests of developing countries and least developed countries<sup>202</sup>. The provisions safeguarding the interests of developing countries makes it clear that there is the distinction within the WTO between the countries that are considered 'developed' and those considered to be 'developing'<sup>203</sup>.

There is however no specific definition for 'developed' and 'developing' countries found on the WTO website<sup>204</sup>. According to the WTO, responsibility falls on the member countries to declare which of the two categories they

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<sup>199</sup> Panitchpakdi S, 'Reflections on the Last three years of the WTO' (2005) World Trade Review UK 367 pg367

<sup>200</sup> Khlestov N, 'WTO-WIPO Corporation: Does it have a future?' (1997) EIPR 560 pg 561

<sup>201</sup> Correa C (2007) op.cit pg1

<sup>202</sup> Nottage H, 'Trade and Competition in the WTO: pondering the applicability of special and differential treatment' (2003) JIEL 23 pg 4

<sup>203</sup> Ibid

<sup>204</sup> See the WTO website for the definition of 'developed' and 'developing' countries within the WTO at [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) accessed [19/07/2011]

come under and this could be challenged by other members where a member is trying to use the advantage of a developing country status. A developing country status confers certain rights on them, for example, they were allowed longer transition periods before they were required to implement the agreements. It also enables them to receive TA to assist them in fulfilling their obligations under the TRIPs agreement<sup>205</sup>.

To assist developing countries and least developed countries comply with the TRIPs agreement, the WTO has a specific mandate to carry out technical cooperation activities contained in various agreements and decisions<sup>206</sup>.

Technical cooperation and capacity building has been described as core elements of the development dimension of the multilateral trading system. The Doha Ministerial Declaration<sup>207</sup> mandate states that *“The delivery of WTO technical assistance shall be designed to assist developing and least-developed countries and low-income countries in transition to adjust to WTO rules and disciplines implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rules-based multilateral trading system. Priority shall also be accorded to small, vulnerable, and transition economies, as well as to members and observers without representation in Geneva. We reaffirm our support for the valuable work of the International Trade Centre, which should be enhanced.”*<sup>208</sup>

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<sup>205</sup> Ibid

<sup>206</sup> Ibid

<sup>207</sup> The Doha Ministerial Declaration which is described as an ‘agreement to negotiate’ was adopted in November 2001 at a meeting in Doha, Qatar attended by trade ministers from 142 member countries of the WTO. Its purpose was to provide a mandate to negotiate a range of issues covered by WTO agreements such as Agriculture, Services and Intellectual Property. One of the notable documents produced was the declaration on the TRIPs and Public Health which makes it possible for the TRIPs Agreement to be interpreted in a way that would support WTO member’s rights to protect Public Health and have access to medicines. See F M Abbot, ‘The Doha Declaration on the TRIPs Agreement and Public Health: Lighting a Dark Corner at the WTO’ (2002) JIEL 469-505; The Doha Declaration Explained available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm) accessed [02/01/2015]

<sup>208</sup> See WTO Doha mandate to carry out technical assistance activities available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#cooperation](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#cooperation) accessed [19/07/11]

The WTO's present commitment towards TA and capacity building for developing countries in the organisation has however not always been the case. It has been as a result of a long struggle on the part of developing countries from the period when the General Agreement on Tariffs and Trade (GATT) presided over world trade to the establishment of the WTO.

At the time GATT was established in 1947, out of the original twenty-three signatories, eleven were developing countries but there was no formal recognition of this group of countries nor was there any special provisions made for them. Developing countries consequently initially participated in GATT activities as equal partners with developed countries<sup>209</sup>. Developing countries soon challenged this situation by raising their concerns and identifying the special challenges they faced in international trade. They expressed that it was unrealistic to expect developing countries with their fragile economies to compete as equal partners with established industrialised economies<sup>210</sup>. This brought about the concept of special and differential treatment for developing countries. The concept was established to recognise the importance of applying special and differential measures to developing countries where appropriate and feasible which would provide them with more favourable treatment in the areas of trade negotiation<sup>211</sup>. It was introduced by the establishment of Part IV of the GATT added in 1965 which consisted of three articles containing provisions designed to promote developing countries interest in the trading system such as the recognition of the importance of improved market access to developing countries and the non-reciprocity principle<sup>212</sup>. The final phase towards negotiating an official

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<sup>209</sup> Nottage H (2003) op.cit pg 2

<sup>210</sup> Ibid

<sup>211</sup> Whalley J, 'Non-Discriminatory Discrimination: Special and Differential Treatment Under the GATT for Developing Countries' (1990) The Economic Journal, Vol. 100, No. 403, pp. 1318-1328. PG 1321-1324. See also Fritz T, 'Special and Differential Treatment for Developing Countries' (2005) Global Issue Paper, No. 18. Heinrich Böll Foundation pg8

<sup>212</sup> The non-reciprocity principle is described as a significant provision because it meant that *"developing countries would not be expected, in the course of trade negotiations, to make contributions inconsistent with their individual development, financial and trade needs"* See Keck A

framework for a special and differential provision for developing countries occurred during the GATT Tokyo round in 1979 which resulted in the adoption of the Framework Agreement known as the “*Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*”. This framework, also referred to as the “*Enabling Clause*” was described as the highpoint of the results of the 1979 GATT Tokyo round which continued to apply as part of GATT 1994<sup>213</sup>.

It has been pointed out that even though the provisions contained in Part IV were designed to promote the interest of developing countries, they were however not legally binding on developed countries to take particular actions in favour of developing countries. Nevertheless a Committee on Trade and Development was established thereafter with a mandate to oversee the application of the provisions including consultations needed and to consider modifications suggested by contracting parties<sup>214</sup>.

TA and capacity building was also part of the special and differential provisions offered by developed countries to assist developing countries in their integration into the trading system<sup>215</sup>. Technical cooperation and training programmes were said to have started in GATT from around 1955 and they were largely in the form of trade policy courses for developing countries officials. These courses were designed to train developing countries officials in trade policy issues and instruments used by governments and also to introduce GATT rules and procedures<sup>216</sup>. By 1974, GATT TA evolved with the establishment of a Special Assistance Unit with a mandate to be in close

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and Low P , ‘Special and Differential Treatment in the WTO : Why, When and How?’ (2004) World Trade Organization Economic Research and Statistics Division publication. pg 4

<sup>213</sup> See Differential and more favourable treatment reciprocity and fuller participation of developing countries available at [https://www.wto.org/english/docs\\_e/legal\\_e/enabling1979\\_e.htm](https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm) accessed [06/08/15]

<sup>214</sup> Michalopoulos C , *Emerging Powers in the WTO: Developing Countries and Trade in the 21<sup>st</sup> Century*, (2003) Palgrave Macmillan pg

<sup>215</sup> Njinkeu D, Cameron H, *Aid for Trade and Development*, (2007 ) Cambridge University Press. pg 47

<sup>216</sup> Boisard M A, Chossudovsky E M, *Multilateral Diplomacy: The United Nations System at Geneva. A Working Guide*, (1998) Kluwer Law International .pg 393

communication with developing countries officials in order to assist them with advice and information needed while they prepared for multilateral negotiations. The information included the provision of background materials on negotiating modalities<sup>217</sup>.

By the time the WTO was established in 1995, the TA efforts and the special and differential provisions were reflected in various WTO agreements.

The special and differential provisions were classed into five and they were the provisions increasing trade opportunities; the provisions that require the WTO members to safeguard the interests of developing countries; the provisions permitting developing countries to assume lesser obligations; the provisions relating to transitional time periods and the provisions relating to TA<sup>218</sup>.

Particularly important here is the Intellectual Property Related Technical Assistance (IPRTA) provision contained in Article 67 of the TRIPs agreement. Other areas in which TA was included which were mainly Trade Related Technical Assistance (TRTA) were provided in Article 9 and 10 of the Sanitary and Phytosanitary Agreement, Article 11 and 12 of the Agreement on Technical Barriers to trade, Article 3.3 of the Agreement on Preshipment Inspection, Article 27.2 of Understanding on Rules and Procedures Governing the Settlement of Dispute<sup>219</sup>.

It should be noted here that there is no great distinction between IPRTA and TRTA within the WTO; WTO makes it clear that many of the general TA activities of the secretariat also cover IP.<sup>220</sup>

Among the efforts the WTO made towards TA was the launch of a TA fund in 1995 to assist least developed countries particularly in Africa<sup>221</sup> and the

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<sup>217</sup> *ibid*

<sup>218</sup> Kessie E, *WTO law and developing countries* (2007) New York : Cambridge University Press, 2007 pg 23-33

<sup>219</sup> For Details on Trade Related Technical Assistance in the WTO, see the WTO website

<sup>220</sup> See Technical Cooperation in TRIPs area  
[http://www.wto.org/english/tratop\\_e/trips\\_e/intel9\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel9_e.htm) accessed[19/07/2011]

publication of a guideline in 1996 for WTO technical cooperation to help improve knowledge of multilateral trade rules and to assist in the implementation of commitments and full use of its provisions. TA during this period was in form of the development of information, training materials and training courses complimented by specialized technical seminars<sup>222</sup>. These capacity building efforts were pointed out as not being well coordinated with national objectives. Many of the TA provided were said to have been one-off events with little sustainable impact which created an overall focus on quantity and not quality. The shortcomings of the capacity building effort were put down to TA being outside the traditional competence of the WTO and also limited funding for the programs<sup>223</sup>.

Following the year 2000 deadline for developing countries to implement their obligations under the TRIPs agreement and their failure to meet these obligations, there was a renewed commitment within the WTO towards IPTA. A work programme was adopted in its Ministerial Declaration in November 2001 known as the Doha Development Round aimed at the fulfilment of its development objectives. According to the 2003 WTO world trade report, the Doha Development Round represented a departure from the previous GATT/WTO approach to TA and capacity building<sup>224</sup>. It was further emphasized that paragraph 38 of the declaration which put technical cooperation and capacity building as core elements of the development dimension of the multilateral trading system marked a significant expansion of the TA activities of the WTO<sup>225</sup>.

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<sup>221</sup> See the press release on Norway provides \$2.5million to launch a WTO fund for least developed countries available at [http://www.wto.org/english/news\\_e/pres95\\_e/pr9513\\_e.htm](http://www.wto.org/english/news_e/pres95_e/pr9513_e.htm) accessed [19/07/2011]

<sup>222</sup> Shaffer G, 'Can WTO Technical Assistance and Capacity-Building serve Developing Countries?' (2006) Wisconsin International Law Journal, Vol. 23, pp. 643-686 (2006) pg658

<sup>223</sup> Ibid

<sup>224</sup> See the 2003 World Trade Report Available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report\\_2003\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf) accessed [19/07/2011]

<sup>225</sup> Ibid

### 3.2.1 WTO Technical Assistance Activities

The WTO website sets out TA plans and annual reports on its activities. According to the WTO, each program is designed to target different needs, audiences, levels of knowledge and objectives taking into account the careful assessment of the needs of the participants and the expected benefits of the beneficiary countries<sup>226</sup>.

These programs are broadly classified into 5 categories summarized below<sup>227</sup>:

- General WTO-related TA and training activities which is designed to offer a broad understanding of all WTO-related matters. Usually directed to government officials with a broad overall WTO responsibility and a general knowledge of the WTO. They include the Geneva-based Trade Policy Courses (TPCs), as well as the field based Regional Trade Policy Courses (RTPCs), lasting up to twelve weeks.
- Specialized and advanced TA and training which addresses specific topics geared mainly towards specialists. They may cover any WTO subject and the main purpose is to address issues that cannot be covered in the general courses. They include national and/or regional seminars and workshops as well as courses and can be held in Geneva or in the field. This category includes, inter alia, a Programme for Government Senior Officials and a Course on Trade Negotiations Skills.

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<sup>226</sup> WTO Development Dimension: Doha Development Agenda, Aid for Trade, the Enhanced Integrated Framework (EIF) and Technical Assistance (TA) and Training (or TRTA) Available at [https://etraining.wto.org/admin/files/Course\\_179/Module\\_538/ModuleDocuments/eWTO-M9-R1-E.pdf](https://etraining.wto.org/admin/files/Course_179/Module_538/ModuleDocuments/eWTO-M9-R1-E.pdf) accessed [ 19/07/11]

<sup>227</sup> Ibid. For detailed information on WTO technical assistance training and products see [http://www.wto.org/english/tratop\\_e/devel\\_e/train\\_e/course\\_details\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/train_e/course_details_e.htm) accessed [ 19/07/11]

- E-Learning programme which takes full advantage of information technology and the Internet as a complement or alternative to traditional training face-to-face programmes. This programme does not require the simultaneous presence of trainees and trainers in Geneva or elsewhere. Each type of product targets different categories of participants and meets distinct needs. It includes the eTraining Programme, which provides interactive courses over the internet for government officials .It also includes a number of computer-based self-training modules available online through the WTO Webpage or on CD-ROM/DVDs.
- Academic support for training and capacity-building. This is a part of the Secretariat's effort to develop partnerships with the trade policy-related academic community in Member countries. These partnerships are designed to promote "joined up" capacity-building, simultaneously enhancing the academic capacity for such training in developing countries and promoting WTO-relevant research intended to strengthen their negotiating capacity. It ranges from national workshops for academics to a PhD support programme.
- Trainee programmes and internships. The objective here is to build human capacities in a systematic and cumulative manner. They provide an opportunity to officials to provide support to the respective beneficiaries' permanent missions or to the coordinators of selected WTO regional groups.

In addition to the implementation of the above programs, ensuring the success of the programs also means a commitment within the WTO to help the beneficiaries of the programs in assessing their needs. In its capacity building role, the WTO deal with various challenges such its ability to be able to meet the demands of such assistance, the ability to make the plans correspond to the needs of the beneficiaries and the difficulty of ensuring that its TA programs are integrated into larger development strategies. There is also the obvious risk of dependency which can undermine local capability unless TA is properly absorbed institutionally and socially. It has also been pointed out that the way TA is funded within the WTO could result in a

conflict between the TA needs of the recipient countries and how the donors want TA to be applied<sup>228</sup>. According to the WTO, funding for TA comes from three primary sources which are voluntary contributions from WTO members, the organisation's regular budget and cost sharing from international organisations or the countries involved in an event<sup>229</sup>. It has however been pointed out that because majority of the funding for TA comes from members contributions<sup>230</sup> there could be an issue of the donors controlling how the money is used which may not respond to the needs and priorities of recipient countries.

While it is important to pay attention to the challenges highlighted above in improving capacity building within the WTO, there is the obvious question of how capacity building fits into the WTO's core functions as a trade organisation. It is therefore useful to consider what the capacity building role of the organisation is in relation to its conventional mandate.

Capacity building in the early years of the WTO was said to have been conceived narrowly in terms of compliance only<sup>231</sup>. The provision of TA by the WTO was mainly to ensure developing countries implementation of their obligations under the international agreements rather than to empower developing countries to better understand WTO rules and negotiating mandates in relation to their development objectives and integrate these objectives in their development plans<sup>232</sup>.

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<sup>228</sup> A developing country official remarked that when TA has been provided on agricultural issues WTO officials have gone to countries to tell them what to do and not to educate them on how to analyse and review options and their implications. See Ibid @ pg667

<sup>229</sup> See Understanding the WTO: Developing countries WTO Technical Cooperation, Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev3_e.htm) accessed {10/08/15]

<sup>230</sup> Over a four year period from 2002, The Doha Development Agenda Global Trust Fund which was established in 2002 to receive extra budgetary contributions from WTO Members to finance the implementation of the annual TA plans contributed a total of about \$55.5 million compared to the \$18.8 million contribution from the regular WTO budget. See Shaffer G(2006) op.cit pg 661

<sup>231</sup> Tandon Y , Technical Assistance as a Political Instrument.Chap.in *The Reality of Trade: The WTO and Developing Countries*, eds Blouin C (2002) The North-South Institute Publication pg 62-63

<sup>232</sup> Shaffer G(2006) op.cit

This is illustrated examining the provision on TA contained in Article 67 of the WTO TRIPs agreement discussed in chapter 1. This provision was for developed countries to provide financial and TA in favour of developing countries and least developed countries. The article however starts by providing that “*In order to facilitate the implementation of this Agreement...*”<sup>233</sup> It has been pointed out that this opening presented TA here only as a means to assist developing countries in the implementation of their WTO obligations<sup>234</sup>. The WTO also describes itself as a member driven organisation, the Secretariat and members refer to the organisation as a ‘contract’ organisation due to its function in facilitating the negotiation of trade agreements and overseeing the implementation of the resulting contractual commitments<sup>235</sup>.

It could therefore be deduced that WTO’s provision of IPTA is directly linked to its primary obligation in ensuring the implementation of trade agreements.

The issue here as it has been pointed out is that if capacity building programs are simply created for this purpose, these programs will serve a limited and donor driven purpose. The donors of TA are said to usually offer TA to developing countries to accept the expanding mandate of the WTO with a promise that the TA provided will help developing countries cope with the expanding agenda. The programs would then be seen as proof that the industrialised countries are fulfilling their obligations to developing countries whilst really the programs are ultimately serving the interests of the donors rather than the recipients<sup>236</sup>. Because of this, developing countries are said to be weary and have generally viewed the WTO Secretariat’s TA provision with

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<sup>233</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1C . Available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) pg 348 accessed [29/04/2014]

<sup>234</sup> Shaffer G(2006) op.cit

<sup>235</sup> ibid

<sup>236</sup> Tandon (2002)op.cit

reservation as it is believed that the Secretariat could be advancing only the interests of the donors<sup>237</sup>.

Developing countries are also of the view that the Secretariat conducts its mission to promote rules rather than to clarify them and go about it in an open-ended manner<sup>238</sup>. According to an international development agency official, when members of the WTO Secretariat travel to a developing country to provide TA, they do not engage in questions as to whether a WTO rule is good or bad for their development and the possible implementation options they may have. The official maintained that WTO Secretariat members were generally discouraged from offering counsel as to how WTO obligation could be interpreted by a country to facilitate development objectives. This makes developing countries feel they have to continually fight for their interests to be put into consideration<sup>239</sup>.

This is perhaps not surprising since the organisation stated that its core mandate involves setting trade rules between nations and ensuring that trade flows as smoothly and freely as possible. It made it clear that even though the organisation has the responsibility of ensuring that the countries effectively participate and benefit from world trade, the organisation was not however a development agency therefore development assistance was not part of its core activities<sup>240</sup>.

However with the advent of the TRIPs agreement as discussed in chapter one, WTO's involvement in the provision of TA to developing countries became crucial in enabling them meet their commitments under the agreement. Development could not be too far from the organisation's core activities as seen in the cooperation agreement entered into with WIPO to provide TA which will be discussed in section 3.4.

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<sup>237</sup> Shaffer G (2006) op.cit

<sup>238</sup> ibid

<sup>239</sup> Ibid

<sup>240</sup> See the WTO Aid for Trade Fact Sheet. Available at [http://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/a4t\\_factsheet\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm) accessed [10/09/2014]

### 3.3 World Intellectual Property Organisation (WIPO)

WIPO was established in 1970 after the entry into force of the 1967 WIPO Convention. It replaced the Bureaux Internationaux réunis pour la protection de la propriété intellectuelle (BIRPI) which was the secretariat to the Paris Convention for the protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Work<sup>241</sup>.

WIPO is a specialised UN agency and the leading intergovernmental organization dedicated to the use and protection of IP. One of WIPO's core activities is development, it has the mandate to assist governments and organisations in developing and least developed countries by providing TA and capacity building particularly in the area of IP<sup>242</sup>.

Unlike the WTO, WIPO is dedicated to IP which means that it has advantages in the context of IP relations and personnel with specific expertise in IP. WIPO has the history of attention to developing countries interests<sup>243</sup>. It also has the infrastructure to provide support for IP administrations which is believed to be because of the budgetary independence it enjoys as a result of the services it provides such as services to patent applicants under the Patent Cooperation Treaty (PCT)<sup>244</sup>. It has been suggested that the financial contribution made by WIPO services make it possible for WIPO officials to travel for development related activities

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<sup>241</sup> Shashikant S (2005) op.cit pg 169-170

<sup>242</sup> WIPO, *A Users' Guide: An Introduction to the Organization for Delegates* (2011) available at [http://www.wipo.int/edocs/pubdocs/en/general/1040/wipo\\_pub\\_1040.pdf](http://www.wipo.int/edocs/pubdocs/en/general/1040/wipo_pub_1040.pdf) accessed [ 18/12/14] pg5

<sup>243</sup> Abbott F M, 'Distributed Governance at WTO-WIPO-An Evolving Model For Open-Architecture Integrated Governance ' (2000) JIEL pg 67

<sup>244</sup> The PCT makes it possible to seek patent protection for an invention simultaneously in a large number of countries by filing a single "international" patent application instead of filing several separate national or regional patent applications see PCT FAQs [Online] Available at <http://www.wipo.int/pct/en/faqs/faqs.html> accessed [10/08/2015]

such as TA and norm creation and to get the information needed for such activities<sup>245</sup>.

WIPO's goal is that IP should stimulate development in developing countries. In a statement made by the Director General of WIPO on its TA activities, he stated that the organisation's objective was to be in a position to provide training and advice where IP played a significant and realistic role in developing countries economic goals. Developing countries require trained persons, well-equipped and well-functioning IP offices and adequate legislation and WIPO aims to provide advice and training when needed.<sup>246</sup>

The Development sector within WIPO coordinates the implementation of TA and capacity building activities including the work of substantive sectors and programs which aims at contributing towards the reduction of the knowledge gap and greater participation of the developing and least developed countries in deriving benefits of the knowledge economy<sup>247</sup>. WIPO sets out its policy objectives for TA programme in a document called '*Medium Term Plan for WIPO Program Activities-Vision and Strategic Direction for WIPO*'<sup>248</sup> The policy framework guiding its TA programs is that every country should be encouraged to develop an IP culture appropriate to its needs that includes the most suitable IP infrastructure, a focused IP strategy and encouraging a nation-wide perception of IP as a powerful tool for economic, social and cultural development<sup>249</sup>.

The Policy framework also states that National IP systems in developing countries should maintain a balance between the interests of holders of IPRs

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<sup>245</sup> Ryan M P, 'Adaptation and Change at the World Intellectual Property Organisation' (1998) JWIP VL 1, Issue 3 pg 516-517

<sup>246</sup> Ryan M P (1998) pg510-511

<sup>247</sup> WIPO Secretariat, 'Terms of Reference for the Review WIPO'S Technical Assistance Activities in the Area of Cooperation for Development' (2010)

<sup>248</sup> WIPO, *Medium-Term Plan for WIPO Program Activities -Vision and Strategic Direction of WIPO* (2003) Available at [http://www.wipo.int/edocs/mdocs/govbody/en/a\\_39/a\\_39\\_5.pdf](http://www.wipo.int/edocs/mdocs/govbody/en/a_39/a_39_5.pdf) accessed [19/07/11]

<sup>249</sup> Pengelly T(2005) op.cit pg 17

and those of the public while being mindful of national policy objectives. It also emphasizes that national IP systems should be consistent with international IP treaties and international agreements.

WIPO has been providing TA to developing countries for more than 30 years<sup>250</sup> and remains the main multilateral provider of IPTA.<sup>251</sup> The details of some of those TA activities are discussed in the next section.

### 3.3.1 WIPO Technical Assistance Activities

WIPO's IPTA can be categorised into four main areas<sup>252</sup>:

- Legislative advice which involves submission of draft laws to member states, comments on draft laws prepared by member states, advisory visits and general legal advice.
- Human resource development and training are mainly organised by the WIPO worldwide academy and it consists of teaching, training and research in IP.
- Institutional development and automation which includes advisory technical services to assist developing countries in utilizing appropriate information technologies, administrative work of IP offices, knowledge transfer for the execution and deployment of automation projects and training of IP offices staff.

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<sup>250</sup> Deere C, Marchant R, 'The Technical Assistance Principles of the WIPO Development Agenda and their Practical Implementation' (2010) ICTSD Programme on IPRs and Sustainable Development pg3

<sup>251</sup> South Centre , 'Establishing a 'Development Agenda' for the World Intellectual Property Organization (WIPO): Commentary on Proposal by Argentina and Brazil (2004) South Centre Analytical Note pg 6

<sup>252</sup> WIPO, *Information on WIPO Development activities* (2000-2005) WIPO publication. Available at [http://www.wipo.int/tad/en/docs/wipo\\_edc\\_inf\\_1\\_rev.pdf](http://www.wipo.int/tad/en/docs/wipo_edc_inf_1_rev.pdf) accessed [19/07/2011]

- Enforcement is about the enforcement provisions of the agreements which developing countries are signatories.

The capacity building programs conducted in developing countries consists of the activities such as<sup>253</sup>

- Training general and specialist personnel working with authorities and institutions in technical and managerial aspects of IPR administration.
- Providing consistent and customized legislative guidance, technical expertise and limited financial assistance for building up and organizing national and regional IP institutions.
- Providing technical support primarily in the form of provision of software and library stock, provision of hardware and advice on information and documentation.
- International patent co-operation and development of global IP protection.
- Promoting public awareness of IP and promotion of an IP culture to encourage the public to obtain use and licence IPRs and assets, creators and innovators.

WIPO's early TA programs have varied and expanded over time. In the early years the programs were almost exclusively reserved for patent and industrial property matters until it later expanded to copyright which was of equal importance.<sup>254</sup> In 1970, WIPO conducted 10 programmes which consisted of 8 patents, 1 trademark and 1 copyright programme. By the 1980's, the programmes conducted by WIPO had increased to about 30 programmes which included 20 patent, 2 trademark and 8 copyright programmes<sup>255</sup>.

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<sup>253</sup> Pengelly T (2005) op.cit

<sup>254</sup> Ryan M P (1998) op.cit. pg 511

<sup>255</sup> Ibid

These programs involved professional staff from WIPO as well as outside experts. Most of the courses were held in developing countries with curricula that emphasized either copyright or neighbouring rights; role and functioning of a patent office or enforcement, judicial practices and mock trials. Some of the programs were held in Geneva, The Hague or Munich such as the main annual industrial property course offered since 1978 and the main annual copyright course since 1988<sup>256</sup>.

The organisation has also been instrumental in creating the International Federation of Inventors' Associations and sponsors periodic conferences regarding inventions and innovation and the role of IP policy. To this end, in 1979, it created an annual award for inventors which it called the 'WIPO GOLD Medal' by early 1990's there were 294 winners of which 155 were from developing countries<sup>257</sup>.

WIPO also provides one on one consulting missions which the organisation has developed over the years. WIPO staffs have gone on several hundred annual missions to offer advice on diverse IP issues<sup>258</sup>.

WIPO activities also include occasional courses that involved tours for participants such as university IP law professors who are taken to top IP law programmes in Europe and the United States and the International Association for the Advancement of Teaching and Research in IP, established by WIPO in 1981. Amongst WIPO's highest profile activities was the decision regarding where national and regional training courses were to be offered in any given year, membership diplomacy called for sensitive judgements therefore such decisions were made at the highest level within WIPO<sup>259</sup>.

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<sup>256</sup> Ibid

<sup>257</sup> Ibid

<sup>258</sup> Ibid

<sup>259</sup> Ibid

From the mid 1990's, WIPO's TA activities became largely influenced by the agreement made with WTO to provide legal and TA in relation to the implementation of the TRIPs agreement. This agreement, often referred to as the WIPO-WTO Agreement is discussed in the next section.

### 3.4 WIPO-WTO Agreement

Prior to the Uruguay round in the WTO, at the multilateral level, WIPO was the main institution responsible for regulating the field of IP rights. Developed countries then attempted to move IPRs from the WIPO to the WTO mainly because they felt that WIPO lacked an effective enforcement mechanism<sup>260</sup>. However, by the time of the conclusion of the TRIPs agreement at the Uruguay round in 1994, it ushered in an era of mutual recognition of certain fundamental IP rights. By the conclusion of the TRIPs agreement, WIPO re-emerged as a forum for IP issues<sup>261</sup>.

As discussed under the TRIPs agreement in chapter 1, the agreement contained transitional arrangements for developing countries in complying with their obligations. These transitional arrangements however did not exempt them from the standards set out in TRIPs therefore these countries still struggled with implementation.

This resulted in a cooperation agreement between WIPO and the WTO designed as a joint initiative in which both organisations were to support each other in providing TA to developing countries in TRIPs matters thereby maximizing the usefulness of their TA provisions. Under the agreement, WIPO was to provide TA to all the developing country members of either the WTO or WIPO and the WTO was to do the same<sup>262</sup>.

This agreement was initially pushed by the United States to avoid recreating the functions of WIPO as an institution in the WTO. Other reasons given include WIPO having more man power in this regard than the WTO as discussed under WIPO in section 3.3 and also because developing countries were already accustomed to going to WIPO for assistance.<sup>263</sup>

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<sup>260</sup> Abott F M (2000) op.cit pg66

<sup>261</sup> Cheek M L, 'The Limits of Informal Regulatory Cooperation in International Affairs: A review of the Global Intellectual Property regime' (2001) 33 Geo. Wash. Int'l L. Rev. 279 pg288

<sup>262</sup> Salmon P, 'Cooperation Between The World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO)' (2003) 17 St.John's J.Legal Comment. 429 pg434

<sup>263</sup> ibid

The text of the Agreement contained in Article 4 of the Agreement between the World Intellectual Property Organization and the World Trade Organization of December 22, 1995 states that:

*“(1) [Availability of Legal-Technical Assistance and Technical Cooperation] The International Bureau shall make available to developing country WTO Members which are not Member States of WIPO the same legal-technical assistance relating to the TRIPs Agreement as it makes available to Member States of WIPO which are developing countries. The WTO Secretariat shall make available to Member States of WIPO which are developing countries and are not WTO Members the same technical cooperation relating to the TRIPs Agreement as it makes available to developing country WTO Members.*

*(2) [Cooperation Between the International Bureau and the WTO Secretariat] The International Bureau and the WTO Secretariat shall enhance cooperation in their legal-technical assistance and technical cooperation activities relating to the TRIPs Agreement for developing countries, so as to maximize the usefulness of those activities and ensure their mutually supportive nature.*

*(3) [Exchange of Information] For the purposes of paragraphs (1) and (2), the International Bureau and the WTO Secretariat shall keep in regular contact and exchange non-confidential information.”<sup>264</sup>*

The joint initiative between WIPO and the WTO was in form of a joint communication between the Directors of the two organisations, Mr Renato Ruggiero of WTO and Mr Kamil Idris of WIPO, which was then sent to the ministers of the developing countries concerned. This was followed by letters of acknowledgement and request for assistance from about 32 countries or territories. This request prompted the two organisations to meet on several occasions to discuss how their effort could be coordinated and the joint handling of specific requests by holding joint consultation with the requesting

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<sup>264</sup> Text available on the WIPO website at

[http://www.wipo.int/export/sites/www/treaties/en/agreement/pdf/trtdocs\\_wo030.pdf](http://www.wipo.int/export/sites/www/treaties/en/agreement/pdf/trtdocs_wo030.pdf) accessed [19/07/2011]

countries where needed<sup>265</sup>. It should be noted that this joint initiative between WIPO and WTO was with an understanding that the bulk of the TA would come from WIPO<sup>266</sup>.

In 1998, in anticipation of the January 1 2000 deadline for the developing countries to fulfil their obligations under TRIPs, both organisations jointly notified all developing countries of the coming deadline and made them aware of the TA available to them. A similar notification was sent to the least developed countries when they approached their 2005 deadline for TRIPs implementation. In response to these notifications, WIPO provided legislative assistance and training to over 100 countries<sup>267</sup>.

WIPO's cooperation for development activities is organised within the organisation into several units. There are four regional bureaus for each developing country region within WIPO. There is also the WIPO academy which was founded in March 1998 and it is responsible for wide and growing specialized courses on all aspects of IP and its management. The academy designs tailored programs to equip and expand the number of target groups with specialist knowledge and tools they need to effectively manage their IP assets and find their way around the IP system. There are different groups that benefit from these programs like inventors and creators, IP professionals, government officials of IP institutions, diplomats and student and teachers of IP. These programs are delivered both by traditional face to face method as well as distant learning<sup>268</sup>. The WIPO academy was established to supplement the assistance provided by WIPO in this field<sup>269</sup>.

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<sup>265</sup> WIPO, *Legal and Technical Assistance to Developing Countries for the Implementation of the TRIPS Agreement from January 1, 1996 to March 31, 1999*. WIPO Document WO/GA/24/5 pg18

<sup>266</sup> Ibid

<sup>267</sup> Salmon P (2003) op.cit. pg 437

<sup>268</sup> Details of WIPO Academy activities is available on the WIPO website at <http://www.wipo.int/academy/en/> accessed [19/07/2011]

<sup>269</sup> Salmon P (2003) op.cit. pg 438

In addition to the above WIPO has a least developed country unit and WIPONET, a project designed to bring internet connectivity to those IP offices around the world without internet and to connect all of the offices to a secure network that will allow access to digital libraries and electronic filing of applications<sup>270</sup>.

The next section will briefly look at the TA programs provided by the co-operation between WIPO and the WTO and their implementation before January 2000 deadline.

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<sup>270</sup> Ibid

### 3.4.1 WIPO-WTO Technical Assistance Activities and Implementation before January 2000

The WIPO-WTO initiative has undertaken numerous activities under Article 4 of the WIPO-WTO Agreement. These include activities involving participating in each other's symposia, attending each other's meetings as observers, workshops, seminars and jointly organised symposia such as the symposium titled "*Technical Cooperation Aimed at Improving Human Resources and Institutional Capacity Required to Implement the TRIPS Provisions on Domestic Enforcement*" which took place at WTO on July 14 1997<sup>271</sup>.

Since the bulk of the TA was to come from WIPO, from January 1996 the International Bureau carried out extensive programmes of TA activities relating to the TRIPs agreement and it continued this in cooperation with the WTO. It was aimed at helping developing countries meet the January 1, 2000 deadline when developing countries were due to bring their national legislative and administrative structure into conformity with the TRIPs Agreement. Provision of TA during this period therefore required urgency on the part of WIPO in providing the necessary intensive and carefully tailored TA to meet developing countries' needs<sup>272</sup>.

The assistance provided at the time were categorised into Legislative advice; awareness building and human resource development; Institutional building and modernization of the IP system and enforcement<sup>273</sup> and they are discussed below.

#### LEGISLATIVE ADVICE

Legislative advice here focused on ensuring that the national legislation of the developing countries would be in compliance with those obligations under

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<sup>271</sup> WIPO Document WO/GA/24/5 op.cit

<sup>272</sup> Ibid

<sup>273</sup> Details of technical assistance implemented in developing countries towards meeting the January 1,2000 deadline is available on the WIPO website. [www.wipo.int](http://www.wipo.int)

TRIPs. The mode of implementation was provided on a strictly bilateral and confidential basis<sup>274</sup>.

For instance, in drafting IP legislation for a developing country in a particular field, WIPO took into consideration the country's membership of International agreements and its level of economic development. Even after the law was enacted, if the member state requested, WIPO would give further assistance in aiding its efficient implementation and enforcement.

The dedication towards legislative assistance clear on WIPO's website which states that *"The WIPO Secretariat also undertakes advisory missions to Member States upon request for bilateral discussions on legislative matters; or receives national officials and policy-makers for discussions at WIPO headquarters. Discussions on legislative matters are also addressed in the course of numerous other workshops, roundtables, seminars and meetings."*<sup>275</sup>

## **AWARENESS BUILDING AND HUMAN RESOURCE DEVELOPMENT**

This became very crucial to developing countries in the wake of the TRIPs agreement. In implementing the TRIPs Agreement, it was important for developing countries to have a proper understanding of the provisions of the agreement and its implications. WIPO provided assistance here by expanding its human resource development and training programs in its contents, facilities and mode of delivery. These were then aligned with the TRIPs requirements in order to take account of the specific needs of each country<sup>276</sup>.

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<sup>274</sup> Ibid

<sup>275</sup> Ibid

<sup>276</sup> Ibid

## **INSTITUTION BUILDING AND MODERNIZATION OF THE INTELLECTUAL PROPERTY SYSTEM**

It is the belief within WIPO that a modern and well-functioning IP system is an essential feature for effectively implementing the TRIPs agreement and also for the successful participation in the world trading system.

This was implemented by sending advisory missions, on request, to IP offices in developing countries to advise them in modernizing their IP systems. They also formulated automation plans for IP offices to deal with the administration, acquisition and maintenance of IP rights<sup>277</sup>.

## **ENFORCEMENT**

Enforcement of IP rights is crucial to the TRIPs Agreement. A large number of developing countries therefore requested that WIPO advise and assist them in understanding the implications of the TRIPs enforcement provision. WIPO in response expanded and adjusted its programs and activities by organising meetings concentrating wholly or in part on the enforcement provisions of the agreement<sup>278</sup>.

The WIPO-WTO Agreement to assist developing countries in meeting the January 1, 2000 deadline was very detailed and comprehensive. Millions of dollars were dedicated to it which appeared to improve the performance of developing countries' IP offices in terms of policy making and infrastructure. The assistance was however criticised for not taking development issues into proper consideration but rather still focused on building bureaucratic infrastructures in developing countries that ensured the promotion and enforcement of IP<sup>279</sup>.

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<sup>277</sup> The implementation process here is just a summary. For more detailed information, please see the WIPO website, section on IP for Development.

<sup>278</sup> Ibid

<sup>279</sup> Halbert D J, 'The World Intellectual Property Organisation: Past, Present and Future' (2006-2007) 54 J. Copyright Soc'y U.S.A. 253 pg 282-283

By the TRIPs deadline, as discussed in chapter 1, the majority of developing countries still had significant legislative reforms outstanding and were unable to meet the deadline. It appeared that despite the TA efforts, there still remained in many developing countries significant gaps in their IP systems resulting in serious development implications. It appeared that despite the increase in the level of assistance and resources devoted to TA, many developing countries and least developed countries were still unable to take advantage of the development-friendly policy spaces that could benefit them within the TRIPs Agreement<sup>280</sup>. This resulted in criticisms made on the effectiveness of the WIPO TA regarding their role in the cooperation agreement. The criticisms included poor management and cost effectiveness; excessive focus of IP offices in developing countries as primary interlocutors; inadequate connections with UN goals and agencies and the development community and inadequate insulation of WIPO's TA from political pressures from developed country members<sup>281</sup>. It is observed that many of the criticisms on WIPO's TA programs are in some way linked to the organisation's internal culture and processes. It can be said that the cooperation agreement between WTO and WIPO with WIPO taking on the bulk of the TA provision exposed the internal processes within WIPO that could hinder its development function. The next section will look at WIPO's governance and how this may affect the effectiveness of the TA programs to developing countries.

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<sup>280</sup> South Centre Analytical Note(2004) op.cit pg 6

<sup>281</sup> See generally Deere C , Marchant R (2010) op.cit .

### 3.4.2 WIPO's Internal Process

Compared to the WTO's conventional mandate as previously discussed which is to primarily set trade rules between nations, development is actually at the centre of WIPO's mandate and one of its core activities is to provide capacity building and TA to developing and least developed countries.

WIPO is known to have a strong influence on the globalization of IP politics which stems from its position as the administrator of about twenty-three IP treaties and their financial arrangement<sup>282</sup>. As the main multilateral provider of IPTA to developing countries for more than 30 years, it is not surprising that developing countries and least developed countries have come to rely heavily on WIPO for advice and training in the use of IP for their development. This means that the effectiveness of WIPO's TA would hinge on having a balance in its policy making<sup>283</sup>, taking account of not only the development needs of developing countries but also the needs of developed countries advocating the strong protection of IP.

It has been argued that there seem to be an imbalance within WIPO which hinders the organisation from effectively fulfilling its development role as a result of its maximalist culture of continuing to promote individual rights and strong IP protection amongst its staff and personnel without proper consideration for the public and communities affected. WIPO staff then promotes this view among the developing countries IP officials who often rely on WIPO for assistance and are therefore to a great extent influenced by WIPO's views<sup>284</sup>.

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<sup>282</sup> Otieno Odek J, The Illusion of TRIPS Agreement to Promote Creativity and Innovation in Developing Countries: Case Study on Kenya. Chap in, *TRIPS and Developing Countries: Towards a New IP World Order?*, eds G Ghidini, RJR Peritz, Ricolfi Edward Elgar Publishing Ltd UK. (2014)pg 253

<sup>283</sup> Gross R, 'World Intellectual Property Organisation (WIPO)' (2007) GIS Watch pg 70 available at <http://www.giswatch.org/institutional-overview/civil-society-participation/world-intellectual-property-organisation-wipo> accessed [24/09/14]

<sup>284</sup> *ibid*

Developing countries due to their history are at different levels of development<sup>285</sup> therefore they have different IP needs. For IP to contribute to their development, it is beneficial for them to know how to take advantage of development friendly exceptions and flexibilities that are contained within TRIPs and other international agreements. WIPO has been criticised for placing more importance on strong IP protection over the flexibilities that could be beneficial to developing countries<sup>286</sup>. WIPO's maximalist culture is also complicated by the organisation's funding situation. WIPO's main source of funding comes from the fees from international IP treaties administered by WIPO such as patent and trademark applications<sup>287</sup>. Even though in recent years a few developing countries have become users of WIPO's services, it is common knowledge that this scene is still dominated by multinational companies from developed countries as they are WIPO's main funders. The result of this as is pointed out is that WIPO continues to operate in the interest of its primary funders from developed countries whose best interest is in the strong protection of IP<sup>288</sup>. It has also resulted in a conflicting situation where on the one hand, the primary funders feel their money is not being spent efficiently and effectively and on the other hand developing countries feel WIPO is owned by developed countries with the right to determine the scale and distribution of its TA<sup>289</sup>.

WIPO has also been said to adopt a one-size-fits-all approach by promoting IP as being universally applicable even in developing countries<sup>290</sup>. This is

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<sup>285</sup> See chapter 1 on the 'Development of Intellectual Property in Developing Countries'

<sup>286</sup> Shashikant S(2005) op.cit. pg 4 This was illustrated in the case of Cambodia where WIPO failed to inform them of the flexibility available to them under the TRIPS Agreement and the Doha Declaration on Public Health under which they were not required to grant patent protection to pharmaceutical products till 2016.

<sup>287</sup> Gross R(2007) op.cit.

<sup>288</sup> Ibid, see also C Deere, Reforming Governance to Advance the WIPO Development Agenda. Chap. In *Implementing WIPO's Development Agenda*, De Beer J (2009) Wilfred Laurier University Press pg 45-47

<sup>289</sup> Deere C ,Marchant R (2010) op.cit pg 8

<sup>290</sup> Robinson D F, Confronting Biopiracy: Challenges, Cases and International Debates, 2010 Earthscan London. Pg32

illustrated in the training courses provided by the WIPO Academy previously discussed, it is pointed out that the Academy does not take into account the levels of development in developing countries and the available flexibilities in its training programs, the academy in fact applies a one size fit all approach which is suited to none<sup>291</sup>.

This approach is evidenced in some of the comments made during an empirical research commissioned by the ICTSD in 2006 with experts, providers, recipients and other stakeholders involved in IP related TA activities. The participants observed that WIPO made no effort to search for development-friendly IP policies that would be useful for their countries and regarding their specific IP needs, the TA experts were frequently not familiar with those needs because they were trained and more experienced in promoting a strong IP culture. They also observed that most issues discussed during their training were of no direct relevance to what was going on in their countries and that even though the programs were intellectually stimulating, they were not useful in their jobs<sup>292</sup>.

Another issue within WIPO that has been brought to attention is the lack of transparency. WIPO is known for its culture of making most of its decisions behind closed doors and not making such records public<sup>293</sup>. While it is acknowledged that this is generally the case in international treaty negotiations, it has been pointed out that in the case of TA, this culture makes it impossible for legal experts, journalists and stakeholders to see the TA programs being implemented and comment on them<sup>294</sup>. For example, legislative TA is mainly kept confidential; information on the countries that have asked for advice, the particulars of the advice given and the persons

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<sup>291</sup> Gold E R, Morin J F, *From Agenda to Implementation: Working outside the WIPO Box*. Chap. In *Implementing WIPO's Development Agenda*, J De Beer (2009) Wilfried Laurier University Press pg 59

<sup>292</sup> For the complete empirical research and data analysis, see M Kostecki, 'What Technical Assistance to Redress the balance in favour of developing nations'(2006) ICTSD paper issue no 12. International Centre for Trade and Sustainable Development (ICTSD)International Environment House 2, 7 Chemin de Balexert, 1219 Geneva, Switzerland. Pgs 15-19

<sup>293</sup> Gross R (2007)op.cit. pg72

<sup>294</sup> *ibid*

responsible for the formulation of the advice given is in the main not known<sup>295</sup>. This has been criticised as being unacceptable because WIPO has been known to have provided unbalanced legislative TA to Member States by not giving consideration for public interest safeguards such as patent protection exceptions and robust compulsory licence provisions<sup>296</sup>.

Another example of where transparency affects TA within WIPO is in the area of the allocation of expenditures where the level of resources available to developing countries and how the budget is being allocated in different regions has been unclear. WIPO is known not to make information about its budgeting available to its members, especially in the case of the developing country members where they have complained of not knowing the level of resources available to their countries or how the total budget is allocated among the countries. This makes it difficult for member countries and industries to evaluate cost efficiency and effectiveness of WIPO's performance<sup>297</sup>.

Developing countries have also complained that they often are given information on the amount or resources allocated to TA and the type of assistance such as training, missions and participants but information on the impact and contribution of the TA particularly towards the development objectives is not available to member countries. This makes transparency a crucial matter to be addressed within WIPO<sup>298</sup>.

Related to the issue of transparency is the need for better accountability to member states and effect oversight of WIPO's activities. It has been pointed out that WIPO Coordination Committee responsible for monitoring WIPO

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<sup>295</sup> Ashton-Hart N, '*Inside Views: How to Reboot WIPO*', (2012) Intellectual Property Watch. Available at <http://www.ip-watch.org/2012/09/12/how-to-reboot-wipo/> last accessed [07/10/2014]

<sup>296</sup> Gopakumar G M, 'WIPO: Developing Countries Demand Transparency' (2013) Third World Network. Available at [http://twinside.org.sg/title2/intellectual\\_property/info.service/2013/ipr.info.130505.htm](http://twinside.org.sg/title2/intellectual_property/info.service/2013/ipr.info.130505.htm) last accessed [07/10/2014]

<sup>297</sup> Deere C, Marchant R(2010) op.cit pg 6-7

<sup>298</sup> ibid

between the annual general assemblies is weak in engaging all the members in ensuring the effective oversight of WIPO. This has created a gap for some member states to dominate and promote their own personal interests within the secretariat and also leaves the secretariat open for certain employees to secure personal benefits for themselves and give out personal favours<sup>299</sup>. Problems in WIPO's internal management will hinder the TA programs the organisation provides.

WIPO is also known to have a culture of not adequately engaging non-governmental stakeholders such as NGO's , civil society and industry that could do more than observe, advise and comment on WIPO's activities. It is pointed out that engaging stakeholders could contribute more to the work of WIPO<sup>300</sup>. For example, WIPO is said not to have the human resources capability in terms of experts in every aspect of IP and particularly few of WIPO's staff actually have previous experiences in the ability to adapt IP to the needs of developing countries<sup>301</sup>. It is suggested that the engagement of the non-governmental community in a global and inclusive basis will enable WIPO to draw expertise which could improve WIPO'S processes and TA activities<sup>302</sup>.

In spite of the discussion above, WIPO's TA cannot be overestimated; the reality is that developing countries continue to rely heavily on WIPO for guidance. It is therefore important to ensure the continuous review and improvement in the design and delivery of WIPO's TA<sup>303</sup>. It is in reaction to this that there was a proposal for the DA.

The DA mandates a wholesale revision to WIPO's approach to TA. The WIPO general assembly designated the fundamental change in WIPO's

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<sup>299</sup> Deere C(2009) op.cit pg 47

<sup>300</sup> Ashton-Hart N (2012),op.cit.

<sup>301</sup> E R Gold, J F Morin (2009),op.cit. pg60

<sup>302</sup> N Ashton-Hart,op.cit(2012). see also C Deere ,R Marchant (2010) op.cit pg 15

<sup>303</sup> South Centre Analytical Note ,op.cit.,pg 6

approach to TA as one of the items requiring immediate implementation.<sup>304</sup>  
DA is discussed in detail in the next chapter.

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<sup>304</sup> N W Netanel, Introduction: The WIPO Development Agenda and Its Development Policy Context in *The Development Agenda: Global Intellectual Property and Developing Countries*, Oxford University Press (2008) UCLA School of Law Research Paper No. 08-37. Available at SSRN: <http://ssrn.com/abstract=1310388> pg7

### 3.5 Conclusion

This chapter has discussed the two main providers of TA to developing countries, the WTO and WIPO. We have seen how TA has evolved over the years in these two organisations in an effort to assist developing countries that have struggled in implementing their TRIPs obligations and to generally support developing countries in using IP towards their development.

Both the WTO and WIPO have been clear in their belief that a strong IP system will eventually contribute to economic growth. As discussed in the chapter, the TA provided by these two organisations have been criticised as stemming from a pro IP direction and have therefore formed the basis of their provision and the implementation of their TA programs. This has resulted in TA programs that have not taken developing countries needs into consideration with less than desirable outcomes.

Developing countries as a result of their IP commitments have fought for their interests to be incorporated in the TA design and provisions made available to them, not only to enable them fulfil their obligations under the various IP agreements but to more importantly promote creativity and innovation thereby contributing to their development. It is as a result of developing countries struggles that the DA was established and this is discussed in the next chapter.

## Chapter 3

# The WIPO Development Agenda

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### 4.1 Introduction

The previous chapter discussed developing countries' reliance on WIPO for guidance on evaluating and implementing their obligations under international IP treaties such as the TRIPS agreement in a manner that best serves their national interests. It also discussed how WIPO's maximalist culture which promotes IP as a tool for more innovations and inventions leading to technological improvements and eventually promoting development<sup>305</sup> has influenced WIPO's advice to developing countries and has shaped the TA provided to developing countries. The WIPO DA was proposed and established to revise WIPO's pro IP approach which permeated its development activities.

At the WIPO General Assembly, a group of 14 developing countries known as the group of friends of development co-sponsored a proposal for the establishment of a DA. The Agenda was towards a detailed reform to ensure that WIPO's activities and IP discussions are driven towards development oriented results<sup>306</sup>.

The WIPO DA contains 45 recommendations which fall within six clusters. For the purpose of this research, cluster A will be focused on which contains TA and Capacity Building. Cluster A provides that "*WIPO technical assistance shall be, inter alia, development-oriented, demand driven, and transparent, taking into account the priorities and the special needs of*

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<sup>305</sup> Netanel N W (2008) op.cit, pg7

<sup>306</sup> Shashikarat S (2005) op.cit p6

*developing countries, especially LDCs, as well as the different levels of development of member states”.*<sup>307</sup>

Towards moving the agenda forward, WIPO members established a Committee on Development and Intellectual Property (CDIP) charged with developing a work program for monitoring and implementing the recommendations proposed<sup>308</sup>. The WIPO general assembly in 2007 decided to immediately implement a set of 19 recommendations subject to the CDIP’s mandate to develop a work program for implementation and to monitor, access, discuss and report on the implementation of the Agenda<sup>309</sup>. The reports containing these recommendations require changes, reform and improvement to the substantive content of the TA delivered to developing countries. The details of these reports and the outcomes of meetings held by CDIP give a significant insight into the future of the DA on TA issues.

This chapter starts by examining the details of the DA and this is done in 4 sections. The first section discusses the history of the DA to give an understanding of where it all began and the significance of the proposal. The second section states and briefly describes the elements of the DA proposal; the third section goes on to discuss the faces of the DA which covers the significance of the DA and its status. Finally, Section 4 focuses on the Committee on Development and Intellectual Property (CDIP) meetings, the work done to implement the recommendations and the progress made.

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<sup>307</sup>Netanel N W(2008),op.cit.pg8

<sup>308</sup> ICTSD publication, ‘Sluggish Start to WIPO Talks on Implementing Development Agenda Recommendations (2008) Bridges Volume 12-Number 9. Available at <http://www.ictsd.org/bridges-news/bridges/news/sluggish-start-to-wipo-talks-on-implementing-development-agenda> last accessed 14/10/14.

<sup>309</sup> WIPO Development Agenda Implementation ‘Commentary on the Preliminary Implementation Report in Respect of 19 Proposals’ see CDIP/1/3 – Initial Working Document for CDIP; 4/3/2008.

## 4.2 History of the Development Agenda

The DA was a response to the call for WIPO to enhance the development dimension of the organization's activities. It was formally established by the WIPO General Assembly in October 2007 as a set of 45 recommendations divided into 6 clusters<sup>310</sup>. These clusters include activities in TA; Norm-Setting; Flexibilities; Public Policy and Public Knowledge, Technology Transfer, Information and Communication Technology (ICT) and Access to Knowledge; Assessments, evaluation and Impact studies, Institutional matters including Mandate and Governance<sup>311</sup>.

This chapter will discuss the TA provision which is contained in Cluster A of the recommendations and the TK, Genetic resources and folklore provision contained in recommendation 18 of Cluster B. Before discussing the details of these recommendations, it will start by understanding the history and the concept of the DA.

As discussed previously in chapter 2 section 3.3, the organisation's main objective from its inception has been to promote the protection of IP all over the world; it has traditionally been structured around the advancement and harmonization of IP rights<sup>312</sup>. Article 4(i) of the Convention establishing WIPO provides that in order to achieve its objective to promote IP throughout the world "*shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field*"<sup>313</sup>

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<sup>310</sup> See WIPO website, *Member States Adopt a Development Agenda for WIPO*, available at [http://www.wipo.int/pressroom/en/articles/2007/article\\_0071.html](http://www.wipo.int/pressroom/en/articles/2007/article_0071.html) last accessed 14/10/2014

<sup>311</sup> Ibid

<sup>312</sup> Okediji R L, History Lessons For The WIPO Development Agenda. Chap. In *The Development Agenda, Global Intellectual Property and Developing Countries*, eds. N Natanel (2009) Oxford University Press. Pg 142

<sup>313</sup> See Article 4 (i) Convention Establishing the World Intellectual Property Organisation 1979 [Online] Available at [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=283833](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283833) accessed [29/08/2015]

However since WIPO became a specialized United Nations (UN) agency by the agreement between WIPO and the UN, it meant that it must contribute to the overall UN development mandate. The agreement between the UN and WIPO specifically states that:

*“The United Nations recognizes the World Intellectual Property Organization (hereinafter called the " Organization ") as a specialized agency and as being responsible for taking appropriate action in accordance with its basic instrument, treaties and agreements administered by it, inter alia, 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...”*<sup>314</sup>

This meant that WIPO’s objective had to go beyond the advancement of IP to incorporate development in its activities to make its status as a specialized UN agency coherent with the UN development mandate. Incorporating development therefore became a major part of WIPO operations.

The obvious conflict between WIPO’s main objective to promote IP throughout the world and its development focus as a specialized UN agency has been said to have caused some confusion in the way developing countries and developed country members perceive the organization<sup>315</sup>. On the one hand, developed countries who see WIPO’s main function as the promotion of IP have mainly openly favored the strengthening and international harmonization of IP rights ignoring the effect IP may have on other emerging issues such as culture and public health. On the other hand, developing countries who see WIPO as a development agency have opposed this view; they argue that IP must be approached with an open mind, taking into serious consideration other areas that may be affected by plans to strengthen IPR protection. These countries also point out the importance of IP being properly accessed to

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<sup>314</sup> See WIPO website for the , *Agreement between the United Nations and the World Intellectual Property Organization*, available at [http://www.wipo.int/treaties/en/text.jsp?file\\_id=305623](http://www.wipo.int/treaties/en/text.jsp?file_id=305623) last accessed 14/10/2014.

<sup>315</sup> Guneratne C, *Genetic Resources, Equity and International Law* (2012) Edward Elgar Publishing pg 130-131

prevent disturbing the already fragile balance between rights, obligations and the general public interest<sup>316</sup>.

In the mid-20<sup>th</sup> century, WIPO distinguished itself as an institution at the forefront of coordinating efforts to address problems relating to the integration of developing countries into the international economic system<sup>317</sup>. Also, the majority of WIPO members are developing countries therefore WIPO would naturally appear to be a development friendly organization<sup>318</sup>. However, over the last few years, developing countries and independent observers have raised concerns about the main activities undertaken by WIPO and about the negative implications of IP rules on the socio-economic and cultural development of developing countries<sup>319</sup>.

These concerns gave rise to the proposal to establish a DA in WIPO initially proposed by Brazil and Argentina. Although the proposal to establish a DA in WIPO was the first time in the recent history of WIPO that the organization's highest body was called upon to specifically table the issue of IP and development<sup>320</sup> there had been previous efforts made by developing countries to put development issues on the international IP agenda before the DA without much success.

In 1961, Brazil and other developing nations within the UN system demanded for rules on the protection of IP to be favorable to their economic development. This was the period when developing countries had unsuccessfully tried to defend and strengthen the safeguards available to them against the abuses of patent monopolies by public interest clauses caused by the influence of private IP experts both in the Paris Union Revision

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<sup>316</sup> Netanel N, *The WIPO Development Agenda and its Development Policy Context*, (2009) Oxford University Press. Pg 33-34

<sup>317</sup> Okediji R L(2009) op.cit. pg 143

<sup>318</sup> De Beer J, *'Implementing the World Intellectual Property Organisation's Development Agenda'* (2009) Wilfried Laurier University Press pg 4

<sup>319</sup> South Centre paper, 'Establishing A "Development Agenda" For The World Intellectual Property Organisation (WIPO): Commentary on Proposal By Argentina and Brazil' (2004) South Centre Analytical Note SC/TADP/AN/IP/3 . pg 29

<sup>320</sup> Ibid pg2

conferences and within the BIRPI<sup>321</sup>. As developing countries felt that their interests were neglected in the Paris Union, they sought a more equitable position in the international IP regime by challenging the dominant position of the Paris Union and strategically shifting the patent debate to the UN which was perceived as a more neutral arena without the vested interests of developed countries<sup>322</sup>.

Brazil was at the fore front of this movement because by that time the country had been disadvantaged by the effects of patent abuse particularly by multinational pharmaceutical corporations. Brazil went on the conduct enquiries into patent abuse which highlighted the payment of high royalties and royalties on expired patents, the restrictive practices in licensing agreements and the resulting high cost of medicines<sup>323</sup>.

Against this premise in 1961, Brazil, co-sponsored by Bolivia presented a new draft resolution to the second committee of the Sixteenth Session of the UN General Assembly. Among the issues highlighted in this resolution was a proposal for a DA which mainly questioned the benefits of an international IP system. One of the highlighted issues on the Agenda was for the international patent system to be applied in a way that consideration is given the needs and peculiarities of the economies of under developed countries<sup>324</sup>. The proposal was presented for a study on the effects of domestic and foreign patents on developing countries' economies and to analyze patent legislation in developing countries in light of their development objectives<sup>325</sup>.

Soon after the proposal was presented, the chairman of the International Chamber of Commerce (ICC) on the international protection of industrial property at the time expressed concerns about the grave repercussions the proposal might have on the system for the protection of industrial property if it

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<sup>321</sup> Menescal A K , 'Changing WIPO'S Ways?' (2005) The Journal of World Intellectual Property, 8: 761–796. Pg763-764

<sup>322</sup> *ibid*

<sup>323</sup> *ibid*

<sup>324</sup> *Ibid*

<sup>325</sup> Okediji R L(2009) *op.cit*,pg 143

were adopted. The members of the ICC Commission moved to draw up a statement designed to defend the patent system on what they believed to be an attack on it. Also, the International Association for the Protection of Intellectual Property was to be involved in these efforts to defend the patent system. This statement was subsequently presented to the UN Secretary General<sup>326</sup>.

The BIRPI also reacted to this proposal by drawing the UN Secretary General's attention to the interest of the International Bureau in the proposal and it being the only international organization solely engaged in the development of the protection of industrial property, it offered its cooperation in any future work which might emerge as a result of the Brazilian proposal<sup>327</sup>.

Following this, in 1964, the UN Department of Economic and Social Affairs (DESA) published a report titled "*The Role of Patents and the Transfer of Technology to Developing Countries*"<sup>328</sup>. This report was highly influenced by the ICC experts, the International Association for the Protection of Intellectual Property (AIPPI) experts and the BIRPI representatives who were involved in the preparation of the report. This influence was so strong that the 1964 report was described as a tribute to the existing international patent system which was far from what Brazil and other developing countries set out to achieve with their proposal<sup>329</sup>. When Brazil raised the proposal before the General Assembly, the intension was to make concrete recommendations on holding an international conference to consider the revision of international conventions which the resulting report did not do. The 1964 report actually made out that international conventions were not in need of reform for purposes of addressing the special needs of developing countries, and that

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<sup>326</sup> Menescal A K(2005) op.cit, pg 768

<sup>327</sup> Ibid

<sup>328</sup> Roffe P , Vea G, The WIPO Development Agenda In An Historical And Political Context' Agenda. Chap in. *The Development Agenda ,Global Intellectual Property and Developing Countries* ,eds N Natanel (2009) Oxford University Press. Pg 96

<sup>329</sup> Menescal A K(2005) op.cit, pg 773

many of the issues highlighted could be achieved through action at the national level rather than by convening an international conference<sup>330</sup>.

Soon after the publication of the report in 1964, the AIPPI and the ICC experts whose efforts were usually endorsed by BIRPI/WIPO set out to educate the public, particularly in developing countries on an awareness of the importance of the international system of protecting patents and other rights of industrial property in development of national economies and economic progress<sup>331</sup>. They followed this up in 1967 by publishing books, articles by prominent academics on the importance of the patent system for the economic development of developing countries which were often backed by scientific evidence. At the same time, seminars and conferences were organized on IP issues by the BIRPI and later WIPO in Asia, Africa and Latin America to convince developing countries of the benefits of the patent system. This was the pattern that subsequent TA efforts to developing countries followed. It was believed that developing countries needed to be convinced that this would not only improve the situation of their own nationals as inventors, commercial enterprises but also create the appropriate climate for investments in their territories.<sup>332</sup>

In recent times, the above arguments have been called into question as it is believed that they were without conclusive scientific empirical evidence.

In 2002, a report was published by the Commission on Intellectual Property Rights (CIPR) generally on the relationship between IPRs and development. The Commission found that the evidence they reviewed did not show IPRs to have strong direct effects on developing countries economic growth. They found that IP plays a stronger role in trade and investment of the more technologically advanced developing countries than for the less technologically advanced developing countries. For the less technologically advanced developing countries, they found that the benefit of IP on trade and investment outweighed the cost of IP at least in the short and medium term.

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<sup>330</sup> Roffe P ,Vea G (2009) op.cit, pg96

<sup>331</sup> Menescal A K. (2005) op.cit, pg 774-777

<sup>332</sup> Ibid

The report also in considering the areas of importance to development in developing countries such as health, information technologies, education, and agriculture generally found IPRs to be more advantageous to developed countries than developing countries<sup>333</sup>.

In the call for a change in the way strong IP rights was perceived, the UK government responded to the Commission report that:

*“...IPRs can play a vital role in the course of the development process for developing countries today, just as they did, and continue to do, in the UK, other developed countries and the most successful developing economies...an IPR system is capable of being an important element in developing that capacity, notably in those countries which have already developed a scientific and technological infrastructure. But, as the Commission’s report makes clear, an intellectual property system cannot of itself ensure a country attains its developmental goals. The degree to which this occurs depends on many different factors, particularly the economic, social and environmental policies it chooses to pursue, for example, openness to trade and effective governance.”*<sup>334</sup>

The above supports the view that IP is not a purely technical matter<sup>335</sup> which can be separated from local factors that will need to work together with IP in order for it to contribute towards developing countries development goals.

Coming back to the role of WIPO in this discussion, WIPO’s core mandate was identified earlier as promoting and protecting IP throughout the world. This was also reflected in a statement made by the former WIPO director,

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<sup>333</sup> CIPR Report (2002) op.cit

<sup>334</sup> See the Department For International Development (DFID) Report The UK Government Response to the Report of the Commission on Intellectual Property Rights “Integrating Intellectual Property Rights and Development Policy” (2002) Available at [http://www.iprcommission.org/papers/pdfs/govt\\_response/govt\\_response.pdf](http://www.iprcommission.org/papers/pdfs/govt_response/govt_response.pdf) last accessed [16/10/14]

<sup>335</sup> Netanel N (2009), op.cit, pg33

Kamil Idris in a WIPO publication<sup>336</sup> when he promoted IP as a power tool for economic development and wealth creation which particularly developing countries were yet to take maximum advantage of. As was previously mentioned in the chapter that there was no particular evidence backing this claim and it has been in fact argued that strong IP may actually stifle the technological development and knowledge diffusion in developing countries<sup>337</sup>, it may be said that WIPO's pro IP approach was not uniform with the WIPO-UN objective to promote development. At that time though, WIPO insisted that promoting greater, universal IP rights was the means by which the organisation facilitated development<sup>338</sup>.

The DA firmly rejected WIPO's pro IP view. Although it did not dispute that IP under some local conditions may fuel creativity, innovation and development, it however insisted that strong IP protection does not consistently promote creativity or accelerate development, it further highlighted the concerns about the adverse effects of the one size fits all approach of IP. The DA therefore placed the UN developmental goals and what could be described as the socialization of IP within WIPO's central mission<sup>339</sup>. The issues highlighted formed the background to the DA as well as a move towards bringing developing countries concerns to WIPO's table in a cross-cutting and permanent manner thereby ensuring that the International IP system is indeed beneficial to all countries<sup>340</sup>.

The DA was an Argentina-Brazil initiative brought before WIPO in August 2004 and it constituted the first time in the recent history of WIPO that the

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<sup>336</sup> WIPO publication No 888.1, Intellectual Property A Power Tool For Economic Growth, (2003) Available at [http://www.wipo.int/edocs/pubdocs/en/intproperty/888/wipo\\_pub\\_888\\_1.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/888/wipo_pub_888_1.pdf) accessed [16/10/2014] Pg1

<sup>337</sup> See Kumar N , 'Intellectual Property Rights, Technology and Economic Development: Experiences of Asian Countries' Economic and Political Weekly (2003) Vol. 38, No. 3 pg. 209-215+217-226

<sup>338</sup> Netanel N (2008),op.cit, pg2

<sup>339</sup> Ibid

<sup>340</sup> Choer Moraes H ,Brandelli O, The WIPO Development Agenda In An Historical And Political Context' Agenda Chap. In *The Development Agenda ,Global Intellectual Property and Developing Countries*,eds.N Natanel (2009) Oxford University Press. Pg 49

organisation's highest body was called upon to discuss the issue of IP and development and incorporating development in its core activities<sup>341</sup>. The proposal was co-sponsored by Bolivia, Cuba, the Dominican Republic, Iran, Kenya, Peru, South Africa, Sierra Leone, Venezuela, Tanzania, Ecuador and Egypt called the Friends of Development (FoD). The proposal called for WIPO as a member of the United Nations system to design and conduct its work in a manner that supports and is coherent with internationally agreed development goals. The proposal also included ideas such as an amendment to WIPO's convention to expressly include the development aspect and increasing participation of the civil society in WIPO's work<sup>342</sup>.

The issues raised by the FoD focused on four fundamental aspects of WIPO's activities. They are WIPO's governance and mandate; promotion of pro-development norm setting; transfer of technology and access to knowledge and the issue of TA.

In the area of TA, the FoD proposed the following:

- A change in WIPO's approach towards IP which overemphasised the benefits of IP while neglecting to address its costs and limitations. It was pointed out that with the adoption of a DA, the development dimension should now be reflected in its TA activities rather than the previous pro IP approach. It was proposed that a set of principles and guidelines should be adopted for the implementation and development of TA. These principles and guidelines will ensure that TA is development oriented and coherent with broader international obligations and national policies.
- A call for a separation of different tasks within WIPO such as its norm setting functions from its TA function. It was suggested that this will make it even easier for the principles and guidelines mentioned above to be implemented. Although at the time, WIPO stated that this was

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<sup>341</sup> Musungu S F, 'A Review of the Outcomes of WIPO Discussions on the Development Agenda Proposal' (2004) Bridges No 9 Available at [http://www.iprsonline.org/ictsd/docs/Musungu\\_Bridges8-9.pdf](http://www.iprsonline.org/ictsd/docs/Musungu_Bridges8-9.pdf) last accessed [16/10/14] pg 21

<sup>342</sup> South Centre and CIEL, 'Intellectual Property and Developments in Multilateral, Plurilateral, And Bilateral Fora' (2005) South Centre and CIEL Second Quarter pg 2-7

already being done within WIPO, it was however contended that since there was no opportunity to independently evaluate WIPO's statement and even its TA in general, it only further highlighted the need for a separation of the different functions within the organisation.

- It was proposed that a code of ethics should be formulated and adopted which would serve as guidance for TA staff and consultants. The code of ethics would ensure that the information and support provided by the TA staff and consultants considers the broader development objectives of the recipient countries.
- It was also proposed that it was necessary to have a system whereby it would be possible to evaluate the impact of the TA activities provided by WIPO. It was also pointed out that where there is a review of the TA provided, it would considerably contribute to the efficiency and effectiveness of the programs, it also would ensure that the assistance provided addresses the concerns of the recipient countries and meets their different needs<sup>343</sup>.

The proposal by the FoD was formerly presented to the General Assembly of the WIPO Secretariat to comment on and for a decision to be made on the course of action to be taken on it<sup>344</sup>. The General Assembly then established the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) to accelerate and complete discussions on the proposals<sup>345</sup>.

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<sup>343</sup> *ibid*

<sup>344</sup> See the WIPO General Assembly Thirty-First(15<sup>th</sup> Extraordinary) Session available at [http://www.wipo.int/edocs/mdocs/govbody/en/wo\\_ga\\_31/wo\\_ga\\_31\\_11.pdf](http://www.wipo.int/edocs/mdocs/govbody/en/wo_ga_31/wo_ga_31_11.pdf) last accessed [17/10/14]

<sup>345</sup> See WIPO Development Agenda: Background (2004-2007) available at <http://www.wipo.int/ip-development/en/agenda/background.html> last accessed [17/10/2014]

#### 4.2.1 Reaction to the Development Agenda

Following the General Assembly, three Inter-sessional Inter-governmental meetings (IIM) were held to discuss proposals submitted by member States. This proposal was not embraced by all the members of WIPO. It was clear at the beginning of the IIM discussions by the General Assembly that there was a clear difference between the positions of developing countries and developed countries. Developed countries like the US and clearly opposed the DA maintaining their view that stronger IP protection would not hinder development but support it. The rest of the developed countries mainly defended WIPO's long-standing record of supporting and assisting developing countries<sup>346</sup>. For the latter group of developed countries, they viewed WIPO's role in the promotion of development issues as limited to TA, which was essentially to bring countries into compliance with their TRIPs related obligations<sup>347</sup>.

This misconception was clarified at the first session of the WIPO Inter-sessional Intergovernmental Meeting (IIM) by Developing countries representatives when it was stated that "*it is critical to clarify that the development dimension of intellectual property is NOT the same thing as technical assistance*"<sup>348</sup>. It was further stated that while TA plays an important role in ensuring that development is incorporated in the implementation of IP rules, the development dimension of IP actually means that WIPO's role in norm setting activities should be supportive of development goals. This is because the extension and use of IP often has detrimental effects on developing countries' developmental paths<sup>349</sup>. This development dimension also includes development incorporated into the transfer of technology to

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<sup>346</sup> Menescal A K (2005) op.cit. pg 787

<sup>347</sup> Ibid

<sup>348</sup> See Inter-sessional Intergovernmental Meeting (IIM) on a Development Agenda for WIPO (2005) available at [http://www.wipo.int/edocs/mdocs/mdocs/en/iim\\_1/iim\\_1\\_4.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_4.pdf) last accessed [20/10/14] pg8

<sup>349</sup> May C, *The World Intellectual Property Organisation: Resurgence and the Development Agenda*, (2007) Routledge pg 81

developing countries and WIPO exploring non exclusionary system in fostering creativity and innovation.<sup>350</sup>

It was discussed in chapter 2 under WIPO's Internal Process how WIPO's pro IP approach could partly be attributed to the influence of its developed country members who openly are in favour of strong IP protection. This pro IP angle was seen during the negotiations for the DA when the United States opposed the proposal; the US was in fact reported to be the earliest and strongest opposition to the DA<sup>351</sup>. Since the country is a strong advocate for strong IP protection, it expressed that strong IP protection is beneficial to the economic development of all countries. It is therefore not surprising that the US indicated that the DA could dilute WIPO's IP expertise within the UN system which WIPO should avoid but instead should focus on continuing to promote IP all over the world by expanding and deepening its IP expertise. It added that such development concerns should be addressed by other agencies within the UN that have specialized expertise in their subject areas<sup>352</sup>.

The US also pointed out that WIPO already had 'DA' incorporated into all of its work with its history of delivering high quality development activities to developing countries on a demand driven basis. It stated that WIPO has played a major role in developing an international IP system which developing countries use as a tool for their economic development. This has involved the devotion of substantial resources while considering the countries circumstances, objectives and needs in assisting developing countries in implementing an IP system that will foster economic growth and local innovation. The US therefore strongly believed that the 'DA' the WIPO had at the time was already "robust"<sup>353</sup>.

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<sup>350</sup> WIPO IIM meeting,(2005) op.cit.

<sup>351</sup> Endeshaw A, 'Intellectual Property and the WIPO Development Agenda' (2006) JILT pg 13

<sup>352</sup> See generally the "Proposal by the United States of America for the Establishment of a Partnership Program in

WIPO" ( 2005) IIM/1/2 available at [http://www.wipo.int/edocs/mdocs/mdocs/en/iim\\_1/iim\\_1\\_2.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_2.pdf) last accessed [20/10/14]

<sup>353</sup> Ibid

Japan also supported the views expressed by the US. Mexico, although a developing country also reacted to the DA by stating that IP is a development tool and advocated for nothing to disturb the present international standard setting in place for the its protection<sup>354</sup>.

In place of the DA, the US therefore proposed a WIPO Partnership Program which is an internet based tool designed to build on WIPO's successes in addressing the development needs of developing countries in IP. Rather than having a development dimension in all WIPO activities as proposed by FoD, this program will only complement WIPO's efforts in assisting member states to implement IP thereby ensuring that WIPO's core mission of promoting IP protection as a tool for development is realized<sup>355</sup>.

The developed countries reaction to the DA generated the feeling among developing countries that there was an attempt to undermine the initiative put forward by the FoD<sup>356</sup>. The opposition to this DA was actually compared to the forces that were able to sideline the Brazilian UN resolution on IPRs in 1961 although the political context for that agenda was a little different at the time<sup>357</sup>. It was also as a result of this reaction that any serious debate on the FoD proposals to reform WIPO was prevented in 2005<sup>358</sup>.

The FoD proposal however subsequently received tremendous support from the majority of the member countries and public interest NGO's. In 2005, 138 public interest NGO's from all over the globe released a statement supporting the FoD proposal<sup>359</sup>. A statement was signed by over 25 organizations

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<sup>354</sup> See the 'Proposal by Mexico on Intellectual Property and Development' (2005) IIM/1/3 available at [http://www.wipo.int/edocs/mdocs/mdocs/en/iim\\_1/iim\\_1\\_3.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/iim_1/iim_1_3.pdf) last accessed [20/10/14]

<sup>355</sup> US Proposal( 2005) op.cit.

<sup>356</sup> Shashikant S (2005) op.cit pg9

<sup>357</sup> May C (2007 ),op.cit. pg79

<sup>358</sup> Gross R D , 'WIPO Resumes "Development Agenda" Talks Developing Countries Continue Push for Balance at WIPO' (2006) available at <http://ipjustice.org/WIPO/DA022006.shtml> last accessed [20/10/14]

<sup>359</sup> WIPO, IIM/3 (2005) NGO Statement Supporting the Friends of Development Proposal and List of Signatories [Online] Available at [http://ipjustice.org/WIPO/NGO\\_Statement.shtml](http://ipjustice.org/WIPO/NGO_Statement.shtml) accessed [08/02/2015]

describing the DA proposal as a great opportunity for all developing countries and development oriented NGO's to put the issue of development on the WIPO Agenda<sup>360</sup>.

The General Assembly went on to convene the final of the three IIM which however did not result in an agreement to proceed with the initiative of establishing a DA for WIPO<sup>361</sup>. Following this, two meetings of the PCDA were held in 2006 which again involved hard discussions which led to the committee eventually agreeing on a report presented to the General Assembly in September 2006. This report contained 111 proposals in actionable and operational form planned to be discussed during the meetings in 2007<sup>362</sup>. The 111 proposals came out of 14 proposal papers by 14 member states<sup>363</sup>. The 2007 meeting of the PCDA narrowed down the recommendations from 111 to 45, thereafter, the meeting held September 2007 proceeded to adopt 45 recommendations for action and also recommended the establishment of the Committee on Development and Intellectual Property (CDIP) to develop a work program for the implementation of the 45 recommendations<sup>364</sup>. The 45 adopted recommendations are discussed below.

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<sup>360</sup> Shashikant S (2005),op.cit.pg13

<sup>361</sup> Ibid @ pg18

<sup>362</sup> De Beer J (2009),op.cit. pg 5

<sup>363</sup> See WIPO Development Agenda: Background (2004-2007) Available at <http://www.wipo.int/ip-development/en/agenda/background.html> last accessed [21/10/14]

<sup>364</sup> De Beer (2009),op.cit. pg 5

## 4.3 Understanding the Development Agenda

### 4.3.1 Content of the Development Agenda

Following the sessions of the PCDA, the committee adopted a set of 45 recommendations which were divided into 6 clusters A to F below:

**Cluster A** covered TA and Capacity Building; **Cluster B** covered Norm-setting, flexibilities, public policy and public domain; **Cluster C** covered Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge; **Cluster D** covered Assessment, Evaluation and Impact Studies; **Cluster E** covered Institutional Matters including Mandate and Governance and **Cluster F** covered other issues<sup>365</sup>.

For the purpose of this thesis, the discussion is limited to **Cluster A** containing recommendations 1 to 14 on TA and **Cluster B** containing recommendation 18 on TK. The recommendations are set out below.

#### CLUSTER A: RECOMMENDATION ON TECHNICAL ASSISTANCE

*“1. WIPO technical assistance shall be, inter alia, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific.*

*2. Provide additional assistance to WIPO through donor funding, and establish Trust-Funds or other voluntary funds within WIPO specifically for LDCs, while continuing to accord high priority to finance activities in Africa through budgetary and extra-budgetary resources, to promote, inter alia, the legal, commercial, cultural, and economic exploitation of intellectual property in these countries.*

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<sup>365</sup> See WIPO, The 45 Adopted Recommendations under the WIPO Development Agenda [Online] Available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html> [22/10/2014]

- 3 Increase human and financial allocation for technical assistance programs in WIPO for promoting a, inter alia, development-oriented intellectual property culture, with an emphasis on introducing intellectual property at different academic levels and on generating greater public awareness on intellectual property.*
- 4. Place particular emphasis on the needs of small and medium-sized enterprises (SMEs) and institutions dealing with scientific research and cultural industries and assist Member States, at their request, in setting-up appropriate national strategies in the field of intellectual property.*
- 5. WIPO shall display general information on all technical assistance activities on its website, and shall provide, on request from Member States, details of specific activities, with the consent of the Member State(s) and other recipients concerned, for which the activity was implemented.*
- 6. WIPO's technical assistance staff and consultants shall continue to be neutral and accountable, by paying particular attention to the existing Code of Ethics, and by avoiding potential conflicts of interest. WIPO shall draw up and make widely known to the Member States a roster of consultants for technical assistance available with WIPO.*
- 7. Promote measures that will help countries deal with intellectual property-related anti-competitive practices, by providing technical cooperation to developing countries, especially LDCs, at their request, in order to better understand the interface between IPRs and competition policies.*
- 8. Request WIPO to develop agreements with research institutions and with private enterprises with a view to facilitating the national offices of developing countries, especially LDCs, as well as their regional and sub-regional intellectual property organizations to access specialized databases for the purposes of patent searches.*
- 9. Request WIPO to create, in coordination with Member States, a database to match specific intellectual property -related development needs with available resources, thereby expanding the scope of its technical assistance programs, aimed at bridging the digital divide.*

10 To assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote fair balance between intellectual property protection and the public interest. This technical assistance should also be extended to sub-regional and regional organizations dealing with intellectual property.

11. To assist Member States to strengthen national capacity for protection of domestic creations, innovations and inventions and to support development of national scientific and technological infrastructure, where appropriate, in accordance with WIPO's mandate.

12. To further mainstream development considerations into WIPO's substantive and technical assistance activities and debates, in accordance with its mandate.

13. WIPO's legislative assistance shall be, *inter alia*, development-oriented and demand-driven, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion.

14. Within the framework of the agreement between WIPO and the WTO, WIPO shall make available advice to developing countries and LDCs, on the implementation and operation of the rights and obligations and the understanding and use of flexibilities contained in the TRIPS Agreement.<sup>366</sup>

#### **CLUSTER B: RECOMMENDATION 18**

18. "To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments."<sup>367</sup>

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<sup>366</sup> Ibid

<sup>367</sup> Ibid

To recapitulate, the WIPO Development Agenda(DA) recommendations 1 to 14 on TA is purposed to be a departure from the one size fits all approach that the WIPO Secretariat had adopted in delivering past TA programs. Historically, WIPO has been providing TA within a narrow minded devotion to educating developing country IP officials and government on the benefits of IP protection. This approach has of course been criticized severely which eventually led to the proposals for DA.

The DA therefore called upon WIPO TA to be development-oriented, demand driven and transparent while being mindful of the special needs of developing countries, especially, LDC's. Nine of the 14 recommendations contained in cluster A were designated for immediate implementation.

In the case of recommendation 18 on TK, the General Assembly underlined the importance of accelerating the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)'s work and generating tangible results<sup>368</sup>. The IGC was established in 2000 and it has the mandate to reach an agreement on a text of an international legal instrument that will ensure the effective protection of TK<sup>369</sup>. One of the issues raised in past negotiations is the provision of TA specifically for indigenous TK related programs that would take into account their IP related interest in order to prevent the misappropriation of associated knowledge<sup>370</sup>. This will ensure the effective protection of TK in developing countries.

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<sup>368</sup> See International Institute for Sustainable Development (iisd), *WIPO General Assembly Addresses Development Agenda , Genetic Resources and Traditional Knowledge , Biodiversity Policy and Practice News* [Online] Available at <http://biodiversity-l.iisd.org/news/wipo-general-assembly-addresses-development-agenda-genetic-resources-and-traditional-knowledge/> accessed [23/10/14]

<sup>369</sup> Full details of IGC Mandate see WIPO, Intergovernmental Committee (IGC) Mandate [Online] Available at <http://www.wipo.int/tk/en/igc/> accessed [23/10/14]

<sup>370</sup> See WIPO, WIPO/GRTKF/IC/9/INF/10 (2006) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Report of International Technical Workshop on Indigenous Traditional Knowledge ninth session [Online] Available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_9/wipo\\_grtkf\\_ic\\_9\\_inf\\_10.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_inf_10.pdf) accessed [23/10/14]

After many years of discussions in the IGC, negotiations are on the way to reaching an agreement on text(s) for an international legal instrument(s) for the effective protection of TK and Traditional Cultural Expression (TCE)<sup>371</sup>. The mandate of the IGC was also renewed in line with the DA recommendations<sup>372</sup>.

Looking beyond the clusters and recommendations set out in the DA; there have been discussions on its role and what the agenda represents for example its significance to WIPO itself as an organisation and what challenges could be met in its implementation.

First of all, what is the DA and what is its legal status under international law?

#### **4.3.2 Legal Status of the Development Agenda**

The DA is formally described as an operational program in the form of prescriptive guidelines which encompasses the concerns of developing countries and least developed countries and integrates them into WIPO's activities<sup>373</sup>.

WIPO is said to lack the power to make international law unlike other international organisations and their bodies such as UN Security Council. This means that the DA recommendations adopted by the WIPO General Assembly in the form of prescriptive guidelines are not binding on individual

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<sup>371</sup> See WIPO, WIPO/GRTKF/IC/27/4 (2014) Twenty-Seventh session Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: The Protection of Traditional Knowledge: Draft Articles [Online] Available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_27/wipo\\_grtkf\\_ic\\_27\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_27/wipo_grtkf_ic_27_4.pdf) accessed [23/10/14]

<sup>372</sup> See Agenda Item 35 at the Forty-Third(21<sup>st</sup> Ordinary) Session (2013) Available at [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc\\_mandate\\_1415.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_1415.pdf) last accessed [23/10/14]

<sup>373</sup> Okediji R L(2009 ) op.cit,pg 155-156

organisations and the member states. As a result the DA is said to have a soft law status<sup>374</sup>.

The issue with the agenda not having a hard law status like in the case of treaties that have entered into force is that it could put in question the credibility of the WIPO's commitment to actually implement the Agenda effectively since the DA may have little or no binding effect on WIPO itself<sup>375</sup>.

As discussed earlier on in this chapter the negotiations towards the adoption of the DA was a long and difficult one, it took several years to agree on the 45 recommendations, the agreement was even described as a victory won by the FoD<sup>376</sup> of what could be described as the biggest contest of principles to have faced WIPO in the past forty years. It has therefore been suggested that being a hard law as an initial status may not have been the intention behind the proposal for a DA in the first place; rather, the recommendations were proposed to start as a guide for WIPO's work on development and IP<sup>377</sup>.

Some have also argued that being a soft law status is not necessarily a limitation<sup>378</sup>, it has been pointed out that being a soft law has advantages, one of which is flexibility in the implementation. Implementation of international agreements can be complex, therefore in a case where an uncertainty arises or one sticky problem that may threaten to upset a larger package deal, the flexibility would allow for issues to be resolved without holding up the entire agreement<sup>379</sup>. Flexibility will also allow for the agreement to be amended,

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<sup>374</sup> De Beer J(2009 ) op.cit. pg 11

<sup>375</sup> Ibid

<sup>376</sup> Bannerman S, The WIPO Development Agenda Forum and its Prospects for Taking into account Different Levels of Development'. Chap. In *Implementing WIPO's Development Agenda*, J De Beer (2009) Wilfred Laurier University Press pg25

<sup>377</sup> South Centre, 'Implementing WIPO Development Agenda: Next Steps Forward' (2007) South Centre Policy Brief.pg1

<sup>378</sup> See de Beer J( 2009 ) , op.cit @ 11-12 and K W Abott (2000 ),op.cit @434-437

<sup>379</sup> K W Abott, D Snidal, 'Hard and Soft Law in International Governance' (2000) International Organization, Vol. 54, p. 421, . Available at SSRN: <http://ssrn.com/abstract=1402966> pg434-435

replaced or upgraded if this is needed at a later time<sup>380</sup>. Being a soft law of course has obvious disadvantages, however, relating particularly to the DA, it has been suggested that having a soft law status will at the very least have a moral effect on WIPO and its members and it is an appropriate way to make progress on what has been described as the first proposal of its kind<sup>381</sup>.

#### 4.3.3 Role and Significance of the Development Agenda

Moving on from the Agenda's legal status, it is said to hold some significance for WIPO as an organisation by the expansion of the organisation's mandate thereby providing an opportunity for WIPO to remain relevant in the future<sup>382</sup>.

With the advent of TRIPs, the relevance of WIPO diminished in its importance as the principal organisation dealing with IP regulation. As discussed in chapter 2, this changed when WIPO went into a cooperation agreement with the WTO to provide TA to developing country members of the WTO on TRIPs matters. WIPO had to prove to the international community that it was still the IP standard setting organisation and was able to deliver results<sup>383</sup>. With the DA, there appears to be an even greater opportunity to ensure that it remains relevant in the future due to the expansion of WIPO's mandate<sup>384</sup>.

Development is a global issue that has been linked directly to the globalization of IP<sup>385</sup> and has been on WIPO's radar since it became a specialized UN agency in 1974. As discussed earlier on in this chapter, previous attempts to

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<sup>380</sup> Hugenholtz, Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright' (2008) Open Society Institute (OSI) Amsterdam Law School Research Paper No 2012-43 pg 45

<sup>381</sup> De Beer J(2009) ,op.cit.pg11

<sup>382</sup> Okediji R L(2009 ) op.cit,pg 157

<sup>383</sup> Shashikarat S(2005) ,op.cit. pg6

<sup>384</sup> Okediji R L(2009 ) op.cit,pg 158

<sup>385</sup> Chon M, 'Intellectual Property and the Development Divide' (2006) Cardozo Law Review, Vol. 27, pp. 2821-2912, 2006. Available at SSRN: <http://ssrn.com/abstract=894162>

put development issues on the international IP agenda had failed to have any meaningful impact until the advent of the DA proposal by FoD.

Although WIPO's past TA programs are said to have shortcomings, nevertheless it would be correct to say that these programs are partly responsible for bringing an understanding to developing countries on the linkages, whether positive or negative, between IP and Development while implementing International intellectual agreements such as TRIPs<sup>386</sup>. It caused developing countries to question the benefits of global IP policies in light of their social economic conditions. It also brought a deeper awareness of the impact of IP on development which is backed up by evidence based analysis and research. These were all influential during the period immediately preceding and following the proposal for a DA which then incorporated development into WIPO concerns<sup>387</sup>. It is suggested that given the tone set by the DA, if WIPO is successful in its implementation, the organisation could again become a leader in global knowledge governance<sup>388</sup>.

The DA is also significant because it could change WIPO's culture of not adequately engaging with wider stakeholders that could contribute more to the work of the organisation as discussed in chapter 2 under WIPO's internal culture. This opportunity will make it possible for WIPO to work meaningfully with other international law regimes which includes interacting with the larger international community<sup>389</sup>.

It was discussed in chapter 2 that IP has been seen to impact other fora such as regimes governing public health, human rights, biological diversity, communications, information and agriculture. This has been referred to as regime complex or conglomerate regime in the IP area which describes formal or informal links that have been established as a result of traditional IP regime

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<sup>386</sup> De Beer J(2009) ,op.cit.pg14 -15

<sup>387</sup> Ibid

<sup>388</sup> Ibid

<sup>389</sup> OkedijiR L (2009) op.cit .pg 158

interacting with other international regimes due to the growing role IP issues play<sup>390</sup>.

Such interactions include the debate in public health where the impact of patenting on the provision of medicines in public health emergencies is being considered. Also in the area of biodiversity, the ability to produce various legislative settlements regarding the recognition of specific form of IP rights for biogenetic resources under the Convention on Bio-Diversity. There have also been extensive discussions on the impact of IP on human rights, also in the area of agriculture, there is the link to the protection of farmer's rights to share and re-use seeds<sup>391</sup>.

The mandate of other UN agencies which brings together a unique wealth of expertise and resources related to development, Innovation and IP also make it crucial for them to be included in WIPO activities. Agencies such as the UN General Assembly, the United Nations Conference on Trade and Development (UNCTAD), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the United Nations Industrial Development Organisation (UNIDO), the Food and Agriculture Organisation (FAO), the United Nations Economic and Social Council (ECOSOC), the ECOSOC Commission on Science and Technology for Development (CSTD), the International Labour Organisation (ILO), the World Health Organisation (WHO), the International Telecommunication Union (ITU), the United Nations Environmental Programme (UNEP), the human rights bodies and the CBD all have mandates for negotiating international instruments or norms that govern innovation, development and IP matters<sup>392</sup>. However WIPO's history show that these organisations have not had significant impact on IP debates, this may be because IP was not considered a central issue in innovation and development matters, however, this has changed as research shows that

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<sup>390</sup> Yu P K, 'International Enclosure, The Regime Complex and Intellectual Property Schizophrenia' (2007) MICH. ST. L. REV. 1pg 14

<sup>391</sup> May C (2007), op.cit. pg97

<sup>392</sup> Musungu S F, 'Rethinking Innovation, Development and Intellectual Property in the UN, WIPO and beyond' (2005) QIAP Ottawa. Pg 18-19

developments over the years have made IP a central issue in the efforts to control knowledge<sup>393</sup>.

The DA is therefore a good opportunity to address this disconnection and intensify collaboration with WIPO's UN sister agencies and organisations. This collaboration will also make it important to re-examine the cost of applying minimum rights to all IP related areas in light of the importance of some fields like agriculture and healthcare for global welfare<sup>394</sup>.

#### 4.3.4 The Development Agenda's implementation Challenges

Understanding the DA has also brought to light issues that may challenge its implementation such as the ambiguity of the recommendations and complexities within the institution itself.

Although the recommendations appear clear in purpose, it has been pointed out that the 45 recommendations lack clear definition making them ambiguous<sup>395</sup>. Starting from the understanding of what development itself means in the context of IP generally and trade then narrowing down to the specific wordings of the recommendations, it would seem that the ambiguity permeating through the DA as a whole could significantly challenge its implementation<sup>396</sup>.

Examples of such include recommendation number 12 which states that WIPO should "*further mainstream development considerations*"<sup>397</sup> is said to

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<sup>393</sup> Ibid

<sup>394</sup> Okediji R L (2009)) pg 158

<sup>395</sup> De Beer J(2009), op.cit. pg 9-12

<sup>396</sup> Ibid

<sup>397</sup> See the details of the 45 adopted recommendations ,op.cit.

have not stated clearly whether development in this context goes beyond just economic growth. Also in implementing recommendation number 11 “*to strengthen national capacity for protection of domestic creations, innovations and inventions*” and recommendation number 10 to assist member states to “*promote fair balance between intellectual property protection and the public interest*”<sup>398</sup> could mean that WIPO continues to promote stronger IP protection as a matter of public interest.

It is also pointed out that even though the word ‘development’ was used throughout the recommendations, there appeared to be no agreement among the countries on its specific connotation. Also noted is the reference to the need for ‘appropriate’ action which was used in different contexts<sup>399</sup>.

The ambiguity has been attributed to the mode of decision making within WIPO which is in the form of consensus building as opposed to a system of voting which is generally avoided as it could cause a divide among the members when it seems some ideas are not accepted by everybody. Constructive ambiguity in the recommendations could therefore hardly have been avoided<sup>400</sup>.

This constructive ambiguity, it’s been argued, may not necessarily have a negative effect on the implementation of the recommendations. It is said that the ambiguity may instead be looked at as flexibilities which would allow the recommendations to be implemented in different ways in different places. Since it is generally agreed that the DA is meant to be a departure from the previous one size fits all model, flexibilities in its implementation should be welcomed<sup>401</sup>.

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<sup>398</sup> Ibid

<sup>399</sup> De Beer J(2009), op.cit. pg 9-12

<sup>400</sup> Yu G, ‘The Structure and Process of Negotiations at the World Intellectual Property Organisation’ (2007) 82 Chi.-Kent. L. Rev. 1445. Pg 1452. Available at <http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3625&context=cklawreview> accessed [05/11/2014]

<sup>401</sup> De Beer J(2009), op.cit. pg 9-12

What these flexibilities could also mean for the recommendations is that without a shared understanding of the meaning of the agenda, implementation will be difficult and could threaten the achievement of the intended purpose for the proposal of the DA<sup>402</sup>.

Regarding the complexity which could affect implementation, this is discussed in terms of the grouping of countries comprising WIPO's membership.

WIPO is traditionally known to consist of negotiating groups usually based on common positions and geographical lines. These negotiating groups usually have a united front over particular issues and a leverage which enables them to push their views forward which would not have been possible individually<sup>403</sup>. Countries are generally grouped into developed and developing countries, within these groups, there are also cross-regional groups. Such as Group B which is a cross-regional group of developed nations that hold most of the world's IP rights and allows them to negotiate as a bloc. There is also the Development Agenda Group (DAG), a cross-regional group for developing countries which was established to focus on WIPO mainstreaming development in all aspects of its work<sup>404</sup>.

Some have argued that the statuses of the countries that make up these groups are always changing. With the changes in statuses follow changes in their priorities and commitments. It is argued for instance that some countries such as Brazil, China and India may no longer be appropriately classified as ordinary developing countries and therefore deserve to be treated distinctly<sup>405</sup>. In India and China their priorities may be changing as computer

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<sup>402</sup> Ibid

<sup>403</sup> Yu P K (2007) op.cit pg3

<sup>404</sup> Mara K, W New, 'New WIPO Development Agenda Group Seeks Transformation of UN Agency' (2010) IP Watch available at <http://www.ip-watch.org/2010/04/26/new-wipo-development-agenda-group-seeks-transformation-of-un-agency/> accessed [04/11/14]

<sup>405</sup> see J De Beer(2009), op.cit. pg 13, M Khor, 'Is China still a developing country?' (2011) Third Network Publication available at <http://www.twinside.org.sg/title2/gtrends/gtrends364.htm> accessed [04/11/14], D Wilson and Purushothaman , 'Dreaming with the BRICs: The Path to 2050'

programmers and film makers push for stronger IP protection because weaker protection adversely impacts their livelihood, this puts their concerns in the same direction as their developed country counterparts<sup>406</sup>. Their priorities will obviously reflect these concerns in IP policies negotiations which may cause disagreements with other countries that have not got such concerns within the same group.

Also within member countries, there is a struggle to have unified national-based positions on IP issues due to factors such as domestic politics. This is illustrated in developing countries where the fast growing stakeholders and the rest of the country often have significantly divergent interests<sup>407</sup> which they bring into negotiations thereby contributing to the what has been referred to as 'intellectual property schizophrenia'<sup>408</sup>.

These varying positions and cross sector disagreements amongst member states could hinder moving forward on issues that may impact implementation of the DA<sup>409</sup>. At the 11<sup>th</sup> session of the meeting of the CDIP, Brazil mentioned that the DAG group was concerned about WIPO members not 'maintaining the same commitment to the effective implementation of the DA at this point in time' because of the difficulty in making decisions and moving forward<sup>410</sup>.

The work of the CDIP is very important for moving the DA forward, it is a committee established to monitor access and discuss the effective implementation of the DA recommendations. Its membership is comprised of member states of the WIPO but also open to the participation of all

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(2003) Global Economics Paper No:99 available at <http://www.goldmansachs.com/korea/ideas/brics/99-dreaming.pdf> accessed [04/11/14]

<sup>406</sup> Yu P K (2007) op.cit pg14

<sup>407</sup> Ibid

<sup>408</sup> De Beer J(2009), op.cit. pg 13

<sup>409</sup> Ibid

<sup>410</sup> Saez C, 'Concerns Arise Over Implementation of WIPO Development Agenda' (2013) IP Watch available at <http://www.ip-watch.org/2013/05/14/concerns-arise-over-implementation-of-wipo-development-agenda/> accessed [04/11/14]

accredited Non-Governmental Organisations (NGO's) and Intergovernmental Organisations.

The work and progress of the CDIP towards the implementation of the DA is discussed in the next section.

## 4.4 Committee on Development and Intellectual Property (CDIP) Work

At the forty-third series of meetings of the Assemblies of the member states of WIPO, held in Geneva in 2007, the member states discussed how to move the DA forward. It was at this meeting that it was decided that the mandate of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) would not be renewed followed by a recommendation to set up a Development and Intellectual Property Committee to replace the PCDA. The functions of the Committee on Development and Intellectual Property (CDIP) will be to:

*“(a) Develop a work-program for implementation of the adopted recommendations;*

*(b) Monitor, assess, discuss and report on the implementation of all recommendations adopted, and for that purpose it shall coordinate with relevant WIPO bodies; and*

*(c) Discuss intellectual property and development related issues as agreed by the Committee, as well as those decided by the General Assembly”<sup>411</sup>*

Like the PCDA, the CDIP holds two-five day sessions annually, the first of those was convened in the first half of 2008 details of which will be discussed later on. Also like the sessions of the PCDA, to attend the meetings of the committee, WIPO provides the financing for the participation of representatives from developing countries , this includes LDC's as well as from countries with economies in transition. The Committee reports and makes recommendations to the General Assembly annually<sup>412</sup>.

The recommendation to establish the CDIP received overwhelming support from the member states. The delegates from Guinea, South Africa, Angola,

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<sup>411</sup> WIPO, A/43/16 (2007) *Assemblies of the Member States of WIPO: Forty-Third series of meetings* [Online] Available at [http://www.wipo.int/edocs/mdocs/govbody/en/a\\_43/a\\_43\\_16-main1.pdf](http://www.wipo.int/edocs/mdocs/govbody/en/a_43/a_43_16-main1.pdf) accessed [08/02/2015]

<sup>412</sup> Ibid

Algeria, Brazil, Kenya, Bangladesh, Kyrgyzstan, Ghana, Iran, Jamaica, Portugal, Norway, Ukraine, Canada, Malaysia, India and Mauritania particularly expressed their support for the establishment of this Committee and went on to say that they were looking forward to be a part of the future discussions of the committee<sup>413</sup>. Brazil also expressed that it was crucial to have the necessary means for implementing the recommendations for the DA and the adequate functioning of the CDIP. It was emphasized that it included the adequate availability of human resources in quantitative and qualitative terms as well as financial resources. This proposal was supported by the other member states<sup>414</sup>. The delegation of Singapore on behalf of the Asian group said that the CDIP meetings provides a significant opportunity to integrate existing and new development dimensions into all areas of WIPO's work and activities. In addition, from the highlighted functions of the CDIP committee, its task was a comprehensive one<sup>415</sup>.

The meetings of the CDIP and issues considered in implementing the DA are discussed below. The meetings are discussed in sessions as they were held to gain an understanding of the progress made.

#### 4.4.1 The First Session Meeting

The first session of the CDIP was attended by 99 member states, 31 non-governmental organisations and 7 intergovernmental organisations. It was held from March 3 to 7, 2008<sup>416</sup>. The meeting opened with discussions on the initial working document prepared by the chair of the PCDA in consultation with the member states and the secretariat, the committee agreed to use this

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<sup>413</sup> Ibid

<sup>414</sup> Ibid

<sup>415</sup> WIPO, CDIP/1/4 (2008) *CDIP First Session Report* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_1/cdip\\_1\\_4.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_1/cdip_1_4.pdf) accessed [05/11/14]

<sup>416</sup> Ibid

as the basis for discussion at this meeting<sup>417</sup>. The document included a preliminary implementation report for the 19 adopted recommendations planned for immediate implementation and also included a draft work program for the second set of 26 recommendations to be worked on later.

At this meeting, the delegation of Algeria spoke on behalf of the African group and expressed the view that the implementation phase of the recommendations was very important, if not more so than the negotiation process itself. Implementation was said should aim to improve institutional capacities and strengthen scientific and technical infrastructure in developing countries. It was further emphasised that it was important to prepare a solid and efficient action plan for development that would allow the promotion of an international IP system that would be balanced and take account of the different needs of the developing countries<sup>418</sup>. Towards this end, the WIPO Assembly approved the preliminary implementation report with respect to the 19 proposals put forward for immediate implementation, thereafter, the Director General of WIPO issued instructions to the sectors concerned to begin the implementation of the proposals which included the implementation of the TA recommendations contained in Cluster A of the DA<sup>419</sup>.

Plans for the implementation of the recommendations started with WIPO stating that it believed that TA programs were already formulated and implemented in close consultation with the member states requesting them which helped to respond to their specific needs and development priorities. WIPO however acknowledged that these programs and activities were going through reorientation to further assist the member countries to formulate nationally focused IP plans and strategies after taking into account the particular development requirements of each country and a careful assessment of their country specific needs. According to WIPO's design, while it pledges its full commitment in providing all the necessary TA and

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<sup>417</sup> WIPO, CDIP (2008) *First Session Summary by the chair* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_1/cdip\\_1\\_summary.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_1/cdip_1_summary.pdf) accessed [05/11/14]

<sup>418</sup> CDIP/1/4 (2008) *CDIP First Session Report*, op.cit.

<sup>419</sup> WIPO, CDIP/1/3 (2008) *Initial Working Document of the CDIP* (2008) [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_1/cdip\\_1\\_3.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_1/cdip_1_3.pdf) accessed [05/11/14]

cooperation in an efficient, timely and cost effective manner, the primary responsibility for the programs and activities was said to rest with the countries concerned<sup>420</sup>.

For the purposes of implementation, the activities planned and implemented since the adoption of the DA were grouped under each recommendation. Regarding recommendation number 1<sup>421</sup>, there were several activities planned and well on the way to adequately assess the needs of the countries concerned. National projects were being implemented in several of the developing countries; specific activities were being implemented for the benefit of the Least Developed Countries (LDC's)<sup>422</sup>.

WIPO also started many training programs in developing countries, making scholarships available for LLM programs in schools to help increase human resources capacity in IP in developing countries, countries in transition and LDC's. Distance learning programs were being offered and a joint program with the World Trade Organisation (WTO) offering a colloquium for teachers and professors of IP from developing countries and economies in transition. These were designed to update the academics on recent developments and policy issues under debate in the field of IP and to enhance the capacity of academics and universities in developing countries to develop national expertise for teaching and training in the field of IP<sup>423</sup>.

Discussing recommendation number 2<sup>424</sup>, WIPO stated that some developed and developing countries had already made voluntary financial contributions to WIPO to administer programs for the benefit of developing and least developed countries (LDCs). WIPO further stated that it would welcome additional donor funding for this purpose, including trust funds or other

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<sup>420</sup> Ibid

<sup>421</sup> Refer to text of the 45 recommendations

<sup>422</sup> CDIP/1/4 (2008) *CDIP First Session Report*, op.cit.

<sup>423</sup> Ibid

<sup>424</sup> Refer to text of the 45 recommendations

voluntary funds specifically for LDCs, while according high priority to finance activities in Africa, in order to enhance the level of assistance provided<sup>425</sup>.

Regarding recommendation number 5<sup>426</sup>, there was a proposal to initiate work on a project to design and develop a consolidated database for all activities such as human resource development and to update the same regularly. General information was to be available on the WIPO website, while more detailed information was also to be made available on specific activities, based on appropriate authorizations<sup>427</sup>.

There were similar activities planned and being undertaken for the rest of the TA recommendations, a detailed outline of these activities can be found on the WIPO website.

Although this first session marked the beginning of the deliberations to implement the agenda, the meeting was described as a slow progress on the recommendations relating to TA<sup>428</sup>. Developed countries were said to have been concerned about the implications of the implementation of the recommendations on WIPO's budget as they were looking to restrict the organisations budget. They were also said to have wanted the recommendations to be put into actions executable with costs to which a developing country representative argued that the DA was not designed to be a quick fix solution but a process to transform the way WIPO worked<sup>429</sup>.

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<sup>425</sup> CDIP/1/4 (2008) *CDIP First Session Report*, op.cit.

<sup>426</sup> Refer to text of the 45 recommendations

<sup>427</sup> CDIP/1/4 (2008) *CDIP First Session Report*, op.cit.

<sup>428</sup> Shashikant S, 'WIPO: Development Agenda meeting ends, slow progress on implementation (2008) Third World Network Publication . available at <http://www.twinside.org.sg/title2/wto.info/twninfo20080311.htm> accessed [05/11/14]

<sup>429</sup> Ibid

#### 4.4.2 The Second Session Meeting

The second session of the CDIP was held from July 7 to 11, 2008. Like the first session, the meeting was attended by member states, inter-governmental organisations and non-governmental organisations. The meeting adopted a proposed draft agenda and the report of the first session.

In the summary of the meeting by the chair<sup>430</sup>, it was stated that at the meeting, the Committee discussed a document containing a revised text on the proposed activities for the implementation of adopted recommendations which was agreed on by the committee with some modifications and also additional human and financial requirements relating to those recommendations. The committee also stated the importance of discussing the necessary mechanisms for its coordination and the modalities of monitoring, assessing and reporting on the implementation of the recommendation with other WIPO bodies in implementing the adopted recommendations.

While the preliminary implementation report used as the working document at the first session contained specific activities planned for the implementation of the recommendations, the working document<sup>431</sup> used for the second session was not as detailed but contained a number of modifications.

Concerning recommendation number 1, it was stated that to be able to ensure a better transparency in the field of TA, WIPO would put more effort in making more information on TA readily available to member states through a database<sup>432</sup>.

On recommendation No 6<sup>433</sup>, WIPO stated that the member states adopted the UN Standards of Conduct for the International Civil Service<sup>434</sup> and

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<sup>430</sup> WIPO, CDIP (2008) *Second Session Summary of the Chair* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_2/cdip\\_2\\_summary.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_2/cdip_2_summary.pdf) accessed [05/11/14]

<sup>431</sup> WIPO, CDIP/2/3 (2008) *Initial Working document for the CDIP: Revised Text in Respect of Recommendations Considered during Informal Consultations on April 16 and 17, 2008* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_2/cdip\\_2\\_3.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_2/cdip_2_3.pdf) accessed [05/11/14]

<sup>432</sup> CDIP (2008) *Second Session summary of the Chair*, op.cit

<sup>433</sup> Refer to text of the 45 recommendations

incorporated this in the WIPO Staff Regulations and Staff Rules. The standards are considered binding on all WIPO employees. In order to ensure that the same standards also apply to consultants hired by WIPO, a specific provision referring to the UN Standards of Conduct was to be included in the Special Service Agreements (SSAs) issued by WIPO for the engagement of consultants. This appears to be a step towards integrating development into all of WIPO's activities.

Regarding recommendation number 2, following the discussions at the first session, the secretariat planned to prepare a paper exploring options to actually implement this recommendation<sup>435</sup>.

Part of the aim of this paper is to analyse current consultation mechanisms with donor agencies to discuss funding and formulate programs and projects on a regional, sub-regional or national level, and consider ways of improving them, if necessary. The paper would also consider the possible establishment of monitoring mechanisms for the management of voluntary funds, bearing in mind that such mechanisms and principles do not themselves deter donor funding. The paper would be divided into three parts. The first section will update and enhance the information available in the Program and Budget document for 2008/09 on existing voluntary funds and the manner in which the Secretariat currently manages extra-budgetary resources. The second section of the paper will report on existing efforts to coordinate WIPO's work in this and to mobilize further voluntary resources through discussions with bilateral donors, multilateral donors and charitable foundations. The third section of the paper will elaborate on proposals for future activities aimed at increasing the availability of voluntary funding<sup>436</sup>.

The Secretariat further stated that the focus of the paper would not only be on the possibility of creating new voluntary funds at WIPO, but also working with

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<sup>434</sup> United Nations, *Standards of Conduct for the International Civil Service*, International Civil Service Commission (2013) United Nations Publication [Online] Available at <http://icsc.un.org/resources/pdfs/general/standardse.pdf> accessed [08/02/2015]

<sup>435</sup> CDIP (2008) *Second Session summary of the Chair*, op.cit

<sup>436</sup> Ibid

current donors, partner countries and international and regional organizations, as well as the World Bank and regional banks to implement special TA and capacity building projects for Member States, in line with the principles adopted under the WIPO DA<sup>437</sup>.

Following up on recommendation number 5, the secretariat stated that the new database discussed during the first session would build on the existing information already provided by WIPO in its development cooperation activities. Information was to be made available on names of donors, consultants and project costs (with the appropriate authorizations). The project was to be guided by the principle of transparency and donors and recipients would be encouraged to authorize WIPO to provide as much information as possible on TA activities<sup>438</sup>.

There is a detailed report on the WIPO website on the plans for the implementation of recommendation number 10 following the first session; this also includes information on additional requirements of human and financial efforts. It was mentioned that through the WIPO academy, WIPO planned to continue to provide specialized training to staff of IP offices in order to enhance their ability to perform their tasks, through intermediate and advanced training programs. Through the TA and capacity building sector with additional human resources, WIPO would also continue to provide sustained support to national IP offices, as well as regional and sub-regional IP Organizations in the provision of value-added services to users, including efficient services relating to grant of IP rights, creation and commercial exploitation of IP assets<sup>439</sup>.

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<sup>437</sup> Ibid

<sup>438</sup> Ibid

<sup>439</sup> Ibid

#### 4.4.3 The Third Session Meeting

The third session of the CDIP was scheduled to approve the report of the second session and to discuss matters regarding the further development of a work program for the implementation of the approved recommendations. IP and development related issues agreed by the committee were also to be developed as well as those decided by the general assembly<sup>440</sup>. This meeting was held from April 27 to May 1, 2009 and like the previous two sessions, it was attended by the members and observers.

At the third session, one of the documents produced by the WIPO Secretariat at the request of a number of delegations was the proposed methodology for the implementation of the DA recommendations<sup>441</sup>. The members were seeking an explanation in greater detail about the proposed approach for the implementation of the recommendations.

This document highlighted a few concerns in the current approach of the implementation of the activities such as the apparent overlap of some of the implementation activities, concerns about the lack of detailed information on the additional human and financial resources in the documents of the second session to enable the committee to make informed decisions. There were also concerns relating to the slow progress that was being made in discussing and agreeing on work programs for implementations and recommendations<sup>442</sup>.

The proposed approach was to put activities with the same or similar subject matter into groups so that their implementation can be jointly addressed through thematic projects. This was thought would sort out the concerns expressed and more importantly the progress of the implementation of the agenda will be accelerated. Project managers were to be appointed for individual projects that would oversee the coordination and implementation

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<sup>440</sup> WIPO, CDIP/3 (2009) *CDIP Third session Report* [Online] Available at [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=17382](http://www.wipo.int/meetings/en/details.jsp?meeting_id=17382) accessed [06/11/14]

<sup>441</sup> WIPO, CDIP/3/INF/1 (2009) *Proposed Methodology for Implementation of Development Agenda Recommendations* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_3/cdip\\_3\\_inf\\_1.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_inf_1.pdf) accessed [06/11/14]

<sup>442</sup> Ibid

and would also enable CDIP to receive reports on the implementation of the activities<sup>443</sup>.

At the second session, there was a request for a progress report on the recommendations considered for immediate implementation which was presented at the third session. The report was divided into three columns covering the implementation strategies, examples of activities and the achievements so far<sup>444</sup>. Some of the achievements recorded by the Secretariat included recommendation 13 on legislative assistance; several developing countries were recorded to have been provided upon request, advice on their existing laws or draft legislations and have been made aware of their options and policy choices in implementing the legislation<sup>445</sup>. This is particularly helpful to developing countries as it would enable them to make informed decisions on the use of legal options and flexibilities.

A Development Agenda Coordination Division (DACD) was established with the responsibility of mainstreaming the development dimension into all the areas of WIPO's activities. The Division was to report to the Director General of WIPO and also responsible for coordinating with the different Sections/Divisions in WIPO to facilitate the integration of the development dimension in the programs of the different sectors in the organization, including in WIPO's TA and capacity building programs. The establishment of the DACD was seen as progress towards the implementation of the DA and beyond the DA<sup>446</sup>.

Another achievement highlighted in the progress report was on assessing the needs of countries receiving TA. It was stated regarding recommendation 1 that needs evaluation exercises had been undertaken for the formulation of IP national plans and strategies; these included a number of needs assessment

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<sup>443</sup> Ibid

<sup>444</sup> WIPO, CDIP/3/5 (2009) *Third Session Progress Report on Recommendations for Immediate Implementation* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_3/cdip\\_3\\_5.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_3/cdip_3_5.pdf) accessed [06/11/14]

<sup>445</sup> Ibid

<sup>446</sup> Ibid

and expert missions involving all stakeholders<sup>447</sup>. It was however unclear from the report how these assessments were done, there were no details given on the factors considered or the methodology of the needs assessments undertaken in the recipient developing countries.

#### 4.4.4 The Fourth Session Meeting

The fourth session like the previous sessions was to discuss the progress of the implementation of the recommendations. It was held from November 16 to November 20, 2009. The project reports presented included specific activities planned, budget allocated, the expected duration of each project and ways to move the work on the projects forward.

During this session, the CDIP approved a project that would support and monitor the impact of WIPO's activities on development. This project comprised of two components and one on them focused on reviewing and producing a report on a macro level assessment of WIPO's TA activities in the Corporation for Development area<sup>448</sup>.

The purpose of this report was to help WIPO identify ways to improve its TA activities by assessing the effectiveness, relevance, efficiency and the impact of the DA programs. The assessment was to focus on all TA for development activities provided by both the development sector and other substantive programs such as TK, TCE's and genetic resources. This assessment was to be conducted through desk reviews and country evaluations, feedback from the beneficiaries of the programs at the national level and field visits to six countries<sup>449</sup>.

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<sup>447</sup> Ibid

<sup>448</sup> WIPO, CDIP/4/8/REV/TOR (2010) *Terms of Reference for the Review of WIPO'S Technical Assistance Activities in the area of Cooperation For Development* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_4/cdip\\_4\\_8\\_rev\\_tor.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_8_rev_tor.pdf) accessed [06/11/14]

<sup>449</sup> Ibid

This report will be examining key areas such as any shift in WIPO's approach towards TA since the DA , the role of WIPO's stakeholders like Governments, IP offices and NGOs in achieving results including the associated risks and a look at the tools and methodologies used to deliver TA activities. It is expected that this report will enable the TA providers to be more informed in achieving the tasks ahead<sup>450</sup>.

The proposal for this report first of all demonstrates a commitment to ensure that the principles of the DA is seen in WIPO's development activities which is a change from WIPO's previous approach as discussed in chapter 2 of this thesis. Also determining the impact, effectiveness and relevance of its TA activities would help towards developing ways to improve it. Country evaluations and feedback from beneficiaries is also an important step towards understanding the needs of the recipient countries.

The final report of this review was submitted on 31 August 2011 and is discussed later on in the chapter.

#### **4.4.5 The Fifth Session Meeting**

The fifth session meeting was held from April 26 to April 30, 2010. Significant progress was reported to have been achieved at this meeting of the CDIP with the delegates in agreement on implementing a coordination mechanism. The coordination mechanism would include audit mechanism, the monitoring and accessing of the implementation of the agenda which was said would improve transparency<sup>451</sup>.

The creation of the Development Agenda Group (DAG) mentioned earlier in the chapter was also announced by Egypt during this meeting. The group started with 18 developing countries and its purpose was to ensure the

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<sup>450</sup> Ibid

<sup>451</sup> ICTSD, 'WIPO Committee Adopts Development Agenda Coordination Mechanism' (2010) Bridges Volume 14-Number 16 [Online] Available at <http://www.ictsd.org/bridges-news/bridges/news/wipo-committee-adopts-development-agenda-coordination-mechanism> accessed [06/11/14]

effective implementation of the DA. The document of the group's guiding principles was presented and discussed at this meeting<sup>452</sup>.

Another issue discussed was patent flexibilities to which a preliminary report was prepared by the Secretariat and presented at this meeting. It was mentioned that WIPO members were paying particular attention to the use of flexibilities in the field of patent which is crucial for the health sector of developing countries where these flexibilities play an important role in ensuring access to medicine<sup>453</sup>.

There was also the Director General's report on the implementation of the DA<sup>454</sup>. This report was in three parts focusing on efforts undertaken to mainstream WIPO DA into WIPO's regular activities, the projects currently being carried out to implement the recommendations of the DA and the future of the DA.

The Director General in looking into the future of the DA expressed the importance of ensuring that projects and activities developed to address the concerns behind the recommendations actually meet the real needs and interests of the recipient countries and adequately reflect their ground reality.

He added that for the DA projects and activities to be sustainable, there was a need for the close interaction and communication with the recipient countries as well as their full commitment.

There was also a report on WIPO's contribution to the United Nations millennium development goals which provided an overview of the contribution

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<sup>452</sup> WIPO, CDIP/5/9 Rev. (2010) *Information on the Development Agenda Group Guiding Principles* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_5/cdip\\_5\\_9\\_rev.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_9_rev.pdf) accessed [06/11/14]

<sup>453</sup> WIPO, CDIP/5/4 (2010) *Patent Related Flexibilities in the Multilateral Legal Framework and their Legislative Implementation at the National and Regional Levels* [Online] [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_5/cdip\\_5\\_4-main1.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_4-main1.pdf) accessed [06/11/14]

<sup>454</sup> WIPO, CDIP/5/2 (2010) *Director General's Report on Implementation of the Development Agenda* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_5/cdip\\_5\\_2.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_2.pdf) accessed [06/11/14]

of the different parts of the organisation towards the millennium goals<sup>455</sup>. This is important because it shows the progress the organisation is making to incorporate development into all its activities. There were other reports produced at the fifth session that set out specific on-going implementation activities which are available on the WIPO website.

#### 4.4.6 The Sixth and Seventh Session Meetings

The sixth session of the CDIP was held in Geneva from November 22 to November 26, 2010. Among the reports considered was the progress report on the recommendations for immediate implementation. This set out in detail the progress made and strategies adopted to implement each DA recommendation from January 2009 to end of June 2010.

This report included further progress made on assessing the needs of recipient countries contained in recommendation one. Pakistan was one of the countries mentioned where a customised IP action plan was developed following a thorough needs assessment conducted in consultation with the national authorities concerned<sup>456</sup>. A look at the IPTA Database (IP-TAD) developed under recommendation number 5 which was designed to hold detailed information on how the needs assessment was conducted stated that discussions were held with senior officials of IP office Pakistan and other stakeholders of the program<sup>457</sup> and there was also consultation with the officials of the trademarks registry, patent office and copyright office on the

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<sup>455</sup> WIPO, CDIP/5/3 (2010) *Report on WIPO's Contribution to the United Nations Millennium Development Goals (MDGs)* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_5/cdip\\_5\\_3.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_5/cdip_5_3.pdf) accessed [06/11/14]

<sup>456</sup> WIPO, CDIP/6/3 (2010) *Progress Report on Recommendations for Immediate Implementation* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_6/cdip\\_6\\_3.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_6/cdip_6_3.pdf) accessed [06/11/14]

<sup>457</sup> See WIPO Technical Assistance Database: Activity details *EC-Pakistan Trade-Related Technical Assistance Program - Phase II: Consultation Mission 31/05/2010 - 02/06/2010* [Online] Available at <http://www.wipo.int/tad/en/activitydetails.jsp?id=1193> accessed [06/11/14]

key automation component of the program<sup>458</sup>. The database mentioned consultation with other stakeholders but there was no information provided on who they were, there was also no assessment checklist of the needs assessment process.

The process of needs assessment is an important step to providing well-tailored TA which if not properly carried out could result in donors providing TA programs that are not based on the defined needs of the stakeholders in beneficiary countries and could also result in the waste of resources<sup>459</sup>.

In 2007, a diagnostic toolkit was developed to aid the assessment of needs for IPTA programs and financial assistance in LDC's<sup>460</sup>. According to the toolkit, the process of needs assessment in practice should be conducted at the earliest stages of planning IPTA programs and focus on understanding the contextual and background situation in the recipient countries by looking at factors such as their economic development and structure, human development status, IP systems and poverty profile<sup>461</sup>. It must also be a collaborative effort of the donor organisations and stakeholders that go beyond national IP offices to include other stakeholders from recipient countries such as the business sectors and civil society<sup>462</sup>.

A successful need assessment process will also ensure a demand driven approach where the supply of IPTA responds to the demand of the recipient countries. In addition, the programs will be tailored to the recipient countries specific needs.

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<sup>458</sup> See WIPO, Technical Assistance Database: Activity details *EC-Pakistan Trade-Related Technical Assistance Program - Phase II: Consultation Mission 26/05/2010 - 28/05/2010* [Online] Available at <http://www.wipo.int/tad/en/activitydetails.jsp?id=656> accessed [06/11/14]

<sup>459</sup> Leesti M, Pengelly T, 'Assessing Technical Assistance Needs for Implementing the TRIPS Agreement in LDCs-A Diagnostic Toolkit' (2007) ICTSD pg2-6

<sup>460</sup> Ibid. The diagnostic toolkit was based on an earlier version of IPRTA needs assessment tool developed by Mart Leesti and Tom Pengelly at Saana Consulting in December 2004 specifically adapted for use in LDCs. It contained an assessment checklist covering a range of national IP issues IPTA recipient countries.

<sup>461</sup> ibid

<sup>462</sup> ibid

In a study conducted by the UK IPO on the impact assessment of IPTA provided by developed countries over the period 2005-2010 in four emerging and transition economies<sup>463</sup>, IPTA activities were placed in four categories which focused on the main pillars of a country's IP system: IPR administration institutional support; support for innovation, technology transfer and IP awareness; legislative, regulation and IP policy support; and the enforcement and protection of IPR. Needs assessment was undertaken by looking at the state of the economy, the role of science and technology and their intellectual property systems.

The study while acknowledging that a thorough needs assessment process required field visits, extensive interviewing, access to key resources and documents nevertheless found that the taxonomy used showed that generally IPTA programs did not pay attention to the different country contexts, instead the programs focused on similar areas in each country<sup>464</sup>. This resulted in IPTA targeting urgent IP needs in some country while in other countries not so much. The findings showed the importance of a proper needs assessment process, a demand-driven and country-specific approach to IPTA.

Also reported during this session was the progress made on recommendation 14 particularly useful for developing countries as they continue to implement the TRIPs agreement which also could assist them to make good use of the flexibilities under it. WIPO reported that the activities carried out under this recommendation has been able to enhance the capacity of developing countries in understanding the use of the existing flexibilities in international treaties and develop a better understanding by way of concrete and practical examples on how to identify and explore flexible means of TRIPs implementation<sup>465</sup>.

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<sup>463</sup> The study looked at Brazil , Poland, India and Thailand . See SAANA Consulting (2011) UK IPO Report, op.cit

<sup>464</sup> ibid

<sup>465</sup> WIPO, CDIP/6/3 (2010) op.cit

At the seventh session of the CDIP meetings<sup>466</sup>, the Director General's report on the implementation of the Agenda from January to December 2010 was presented<sup>467</sup>. The report provided an overview of the mainstreaming of the DA, a summary of the projects undertaken and outlook for the future of the DA. The report stated that projects would continue to be implemented and a number of them would be brought to completion by 2012.

Looking into the future of the DA, the plan is for the outcome of all the activities undertaken to feed into the future activities of WIPO. The DACD would continue to facilitate discussions in the CDIP and other relevant bodies for the continual implementation of the DA recommendations<sup>468</sup>.

#### 4.4.7 The Eighth Session Meeting

The much anticipated report titled "*An External Review of WIPO Technical Assistance in the Area of Cooperation for Development*" discussed during the fourth session meeting of the CDIP was submitted on the 31 August 2011. The final report was presented and approved at this meeting which was held from November 14 to November 18, 2011. The review was conducted by two external independent consultants who were selected by an internal selection committee established for that purpose<sup>469</sup>.

This part of the thesis will give a brief summary of the key findings of the report.

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<sup>466</sup> Held from May 2 to May 6, 2011 Geneva, Switzerland

<sup>467</sup> CDIP document, *Director General's Report on Implementation of the Development Agenda* (2011) WIPO document CDIP7/2 Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_7/cdip\\_7\\_2.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_7/cdip_7_2.pdf) accessed [07/11/14]

<sup>468</sup> Ibid

<sup>469</sup> Birkbeck C D, Roca S, 'An External Review of WIPO Technical Assistance in the Area of Cooperation for Development ' (2011) WIPO document CDIP/8/INF/1 Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_8/cdip\\_8\\_inf\\_1-annex1.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_inf_1-annex1.pdf) accessed [07/11/14]

The purpose of the document was stated as a macro level assessment of the effectiveness, impact, efficiency and relevance of WIPO's TA activities in the area of cooperation for development. The review was also to examine the existing internal coordination mechanisms for delivering TA for the purpose of determining their adequacy<sup>470</sup>.

This report focused on using evidence based approach by capturing the perceptions of the member states, WIPO staff and the stakeholders involved. The intended objective of the External Review report was to improve WIPO's TA activities and to identify ways to develop the monitoring and evaluation of the impact of these activities.

The review covered a three year period, from 2008 to 2010. It examined WIPO's current approaches to TA, impact, coordination, monitoring and efficiency and then made recommendations for improvement. Most of the areas and concerns discussed during the previous CDIP sessions were assessed and reported on in this review.

The review team made it clear that the review was conducted at a time when WIPO was undertaking a number of organizational change therefore many of the WIPO Development cooperation activities at that point were under revision or in a pilot phase.

While the review team found WIPO focused on integrating the WIPO DA recommendations into the organization's development cooperation activities, they also found that there still remained significant challenges in translating plans into action under the various principles and expected results in terms of development orientation. There were four challenges identified by the team.

One of the challenges highlighted was the absence of adequate and shared definition of development-oriented assistance as found in the DA recommendations. Also at the institutional level there was a lack of a clear and broad understanding of the overall purposes of WIPO Development

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<sup>470</sup> Ibid

cooperation activities. This of course goes to the foundation of WIPO's efforts in implementing the DA recommendations. The review team also found that WIPO's Pro-IP culture previously discussed in chapter 2 of this thesis<sup>471</sup> still remained in spite of the great consideration being given for development concerns. Interviewing some of the WIPO staff revealed that they still viewed WIPO's primary role as a guardian of the international IP system. The review team stated that even though this was one of the organisation's core functions, it was responsible for the pro-IP culture and the narrow interpretation of the DA. As a result there was a lack of openness to different perspectives on the IP system, culture of collaboration and public engagement necessary for the improved development orientation.

Secondly, the review team found that despite the fact that creative and cultural industries represent one of the strongest potential development areas for many developing countries, the intensity of activities in these areas and related rights were not adequate. They found that instead there was a greater intensity of programs in the area of industrial property and budget allocation. It was also pointed out that even though WIPO had activities to address issues such as geographical indication and TK, they were less resourced than other issues. It was found that the diversity of activities underway was broad but the facilities available for their implementation and follow up were limited.

Also regarding TRIPs flexibilities which is a subject that has been discussed during the previous meetings of the CDIP, the team still found that there were relatively few activities to contribute towards assisting developing countries in this area.

Thirdly, another area the review found lacking was in assessing the needs of TA recipients. They found that development activities were still being undertaken on an ad-hoc request driven basis or according to WIPO's programs work plan. The team did find a number of methodologies in place for conducting needs assessment; some were developed before the DA discussions while others evolved during the CDIP activities and were in the pilot testing stages during the review.

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<sup>471</sup> See chapter 2 under WIPO's Internal process

The methodologies consist of a series of questionnaires designed to assess the benefit of IP systems in developing countries, integrated questionnaire called the benchmarking tool kit designed to assess issues related to design and implementation strategies and questionnaires on IP and business strategy for SME's. They also found a summary of best practices called the Practical Roadmap for National IP strategies and Innovation to act as a guideline for WIPO consultants and an IP audit tool which was designed to make information available to WIPO consultants on the type of support and infrastructure countries have towards the development of their IP assets which will be useful information towards defining strategic national IP objectives and developing implementation strategies<sup>472</sup>.

The review team however noted that some of the methodologies still remained in the early stages of implementation at the time of the review while the methodology that was currently in use by the secretariat was not satisfactory in assisting developing countries to assess their IP capabilities, developmental needs and to develop appropriate strategies.

It was discussed earlier on in this chapter that one of the factors that may cause implementation challenges is the lack of clear definition of some of the wordings of the recommendations. According to the review findings, this was indeed the case when the team found that there was confusion within the WIPO secretariat and among member states about certain terms in the cooperation activities such as the meaning of 'demand-driven'. They found that 'demand-driven' was interpreted by WIPO staff an obligation to respond to member states requests even in cases where these requests were not likely to yield any impact and there were no known links to their national needs or the DA.

Stemming from this, the team also found that there was inadequate communication between member countries and WIPO staff on local conditions in member countries that could facilitate or challenge the successful implementation of WIPO activities including information about risks associated with such activities.

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<sup>472</sup> Birkbeck C D, Roca S, op.cit pg77

Fourthly, the review team found shortcomings at the implementation level of the DA, they found uneven progress in mainstreaming of the DA recommendations particularly in the design of work plans and the conduct of concrete development activities. They illustrated this by highlighting examples of challenges found at the implementation level of the WIPO development cooperation activities such as weakness in WIPO's use of IP policies, plans, strategies and needs assessment to guide its planning of development cooperation work. During the period of this study, the review team found no evidence of country desk officers consulting any policies or plans within the recipient countries to guide their development cooperation activities.

The findings of the review team cannot be completely covered in this chapter, however the summary of their findings show that several of the issues that existed before the establishment of the DA still persisted within WIPO at the time of the review. Although there has been a considerable amount of work done and continuing since the implementation process of the DA began which the review team acknowledged, the result of the findings of this external report would serve as a focused and concrete guide in subsequent CDIP discussions on implementing the agenda.

#### 4.4.8 CDIP Meetings Update after the External Review Report

At the ninth meeting of the CDIP following the presentation of the External review report, an ad hoc working group was established to meet and discuss the recommendations proposed. After the review by the working group, the Development Agenda Group (DAG) and the Africa group agreed that there should be a focus on the proposals of the external report to improve WIPO's development cooperation activities. Following which a joint proposal was submitted by the DAG detailing the recommendations made by the report which should be worked on<sup>473</sup>.

At the subsequent sessions of the CDIP, Group B which is a cross-regional group of developed nations did not show any interest in discussing the proposal put forward by the DAG. The chairman's summary stated that an agreement could not be reached on the matter by the committee therefore it was decided that it would be considered at the next CDIP session<sup>474</sup>.

At the thirteenth session of the CDIP held in May 2014, the situation remained the same, while the African group pushed for a consideration of the joint proposal submitted which stood as the only official proposal on the external review, Group B still resisted any discussions on the proposal stating that the CDIP was not obliged to implement recommendations made by external experts. Instead they suggested a compilation of best practices in the TA area as the way forward<sup>475</sup>.

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<sup>473</sup> WIPO, CDIP/9/16 (2012) *Joint Proposal by the Development Agenda Group and the Africa Group on WIPO's Technical Assistance in the Area of Cooperation for Development* [Online] Available at [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_9/cdip\\_9\\_16.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_9/cdip_9_16.pdf) accessed [07/11/14]

<sup>474</sup> Third World Network, 'WIPO: Developed countries resist movement on IP and Development' (2014) Third World Network Publication [Online] Available at [http://www.twn.my/title2/intellectual\\_property/info.service/2014/ip140511.htm](http://www.twn.my/title2/intellectual_property/info.service/2014/ip140511.htm) accessed [07/11/14]

<sup>475</sup> Ibid

## 4.5 Conclusion

This chapter has discussed the DA starting from its history and its establishment to the CDIP discussions on its implementation. The DA is considered a major achievement in putting development at the forefront of WIPO's activities, not just in the area of cooperation for development activities but also in the transformation of WIPO's internal culture to support the development goals of member countries.

This chapter has also highlighted through the meetings of the CDIP some of the issues raised by the delegates on the implementation of the recommendations and some of the progress made on the issues discussed which have already resulted in changes made to WIPO's activities in the area of cooperation for development.

However according to the external review report submitted by a team of experts at the eighth session, it showed that at the time of the review, the concerns raised by member states which prompted the debate that resulted in the establishment of a DA in the first place still remained. The finding on the inadequate communication between the member countries and WIPO staff on local conditions in member countries that could challenge the successful implementation of WIPO activities is in line with the questions being asked in this thesis.

While the request for the report could be seen as a demonstration of the commitment by the member states to implement the DA, unfortunately the proposal submitted by the DAG to the CDIP to take the recommendations of this report forward has so far met resistance on the part of developed countries.

It is agreed by the member countries that the findings presented by the external review team will go a long way towards successfully implementing the DA so it is hoped that the present position will change in the near future as discussions on the implementation of the DA continues within the CDIP.

Looking back at the DA Cluster A recommendation 1 provision for TA to take into account the priorities and special needs of developing countries, an area of priority for developing countries is their creative and cultural industries.

It was mentioned earlier that the external review report found that there was a lack of intensity of WIPO activities in the creative and cultural industries even though it represents one of the strongest potential development areas for many developing countries. In line with this the next chapter will be looking in detail at the importance the of the TK sector to developing countries and how the DA recommendations could help this industry reach its fullest potential thereby contributing to developing countries development goals.

## Chapter 4

# Traditional Knowledge and Technical Assistance

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### 5.1 Introduction, Definition and Scope

The universal concept of IP which identifies it as a nonphysical property which is valuable as a result of it originating from an idea or ideas itself is not new to developing countries<sup>476</sup>. For centuries developing countries have survived and depended on such ideas in almost all aspects of their daily lives in areas such as medicine and food production. However the western concept of IP which defines these ideas as legal rights associated with creative efforts<sup>477</sup> as discussed earlier on in chapter 1 of this thesis was introduced to most developing countries during colonisation.

As developing countries continue to participate in global IP and using IP to further their development, their TK is probably where their biggest strength lie.

TK is a multidisciplinary concept that is used to describe different types of knowledge that have been acquired, developed and shared mainly from traditional communities. The knowledge is referred to as traditional because it involves cultural expressions, innovation, practices usually passed on from generation to generation and identifiable to a particular people and its territory<sup>478</sup>. The communities use the knowledge to sustain themselves, to

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<sup>476</sup> Hughes J, 'The Philosophy of Intellectual Property' (1988-1989) 77 Geo. L. J. 287 pg 294

<sup>477</sup> Brainbridge D, *Intellectual Property fifth edition*, (2002) Pearson Education imprint .pg3

<sup>478</sup> Alvarez Nunez R G, 'Intellectual Property and the Protection of Traditional Knowledge, Genetic Resources and Folklore: The Peruvian Experience' (2008) Max Planck UNYB 12. Pg 493

maintain their culture and preserve their genetic resources needed for their continued survival<sup>479</sup>.

The term 'traditional knowledge' has been described as a broad concept<sup>480</sup> which has resulted in definitional issues. It has been described to include literary, scientific and artistic creations as well as knowledge from biological and genetic resources<sup>481</sup>. The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) treaty used TK in association with farmers' rights which is knowledge relevant to plant genetic resources for food and agriculture<sup>482</sup> while the Convention on Biological Diversity (CBD) defines the scope of TK to include "stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds"<sup>483</sup>.

Agreeing with WIPO that there is no single definition which can fully encompass the diverse forms of knowledge that traditional communities hold<sup>484</sup>, the definition and scope of TK referred to in this chapter will therefore include the widest possible definition of TK.

Indigenous people and communities use of intimate knowledge of their surroundings to provide food, medicines and other useful products and to

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<sup>479</sup> Hansen S A, VanFleet J W, 'A Handbook on issues and options for Traditional Knowledge Holders in protecting their Intellectual property and Maintaining Biological Diversity' (2003) American Association for the Advancement of Science (AAAS) Washington DC pg3

<sup>480</sup> Commission on Intellectual Property Report (CIPR), 'Integrating Intellectual Property rights and Development Policy' (2002) CIPR Commission publication . pg 7

<sup>481</sup> Overwalle G V, 'Protecting and Sharing Biodiversity and Traditional Knowledge: Holder and User Tools' (2005) Ecological Economics 53,585– 607. Pg586

<sup>482</sup> Food and Agriculture Organization (FAO) of the UN, *International Treaty on Plant Genetic Resources for Food and Agriculture* (2009) ITPGRFA Treaty text. FAO Publication Pg 12 Available at <http://ftp.fao.org/docrep/fao/011/i0510e/i0510e.pdf> accessed [11/11/14]

<sup>483</sup> See Convention on Biological Diversity (CBD) *Traditional Knowledge and the Convention on Biological Diversity* [Online] <http://www.cbd.int/traditional/intro.shtml> accessed [11/11/14]

<sup>484</sup> World Intellectual Property Organisation (WIPO), 'Intellectual Property and Traditional Knowledge' Booklet No 2 WIPO Publication pg4 Available at [http://www.wipo.int/freepublications/en/tk/920/wipo\\_pub\\_920.pdf](http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf) accessed [11/11/2014]

influence their ecosystem dates back thousands of years<sup>485</sup>. This knowledge has proved valuable to the communities and they have been passed from generation to generation through learning and teaching. Even though the process of passing the information is usually old and may have originated a long time ago<sup>486</sup> nevertheless, the knowledge is also recognized as having a dynamic character. WIPO reports that TK evolves every day, it is created everyday as communities and individual respond to changes and challenges posed by their environment<sup>487</sup>.

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<sup>485</sup> Arriaza N R , 'Of Seeds and Sharmans:The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities (1995-1996) Citation: 17 Mich. J. Int'l L. 919 pg 920

<sup>486</sup> Biber-Klemm S, Cottier T, *Rights to Plants, Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (2008) CABI Publishing Oxfordshire Pg17

<sup>487</sup> WIPO booklet No.2 ,op.cit, pg 6

## 5.2 Significance of Traditional Knowledge to Developing Countries

Most developing countries are mainly indigenous people, even though the majority of them have undergone considerable socio cultural changes over the past century, they still continue to retain and practice their cultures<sup>488</sup>.

It is generally acknowledged that developing countries have the least developed economies but it is also widely known that they are very rich in various forms of TK like the knowledge from biological diversity and arts. They have developed knowledge over time on the use and conservation of these natural resources to sustain themselves which is the source of their livelihood and also to contribute to their economic development<sup>489</sup>.

TK holds personal, commercial as well as spiritual significance for developing countries. For many indigenous communities, it is impossible to separate the spiritual from the physical, their traditional practices are seen as emanating from a spiritual base, their spirituality is much more a reality to them than material, and they therefore frequently view themselves as stewards and guardians of nature<sup>490</sup>. Most communities associate the properties of various foods, medicinal plants, health and diet with natural and horticultural resource management practices<sup>491</sup>. The local communities embrace information about their environment such as factors that explain timing in ecosystem, sequences of events and trends. They have direct links with their lands which

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<sup>488</sup> Karbolo O, Promoting Development Among the Indigenous Loita Maasai Pastoralists of Kenya, Chap. in *Promoting Traditional Knowledge : Systems, National Experiences and International Dimensions*, eds. Twarog,S and Kapoor,P , 2004,United Nations Publication,pg 273

<sup>489</sup> Ekpere, J A, *The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (2000) Organization of African Unity Scientific, Technical and Research Commission, Lagos, Nigeria pg6

<sup>490</sup> Posey D A , 'Commodification of Sacred through Intellectual Property Rights ' (2002) *Journal of Ethnopharmacology* 83 pg 4

<sup>491</sup> Ibid

creates an obligation to maintain connections that form the core of individual and group Identity<sup>492</sup>.

TK resource is also vital to the health of indigenous peoples in developing countries. Most developing countries still rely on traditional medicines as a major source of their healthcare needs as it is the only affordable option available to poor people<sup>493</sup>. According to the World Health Organisation (WHO) 80% of the population in some African and Asian countries depend on traditional medicine for their primary healthcare, traditional medicine has been reported to treat various infectious and chronic conditions<sup>494</sup>. A few examples of the healing properties of plants can be seen in the use of quinine as a well known cure for malaria which comes from the bark of cinchona tree in Peru. This was thought to have been discovered by the Andean indigenous community which observed jaguars eating the bark of the tree when feverish<sup>495</sup>.

Another popular example is the use of rose periwinkle plant which is unique to Madagascar as a source of properties that have been known to fight certain types of cancers<sup>496</sup>. Going back thousands of years in India, indigenous farmers have used the juice of the neem tree to help prevent skin disorders such as scabies, they have also used the seeds and leaves of the neem tree as a natural insecticide<sup>497</sup>.

TK also plays a vital role in the food security of indigenous people. The farmers in developing countries in subsistence systems ensure a minimum amount of production and prevent food shortage by maintaining a high diversity of crop species, the seed production is usually based on the

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<sup>492</sup> Ibid

<sup>493</sup> CIPR Commission report (2002) ,op.cit, pg 73

<sup>494</sup> World Health Organisation (WHO), 'WHO Traditional Medicine Strategy 2002–2005' (2002) WHO/EDM/TRM/2002.1 WHO Publication pg 1

<sup>495</sup> Arriaza N R, op.cit pg 921-922

<sup>496</sup> Ibid

<sup>497</sup> Ibid

informal knowledge of seed storage and selection and the exchange of seeds between farmers and farms. They also engage in systems of crop rotation that lead to sustainable production and resource use<sup>498</sup>.

Commercially, TK is a valuable resource for many developing countries communities as well as outsiders such as researchers, government and commercial industries. TK products and associated knowledge have been used as a starting point for product development in major industries such as pharmaceutical industries, food and agriculture<sup>499</sup>. Herbal medicines are reported to generate billions of dollars in revenue being the most lucrative source of traditional medicine in developing countries<sup>500</sup>. Arts and crafts have also been known to provide economically for these countries, for example in India, handicraft is a huge source that generates income for a large number of poor people in their communities, it is estimated that over 3 billion US dollars is generated by almost 10 million people from their handicrafts<sup>501</sup>.

TK related to biological resources which is often referred to as biological diversity is particularly commercially valuable to developing countries. Over the years with technical advances, scientists have been able to study the commercial potential of species which has resulted in companies expanding their studies to the natural world mostly in developing countries with rich tropical forests. To help carry out their research, the knowledge of the local communities have often been relied upon because they have sophisticated knowledge of local plants and animals<sup>502</sup>.

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<sup>498</sup> Biber-Klemm S, Cottier T (2008) op.cit, pg22

<sup>499</sup> Downes D R , 'How Intellectual Property could be a Tool to Protect Traditional Knowledge' (2000) 25 Colum. J. Envtl. L. 253 pg 254-255

<sup>500</sup> Priyanka T, Ganesh T G, Khadabadi S S, 'Distribution and Ancient-Recent Medicinal uses of *Trichosanthes* Species' (2012) International Journal of Phytopharmacy Review Article Vol. 2 (4), pp.91-97 pg 91

<sup>501</sup> Finger J M, *Poor Peoples Knowledge, helping poor people to earn from their knowledge. Protecting Intellectual Property in Developing Countries* (2004) Word Bank and Oxford University Press pg2

<sup>502</sup> Posey D A , Dutfield G, *Beyond Intellectual Property. Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (1996) International Development Research Centre ,Canada. pg14

Apart from its commercial significance, TK is also important for the conservation of biological resources. Due to overexploitation and irresponsible development, biological resources are reported to be rapidly depleting. This is often as a result of inappropriate government policies which does not specify that local resources should be extracted at a sustainable level but allows relatively unlimited access to these materials<sup>503</sup>. The loss of biological resources has also been linked to economic factors. The International Union for Conservation of Nature (IUCN) reports that many economic activities have the potential to result in the loss of biological resources by converting resources and habitats to other uses, through the use up of non-renewable resources and the adding of waste and effluent to the environment<sup>504</sup>.

As a result of the knowledge that Indigenous and local communities possess, they have come to play an important role in the conservation of biological resources. In many instances, traditional farming techniques in developing crops that thrive in particular conditions, adverse conditions and intercropping techniques have maintained the productivity of land for many generations. It would therefore be useful to preserve these techniques for the conservation of the environment<sup>505</sup>. Another similar situation is where farmers have developed over time crop varieties suited to their land and climate, these techniques and varieties should also be preserved to feed the growing population of the world<sup>506</sup>.

The significance of TK to developing countries discussed above with examples makes it crucial that these biological materials and associated knowledge are preserved against misappropriation. Misappropriation of TK is an issue that has dominated the global scene in recent years and has been a major concern to many developing countries. This will be looked at in more detail next.

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<sup>503</sup> Ibid

<sup>504</sup> Biber-Klemm S, Cottier T (2008), op.cit, pg 27

<sup>505</sup> Posey D A and Dutfield G(1996) ,op.cit. pg15-16

<sup>506</sup> Ibid

### 5.3 Misappropriation of Traditional Knowledge

The misappropriation of TK and resources is commonly referred to as biopiracy which has been described as the “*unauthorised extraction of biological resources and/or associated traditional knowledge from developing countries, or to the patenting of spurious ‘inventions’ based on such knowledge or resources without compensation*”<sup>507</sup>.

There have however been questions in international forums about what actually constitutes biopiracy as there is no specific definition for the term. Therefore biopiracy has been categorised into 3 forms based on the various descriptions of the term by academics and NGO’s as well as reported examples of biopiracy cases<sup>508</sup>.

The first is the patent based biopiracy which involves patenting inventions based on the TK and/or biological resources obtained from local communities of developing countries without obtaining adequate permission and benefit sharing<sup>509</sup> arrangements with these communities<sup>510</sup>.

The second form is called non-patent biopiracy which involves other IP control such as deceptive trademarks and plant variety protection, based on biological resources and TK obtained from local communities in developing countries without adequate permission and benefit sharing arrangements<sup>511</sup>.

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<sup>507</sup> Dutfield G, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (2004) Earthscan pg 52

<sup>508</sup> Robinson D F, Biopiracy and the Innovations of Indigenous Peoples and Local Communities . Chap. In *Indigenous Peoples Innovation: Intellectual Property Pathway to Development*, eds, P Drahos , S Frankel (2012) ANU E Press pg78-80

<sup>509</sup> Benefit sharing is defined as arrangements made to ensure that benefits arising from the use of traditional knowledge and practices of indigenous people are shared equitably and fairly with the people or communities. See Article 8(j) - Traditional Knowledge, Innovations and Practices [Online] Available at <http://www.cbd.int/traditional/> accessed [06/03/15] ; Tsioumani E, *Benefit-sharing and traditional knowledge: the need for international guidance* (2014) [Online] Available at <http://www.benelexblog.law.ed.ac.uk/2014/07/08/benefit-sharing-and-traditional-knowledge-the-need-for-international-guidance/> accessed [06/03/15]

<sup>510</sup> Robinson D F (2012) op.cit pg 78-80

<sup>511</sup> Ibid

The third involves extracting biological resources and the associated TK from indigenous communities for research and development purposes without adequate benefit sharing arrangements with these communities.<sup>512</sup>

Although the misappropriation of biological resources and associated knowledge have been going on for centuries reportedly since the colonial times, there is now a real awareness of it since the rapid globalization of IP regimes. Situations of biopiracy have become more evident especially in cases where developed countries hold patents that are well known and commonly used biological resources from developing countries<sup>513</sup>. A typical example to illustrate biopiracy, where TK and biological resources have been misappropriated is the white kwao krua case.

The white kwao krua is a plant that has been used for many years by the people of South East Asia for its skin treating properties. Thai traditional healers have over the years experimented with the extracts of this plant and transmitted the knowledge of its healing properties going back a century<sup>514</sup>.

Patents were granted in the US and Japan based on the extracts of this plant. In the US, patents were granted based on claims on the use of the extract from this plant as a cosmetic ingredient that may help reduce wrinkles. Another US patent which was granted in 2010 attempted to distinguish it from the traditional application of this plant and other patents already applied for by claiming that theirs was a dry extract which did not cause eye irritation. The claims were not inventive; neither did they indicate whether they were the ones who identified the specific variant of the species. In addition, there was a contradiction in the claims made when the patent applications acknowledged the traditional medicinal use of the plant<sup>515</sup>.

These claims have been criticized for the use of TK and biological resources without clear access and benefit sharing procedures with the local

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<sup>512</sup> Ibid

<sup>513</sup> Hansen S A , VanFleet J W (2003), op.cit. pg 5

<sup>514</sup> RobinsonD F (2012) ,op.cit. pg 88-90

<sup>515</sup> Ibid

communities and countries that own these resources. They have also received criticisms regarding novelty and obviousness<sup>516</sup>.

It was pointed out that even though with regards to the claims made, the inventors clearly isolated active ingredients and altered dosage levels to improve the products safety for human use, it would however not have been possible without the experiments done over time by the Thai traditional healers who transmitted the knowledge<sup>517</sup>.

Traditional medicinal knowledge in this case was obviously used for commercial gain resulting in the high demand for the white kwao kruo plant which is now reported to have been heavily poached from the forest areas. Since then also there has been no evidence to date of any access and benefit sharing arrangement between researchers and the Thai government regarding this plant<sup>518</sup>.

Historically, researchers and corporations have had free access to communities' TK and biological resources because these resources have been considered to be in the public domain and there was no such thing as biopiracy<sup>519</sup>. This has permitted them to profit from technological use of indigenous knowledge and resources without any benefits given to the local communities themselves<sup>520</sup>. There has also been a great increase in the commercial value of indigenous biological resources due to the growth of biotechnological industries and the use of genetically engineered materials especially in the pharmaceutical industry and other industries<sup>521</sup>. As a result of this, the alarming rates at which these resources are being depleted have become a major concern. These communities still depend heavily on these biological resources, the rate of poverty remains high amongst them as they

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<sup>516</sup> Ibid

<sup>517</sup> Ibid

<sup>518</sup> Ibid

<sup>519</sup> Alvarez Nunez R G (2008) ,op.cit. pg 490

<sup>520</sup> Arriaza N R (1995-1996) , op.cit. pg 927

<sup>521</sup> Ibid

are not able to take advantage of and benefit from their knowledge and resources.

These concerns in addition to the well-known cases of biopiracy have resulted in holders of TK, developing countries and campaigning organisations to call for TK to be protected. The protection of TK has been discussed within the framework of some international organisations such as the Food and Agriculture Organisation (FAO), the World Health Organisation (WHO), the United Nations Conference on Trade and Development (UNCTAD), the World Intellectual Property Organisation (WIPO) and the Convention on Biological Diversity (CBD)<sup>522</sup>.

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<sup>522</sup> CIPR Commission report (2002) ,op.cit.pg 75

## 5.4 Traditional Knowledge Protection

Before and during decolonisation, a period when declarations of authority were being made over natural resources such as mineral, gas and oil, there was no discussion on the sovereignty over biological resources, as mentioned above, biological resources and in fact any associated knowledge was left in the public domain<sup>523</sup>. The general thought was that the public was best served by making such experience available to all. This was the situation until the coming of the industrial revolution mainly in Europe and the United States. Exclusive rights began to be granted in the form of IP rights which in turn allowed inventors and producers to make good use of these newly found rights thereby contributing to technology transfer, progress and economic growth.<sup>524</sup> This however also caused the loss of TK in industrial societies when new products began to replace the need for such knowledge. In addition knowledge was being lost as it was no longer passed on from generation to generation<sup>525</sup>.

The same is happening in developing countries today. However, unlike developed countries, because of the significance of biological resources and TK to developing countries' indigenous communities, discussed in the previous section as their very source of livelihood, this loss could have a devastating effect on their local communities.

International discussions began on IP rights for traditional peoples and communities during the first half of 1990's mostly by Non-Governmental actors (NGO's)<sup>526</sup>. These discussions took place independently at academic conferences, inter-governmental meetings, events organised by indigenous people and conferences such as the Food and Agriculture Organisation

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<sup>523</sup> Cottier T, 'The Protection of Genetic Resources and Traditional Knowledge: Towards more specific rights and obligations in World Trade Law' (1998) JIEL 555-584 PG 561-562

<sup>524</sup> Ibid

<sup>525</sup> Ibid

<sup>526</sup> Dutfield G, 'TRIPS-Related aspects of Traditional Knowledge' (2001) 33 Case W. Res. J. Int'l L. 233 pg 236-238

(FAO) and Convention on Biological Diversity (CBD)'s Conference of the Parties (COP).

At this time, government involvement was described as minimal and international organisations were quite detached from these deliberations. For example, the GATT Uruguay round of trade negotiations did not discuss matters relating to TK and although WIPO was reported to have shown interest in the protection of folklore, the issue was later dropped by the organization. It was also pointed out that the 1992 text of the CBD<sup>527</sup> on the protection of TK was vague and mainly as a result of the pressure from NGO's on the subject and not because of the organisations' commitment to the issue<sup>528</sup>.

This is however no longer the case today; the issues surrounding TK are being embraced by governments and inter-governmental organisations. The protection of TK is now a dominant issue in organisations such as WIPO since 1998<sup>529</sup>, in WTO at the preparation for the 1999 Seattle Ministerial Conference and particularly since TRIPs<sup>530</sup> and also now the main issue at the COP of CBD.

Discussions about the international protection of TK is usually started and found within the IP model<sup>531</sup>. From the IP angle, WIPO is one of the most relevant organisations where the protection of TK is also deliberated. Described as the most important international organisation dedicated to IP Rights<sup>532</sup>, its work as a major provider of TA to developing and least developed countries on IP related matters has become significant in assisting

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<sup>527</sup> United Nations CBD 1992 [Online] Available at <https://www.cbd.int/doc/legal/cbd-en.pdf> accessed [06/03/2015]

<sup>528</sup> Dutfield G (2001) op.cit, pg 237

<sup>529</sup> Ibid

<sup>530</sup> Ibid

<sup>531</sup> Gibson J, 'Traditional Knowledge and the International Context of Protection' (2004) 1:1 SCRIPT-ed pg59. See also Chapter 2(2.3) on WIPO's core activities.

<sup>532</sup> Dutfield G (2004) pg 132

these countries in the use of their TK towards their development as well as protecting their resources.

The CBD is another relevant organisation involved in the protection of TK by focusing on the conservation of genetic resources by way of international agreements. The Convention is described as the most important international legal instrument at present in the protection of TK<sup>533</sup>. The CBD has done a considerable amount of work in the development and protection of TK and acknowledges the importance of TA in its work<sup>534</sup>.

The following section will start by discussing the work of CBD in the conservation and protection of TK resources and also the work of the WTO. It then goes on to discuss the work of WIPO on TK which leads to the IP and TK debate where it is considered whether IP law can effectively protect TK.

#### **5.4.1 Convention on Biological Diversity (CBD) and Traditional Knowledge.**

The CBD is an international treaty which was inspired by the global rising commitment to sustainable development. It entered into force in 1993 and its main objectives contained in Article 1 of the Convention text states that:

*“The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of*

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<sup>533</sup> Fitzmaurice M, ‘The Dilemma of Traditional Knowledge : Indigenous Peoples and Traditional Knowledge’ (2008) International Community Law Review 10 ,255-278. Pg 256

<sup>534</sup> See Convention on Biological Diversity (CBD) *Cartagena Protocol Capacity Building* [Online] Available at [http://bch.cbd.int/protocol/cpb\\_art22.shtml](http://bch.cbd.int/protocol/cpb_art22.shtml) accessed [17/11/14]

*relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.*<sup>535</sup>

From the above, CBD is focused on the conservation of biological resources through the sustainable use of biological resources for instance the use by biotechnological industries<sup>536</sup>. It is thought that through the sustainable use of these resources, economic benefits derived would be put back into conservation activities in the affected local communities. The states then retain the sovereign rights to their biological and cultural resources and have the responsibility of ensuring that such benefits also reach the local communities and the people.<sup>537</sup>

In the past, indigenous people were generally marginalized from issues concerning their knowledge and resources<sup>538</sup> therefore the recognition by the CBD in the Convention text of the part local communities and indigenous people play in their communities in relation to the conservation of biological resources has been described as an acknowledgement of the authority of the community<sup>539</sup>. Article 8(j) of the Convention text expressly recognises and mentions the traditional lifestyles and practices of indigenous peoples and their central contributions to biodiversity conservation. It states that:

*“Each Contracting Party shall, as far as possible and as appropriate: Subject to its 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*

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<sup>535</sup> Convention on Biological Diversity (CBD) *Convention on Biological Diversity Objectives* [Online] Available at <https://www.cbd.int/convention/articles/?a=cbd-01> accessed [28/08/2012]

<sup>536</sup> Posey D A and Dutfield G (1996) ,op.cit. pg103-104

<sup>537</sup> Ibid

<sup>538</sup> Ibid

<sup>539</sup> Gibson J (2004), op.cit. pg70

*encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*<sup>540</sup>

There are other provisions contained in the CBD Convention text which have been pointed out that with proper implementation have the potential to secure a greater degree of community empowerment<sup>541</sup>. Such provisions as Article 6 which calls for national plans, programs and strategies in the conservation and sustainable use of biological diversity, Article 7 calls for the identification and monitoring of the components of biodiversity with the participation of indigenous peoples, Article 10 also states that the customary use of biological resources in addition with traditional and cultural practices that are compatible with conservation or sustainable use requirements should be encouraged<sup>542</sup>.

Like in the case of the TRIPs Agreement, developing countries are expected to meet the objectives stipulated under the CBD such as the development of action plans and national biodiversity strategies towards the conservation and sustainable use of biodiversity<sup>543</sup>. This brings up the subject of TA and capacity building. When the Convention was adopted, developing countries emphasized that it was crucial for them to have TA to enable them to take national actions to achieve global biodiversity benefits. Developing countries stressed that their ability to meet the Convention's objectives depended on the successful implementation of TA programs<sup>544</sup>. Apart from the need for assistance in taking national actions, the successful implementation of the CBD objectives also requires the active participation of the indigenous peoples directly affected and TA is a useful way to involve them and ensure their participation. Article 18 of the Convention text states the obligation of

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<sup>540</sup> Convention on Biological Diversity (CBD) *Article 8 In-situ Conservation* [Online] Available at <https://www.cbd.int/convention/articles/default.shtml?a=cbd-08> accessed [17/11/14]

<sup>541</sup> Posey D A and Dutfield G (1996) ,op.cit. pg103-104

<sup>542</sup> See text of the provision , Convention on Biological Diversity (CBD) *Text of the CBD* [Online] Available at <http://www.cbd.int/convention/text/> accessed [17/11/14]

<sup>543</sup> Convention on Biological Diversity CBD Secretariat, 'How the Convention on Biological Diversity promotes nature and human well-being' (2000) UNEP Publication pg 9

<sup>544</sup> Ibid @pg 15

contracting states to cooperate in the promotion of technical and scientific matters in implementing the Convention.

Article 18 of the Convention text states that:

*“1. The Contracting Parties shall promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, where necessary, through the appropriate international and national institutions.*

*2. Each Contracting Party shall promote technical and scientific cooperation with other Contracting Parties, in particular developing countries, in implementing this Convention, inter alia, through the development and implementation of national policies. In promoting such cooperation, special attention should be given to the development and strengthening of national capabilities, by means of human resources development and institution building.*

*3. The Conference of the Parties, at its first meeting, shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation.*

*4. The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.*

*5. The Contracting Parties shall, subject to mutual agreement, promote the establishment of joint research programmes and joint ventures for the development of technologies relevant to the objectives of this Convention.”*

While the above article can be described as a kind of transfer of technology provision because it provides for the promotion of technical and scientific cooperation, the article also draws attention to some forms of TA. This can be seen in Paragraph 2 which provides for the strengthening of national capabilities in developing countries through human resources development and institution building.

Paragraph 4 also mentions “*the training of personnel and exchange of experts*” as ways of achieving cooperation for development and the use of technologies including indigenous and traditional technologies towards the objectives of the Convention.

An important aspect of the Convention’s objectives is the implementation of its international agreements such as the Cartagena Protocol and the Nagoya Protocol.

The Cartagena Protocol on Biosafety is an international treaty that came into force in September 2003<sup>545</sup>. It is a supplementary agreement which was adopted by the Conference of Parties to the Convention on Biological Diversity and established pursuant to Article 19 paragraph 3 of the CBD to develop a protocol setting out the appropriate procedures in the transfer, handling and the use of any modified living organism resulting from biotechnology. It is designed to protect biological diversity from potential risks that could come from living modified organisms resulting from modern biotechnology. It establishes a procedure that ensures that countries are given all the information they need to be able to make decisions on whether they should import such organisms into their countries<sup>546</sup>.

Article 22 of the Protocol states that developing countries need appropriate institution mechanisms and infrastructure, adequate and well trained human resources and other capacities to be able to fulfill their obligations under this agreement. It has therefore asked parties to cooperate in the development of TA activities and to take the needs of developing countries fully into consideration<sup>547</sup>.

Towards a successful TA program, the Convention established a coordination mechanism to help with the sharing of information and experiences and lessons learned between various capacity building

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<sup>545</sup> Convention on Biological Diversity (CBD) *About the Cartagena Protocol on Biosafety to the Convention on Biological Diversity* [Online] Available at <http://bch.cbd.int/protocol/background/#intro> accessed [18/11/14]

<sup>546</sup> Ibid

<sup>547</sup> Ibid

initiatives<sup>548</sup>. The CBD website<sup>549</sup> has a frequently updated capacity building portal from which country reports of the capacity building efforts carried out so far can be accessed. The portal also includes an online forum opened to parties to the Protocol, government and other stakeholders to discuss their experiences regarding the implementation of the Cartagena Protocol.

CBD has the same TA commitment regarding the Nagoya Protocol which is also a supplementary agreement to the CBD<sup>550</sup>. The Nagoya Protocol is particularly important to the CBD because it provides a legal framework for the implementation of one of the three objectives of the Convention which is the fair and equitable sharing of benefits arising from the use of biological resources<sup>551</sup>. It was adopted in 2010 and its aim is to ensure the sharing of benefits arising from the use of biological resources in a fair and equitable way<sup>552</sup>. It contains provisions for TA to assist developing countries by setting up capacity building workshops for access and benefit sharing national focal points in indigenous communities to raise awareness of the Protocol<sup>553</sup>.

In February 2004, the Conference of Parties adopted the Action Plan on capacity building for access and benefit sharing to facilitate and support the strengthening of capacities of all relevant stakeholders which include indigenous communities and institutions for the effective implementation of

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<sup>548</sup> Ibid

<sup>549</sup> Convention on Biological Diversity (CBD) *Cartagena Protocol Capacity-Building Portal* [Online] Available at [http://bch.cbd.int/onlineconferences/portal\\_art22/cb\\_main.shtml](http://bch.cbd.int/onlineconferences/portal_art22/cb_main.shtml) accessed [19/11/14]

<sup>550</sup> Convention on Biological Diversity (CBD) *About the Nagoya Protocol* [Online] Available at <http://www.cbd.int/abs/about/> accessed [19/11/14]

<sup>551</sup> Ibid

<sup>552</sup> The Nagoya Protocol received its 51st instrument of ratification on 14 July 2014 and entered into force 90 days later on 12 October 2014. See statement of MR. Braulio F. De Souza Dias Executive Secretary *On the occasion of Fourth Access and Benefit Sharing Business Dialogue* 2015 [Online] Available at <http://www.cbd.int/doc/speech/2015/sp-2015-01-28-business-en.pdf> accessed [06/03/15]

<sup>553</sup> Convention on Biological Diversity (CBD) *Capacity-building for the early entry into force of the Nagoya Protocol on Access and Benefit-sharing* [Online] Available at <https://www.cbd.int/abs/capacity-building.shtml> accessed [19/11/14]

the provisions of the Convention<sup>554</sup>. The Action Plan is similar to the WIPO DA because it is also focused on a demand-driven and country specific approach which will take into account the different needs, capabilities and levels of development of each country. The UK IPO report<sup>555</sup> on the impact assessment of IPTA in four emerging and transition economies over a period shows a practical approach to a demand-driven and country specific approach to IPTA. The taxonomy and needs assessment profiles set out in the report<sup>556</sup> showed the different areas IPTA programs needed to target in each country for the programs to make the most impact.

CBD also plans to liaise with relevant international organizations on capacity building programs such as WIPO to ensure their programs are complementary<sup>557</sup>. Mechanisms planned for the implementation of its capacity building programs include identification of existing capacity building activities in place, awareness raising for the issues at stake and full and effective involvement of the indigenous communities. From June 2011, there have been ongoing workshops set up to identify the capacity building needs of the parties to the Protocol towards the implementation the Protocol<sup>558</sup>.

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<sup>554</sup> More information on the Action Plan can be found on the CBD website [Online] Available at <http://www.cbd.int/abs/action-plan-capacity/> accessed [19/11/14]

<sup>555</sup> SAANA Consulting (2011) UK IPO Report, op.cit @pg 72

<sup>556</sup> IPTA activities were placed in four categories which focused on the main pillars of a country's IP system : IPR administration institutional support; support for innovation, technology transfer and IP awareness; legislative, regulation and IP policy support; and the enforcement and protection of IPR

<sup>557</sup> Ibid

<sup>558</sup> Three workshops on capacity building were held in Montreal Canada and in New Delhi India between June 2011 and July 2012. Also the Secretariat with financial support from the Governments of Japan and the Republic of Korea and the European Union organized seven regional and sub-regional capacity-building workshops for the [Pacific](#) (25-29 November 2013, Suva, Fiji); [East, South and South-East Asia](#) (3-7 December 2013, Chennai, India); [Latin America](#) (24-28 March 2014, Montevideo, Uruguay); [Central and Eastern Europe and Central Asia](#) (31 March - 4 April 2014, Minsk, Belarus); [Caribbean](#) (19-22 May 2014, Georgetown, Guyana); [West Asia and North Africa](#) (1-5 June 2014, Dubai, UAE); and [Sub-Saharan Africa](#) (9-13 June 2014, Kampala, Uganda) .Reports of the workshops are available at <http://www.cbd.int/abs/capacity-building.shtml> accessed [19/11/14]

#### 5.4.2 World Intellectual Property Organization (WIPO) and Traditional Knowledge

WIPO was discussed earlier on under 2.3 as a specialized UN agency whose mandate is to promote the protection of IP throughout the world. The work of WIPO on TK is in line with its mandate which is stated on its website to address *“the role that intellectual property (IP) principles and systems can play in protecting TK and TCEs from misappropriation, and in generating and equitably sharing benefits from their commercialization and the role of IP in access to and benefit-sharing in genetic resources.”*<sup>559</sup>

WIPO's work on TK began in 1978 in conjunction with United Nations Educational Scientific and Cultural Organisation (UNESCO). Its work at that time was limited to expressions of folklore<sup>560</sup>, series of meetings were held by WIPO and UNESCO which resulted in the adoption of the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (the Model Provisions)<sup>561</sup>. WIPO and UNESCO later had meetings in order to reach an agreement for a proposal of an international treaty for the protection of folklore based on the model provision but the participants at this meeting failed to reach an agreement, therefore the discussions for a form of protection for folklore was abandoned by WIPO<sup>562</sup>.

Meanwhile in the international fora, after the adoption of the Model Provisions, the range of subject matters covered by the 'expressions of folklore' as

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<sup>559</sup> See the WIPO Traditional knowledge [Online] Available at <http://www.wipo.int/tk/en/> accessed [11/09/2012]

<sup>560</sup> Wendland W B, 'Intellectual Property, Traditional Knowledge and Folklore: WIPO's Exploratory Program' (2002)IRIPCL pg1

<sup>561</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO), WIPO, 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions' (1985) WIPO and UNESCO Publication . Available at <http://www.wipo.int/export/sites/www/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> accessed [12/09/2012]

<sup>562</sup> Dutfield G(2001), op.cit. pg266-267

defined by the Model Provision expanded<sup>563</sup>. Section 2 of the Model Provisions defined expressions of folklore as “... *productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community*”<sup>564</sup>. Since then, International legal instruments such as the CBD in Article 8j of its Convention text adopted the term TK to cover the expressions of folklore covered by the Model Provision<sup>565</sup> and matters relating to traditional medicinal knowledge, traditional agriculture and biodiversity<sup>566</sup>.

For a number of years after this period, there was minimal focus by WIPO on matters concerned with TK protection until 1998 when WIPO began work on exploring ways in which IP could protect TK<sup>567</sup>. Shortly after a new Director General, Dr Kamil Idris was elected, WIPO established a new exploratory work program unit called the Global Intellectual Property Issues Division (GIPID) to identify and respond to the new issues and challenges that the globalization of IP encountered such as TK. In line with its mandate, the GIPID also set out to identify IP rights new beneficiaries like indigenous peoples and local communities and investigate issues that include the protection of TK, the protection of folklore and innovations and creativity<sup>568</sup>.

The GIPID also explored the broader meaning of the term ‘Traditional Knowledge’. There was a shift in the organisations’ focus when it recognized the close linkages between expressions of folklore, biodiversity and associated knowledge. WIPO now refers to TK to include biological resources,

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<sup>563</sup> Wendland W B(2002) , op.cit. pg2

<sup>564</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO), WIPO (1985) op.cit

<sup>565</sup> Convention on Biological Diversity (CBD) *Article 8. In-situ Conservation* [Online] Available at <https://www.cbd.int/convention/articles/?a=cbd-08> accessed [29/08/2012]

<sup>566</sup> Wendland W B(2002) , op.cit. pg2

<sup>567</sup> Bhatti S T, Intellectual Property and Traditional Knowledge: The Work and Role of WIPO, Chap. In *Promoting Traditional Knowledge : Systems, National Experiences and International Dimensions*, eds. S Twarog and P Kapoor (2004) United Nations Publications UNCTAD/TIDC/TED/10 pg122

<sup>568</sup> Dutfield G(2001), op.cit. pg266-267

traditional technical know-how, innovations, traditional ecological medical knowledge, traditional agricultural knowledge as well TCE's such as folklore, motifs and designs<sup>569</sup>.

As the significance of TK became internationally recognised, its protection also started to come up in international discussions relating to issues such as biological diversity, food and agriculture, trade and economic development and human rights, especially concerning the rights of indigenous people.

It was pointed out under TK protection that IP law has been the forum deemed appropriate for International discussions on TK protections and such discussions have remained within the IP model. This has triggered questions about the appropriateness of IP protection for TK within WIPO as the global forum for IP services<sup>570</sup>. It was considered whether the IP system which promotes individual rights is compatible with the values and systems in traditional communities that are based on collective rights. It was also asked whether IP was able to provide the support necessary to uphold the cultural identity of indigenous people and give them more authority over their resources. If so, what were the forms of recognition and respect that would embody the TK concerns of local communities and provide such tools the communities needed to safeguard their interests? It was also considered whether the IP system has in any way been used to misappropriate TK and what can be done legally and practically to avoid this so that IP can better serve indigenous people interests<sup>571</sup>.

It was with these questions in mind that WIPO began its exploratory work in 1998 into identifying through consultation and research the expectations of TK holders and how the effective protection of IP can contribute to their cultural, social and economic development. They did this by conducting a series of activities which included commissioning in conjunction with the United Nations Environment Programme (UNEP) studies that helped to understand how the

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<sup>569</sup> World Intellectual Property Organisation Booklet No 2, op.cit. pg4

<sup>570</sup> WIPO 'What is WIPO?' [Online] Available at <http://www.wipo.int/about-wipo/en/> accessed [21/11/14]

<sup>571</sup> World Intellectual Property Organisation Booklet No 2 ,op.cit. pg3

effective protection of IP rights can support benefit sharing that arise from the use of genetic resources; it also included regional consultations on expressions of folklore<sup>572</sup>.

In line with this exploratory work, WIPO launched nine fact finding missions (FFMs) into 28 developing countries in the South Pacific, Southern and Eastern Africa, South Asia, North America, Central America, West Africa, the Arab countries, South America and the Caribbean<sup>573</sup>.

This was an attempt by WIPO to access and document first-hand the IP needs of TK holders. The purpose of the fact finding missions was to provide the information collected as expressed by TK holders to WIPO member states as well as to the TK holders themselves including indigenous people, non-governmental organisations, inter-governmental organisations, academic and research institutions and all other interested parties. The information was expected to help guide WIPO's future activities in the protection of TK<sup>574</sup>.

The report containing the fact finding missions was issued in 2001 and it was divided into three parts<sup>575</sup>:

The first part was called "*Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders*" which was an introduction to the IP system and provided basic information about the available forms of IP protection. This part also described IP as being a broad concept and therefore not limited to the existing categories such as patents and copyright protection.

The second part called "*Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders*" set out detailed reports on each of the nine fact finding missions conducted.

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<sup>572</sup> Wendland W B(2002) ,op.cit. pg2

<sup>573</sup> Ibid

<sup>574</sup> WIPO 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders': WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (2001) Geneva. Pg5-6

<sup>575</sup> Ibid

The third part called the “*Summary, Reflections and Conclusions*” contained the summary of the conclusions drawn from the information thought to be the main IP needs and expectations expressed by the TK holders and other stakeholders consulted by WIPO.

Through a series of interviews, consultations, meetings and visits, WIPO was able to compile reports from the information provided by holders of TK, innovations, culture and indigenous people in the countries that took part. The report was able to show the diversity and richness of TK on a global level as a potential subject for protection and also its inherent creativity<sup>576</sup>.

From the research done, it appeared that some of the countries did not think that IP could adequately protect TK. For example, on the fact finding mission to Eastern and Southern Africa, it was pointed out that the way TK worked and the kind of creativity and innovations IP was established to protect were too different. Stemming from this, the indigenous people also expressed the concern that IP could conflict with their cultural beliefs and traditional practices which were community shared and holistic in nature.<sup>577</sup>

While this was the general view across the countries that participated in the fact finding mission, many of them also expressed that they were eager to learn more about IP protection and the ways it could possibly help them gain more from their traditional resources<sup>578</sup>. The countries mostly agreed that for them to use IP to protect their TK and resources, they needed help in understanding how IP worked. At the time of the fact finding missions, the majority of the developing countries had outdated IP systems and legislations<sup>579</sup>, it was expressed during the fact finding mission to West Africa that they also had less than adequate financial capability and the capacity to

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<sup>576</sup> Ibid @pg233

<sup>577</sup> Ibid @pg90

<sup>578</sup> Ibid @ pg87

<sup>579</sup> It was pointed out during the Fact Finding Mission (FFM) to Eastern and Southern Africa that most of the developing countries were only just in the process of amending their intellectual property systems and legislations to be enable compliance with the TRIPS Agreement. See Pg90 of the report.

exploit their traditional resources or even to protect their knowledge effectively<sup>580</sup>.

In summary, what was therefore needed was for a general awareness raising among the local communities and their indigenous peoples on the IP system in general and documentation and the provision of TA to advice on the development of an appropriate legislation for the protection of their TK<sup>581</sup>.

While WIPO acknowledged that it could not meet all the needs and expectations expressed during the fact finding missions without collaborating with other international agencies, the organisation however pledged its commitment when it stated that as a specialised UN agency for the promotion of IP worldwide, it was “*committed to continuing to address conceptual problems and undertake a practical and technical examination of the application of IP rights to various forms of TK in order to provide an informed and realistic analysis*”<sup>582</sup>. WIPO pointed out that an effective IP system for the protection of TK would be beneficial for the promotion of continued innovation and creativity based on that system.

Using this as the foundation, WIPO launched various activities such as practical training workshops and documentations on IP protection. Also after discussions by the WIPO general assembly, from 1999 there was a decision to establish a distinct body within WIPO to facilitate discussions among member states on matters concerning TK, genetic resources and expressions of folklore.

In 2000, at the twenty-six session of the General Assembly of member states of WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)<sup>583</sup> was established. The work of IGC has been based on existing consultations including the discussed fact finding missions. The WIPO DA’s work on TK is

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<sup>580</sup> Ibid @pg152

<sup>581</sup> Ibid

<sup>582</sup> Ibid@ pg233

<sup>583</sup> Bhatti S T (2004) , op.cit. pg123

closely linked with the work of the IGC. Cluster B, recommendation 18 of the DA states the importance of accelerating the work of the IGC to generate tangible results on TK protection. The work of the IGC also includes the provision of TA specifically for TK related programs that would take into account their IP related interest in order to prevent the misappropriation.

The Committee have held several sessions that have produced detailed set of integrated materials that draw together a wide range of national experiences in the IP protection of TK which provides an informed basis for national policymaking processes and capacity-building activities in the area<sup>584</sup>. The IGC have however also had several unsuccessful meetings where member states could not agree on how to proceed on the type of instrument that may be used to protect TK, TCEs and genetic resources. Following this at the WIPO General Assembly meeting held in September 2014, member states could not agree on a work programme for the Committee for 2015<sup>585</sup>.

### **5.4.3 World Trade Organization (WTO) and Traditional Knowledge**

TK is a subject that has been discussed within the WTO since the first year of its inception<sup>586</sup>. Even though the focus of the WTO is mainly on trade liberalization as previously discussed in chapter two of this thesis, WTO's

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<sup>584</sup> Ibid

<sup>585</sup> Saez C, 'WIPO Seminar Could Rekindle Discussions on Genetic Resources' (2015) IP Watch [Online] Available at <http://www.ip-watch.org/2015/02/20/wipo-seminar-could-rekindle-discussions-on-genetic-resources-tk/> accessed 13/08/15

<sup>586</sup> Dutfield G(2001) , op.cit. pg269

involvement in IP rights as a result of the TRIPs agreement impacts TK which therefore makes the subject relevant within the WTO<sup>587</sup>.

At a meeting of the Committee of Trade and Environment in June 1995, a delegate from Nigeria raised the issue of TK when he pointed out that traditional interests and right holders should be recognised by the TRIPs agreement<sup>588</sup>. A delegate from India also highlighted the issue of TK when he warned about the negative effect an IP rights regime on Plant Varieties would have on the knowledge, innovation and indigenous practices of local communities embodying traditional lifestyles that were relevant for the sustainable use and conservation of biological diversity. He went on to suggest a sui generis system in accordance with Article 8(j) of the Convention on Biological diversity in which new forms of IP rights could be created to protect the knowledge, innovation and indigenous practices of local communities<sup>589</sup>.

Meanwhile, in the months leading to the Seattle Ministerial conference in 1999, developed nations like the United States, European Union and Japan pushed to raise the standards of the TRIPs agreement<sup>590</sup>. In a communication with the General Council, they warned against lowering the standards of the agreement or granting further transitional periods<sup>591</sup>. Although developing countries were struggling to comply with their TRIPs obligations at the time,

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<sup>587</sup> Frankel S, 'The Mismatch of Geographical Indications and Innovative Traditional Knowledge' (2011) Victoria University of Wellington Legal Research Papers No35/2011 . pg 4

<sup>588</sup> Details of the issues discussed can be found in the report of the Committee on Trade and Environment meeting held from 21-22 June 1995. Document WT/CTE/M/3, number 95-2058. Available on the WTO website Documents Online

<sup>589</sup> Ibid

<sup>590</sup> Dutfield G(2001) ,op.cit. pg270-271

<sup>591</sup> This was stated in a communication from the European Communities to the WTO General Council in Document WT/GC/W/193 02/06/1999 titled 'Preparations for the 1999 Ministerial Conference : EC Approach to Trade-Related Aspects of Intellectual Property', (02/06/1999) available on the WTO website (documents online). See also WTO Doc. WT/GC/W/1 15 dated November 19 1998 for the reaction of the United States when the General Council was asked to consider whether it was desirable to modify the TRIPs Agreement by eliminating the exclusion from patentability of plants and animals and incorporating key provisions of the UPOV agreement regarding plant variety protection

they however responded to the pressure by expressing their dissatisfaction with some aspects of the TRIPs agreement and one of their concerns was the issue of TK<sup>592</sup>.

At the preparation for the 1999 Ministerial conference in Seattle<sup>593</sup>, TK was raised by a number of developing countries<sup>594</sup> in proposals submitted for the preparation of the conference. It was suggested by these countries that WTO in collaboration with other relevant organisations should focus on making recommendations on the most appropriate ways to recognise and protect TK as a subject matter of IP rights. It was also proposed that there should be an establishment of a mandatory system within the TRIPs agreement with an economic and ethical content to protect IP that is also applicable to the TK of indigenous local peoples and also recognises the need to define the rights of collective holders<sup>595</sup>.

The discussions about TK protection within the WTO have been brought up while discussing the TRIPs Agreement. It's been pointed out that there is an imbalance within the TRIPs Agreement regarding the types of knowledge that the agreement stipulates minimum standard protection for. Knowledge from such categories as patents, trademarks and copyrights, often referred to as industry-type IP which are mainly found in developed countries, from their nature are covered by the TRIPs Agreement. Meanwhile by the nature of the knowledge from TK which is predominantly held by the indigenous people in developing countries, held collectively and usually passed down from generation to generation is said to be out of the scope of the TRIPs

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<sup>592</sup> Dutfield G (2001) , op.cit. pg271

<sup>593</sup> Ibid at pg237

<sup>594</sup> The countries that brought up traditional knowledge included Bolivia, Columbia, Ecuador, Nicaragua, Peru, Cuba, Honduras, Paraguay, Venezuela, Zambia, Jamaica, Kenya, Pakistan, Sri Lanka, Tanzania, Zimbabwe and Uganda

<sup>595</sup> Full information on the proposals see WTO, *Compilation of Proposals Submitted in Phase 2 of the Preparatory Process. Preparation for the 1999 Ministerial conference* [Online] Available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/min99\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm) accessed [26/09/2012]

Agreement<sup>596</sup>. It has been argued that this is because the TRIPs Agreement was developed to protect a formal type of knowledge that is “codified and systematic” which makes it weak to protect the informal in nature and often unfixed TK type knowledge<sup>597</sup>.

However, regardless of the fact that the TRIPs Agreement does not expressly contain provisions for the type of knowledge predominant in developing countries (TK), they were still expected under the agreement to put in place the same level of comprehensive IP protection systems for the industry-type IP categories as in the developed countries even if the result would not be favourable for their natural resources.

This resulted in the reluctance on the part of developing countries such as India in complying with TRIPs requirements because they believed such laws would cause a problem for their local research activities<sup>598</sup> and also have an effect on their countries’ biological resources. They therefore wanted TRIPs to specifically address the conservation of their natural resources<sup>599</sup>. However in the absence of specific provisions in the TRIPs Agreement addressing the conservation of natural biological resources, policy makers and legal practitioners began exploring ways to adapt or create new norms from existing IP rights to address TK protection<sup>600</sup>.

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<sup>596</sup> Twarog S and Kapoor P, *Preserving, Protecting and Promoting Traditional Knowledge: National Actions and International Dimensions* (2004) UNCTAD/TIDC/TED/10 UN Publication pg62

<sup>597</sup> Walker S, ‘The TRIPs Agreement, Sustainable Development and the Public Interest’ (2001) IUCN Publication pg34

<sup>598</sup> At the time, India had researchers working on developing genetically engineered cotton and rice that would be resistant to pests. Although the components of the research were either indirectly or directly patented, the researchers would however not be able to follow the local level of genetic engineering once India’s laws were in compliance with the TRIPs Agreement. This they believed posed a threat to agricultural research. See K Mahamuni, ‘TRIPs and developing countries: the impact on plant varieties and traditional knowledge’ (2006) *International Trade Law & Regulation* pg2

<sup>599</sup> Tejera V, ‘Tripping Over Property Rights: Is it Possible to Reconcile the Convention on Biological Diversity with Article 27 of the TRIPs Agreement?’ (1999) 33 *New Eng. L. Rev.* 967 pg 969-981

<sup>600</sup> Milius D, ‘Justifying Intellectual Property in Traditional Knowledge’ (2009) *I.P.Q* 185 pg11

The TRIPs agreement does however contain some provisions that are somewhat relevant to the protection of TK such as the provisions on geographical indication contained Articles 23-24 of the agreement, provisions on patents contained in Articles 27 to 34 and provisions on trademarks contained in Article 39<sup>601</sup>. The most relevant of these provisions is said to be Article 27 which defines patentable subject-matter as “...*products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application...*”<sup>602</sup> This provision has sparked the most controversy on its interpretation and what it could mean for developing countries in terms of protection their TK.

It has been argued that by the very nature of TK as knowledge usually passed down from generation to generation, it would naturally fail the patentable subject matter test as the knowledge is not new. This provision therefore is said to be generally unable to protect TK<sup>603</sup>. However, section 3(b) of that article which states that “*Members may also exclude from patentability: plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof...*”<sup>604</sup> makes provision for a sui generis system which has been suggested as a potentially more suitable way to enable developing

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<sup>601</sup> Graber C B, Girsberger M A, ‘Traditional Knowledge at the International Level: Current approaches and Proposals for a Bigger Picture that include Cultural Diversity’ (2006) RECHT DES LÄNDLICHEN RAUMS. FESTGABE DER UNIVERSITÄT LUZERN FÜR PAUL RICHLI ZUM 60. GEBURTSTAG, pp. 243-282 pg 262

<sup>602</sup> WTO, *Uruguay Round Agreement: TRIPS Part II — Standards concerning the availability, scope and use of Intellectual Property Rights Sections 5 and 6* [Online] Available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04c\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm) accessed [28/09/2012]

<sup>603</sup> Quinn M L, ‘Protection for Indigenous Knowledge: An International Law Analysis’ (2001-2002) 14 St. Thomas L. Rev. 287 pg300; Mugabe J, ‘Intellectual Property Protection and Traditional Knowledge: An exploration in International Policy Discourse’ (1999) WIPO Publication pg 15 Available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/mugabe.pdf> accessed [28/09/2012]

<sup>604</sup> Full text of this provision is available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04c\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm) accessed[28/09/2012]

countries protect their TK if such system is developed<sup>605</sup>. At the same time, Article 3(b) could provide developing countries with the flexibility of establishing alternative approaches to the conventional IP measures such as promoting non-patent measures for the protection of TK<sup>606</sup>. A sui generis framework could also be seen as an opportunity to develop a system that would introduce TK into the WTO and thereby result in a true focus and action on TK protection<sup>607</sup>.

It has however been suggested that any sui generis framework must be founded on indigenous knowledge and incorporate the protection of the collective rights of the indigenous communities, the retention of TK and farmers' rights covering plants varieties<sup>608</sup>.

Developing country governments still continued to pursue TK protection as a TRIPs related issue. The result of this effort was seen when it was stated in paragraph 19 of the Doha WTO Ministerial declaration that the Council for TRIPs was instructed in pursuing its work programme in the review of Article 27.3(b) “...to examine, *inter alia*, the relationship between the TRIPs Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore...” it was stated that the work was to be guided by the objectives set out in Articles 7<sup>609</sup> and 8<sup>610</sup> of the TRIPs text and the development dimension would be fully taken into account<sup>611</sup>.

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<sup>605</sup> Ibid

<sup>606</sup> Mugabe J (1999), op.cit. pg 17

<sup>607</sup> Aguilar G, ‘ Access to genetic resources and protection of traditional knowledge in the territories of indigenous peoples’ (2001) Environmental Science & Policy 4 241–256 pg 251

<sup>608</sup> Mahamuni K (2006) ,op.cit. pg 2

<sup>609</sup> Article 7 of the TRIPs Agreement contains the objectives of the agreement and it states that “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” see WTO, *Uruguay Round Agreement: TRIPs Part I — General Provisions and Basic Principles* [Online] Available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm) accessed [01/10/2012]

<sup>610</sup> Article 8 contains the principles of the Agreement and it states that “1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public

Some were of the opinion that the TRIPs agreement may not have been the most appropriate avenue for developing countries to promote the protection of TK, reasons for this included the fact that if there was going to be amendments or modifications to TRIPs, the extent would be unknown and difficult to predict. It would also be improbable that the result would respond to every need and concern of TK holders and even if it were possible such amendments could take several years to negotiate and enter into force<sup>612</sup>. It was also pointed out that even without any obstacles, IP law by nature would be unable to adequately protect TK. If this was the case, it would also have implications on the usefulness of the TRIPs related TA provided to developing countries for their TK matters since such assistance would be based on IP law.

This could however change in the near future in light of the discussions within the TRIPs Council based on paragraph 19 of the 2001 Doha mandate that the TRIPS Council should examine the relationship between the TRIPS Agreement and the CBD and the protection of traditional knowledge and folklore. The TRIPs council have therefore discussed proposals put forward by a group of countries represented by India and Brazil and supported by the African group and other developing countries on amending the TRIPs Agreement requiring patent applicants to disclose the origin of TK and genetic resources used in their inventions to show evidence of complying with the

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health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. Also available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm) accessed [01/10/2012]

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.” available at [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm) accessed [01/10/2012]

<sup>611</sup> WTO, *DOHA WTO Ministerial 2001*; WT/MIN(01)/DEC/1 (2001) [Online] Available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm) accessed [01/10/2012]

<sup>612</sup> Gervais D, ‘Traditional Knowledge and Intellectual Property: A TRIPS compatible approach’ (2005) MSLR PG 139. See also Dutfield G (2001), op.cit. pg 273

CBD benefit sharing and prior informed consent provisions<sup>613</sup>. According to the Director General's report, although members' views diverge on the issue, the discussions continue to move towards understanding how the proposal would work in practice<sup>614</sup>. This means that TK could potentially be within the scope of the TRIPs Agreement in the future.

Meanwhile there is still the debate on the level of protection the present form of IP could provide TK holders. The next section discusses this debate and the experiences of developing countries in using the existing IP rights to protect their TK and natural resources.

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<sup>613</sup> See TRIPs Review of Article 27.3(B) and Related Issues: Background and Current Situation. Available [Online] at [https://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_background\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm) accessed [24/08/2015]

<sup>614</sup> *ibid*

## 5.5 Intellectual Property and Traditional Knowledge Debate

Legal history shows that there is a close relationship between the economic and commercial value of resources, both natural and man-made and the allocation of legal rights to those resources. With human development came the advent of knowledge, skills, technology and science which resulted in natural resources being economically viable and eventually depleted. This then created a need for law to develop the allocation of property rights thereby withdrawing it from the public domain<sup>615</sup>. IP rights are one of the primary mechanisms recognised and used globally to allocate such property rights<sup>616</sup>. It makes it possible for legal protection to be given to persons over a discovery or their creative endeavours for a certain period of time<sup>617</sup>. IP rights have been described as relevant to the protection of TK because it is a tool recognised for allocating rights over knowledge. It has also been considered as useful tool for promoting the conservation and sustainable use of biological diversity and ensuring that the benefits derived from the use of biological resources are shared among relevant stakeholders in a fair and equitable manner<sup>618</sup>.

The practicality of applying IP rights to protect TK has however proved to be anything but straightforward. The debate whether IP is actually able to adequately protect TK has been on for a number of years and it has in fact proved to be a complex and a controversial issue<sup>619</sup>.

In the past IP rights were seen as a technical subject, so technical that the connection between IP rights and TK was not always clear. This began to change after World War II when many developing countries became sovereign states and called for a reform of the international IP framework<sup>620</sup>. The issue

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<sup>615</sup> Cottier T (1998), op.cit. pg556

<sup>616</sup> Downes D R (2000) , op.cit. pg 256

<sup>617</sup> Hansen S A, VanFleet J W (2003), op.cit. pg2

<sup>618</sup> Mugabe J (1999), op.cit. pg10

<sup>619</sup> Ibid @pg11

<sup>620</sup> Drahos P, Frankel S (2012) , op.cit. pg 6-7

of TK and IP then gained a little recognition when the Tunisian Model Copyright Law was published in 1976. This law showed recognition of copyright in the works of national folklore. In the 1980's the growth in the field of ethnobiology resulted in international organisations establishing research programmes in traditional indigenous knowledge. After this, IP and TK came together as part of a formal work programme of international organisations in the 1990's brought about by two events; The first was the establishment of the CBD which came into force in 1993 and second, the coming into force of the TRIPs agreement in 1994<sup>621</sup>. The CBD as discussed in section 5.4.1 of this chapter acknowledges the importance of the part local communities and indigenous people play in their communities in relation to the conservation of biological resources. The TRIPs agreement on the other hand, although it does not expressly make provision for the protection of TK, is nevertheless an avenue where developing countries have pursued and continue to pursue the issue of TK protection at the international level.

The coming together of IP and TK then developed into a complex negotiating agenda amongst states within the CBD and the WTO regarding matters such as the patentability of biological materials and the protection of TK<sup>622</sup>. There also evolved a categorisation of TK by international legal instruments comparably similar to the categorisation found in IP law. For instance TK related to biological resources and materials was differentiated from that directly connected with works of art and culture often referred to as TCE's. Therefore TCE's were associated with copyrights in IP and the expressive use of trademarks whereas biological resources and materials were associated with patents and plant variety rights<sup>623</sup>.

While this categorization made it easier to mesh TK with IP, critics however warned that the categorization was foreign to indigenous people. It was believed that it was an attempt to oversimplify the two concepts<sup>624</sup> so that they

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<sup>621</sup> Ibid

<sup>622</sup> Ibid

<sup>623</sup> Ibid

<sup>624</sup> Downes D R (2000) pg 258

could work together and asked whether it would require indigenous peoples to force their values and ideas to fit into concepts alien to them<sup>625</sup>.

Generally differences have been pointed out in the characteristics and nature of the two concepts. IP protection in the form of copyrights, patents and trademarks have been described as private rights usually applying to an identifiable author, inventor or other originator which confers private material benefits resulting from such protection<sup>626</sup>. Critics argue that this concept of private ownership and individual invention inherent in IP rights is directly at odds with TK systems which are based on collective creation and ownership of knowledge usually passed on from generation to generation<sup>627</sup>. They further emphasize that even though some forms of TK may be restricted or secret, the reason for the restrictions are not usually commercial therefore for most indigenous communities the idea of privatisation and commoditization of knowledge and biological resources is mainly alien and could be detrimental to their way of life<sup>628</sup>.

The obvious differences pointed out between IP rights and TK appeared to form the basis of the argument that IP could not adequately protect TK. There were however other reasons put forward by critics, some of which include the concern about the time frame IP rights grants to recipients of such rights, they argued that the TK of indigenous communities typically span generations which would be a longer time frame than the duration of most IP rights<sup>629</sup>.

There was also the concern about the cost of using IP rights. The majority of the indigenous communities in developing countries are known to be very poor. Therefore the process of registering their IP rights in the first place would be costly for these communities, it could also develop into a situation where these communities would have to challenge patent application or sue

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<sup>625</sup> Arriaza N R (1995-1996) , op.cit. pg 956

<sup>626</sup> Report of Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (2002) Commission on Intellectual Property Rights c/o DFID pg6

<sup>627</sup> Arriaza N R (1995-1996), op.cit. pg 956

<sup>628</sup> Ibid

<sup>629</sup> Alvarez Nunez R G (2008), op.cit. pg514

for patent infringement and in most cases they would be competing with developed countries and their sophisticated corporations and governments<sup>630</sup>.

Critics have also stressed the negative effect IP has on TK in terms of its exploitation. This was discussed earlier on in the chapter as biopiracy and it is perhaps the most commonly expressed concern. Cases where TK have been inappropriately claimed or where they have been used for research purposes and the resulting benefits have not been shared with the local communities have created mistrust for IP systems among indigenous people. This created a belief that IP systems encourage large corporations to monopolise benefits they have derived from their use of TK resources without acknowledging the interests of the local communities they got the resources from<sup>631</sup>.

The discussion above shows that generally IPR is not a right fit for TK protection. However, in the absence of any specific legislation to protect TK, it has been pointed out that the desire of indigenous communities to benefit from their knowledge and resources and stop exploitation has made it necessary to reconcile TK with IP rights<sup>632</sup>. But is reconciliation possible? The next session will now examine the individual IP categories and their relation to TK protection.

### 5.5.1 Patents

A Patent is usually described as a statutory monopoly granted to an inventor for a certain period of time, usually about 20 years, which creates a legal status that enables the inventor to prevent others from commercially exploiting the invention. This right enables the inventor to bring legal action against anyone who infringes the patent right<sup>633</sup>.

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<sup>630</sup> Arriaza N R (1995-1996) , op.cit pg 957

<sup>631</sup> Hansen S A and VanFleet J W (2003), op.cit. pg 5

<sup>632</sup> Oguamanam C, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge' (2004) 11 Ind. J. Global Legal Stud. 135 pg 139

<sup>633</sup> Brainbridge D (2002), op.cit. 309-311

For an invention to be patentable, there are certain conditions that must be fulfilled such as:

- the invention must consist of a patentable subject matter
- it must be new or novel which means that it must not be anticipated by the prior art
- it must show a sufficient inventive step which means that it must be non-obvious to a person that has an ordinary skill in the art
- it must be industrially applicable which means that it must be useful and can be applied for practical purposes and not just theoretical<sup>634</sup>.

Critics have argued that developing countries have difficulties in meeting some of the requirements above. Developing countries are known for their use of traditional medicine which includes knowledge of curing properties from leaves, herbs and plants usually known only to particular indigenous communities. Large corporations have known that this aspect of TK could be developed into medicine with the potential of a worldwide market power and have even been accused of exploiting this knowledge without giving any benefits to the indigenous communities<sup>635</sup>. The question here is, since these resources and associated knowledge are potentially patentable, why have indigenous people not been able to take advantage of this? Several reasons have been put forward why Indigenous communities have encountered several obstacles in meeting the requirements above.

First of all there is the problem of TK meeting the novelty or newness requirement because a major characteristic of TK is that it is often passed on from generation to generation and basically built on prior knowledge. As in the case of medicinal knowledge where in some indigenous communities are held by Shamans, the fact that it is knowledge passed on from generation to generation would make it fail the novelty test<sup>636</sup>.

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<sup>634</sup> Ibid

<sup>635</sup> Ragavan S, 'Protection of Traditional Knowledge' (2001) 2 Minn.Intell.Prop.Rev.1 pg 8

<sup>636</sup> Arriaza N R(1995-1996), op.cit. pg936-937

Secondly, for a patent to be granted it must be documented in a way that the patent examiner can understand which often involves the use of technical language. It has been argued that a Shaman for example may know the active ingredients in a plant but cannot be expected to have the ability to complete a patent application in a language of chemistry or molecular biology<sup>637</sup>.

In addition to the above, critics have also emphasized that the patent process is very expensive ,therefore most developing countries usually with a high level of poverty face difficulty in funding it<sup>638</sup>.

### 5.5.2 Copyright

Copyright law is a form of law that helps intellectual creators to protect their work against misuse. This right usually covers works such as artistic, literary, photographic and musical works and it is granted for the duration of a period. For most countries, this period usually lasts for the lifetime of the creator and not less than 50years after the death<sup>639</sup>.

The area of TK that copyright would apply to is TCE<sup>640</sup> which is TK in art form. Indigenous communities are known for their folklore which one author described as having rustic and ethnic qualities which depict a sense of originality that modern consumers find very appealing<sup>641</sup>; this would explain why folklore is susceptible to infringement and there have been many known cases of its misuse and exploitation<sup>642</sup>. This is when artistic items are used or

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<sup>637</sup> Alvarez Nunez R G (2008), op.cit. pg 518-519

<sup>638</sup> Ibid

<sup>639</sup> Brainbridge D (2002), op.cit. 27-28

<sup>640</sup> See earlier discussed Traditional Knowledge categorization pg 130

<sup>641</sup> Ragavan S (2001), op.cit. pg 15

<sup>642</sup> ibid

copied without permission from the source or an acknowledgement of the source and often passed off as authentic/original when they are not<sup>643</sup>.

Critics consider that the possibility of protecting folklore with copyright law have a few limitations. For copyright to be granted, it is required that there should be an identifiable author, a main characteristic of copyright law is that it rewards individual works and places importance on the role individuals play in knowledge creation.<sup>644</sup> This is at odds with the TK system where in most cases an artistic creation is a collaboration of groups of indigenous people and sometimes a whole community. Copyright cannot be granted to groups of people or sometimes a whole tribe or community because this type of ownership is not recognised<sup>645</sup>. Copyright also generally requires the work to be protected to be fixed. For the example the United States copyright law<sup>646</sup> states that the work to be protected should be in a “*tangible medium of expression*”. It has been argued that the problem with this requirement regarding indigenous peoples traditional expression is that they often do not have the means of recording their works, this therefore means that they will not be entitled to copyright protection.<sup>647</sup> Finally copyright law does not recognise permanent protection; like patent law discussed above, there is a time limit, this is in contrast to the nature of cultural expressions which slowly evolves over time and therefore makes it impossible to determine when a particular art was first created to be able to establish a framework for when a particular work should be protected<sup>648</sup>.

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<sup>643</sup> Dutfield G (2001) , op.cit. pg249

<sup>644</sup> Ibid @pg 250

<sup>645</sup> Ragavan S (2001) pg18

<sup>646</sup> U.S Copyright Office, *Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code Circular 92* (17 U.S.C. § 102(a) (2006) Available at <http://www.copyright.gov/title17/92chap1.html> accessed [01/12/14]

<sup>647</sup> Dutfield G (2001) pg 252

<sup>648</sup> Kuruk P, ‘Protecting Folklore under Modern Intellectual Property regimes: A Reappraisal of the tensions between Individual and Communal rights in Africa and the United States’(1999) Vol 48 Article 2 AULR pg 30

### 5.5.3 Trade Secrets

WIPO generally describes trade secret as “*any confidential business information which provides an enterprise a competitive edge...*”<sup>649</sup> This form of protection is different from patent and copyright therefore it could be granted for an unlimited period. It has three basic requirements namely:

- The information must be secret which means that it must not generally be known
- Due to its secrecy it must have commercial value and
- The rightful owner must have taken reasonable steps to ensure its confidentiality<sup>650</sup>.

While the two previously discussed IP forms have been described as unfavourable to the types of knowledge indigenous people hold<sup>651</sup> due to their characteristics, trade secrets on the other hand has been considered to be the most favourable and a better fit for protecting TK, particularly for specialist knowledge holders<sup>652</sup>. An example could be in the case of a Shaman who may possess a form of knowledge that he does not wish to share with the rest of the world, this information would qualify as a trade secret<sup>653</sup>.

This form of protection has also been described as cheaper and easier than the previously discussed forms and quicker to implement<sup>654</sup>.

The downside to this form of protection for TK as critics have pointed out is that since one of the requirements of this form of protection is that the information wished to be protected must not be easily accessible to anyone apart from the knowledge holder; it may be difficult for indigenous knowledge

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<sup>649</sup> See WIPO, *What is a Trade Secret?* [Online] Available at [http://www.wipo.int/sme/en/ip\\_business/trade\\_secrets/trade\\_secrets.htm](http://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm) accessed [01/12/2014]

<sup>650</sup> Ibid

<sup>651</sup> Varadarajan D, ‘A Trade Secret Approach to protecting Traditional Knowledge’ (2011) *Yale Journal of International Law*, Vol. 36, No. 2 pg383

<sup>652</sup> Dutfield G (2001) pg 259

<sup>653</sup> Ibid

<sup>654</sup> Ragavan S (2001) pg 22

holders to gain protection because their knowledge is generally shared among the community members<sup>655</sup>.

#### 5.5.4 Geographical Indications

Geographical indications like trade secrets are another form of protection also considered to be favourable to TK protection.

Geographical indications originated from France in the 1820's and this form of legal protection recognises the origin of products<sup>656</sup>. The legal concept was known by other names such as indication of source and appellation of origin before it became internationally recognised during the TRIPs agreement and formally known as geographical indications<sup>657</sup>.

Geographical indications are defined under the TRIPs agreement as “...*place names (in some countries also words associated with a place) used to identify the origin and quality, reputation or other characteristics of products...*”<sup>658</sup> This form of protection is however subject to the national law of the country of origin meaning that geographical indications must be protected under the domestic laws of the country of origin before it can be enforced<sup>659</sup>. It covers a variety of products including manufactured, agricultural or even natural products<sup>660</sup>.

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<sup>655</sup> Alvarez Nunez R G(2008) pg 520

<sup>656</sup> Gopalakrishnan N S, P S Nair, Babu A K, 'Exploring the Relationship between Geographical Indications and Traditional Knowledge: An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia' (2007) ICTSD Publication pg 11

<sup>657</sup> Ibid

<sup>658</sup> See WTO, *TRIPS: Issues Geographical indications* [Online] Available at [http://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/gi_e.htm) accessed [02/12/14]

<sup>659</sup> Gopalakrishnan N S, Nair P S, Babu A K(2007) ,op.cit. pg 15

<sup>660</sup> See WIPO, *Frequently Asked Questions: Geographical Indications* [Online] Available at [http://www.wipo.int/geo\\_indications/en/about.html](http://www.wipo.int/geo_indications/en/about.html) accessed [02/12/14]

In terms of TK protection, although geographical indications are unable to protect a particular knowledge it has however been said to be a suitable form of protection because both concepts appear to have similar characteristics which include collective rights because geographical indications recognises the collective decision making process; a period of indefinite protection because the protection lasts as long as the existence of the collective tradition and the relationship with the land<sup>661</sup>.

Even though the similarities between the two concepts make them a better fit than the other IP categories, it has however be cautioned that while indigenous peoples can take advantage of it for business purposes, it should not be put forward as a model for TK protection<sup>662</sup>.

One of the reasons put forward is that the similarities pointed out which appear to make the two concepts fit are said to be at best superficial. For example, the collective nature of geographical indications is said to be different from that of TK. While the nature of the TK collective rights means that no individual can claim ownership of the collective rights, geographical indications on the other hand are usually owned collectively by qualified people who can make claims individually for their businesses<sup>663</sup>.

Regarding the land connection similarity, it has been argued that indigenous peoples connection with their land go beyond that of geographical indications. While geographical indications protect the name of the land/place because the rights claimed only exist based on the land connection, TK is more about protecting the relationship with the lands including what lives and grows on them because knowledge has been developed overtime from this relationship<sup>664</sup>.

Apart from the differences pointed out above, it has also been stated that to benefit from geographical indications, protection requires an existing and

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<sup>661</sup> Downes D R(2000) , op.cit, pg 269 . See also Frankel S (2011) ,op.cit. pg4

<sup>662</sup> Frankel S(2011) ,op.cit. pg15

<sup>663</sup> Ibid

<sup>664</sup> Ibid

developed industry which developed countries already have. For the indigenous communities on the other hand, where they have the desire to do so, most do not have the financial means or the know-how to develop such industries. It may for example require getting experts to carry out services such as market demand survey of their goods and the authenticity of the goods produced traditionally<sup>665</sup>.

The reasons given for the caution is not fully discussed here , however the point being made is that enhancing geographical indication as a fit for TK protection could make it seem like it is in fact enough to protect TK. This could then stifle any opportunity TK proponents may have to find a more suitable method for TK protection outside the geographical indication framework<sup>666</sup>.

For the purposes of this research, the debate whether geographical indication is a match or not for TK protection cannot be fully discussed here. However, since the perfect legal model that would best serve the needs and aspirations of indigenous people is yet to be developed, geographical indications remain a very viable option for developing countries. The proponents of geographical indications have even promoted it as a tool that developing countries could use in creating and maintaining local and international markets for products that originate from their territories<sup>667</sup>.

The IP and TK debate has so far highlighted the shortcomings of the current IP categories in meeting the needs and aspirations of TK holders. WIPO itself acknowledged this when it stated in one of its publications that “*TK protection involves important policy issues beyond the domain of IP*”<sup>668</sup>.

On the other side of the debate, those that support the use of the current IP system for TK protection see the possibility of making the two concepts fit. This is often founded on the belief that since IP is based on respecting, rewarding and protecting the contributions of human creativity; it can be useful

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<sup>665</sup> Downes D R (2000) , op.cit, pg 273

<sup>666</sup> Frankel S (2011) ,op.cit. pg15

<sup>667</sup> Ibid @ 272

<sup>668</sup> WIPO booklet No.2 ,op.cit, pg 12

for the protection of TK by recognising the legal property rights associated with the knowledge and granting the holders of such rights some form of control regarding its use by others<sup>669</sup>.

IP proponents regard most of the criticisms against IP here to be based on generalisations to which they suggested that it was necessary to reassess as the generalisations to prevent them from hindering any opportunities indigenous people may have in exploring new avenues within IP to protect their knowledge<sup>670</sup>.

Stemming from this, IP proponents state that the advantages TK holders could gain in using IP for TK protection include technological innovation for indigenous people and the opportunity for TK to be developed within modern economics. They also argue that reconciling both concepts could potentially generate incentives for the management and conservation of indigenous community's environment and biodiversity<sup>671</sup>. They add that it would also create a moral obligation on the part of industrialized countries in acknowledging and making sure that indigenous people are adequately compensated for the use of their resources<sup>672</sup>.

From the discussions on the suitability of the IP categories for TK protection, it is clear that not all forms of IP rights are completely unsuitable for TK protection as seen in the case of trade secrets and geographical indications. It is therefore not surprising that without an alternative solution that would completely address the needs of indigenous people regarding their knowledge and their resources, many developing countries continue to use IP to protect their TK despite the discussed limitations. For example Malaysia and Kenya have managed to reconcile intellectual property rights with their traditional knowledge which will be discussed in detail in chapter 5 and 6. These countries acknowledge that their creative industries have the potential to

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<sup>669</sup> Aguilar G (2001) , op.cit pg 250

<sup>670</sup> Drahos P, Frankel S (2012), op.cit. pg xvi

<sup>671</sup> Mugabe J (1999) ,op.cit.pg 11

<sup>672</sup> Ibid

significantly to their development given the right tools to which the successful implementation of technical assistance programs in this area could provide.

## 5.6 Conclusion

As developing countries continue to develop their economies, the discussions so far have shown that their cultural and creative industries in the form of traditional knowledge and biological resources have the potential to contribute significantly to their development. The lack of an appropriate legislation that is able to recognize the rights of indigenous people and their resources and at the same time meet their needs and expectations sparked the debate about the inadequacy of the intellectual property system in meeting those needs. Those arguments have been based on the disconnection between the two concepts as seen in the discussions.

It was important to discuss the intellectual property and traditional knowledge debate because even though it has been argued that IP by nature would be inadequate to protect TK, developing countries still use intellectual property to make the most of their TK and the intellectual property related technical assistance they receive has been useful for their TK protection as well.

In any case this research supports the argument that even if there was a perfect international legal framework developed to protect TK; this in itself will only serve as a support for development and not specifically as a development tool<sup>673</sup>. This is because for TK to actually contribute towards development, developing countries and especially the indigenous people that own these resources need to be equipped with the ability to use these resources for their own economic and social development while preserving and safeguarding their knowledge. This is where a successful technical assistance program in this area becomes crucial which takes into consideration the needs and priorities of the recipient developing countries in the design and delivery mechanisms as stipulated by the WIPO DA.

However a one size technical assistance programs cannot fit all because of their unique cultures and conditions. In other words, no matter what legal framework is adopted by developing countries for their TK which currently is mainly intellectual property rights, the technical assistance designed to assist

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<sup>673</sup> Frankel S (2011) ,op.cit. pg3

them point to the importance of being mindful of the local conditions in the countries, which means being country-specific as recommended by the DA.

The next two chapters will look at these country-specific conditions in more detail in Malaysia and Kenya. The chapters will discuss the development and the impact of local factors on intellectual property development as it relates to technical assistance programs, economic development and their TK.

# **Globalisation to Localisation-** **Malaysia and Kenya**

Most developed countries like the US and the UK have been known generally to benefit from the use of IP rights towards economy growth which is why they strongly advocate for the highest form of protection for IP as evidenced by the birth of the TRIPs agreement<sup>674</sup>. Developing countries have been trying to do the same for their economies since they became independent states with some developing countries having more success than others.

The differences in the development and use of IP in developing countries could be explained by a number of factors such as the interjectory of IP into developing countries and the effect of local factors such as economic, political and cultural factors within these countries on IP development.

The concept of taking into consideration local factors in a country before designing and implementing development programs for them is also known as localization and it is a significant deviation from the one size fits all approach of the TRIPs agreement . The one size fits all approach of the TRIPs agreement has been widely criticized<sup>675</sup>, as a result localisation is a welcomed change.

This concept of localisation is not new, borrowing from a publication on localizing WIPO's legislative assistance<sup>676</sup>, it was stated that localization has been used by multinational companies in tailoring their products and services

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<sup>674</sup> Nathan associates Inc, 'Intellectual Property and Developing Countries: An Overview' (2003)  
Nathan associates Inc briefing paper, USAID Washington pg 7

<sup>675</sup> This was discussed in chapter 1 of this thesis. See also Yu P K, 'Objectives and Principles of the Trips Agreement' (2009) Houston Law Review 46' pg 1

<sup>676</sup> Lihong Li ,Localizing WIPO's Legislative Assistance: Lessons from China's Experience with the TRIPs Agreement . Chap. In *Implementing the Development Agenda* ,ed .Jeremy De Beer Wilfried Laurier University Press , Canada (2009) pg 118

to meet a country's specific needs but it is only a recent approach in the area of IP. Localization can now be seen permeating many of the DA recommendations. This for example can be seen within Cluster A Recommendation 1 on TA which states that "*WIPO technical assistance shall be, inter alia, development-oriented, demand-driven and transparent, taking into account the priorities and the special needs of developing countries, especially LDCs, as well as the different levels of development of Member States and activities should include time frames for completion. In this regard, design, delivery mechanisms and evaluation processes of technical assistance programs should be country specific*"<sup>677</sup>

In accordance with this recommendation, it was emphasised that policy makers must take more consideration of local factors in developing countries.

Another proponent<sup>678</sup> of this concept stated that there should be a move to go beyond the study of law in books. While discussing the need for an evaluation of global copyright against each country's local factors which form a country's cultural field, it was also emphasised that interaction of local factors makes it possible to see law in action.

Localisation is also supported by the idea that in understanding how law works generally in any society, it is pertinent to examine it from a sociological perspective<sup>679</sup>.

Using localisation as a premise, the next two chapters will begin from the pre-colonial period which looks at the economic, political, culture, ethnic and political situation in the two countries before the introduction of IP. This will be followed by discussing the changes implemented during the colonisation in these two countries and the resulting local factors. Finally the post-colonial

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<sup>677</sup> See section 3.3.1 for the content of the Development Agenda

<sup>678</sup> Birnhack M D, 'Trading Copyright: Global pressure on Local culture' (2007) Tel Aviv University, Berkeley Electronic press. Available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1049&context=taulwps> accessed [18 December 2013] pg 1

<sup>679</sup> Cotterrell R, *Law, Culture and Society: Legal ideas in the Perspective of Social Theory* (2006) Ashgate Publishing Group pg 8

period will discuss the interaction of local factors with IP development especially looking at the impact they may have on the effectiveness of IPTA programs.

## Chapter 5

# MALAYSIA

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### 6.1 Brief Introduction to Malaysia

Malaysia whose economy is often described as one of the most vibrant economies in Asia achieved independence in 1957; it became the Federation of Malaysia in 1963 when it joined with Sabah, Sarawak and Singapore. The Federation of Malaysia consists of the peninsular Malaysia and it comprises of component states namely: Negri Sembilan, Perak, Kedah, Johore, Kelantan, Selangor, Perlis and Trengganu, Malacca and Penang, Pehang, Sabah and Sarawak<sup>680</sup>.

One of the distinguishing features of Malaysia is the makeup of its population. Malaysia is known for its diverse ethnic makeup which is credited for the country's rich and colourful culture<sup>681</sup> but also associated with the country's tumultuous history and described as the key to understanding Malaysia<sup>682</sup>.

The main ethnic groups in Malaysia are the Malays, the Chinese and the Indians. The Malays constitute the majority followed by the Chinese and the Indians<sup>683</sup>. In addition to this composition is a smaller group made up of

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<sup>680</sup> Heng Gee L, 'A Study of the Historical Development of the Malaysian Patent System' in Alison Firth, *Perspectives on Intellectual Property: The Prehistory and Development of Intellectual Property Systems* (2007) Sweet&Maxwell. Pg 84

<sup>681</sup> Thomas White International, Malaysia Country Profile (2010) Thomas White International Limited Illinois Chicago [Online] Available at <http://www.thomaswhite.com/world-markets/malaysia-manufacturing-drives-growth/> accessed [06/02/2015] pg2

<sup>682</sup> Milne R.S, *Politics and Government of Malaysia*, 1978, University of British Columbia Press, pg 3

<sup>683</sup> Abeyratne S, Economic Development and Political Conflict: Comparative Study of Sri Lanka and Malaysia (2008) South Asia Economic Journal 9:2: 393–417 pg396

indigenous people called the Orang Asli which means *the original people or aboriginals*, this group in addition to the Malays are classed into a category called the Bumiputera which means *sons and daughters of the soil*<sup>684</sup>. The legal definition of Malay is “*One who habitually speaks Malay, adheres to Malay customs, and is a follower of Islam*”<sup>685</sup>

Before independence, the Malaysian economy depended mainly on agriculture and mining, after independence the government moved towards transforming the country into an industrialised economy through several industrialised industries such as textiles, the food industry, rubber, telecommunications, the iron and steel industry and now embracing its knowledge economy<sup>686</sup> by developing its national IP<sup>687</sup>.

Malaysia is currently classed as a developing country but now working towards being a fully developed country as stated in their Vision 2020 statement<sup>688</sup>. Towards this goal, there is an acknowledgement that the knowledge, skill and creativity of the nation constitute the most important resource towards the country’s development<sup>689</sup>. This was expressed in a statement<sup>690</sup> made by the Prime Minister of Malaysia when talking about the establishment of a National Intellectual Property policy; he stated that one of

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<sup>684</sup> Andaya B.W, Andaya L.Y, *A History of Malaysia*, 2001, MPG Books Group, Bodmin and King’s Lynn Great Britain. Pg3

<sup>685</sup> Ibid

<sup>686</sup> Thomas White International, op.cit.,pg5

<sup>687</sup> Heng Gee L, ‘Impact of Intellectual Property System on Economic growth-Fact Finding Surveys and Analysis in the Asian Region’ (...) WIPO-UNU Joint Research project. Pg3

<sup>688</sup> *The Way Forward: Presented by His Excellency YAB Dato’ Seri Dr Mahathir Mohamad at the Malaysian Business Council* [Online] Available at <http://www.wawasan2020.com/vision/> accessed [09/02/2015]

<sup>689</sup> Tengku Mohd Azzman Shariffadeen, ‘The role of culture and values in enabling transformation towards knowledge economies: *lessons from two countries*’ (2009) World Bank and Carthage. Pg8

<sup>690</sup> Statement by the Prime Minister of Malaysia, Y.A.B Dato’ Seri Abdullah Bin Hj. Ahmad Badawi on the National Intellectual Property Policy [Online] Available at [http://www.myipo.gov.my/documents/10180/21979/ip\\_policy\\_eng.pdf](http://www.myipo.gov.my/documents/10180/21979/ip_policy_eng.pdf) 10/02/2015 accessed [10/02/2015]

the aims of the establishment of the National Intellectual Property policy was to enhance the returns of creativity, research and development in Malaysia through the use of IP. He also stated that the country's Ministry of Domestic Trade and Consumer Affairs would be focussed on ensuring the success of the National Intellectual Property Policy towards achieving their goal<sup>691</sup>.

Malaysia like most developing countries is currently working with WIPO through TA programs to assist them in harnessing their creativity and knowledge towards developing their IP. Towards the WIPO DA's country specific<sup>692</sup> and demand driven<sup>693</sup> approach in the designing and implementation of TA programs to developing countries, this chapter will begin by understanding the situation in Malaysia before the introduction of IP.

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<sup>691</sup> Ibid

<sup>692</sup> See the 45 Recommendations of the WIPO Development Agenda. Available on the WIPO website <http://www.wipo.int/ip-development/en/agenda/recommendations.html#a> accessed[14 January 2014]

<sup>693</sup> Ibid

## 6.2 Malaysia-Pre-colonial Period

During the period before colonisation, records show that the territorial scope of what is now known as Malaysia culturally included Singapore, Brunei, most of Indonesia, the south of Thailand and the Philippines. The boundaries then were not set<sup>694</sup> some of the people settled along the coasts and rivers and some were forest dwellers<sup>695</sup> the people at that time had close relationships with their land or environment and from these relationships they developed their cultures and religion<sup>696</sup>.

From early on in Malaysia's history, it was recorded that they had an established trading network. The territorial region where the people resided was rich in natural resources both from the jungle and the rivers; these resources provided the products the people used for trading<sup>697</sup>. This section starts with the economic situation in Malaysia before colonisation.

### 6.2.1 Economic situation

As mentioned in the introduction of this chapter, some parts of Malaysia were already well known for their trade in products that came from their rich jungles and sea products which enabled them to establish trading networks with other countries like China, Arab lands and India. Indian traders were said to have been particularly drawn to Malaysia in search for spices and gold. They had therefore developed a commercial relationship with other

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<sup>694</sup> Vidhu Verma, *Malaysia State and Civil Society in Transition*, (2002) Lynne Rienner Publishers, Inc. pg21

<sup>695</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg 12

<sup>696</sup> Nicholas C, 'Asserting Place and Presence via Orang Asli Oral Tradition' (2004) Centre for Orang Asli Concerns (COAC) publication [Online] Available at [http://www.coac.org.my/main.php?section=articles&article\\_id=18](http://www.coac.org.my/main.php?section=articles&article_id=18) accessed [06/02/2015]

<sup>697</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg 12

parts of the world long before colonisation and this attracted the traders to settle in the Malay area to better facilitate trade<sup>698</sup>.

Economically, the people that constituted the region were mostly into agriculture and they also collected forest products for trading. The form of trading then was mostly by barter in forest products which they exchanged for items such as iron tools, salt and cloth<sup>699</sup>. The region was also well known for the large deposits of tin which was relatively easy for them to mine using primitive techniques. It is thought that as far back as the fifth century CE, tin may have been shipped overseas to countries such as India who used tin to manufacture religious images<sup>700</sup>.

Large scale commercial production during this period was thought to be relatively low as the people were not developed technologically and economically speaking the people mainly practised subsistence living<sup>701</sup>.

### **6.2.2 Culture and Traditional Knowledge**

It was mentioned under the pre-colonial economy how Malaysia's established trade system attracted traders from different parts to settle in the area; these traders also brought with them their different cultures. As a result of Malaysia's openness and the acceptance of the different cultures of the people that settled in the area, the region became known as a culturally plural society which is still a part of their identity<sup>702</sup>.

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<sup>698</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg11-15

<sup>699</sup> Nicholas C (2004) op.cit

<sup>700</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg11-15

<sup>701</sup> Drabble J H, 'An Economic History of Malaysia' (2000) EH.net Publication [Online] Available at <http://eh.net/encyclopedia/economic-history-of-malaysia/> [accessed 24 September 2013]

<sup>702</sup> Embong A R, 'Malaysia as a Multicivilizational Society' Macalester International Vol. 12 pg 39-40

Although the people that settled in Malaysia had diverse cultures, the TK of the people was still generally acknowledged to reside in the original indigenous peoples of the country<sup>703</sup>. In Malaysia they are referred to as the Orang Asli which means “*the original people*”<sup>704</sup>, they are believed to have inhabited the Malay Peninsula before the beginning of Malay migration<sup>705</sup>. For administrative reasons they are grouped into three namely: the Negerito, the Senoi and the Aboriginal Malay all comprising of 18 subgroups<sup>706</sup>.

It is recorded that during this period, they were said to have held important positions in the region’s governance whereby their alliances were sought after by the Malay settlers<sup>707</sup>. The Orang Asli’s are known for their personal relationship with their land, for example they identified themselves with their traditional land which they are said to have developed close affinity with it. Because of their knowledge of their environment, they were said to have had important roles in trade as they supplied most of the forest products for international trade to the Malays and to early traders from India and China and also bartered the items for tools and cloth. Most of their culture and spiritual life was linked directly to the relationship with their environment<sup>708</sup>.

The indigenous people of Malay at the time therefore considered their TK which they developed from the intimate knowledge of their environment an important aspect of their cultural identity. Research on some of the local tribes such as the Temuan showed that they were so knowledgeable about their environment that by late adolescence every member of the tribe was able to

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<sup>703</sup> See generally UN Permanent Forum on Indigenous Issues (UNPFII), *State of the World's Indigenous Peoples*, (2010), ST/ESA/328, available at: <http://www.refworld.org/docid/4b6700ed2.html> accessed [10 /10/2013]

<sup>704</sup> G P Means, ‘The Orang Asli: Aboriginal Policies in Malaysia’ (1985-1986) *Pacific Affairs*, Vol. 58, No. 4, pp. 637-652 pg 638

<sup>705</sup> *ibid*

<sup>706</sup> Nicholas C, ‘The Orang Asli and the Contest for Resources: Indigenous Politics , Development and Identity in Penninsular Malaysia’ (2000) IWGIA Document No 95. Copenhagen pg 33

<sup>707</sup> Idrus R, ‘The Discourse of Protection and the Orang Asli in Malaysia’ (2011) *Kajian Malaysia*, Vol. 29, Supp. 1, 2011, 53–74 pg 57

<sup>708</sup> Nicholas C (2000) *op.cit.* pg 38-39

identify several plant species around them<sup>709</sup>. This involved specialised skills normally passed on from generation to generation.

A few of the products identified through their knowledge include the aromatic gaharu wood traditionally used for medicine, perfume and incense<sup>710</sup> and Camphor also used for medicine among other things<sup>711</sup>. The gaharu wood which is from the deceased timber of a certain tree is usually presented as dark patches or coloured steaks in the tree and often identified through the bark peeling and falling leaves. Camphor was also identified by specific signs such as the smell of the wood<sup>712</sup>.

Another tribe called the Orang Laut also called the strand and sea peoples made good use of a particular palm tree called the Nipa palm. They used its wood for timber, they made drinks out of its fermented fruits and also mats were woven from the leaves<sup>713</sup>.

The specialized skill of identifying the vast range of botanical plants apart from being personally useful to the communities also made it possible for them to collect and trade for needed tools and items thereby serving as a form of livelihood<sup>714</sup>.

A useful means of passing on these specialized skills to the younger generation was through education. Although research shows that in pre-colonial Malaysia, education was mainly in the form of religious classes conducted by Muslim missionaries, parents also taught their children

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<sup>709</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg12

<sup>710</sup> Global Information Hub On Integrated Medicine (GLOBinMED), *Gaharu* [Online] Available at [http://www.globinmed.com/index.php?option=com\\_content&view=article&id=83459:gaharu](http://www.globinmed.com/index.php?option=com_content&view=article&id=83459:gaharu) [18 September 2013]

<sup>711</sup> Grieve M (Botanical.com, A Modern Herbal) *Camphor* [Online] Available at <http://botanical.com/botanical/mgmh/c/campho13.html> accessed [18/09/13]

<sup>712</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg12-15

<sup>713</sup> *ibid*

<sup>714</sup> *ibid*

practical skills<sup>715</sup> such as discussed above with the intention of preserving the cultural identity of their communities.

Another aspect of the indigenous people's culture used for the preservation of their cultural identities was their indigenous language. Given the cultural diversity of the country, they had a common language for communication and for trade purposes which was the Malay language<sup>716</sup>. The Malay language also called bahasa was considered to be such an important part of their identity. They believed in the Malay saying "*bahasa jiwa bangsa*" which means that "*language is the soul of the nation*"<sup>717</sup>. The Orang Asli tribes themselves spoke variants of the Malay language with the exception of two subgroups linked to the Senoic languages<sup>718</sup>.

Therefore as early as the pre-colonial period, the Malay people were aware of the value of their TK and tried to preserve their knowledge as they knew how to at the time. It was not just a crucial aspect of their identity but also the main source of their livelihood.

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<sup>715</sup> Gaudart H, 'English Language Teaching in Malaysia: A Historical Account' (1987) The English Teacher Vol XVI. Available at <http://www.melta.org.my/ET/1987/main2.html> accessed [19/09/2013]

<sup>716</sup> Mohd.Faisal b.Hanapiah, 'English Language and the Language of Development: A Malaysian Perspective' (2004) Jurnal Kemanusiaan (3). pp. 107-120. Pg 106-107

<sup>717</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg290-291

<sup>718</sup> Nicholas C (2000) op.cit, pg31

### 6.2.3 Ethnicity

Malaysia is known to be a country with diverse ethnicity, which as previously discussed was as a result of the openness and acceptance of the people that settled in the local area from trading relations such as the Indians and the Chinese.

During this period, immigration was described as “...*natural, as part and parcel of the public culture of the indigenous people...*”<sup>719</sup> which showed that the nature of the Malay people at the time was very accommodating, relatively open and not in any way exclusivist. The people were therefore said to have had a peaceful co-existence as the groups didn’t invade one another and the indigenous leaders did not feel their positions were threatened. The relationship between the Malays and the Chinese was even described as harmonious as there was no issue of one group trying to dominate another economically or prevent other cultures from freely expressing themselves<sup>720</sup>.

It could therefore be concluded that ethnicity was not an issue of concern during the pre-colonial period.

### 6.2.4 Political /Legal System

During the pre-colonial period Malaysia had no fixed boundaries, the area mostly consisted of states scattered around. These states were not unified under a single political leadership<sup>721</sup> but were each governed by a

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<sup>719</sup> Embong A R, op.cit pg 40

<sup>720</sup> Wan Husin W N, ‘Cultural Clash Between the Malays and Chinese in Malaysia: An Analysis on the Formation and Implementation of National Cultural Policy’ (2012) International Conference on Humanity, History and Society IPEDR vol.34 pg2

<sup>721</sup> Vidhu Verma, *Malaysia State and Civil Society in Transition*, (2002) Lynne Rienner Publishers, Inc. pg21

combination of the customary law (Malay Adat laws<sup>722</sup>) that applied in a particular area and Islamic law while the early immigrants were governed by their own personal laws.

Sultan's or Chief's in the position of authority generally recognised by the society usually resolved disputes between the people. They were usually in their positions as a result of their status or rank within the particular society, the people were absolutely loyal to them regardless of how they ruled and the people were seen as their subjects<sup>723</sup>.

There appeared to be no records of legal or judicial proceedings kept or any established legal system<sup>724</sup>. The political and legal system that operated before colonisation was therefore a simple one.

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<sup>722</sup> This refers to the aspects of Malay customs that were backed by the force of law and if they were breached would result in consequences usually administered by a person of authority. For further reading on Malay Adat law see M. B. Hooker, 'The Challenge of Malay Adat Law in the Realm of Comparative Law' *The International and Comparative Law Quarterly*: Vol.22 No.3 (July 1973). Pp. 492-514 and Judith A. Nagata, 'Adat in the City: Some Perceptions and Practices Among Urban Malays' *Bijdra Tot de Taal-Land-en Volkenkunde* 130 (1): 91-109

<sup>723</sup> Vidhu Verma (2002) *op.cit*, pg 21-22

<sup>724</sup> Asean Law Association, *Malaya* [Online] Available at [http://www.aseanlawassociation.org/papers/Malaysia\\_chp1.pdf](http://www.aseanlawassociation.org/papers/Malaysia_chp1.pdf) accessed [10/02/2015]

### 6.3 Malaysia-Colonial Period

Like most developing countries, Malaysia has a history of colonisation which had a great impact on the country as a whole. It was mentioned in the introduction that before colonialism, what is now recognised as Malaysia was not a single political unit or kingdom, Malaysia then was known to cover a wide area which included the present Malaysia, Singapore, Philippines, Brunei, South of Thailand and most of Indonesia. Therefore the present day Malaysia's territorial scope is said to have been defined by colonial boundaries<sup>725</sup>.

The Portuguese were the first to come into Malaysia from 1511, followed by the Dutch who took over from the Portuguese in 1641<sup>726</sup>. They controlled only part of Malaysia and not the entire region, their goal was to establish trading bases. The Portuguese and the Dutch however did not make much impact on Malaysia until the coming of the British in 1786. The British came in to Malaysia as the British East India Company and like the Dutch they originally came into Malaysia in search of trade and also to establish a base for their trading with China. The first place that they occupied was Penang which was part of the Straits Settlement and then Malacca, also part of the Straits Settlement.<sup>727</sup>

The Dutch presence in Malaysia came to an end in 1824 when the British took over from them<sup>728</sup>. At the beginning, the British were not particularly concerned with the main Malaysia settlement but more interested in the area that affected their trading. This remained the situation until disputes arose between the Malay rulers and the chiefs over the financial gain from the increase in tin production in Perak and Selangor. These disputes caused

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<sup>725</sup> Vidhu Verma (2002) op.cit pg21

<sup>726</sup> The Economist, History in brief. The Economist 15 December 2003 [Online] Available at <http://www.economist.com/node/2295930?zid=306&ah=1b164dbd43b0cb27ba0d4c3b12a5e227> accessed [10/02/15]

<sup>727</sup> Milne R S, op.cit., pg 11

<sup>728</sup> The Economist(2003) , op.cit

concern for the British firms who did not want the fighting to disrupt the trade in tin mining at the time<sup>729</sup>. This eventually led to the colonial office appointing resident advisors whose advice was then sought and acted upon on all matters other than issues relating to the Malay religion and custom<sup>730</sup>. The system of resident advisors which was also called the British indirect rule was said to have been designed to make the transition to colonial administration easier for the people of Malaysia<sup>731</sup>.

Due to the tin industry in Malaysia and an ambition to control this industry in the region, the British eventually expanded their interest to all the areas that made up what is now known as the Straits Settlement<sup>732</sup>. During that period, parts of the Peninsula Malaysia that were not colonised by the British had separate legal systems and conducted their own affairs but the British maintained control by the supervision of appointed British residents or advisers<sup>733</sup>.

The next section examines the changes British occupation made to the Malaysia society and the impact of such changes on the country's economy, ethnicity, culture and TK and the political legal system.

### 6.3.1 Economic Situation

As discussed in the previous section, pre-colonial Malaysia already had an established trade system in products that came from their rich jungles and sea products.

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<sup>729</sup> Milne R S, op.cit., pg 13-14

<sup>730</sup> ibid

<sup>731</sup> ibid

<sup>732</sup> The Economist (2003) op.cit

<sup>733</sup> Vidhu Verma (2002) op.cit pg27

The British coming into Malaysia was mainly for trade purposes and they proceeded to enter into treaties with the Malays basically to secure their influence over the Malay states for trading. One of such treaties was the treaty entered into by the then governor of the Straits Settlement, Robert Fullerton with the Malacca Straits for trade purposes in exchange for the protection of the British against threats and potential attack<sup>734</sup> from the Siamese<sup>735</sup>.

The British presence in Malaysia was said to have been responsible for Malaysia's thriving export economy during the colonial period. Products that already existed such as tin which was already traded in small quantities commercially expanded with the introduction of new technologies and also production began on new products such as rubber which later became a major commercial export<sup>736</sup>. About the mid 1800's large deposits of tin were discovered in two states; Perak and Selangor. This caused a great increase in Chinese immigration into the area, the Chinese brought in new innovations and mining techniques that increased the production of tin and were reported to have taken over the tin industry. The expansion of the tin industry also attracted British investors who also brought their own innovations to increase its production. Tin then became a major contributor to Malaysia's developing export economy<sup>737</sup>.

The agricultural sector during this period also became very important to Malaysia's thriving export economy with the introduction of rubber. Rubber

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<sup>734</sup> Noh A, 'Small Steps Big Outcome: A Historical Institutional Analysis of Malaysia's Political Economy' (2010) Asia Research Centre Publication . pg 9 available at <http://www.warc.murdoch.edu.au/publications/wp/wp165.pdf> accessed [26/09/13]

<sup>735</sup> Siam which is now known as Thailand was a powerful state at the time, therefore they were feared by the Malays. They invaded the Malay territory Kedah in 1821, they deposed of the Sultan and killed most of the males while they held the women and children captive. See T J Newbold, *Political and Statistical Account of the British Settlement in the Straits of Malacca viz Pinang, Malacca and Singapore with a History of the Malayan States on the Peninsula of Malacca* (1839) Vol 2, Stewart and Murray Old Bailey London. Pg4

<sup>736</sup> Dodd J W, 'The Colonial Economy, 1967: The Case of Malaysia' (1969) Asian Survey, Vol. 9, No. 6 , pp. 438-446 pg 449

<sup>737</sup> Drabble J H (2000) op.cit

was not originally grown in Malaysia; it was said to have been introduced by the colonial government by experimenting its plantation on estates owned by the British. Through successful experimentation, there followed the commercial plantation of rubber in Malaysia by the mid 1890's. With the expansion of the international motor car industry, there was a great increase in the demand for rubber internationally which resulted in the rubber boom<sup>738</sup>. The rubber industry became so rich that Malaysia was at the time the world's largest producer of natural rubber<sup>739</sup>.

Other agricultural produce that contributed to the export economy was palm oil and padi farming (wet rice)<sup>740</sup>.

The success of Malaysia's export economy during the colonial period created a need for infrastructures and communication systems such as the construction of roads, railways and the development of plantation and tin mines. There was also the need to connect the states for ease of transporting the raw materials and for trade purposes, therefore roads were built and railway lines were constructed to link tin mines which were mainly owned by the Chinese<sup>741</sup>. This meant that there was the need for more labour to maximise production and fill the gap that the local Malays were unwilling to occupy. This attracted people from India, China and Indonesia to settle in Malaysia in order to fill these roles which resulted in a significant increase in immigration<sup>742</sup>.

During the colonial period, the payment of taxes was also introduced as well as the introduction of property rights with the growing export economy.

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<sup>738</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg 218-220

<sup>739</sup> Dodd J W, op.cit, pg439

<sup>740</sup> Andaya B.W, Andaya L.Y (2001) op.cit.,pg 212-220

<sup>741</sup> ibid

<sup>742</sup> Vidhu Verma (2002) op.cit, pg25

There was at that time the imposition of taxes on the use of river ways by the local people<sup>743</sup>. Also as a result of the growing export economy, the British needed large tracts of land to be cultivated and due to their investment in Malaysia's economy, they proceeded to secure legal titles to these lands<sup>744</sup>.

This led to the introduction of land enactments which restricted certain lands for the cultivation of certain produce. An example was the Rice Lands Enactment which was introduced for the purpose of preventing rubber cultivation on lands that were allocated for rice cultivation. Customary land rules were also abolished and replaced by the colonial land tenure system which helped them to acquire titles to large tracts of land which used to be Malaysia's virgin forests. These forests were replaced by vast plantations necessary for the export economy. These land practices eventually resulted in the Malays being restricted to subsistence production and living in rural areas that the British didn't have use for<sup>745</sup>.

The British presence also established Malaysia's economic development during the colonial period by introducing banking and insurance facilities, linking the currency in Malaysia to the sterling and also creating institutions for technical training and scientific research. All these helped to maintain the confidence of the European investors in the thriving Malaysia's economy<sup>746</sup>.

For the economic development to continue to flourish in Malaysia, the British recognised that it was necessary to have the assurance of a working legal system to maintain peace and order. This resulted in the development of the colonial legal system in Malaysia which is discussed later in this section.

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<sup>743</sup> Noh A,(2010) op.cit, pg 12

<sup>744</sup> Ibid

<sup>745</sup> Andaya B.W, Andaya L.Y (2110) op.cit.,pg 212- 221

<sup>746</sup> ibid

### 6.3.2 Ethnicity

It was mentioned under ethnicity during the pre-colonial period that immigration among the Malays and non-Malays was described as one of peaceful co-existence which was because there was no necessity for the struggle for power and resources.

By the time Malaysia was colonised, immigration was said to have significantly increased from what it was during the pre-colonial period due to Malaysia's booming export economy which created the need for labour to maximise production. Immigrants therefore came from India, China and Indonesia to settle in Malaysia in order to fill the needed roles.

The large number of immigrants who eventually settled in Malaysia created an even bigger multi-ethnic society than the pre-colonial period which created what was called a plural society<sup>747</sup>.

There was a clear separation between the Malays, the Chinese, the Indians and the European immigrants in terms of language, religion, and custom. The colonial period and its policies was said to have been partly responsible for this separation resulting in the plural nature of the society<sup>748</sup>. Each ethnic group formed their own society and hardly interacted with each other, there existed different forms of government for each part of Malaysia which were all coordinated by the British colonial office. Malaysia was so divided that it was stated that before independence the only thing that the people that occupied Malaysia had in common was the fact that they lived in the same country<sup>749</sup>.

As time went on, it became obvious among the different ethnic groups of the apparent inequality between them. The Chinese were numerically larger than

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<sup>747</sup> A plural society is described as a society where various ethnic groups dwell together under one political unit and have to interact with one another perhaps economically but beyond that, there is little interaction socially or culturally. See M A Ramli and M A Jamaludin, 'Interaction of Plural Society in Malaysia: Diatribe or Dialogue' (2012) World Journal of Islamic History and Civilization, 2 (1): 53-57

<sup>748</sup> Vidhu Verma (2002) op.cit, pg24

<sup>749</sup> Milne R S, op.cit., pg 23

the Indians and compared to the Chinese, the Indians were more of a disadvantaged group as they were recorded to have been deprived of education and health care facilities<sup>750</sup>.

The situation was said to have been aggravated by the categorization and stereotyping by the British of the different groups according to their abilities. For instance, the qualities of a true Malay at that time was officially defined by the British in the Malay Reservations Act of 1913 as “*any person belonging to the Malayan race, who habitually spoke Malay or any other Malayan language and who professed Islam*”<sup>751</sup>. Even though the Malays were considered to be courageous people and proud of their country and their people, they were also stereotyped by the colonial administration to be generally very lazy, people that were not inclined to work to earn wages and therefore were not considered to be a particularly useful source of labour for the purposes of advancing the colonial economy<sup>752</sup>. The Chinese on the other hand were considered to be hard workers and relied upon to bring in most of the revenue. They worked in tin mines, on plantations and thereby filled the gap the Malays were supposedly unable to fill because of their lack of industry. While the Indians were seen to be a useful source of labour for the different jobs that needed to be done<sup>753</sup>.

It followed that the result of the stereotyping further drove a wedge between the three main ethnic groups and there was even less interaction between them.

While the British still occupied Malaysia, the lack of interaction and the clear division between the ethnic groups could be managed because all the ethnic groups were under one authority, in both political and economic concerns

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<sup>750</sup> *ibid*

<sup>751</sup> Andaya B.W, Andaya L.Y (2001) *op.cit.*,pg177

<sup>752</sup> *Ibid* pg 178

<sup>753</sup> *ibid*

they were all under one umbrella which meant that there was no dominant group at the time<sup>754</sup>.

However when the British left and the single authority they were all under was abolished, there was a clear conflict between the groups. It followed that the Malays constituted the governing class which enabled the exercise of political control while the non-Malays dominated the capitalist class which gave them the power to control the economy<sup>755</sup>. This division is discussed in more detail under post-colonial Malaysia.

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<sup>754</sup> *ibid*

<sup>755</sup> Noh A (2010) *op.cit* pg3

### 6.3.3 Culture and Traditional Knowledge

The culture and lifestyle of the indigenous people in Malaysia also changed during the colonial period.

During the early British occupation, the TK of the indigenous people which was a main part of the culture of the people was recognised by the European travellers and the colonial government. The recognition by early colonial scientists of Malaysia's natural resources and the richness of the Malaysian forests subsequently led to the exploration and the documentation of information on various natural resources<sup>756</sup>. They were able to do this with the assistance of the indigenous people they recruited who had direct knowledge of their environment. This collaboration was said to have given results that significantly contributed to scientific knowledge during the colonial period. The British were reported to have set up research centres to explore most of the forest resources for their commercial value and innovative commercial production<sup>757</sup>.

This exploration although exposed the wealth of Malaysia's natural resources and brought attention to their commercial significance and potential, it however also created a mistrust for the British scientific research methods which early Malaysians saw as intuitive and exploitative<sup>758</sup>.

Another aspect of the colonial period that impacted the lives of the indigenous people was the introduction of the export economy. It was discussed under the pre-colonial period how they lived simple lives and were hugely dependent on their lands. This changed with the export economy which required large tracts of land for the vast plantations necessary to sustain the large commercial production. This unfortunately meant that the indigenous people lost most of their lands to make way for these plantations.

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<sup>756</sup> Kathirithamby-Wells J, 'Penninsular Malaysia in the Context of Natural History and Colonial Science' (2009) *New Zealand Journal of Asian Studies* 11, 1 :337-74. Pg 337-341

<sup>757</sup> Ibid

<sup>758</sup> Ibid

The Orang Asli were particularly said to have lost the control of their lands and forests due to settlements, development and people's interest in their territory<sup>759</sup>. During colonisation, a land tenure system was adopted called the Torrens system in which the crown held all the titles to the land in the region and private rights to lands were only granted on fixed term leases whereby rent was collected on these lands<sup>760</sup>. This system of land tenure was designed to promote economic development by the government having full access to all the lands. The Malay rulers at the time acted as the crown and the rights were vested in them. The Malays at that time were not happy with that arrangement as they had concerns that it would affect their traditional titles to their already occupied lands. As a result of this the land tenure system was amended to recognise the titles to lands held by the Malays who were categorised as Malays and Muslims. Temporary occupation leases were also extended to foreigners and immigrants on some lands<sup>761</sup>.

This arrangement was however not extended to the indigenous people of Malaysia therefore they had no titles to their lands as their lands were deemed to be owned by the crown. They were only allowed to live on lands that were unoccupied as dependants of the Malay rulers<sup>762</sup>.

As time went on, one of the offices of the British civil service had some concern for the welfare of the indigenous people which eventually resulted in the creation of the Aboriginal Peoples Ordinance in 1954<sup>763</sup>. This Ordinance created the Department of Aborigines<sup>764</sup> which was headed by a commissioner and responsible for all matters concerning them. This department was given the authority to establish reserves for Aboriginal lands

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<sup>759</sup> Gomes A G , 'The Orang Asli of Malaysia' (2004) IIAS Newsletter [Online] Available at [http://www.iias.asia/nl/35/IIAS\\_NL35\\_10.pdf](http://www.iias.asia/nl/35/IIAS_NL35_10.pdf) accessed [03/10/2013]

<sup>760</sup> Mean G P(1985-1986) s op.cit pg 639-640

<sup>761</sup> ibid

<sup>762</sup> ibid

<sup>763</sup> Idrus R, po.cit (2011) pg 63-64

<sup>764</sup> The indigenous people of Malaysia are also referred to as the aboriginal people. See G P Means(1985-1986) op.cit.

and to exclude other people from entering these lands except for the indigenous people themselves. Unfortunately the Ordinance still did not vest titles to the lands in the indigenous people, rather the department held the titles in trust for them<sup>765</sup>. The State still had full authority over the Orang Asli lands and had the right to revoke the status of the land(s) at any time. This unfortunately meant that the Orang Asli still ended up having no rights to the lands they occupied and their occupancy was in fact subject to the discretion of the commissioner or state authority<sup>766</sup>. This situation remained the same even after colonisation which will be discussed in more detail under post-colonial Malaysia.

Another effect of the colonial period on Malaysia's cultural identity was the displacement of the Malay language.

As discussed under pre-colonial Malaysia, the Malay language was the common language used for communication purposes and for trading<sup>767</sup>. When the British first came into Malaysia, they had to communicate with the locals using sign languages and later on English.

The later established British presence in Malaysia which involved the expansion of government services, commerce and trade changed that by the spread English language throughout Malaysia. In order to facilitate easy communication between the government and the locals, only a few of the locals who were able to understand and speak basic everyday English were employed by the government officials that were involved in the collection of revenues, the supervision of mines, the construction of roads and railways<sup>768</sup>. Gradually the English language took over from the Malay language and became the dominant language in Malaysia.

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<sup>765</sup> Ibid @ pg 645

<sup>766</sup> Idrus R (2011) op.cit, pg64

<sup>767</sup> Mohd.Faisal b.Hanapiah, 'English Language and the Language of Development: A Malaysian Perspective' (2004) Jurnal Kemanusiaan (3). pp. 107-120. Pg 106-107

<sup>768</sup> ibid

As previously mentioned, Malaysians considered their language to be very important as they referred to it as the soul of the nation<sup>769</sup>. Especially with their long history of immigration making Malaysia a country with diverse ethnic groups, they considered their language, customs and culture to be interwoven and therefore played a crucial part in retaining their identity<sup>770</sup>. One Malay author wrote that the spread of English language during the colonial time and the resulting displacement of the Malay language was seen to be a disregard for their national language and identity which to the people was a devaluation of their culture and traditions<sup>771</sup>.

Indigenous languages are invaluable to the transfer of TK and cultural values since the knowledge can only easily be passed on to younger generations through indigenous languages. In Malaysia, this meant that the displacement of the Malay language at that time impacted the method of passing on TK skills to the younger generation. However by the time the colonial period ended, there was a move by the Malaysian government to correct the situation and reinstate the Malay language as the national language. This is discussed in more detail under post-colonial Malaysia.

#### **6.3.4 Political/Legal System**

The political legal system that operated in Malaysia before colonisation as discussed under pre-colonial Malaysia was mainly a customary system of law presided over by the Sultans. There was no recorded single political unit until colonisation.

With the introduction of the export sector into Malaysia's economy, it became essential for the European investors to have an assurance of a legal system

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<sup>769</sup> Ibid pg 291

<sup>770</sup> Ibid

<sup>771</sup> Mandal S K, 'Reconsidering Cultural Globalization: The English Language in Malaysia' (2000), Third World Quarterly, 21:6, 1001-1012. Pg 1004

that would maintain law and order in the country<sup>772</sup>. The British rule therefore introduced the formation of State Council and Civil Administration which at the time mainly comprised of British officials<sup>773</sup>. The Common Law of England was also introduced, first to Penang in 1807 by the First Charter of Justice and in 1826 to Malacca and Singapore by the Second Charter of Justice; thereafter it reached other protected Malay states<sup>774</sup>.

Even though there was an already established system of law in Malaysia, which was the customary system, the colonial government still proceeded to introduce a form of law completely foreign to the people of Malaysia. The reason for this was thought to be because the British saw that the existing customary laws were unable to adequately meet the needs of the Malay society.

It was pointed out that this perception could be seen from the works of early colonial administrators such as John Crawfurd<sup>775</sup> and Sir Stamford Raffles<sup>776</sup> when they described Malay Adat laws as “*primitive, backward and inadequate in dealing with the important aspects of social life*”<sup>777</sup>. The British administrators were also of the opinion that compared to the English legal system; the pronouncements of the Malay Adat laws were unmethodical and full of uncertainties while they found the legal theories to be faulty and

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<sup>772</sup> Andaya B.W, Andaya L.Y op.cit.,pg 212

<sup>773</sup> Noh A, op.cit (2010) pg 12

<sup>774</sup> Neoh J, ‘Legitimacy of the Common Law in Post-Colonial Malaysia’ LAWASIA: Journal of the Law Association for Asia and the Pacific (2010): 59-82 pg60

<sup>775</sup> John Crawfurd was a British colonial administrator and author, he had interest in Malaysia culture, history and languages , he wrote scholarly works to reflect this. More information available at Encyclopaedia Britannica, John Crawfurd [Online] Encyclopaedia Britannica Inc. Available at <http://www.britannica.com/EBchecked/topic/142018/John-Crawfurd> accessed [07/02/2015]

<sup>776</sup> Sir Stamford Raffles was a British East India Administrator, like Crawfurd, he also explored the culture, history and language of the Malayan peoples. More information available at Encyclopaedia Britannica, Stamford Raffles, Encyclopaedia Britannica Inc. <http://www.britannica.com/EBchecked/topic/489451/Sir-Stamford-Raffles> accessed [22/03/2013]

<sup>777</sup> Rahman Noor Aisha Abdul, *Colonial Image of Malay Adat Laws: A Critical Appraisal of Studies on Adat Laws in the Malay Penninsular during the Colonial Era and some continuities* (2006) Brill Academic Publishers. Pg 15-29

crude<sup>778</sup>. English law on the other hand they said was just and impartial which they thought would make a difference in improving the welfare of the Malay people<sup>779</sup>.

There was clearly a supposed superiority of the British English Law to the Malay Adat laws at the time. It could be assumed that the perception of the British administrators represented the general opinion of the British on Malay Adat laws during colonisation and what deemed it necessary for the introduction of English Law into Malaysia.

The introduction of English law also brought with it the introduction of IP law into Malaysia which is discussed in the following section.

### **6.3.5 Introduction of Intellectual Property Law in Malaysia**

As previously discussed, before colonisation, Malaysia had a thriving system of commerce as a result of its international trade links; it is believed that the system of commerce at that time was accompanied by some degree of a commercial law system<sup>780</sup>. There was however no indication from the existing texts on Malay customary laws that the form of commercial law operating at the time included any form of IP law<sup>781</sup>.

It is assumed that when the English Common Law was granted to the Straits Settlements via the Second Charter of Justice, the English patent law and copyright law may have been available in some parts too, however there appeared to be no written evidence of a specific period when IP law in Malaysia started. There is also no evidence to indicate that these laws, even

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<sup>778</sup> *ibid*

<sup>779</sup> *ibid*

<sup>780</sup> Rahman Noor Aisha Abdul(2006) op.cit pg24

<sup>781</sup> Khaw Lake Tee, *Copyright Law in Malaysia*, (2008) Lexisnexis Malaysia SDN BHD . pg 2-3

though were available, were actually in operation when they were introduced<sup>782</sup>.

Following its inception, various IP laws were enacted throughout Malaysia. Each territory developed its own patent laws and copyright laws at different times, some earlier than others before they were later consolidated when the Federation of Malaysia was formed<sup>783</sup>.

To make the developments easy to follow, they will be briefly discussed according to each territory, namely:

- (1) The **Straits Settlement** comprising Labuan, Penang, Singapore and Malacca
- (2) The **Borneo territories** comprising of Sabah, Sarawak and Brunei.
- (3) The **Federated Malay States** which includes Selangor, Negri Sembilan and Pahang
- (4) The **Unfederated Malay States** which includes Johore, Kedah, Kelantan, Perlis and Trengganu

Significant developments in IP laws began with the former Straits Settlement; they were the first territories in Malaysia to have been given the status of a colony. Before the Straits Settlement became a Crown Colony, the territories were first administered by the East India Company; afterwards it was administered by the British Government in India. The patent laws enacted in India at that time were the Act No.VI of 1856 which was later repealed by the Act XV of 1859. The application of the patent laws enacted in India at that time was extended to the Straits Settlement<sup>784</sup>.

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<sup>782</sup> ibid

<sup>783</sup> ibid

<sup>784</sup> Heng Gee L, A Study of the Historical Development of the Malaysia Patent System, Chap in *Perspectives on Intellectual Property: The Prehistory and Development of Intellectual Property Systems*, ed Alison Firth (1997) Sweet&Maxwell London pg 84-97

After the Straits Settlement territories were separated from India, a special legislation was passed in 1870 to grant special privileges to inventions that had to do with electric telegraphs, this was referred as The Electric Telegraph Exclusive Privileges Ordinance of 1870 which then paved the way for local patent legislation to be enacted in the territories<sup>785</sup>.

The first local legislation was the Inventions Ordinance which was based on the 1859 Ceylon Act No 6. This Ordinance made it possible for inventors to petition the Governor in Council for the permission to file a specification. The Governor may respond by making an order granting the permission or make inquiries concerning the specification or even refuse in which case the inventor may oppose the Governor's decision. The Inventions Ordinance was later amended by the 1924 amendment Ordinance No 15 and eventually repealed by the 1937 United Kingdom Patents Ordinance<sup>786</sup>.

It was pointed out that the change made to the structure of patent registration from the Inventions Ordinance to the amendment Ordinance and the repealed Ordinance was significant. The initial registration of patent in the Straits Settlement was in the form of local registration in the Colony whereby persons seeking for patents to be granted could apply to the Governor in Council in the Colony. The invention had to be novel; meaning at the time before the patent was filed, the invention must not have been used publicly in the United Kingdom, any British Dominion or possession, Northern Ireland or in the Colony and it was usually for a period of 14 years<sup>787</sup>. Then with the amendment Ordinance, a dual system of registration was introduced which meant that in addition to local applications being examined and granted in the Colony, patents granted in the United Kingdom could also be re-registered in the Colony following an application to the Registrar of Patent in the Colony. A certificate of registration would then be issued granting exclusive rights that

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<sup>785</sup> *ibid*

<sup>786</sup> *ibid*

<sup>787</sup> *ibid*

were conferred in the United Kingdom to have the same effect in the Colony<sup>788</sup>.

This dual system was however criticised when the Straits Settlement Trade Commission pointed out the limitations of a local patent examiner in ensuring that an invention was not only new within the Colony but also throughout the whole empire. There was a realisation that the Colony didn't have the proper administrative set up and personnel to carry out the necessary examination<sup>789</sup>.

The 1937 Ordinance later repealed the 1924 Ordinance which changed the dual system into a simple re-registration system whereby the independent patent system in the Straits settlement ended. Patent applications could only be made in the United Kingdom and inventors who wished to could then apply in the Colony for the extension of such rights and privileges<sup>790</sup>.

Copyright law came later in the Straits Settlement. In the early 1900, there arose a need to provide some protection for newspaper proprietors in the Settlement territories from rival newspapers that published news items without the owner's consent and without paying for the right to do so. This resulted in the enactment of the first copyright like statute in 1902 called the Telegram Copyright Ordinance<sup>791</sup>. In 1911, the Copyright Act was passed in the United Kingdom which was extended to the Straits Settlement as part of his Majesty's colonies. The United Kingdom Copyright Act was in operation along with the Telegram Copyright Ordinance until the formation of the Federation of Malaysia in 1963<sup>792</sup>.

The introduction of patent law in the other territories such as Sabah in the Borneo territory followed the Straits Settlement first patent legislation which

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<sup>788</sup> ibid

<sup>789</sup> ibid

<sup>790</sup> ibid

<sup>791</sup> Khaw Lake Tee (2008) op.cit pg 2-12

<sup>792</sup> ibid

was the Inventions Ordinance in 1887. This was later repealed by the United Kingdom Patents Ordinance of 1937 while Sarawak also in the Borneo territory did not have any patent legislation till the Patent Order of 1922. This was said to be because the Rajah at the time did not feel that there was a need for a patent legislation like the other territories, if there was an invention to be registered, he said the patentee could simply apply to the Rajah for exclusive rights and privileges in the state<sup>793</sup>.

For the Federated Malay States, patent law was introduced in Selangor and Negri Sembilan in 1896 with the enactment of the Inventions Regulations and Inventions Order in Council respectively while Pahang followed with a similar statute in 1897. All three laws were identical to the patent law that was in force in the Straits Settlement which stipulated that the inventions had to be novel and for a period of 14 years. The difference was that in the Federated Malay States, the applicant was required to petition the Sultan in Council who had the discretion of granting or refusing the application if he thought that it was prejudicial to public interest<sup>794</sup>.

By 1906 there was a proposal to have a centralised patent system for these Federated Malay States and a Bill was passed resulting in the enactment of the Inventions Enactment of 1914 later amended in 1925<sup>795</sup>.

For the Unfederated Malay States, patent legislation came later. Johore enacted their first patent legislation in 1911 which was the Inventions Enactment, similar to the patent legislation in the Federated Malay States. Kedah followed with the Enactment No 54 (Inventions) and then Kelantan in 1916 with the Inventions Enactment similar to the one in Kedah. Perlis and Trengganu did not have any patent legislation until after the Federation of Malaysia was formed<sup>796</sup>.

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<sup>793</sup> Heng Gee L (1997) op.cit pg 84-97

<sup>794</sup> *ibid*

<sup>795</sup> *ibid*

<sup>796</sup> *ibid*

By this time there were so many patent laws scattered all over Malaysia that there was an attempt to consolidate them all into a centralised system which resulted in the enactment of the United Kingdom Patents Ordinance of 1951. This piece of legislation repealed the Registration of United Kingdom Patents Ordinance and Enactment of 1937(for the Straits Settlement and Johore), the Inventions Enactment and the Enactment Inventions 1928 (for the Federated Malay States, Kedah and Kelantan)<sup>797</sup>.

Regarding Copyright Law, the three territories above, that is the Federated Malay States, the Unfederated Malay States and the Borneo territories did not have a copyright law at the time the Straits Settlement had one. This was because they did not feel that there was a need for such a legislation so they carried on until there began in these territories the frequent infringement of copyright works. The British authors and the Performing Rights Society were concerned about the frequent infringement of their works so they brought the matter to the attention of the colonial office. This pushed the Federated Malay States and the North Borneo territories including Sarawak to adopt the 1930 Copyright Enactment (Cap 73) and the 1935 Copyright Ordinance and Copyright Ordinance (Cap 44) respectively<sup>798</sup>.

In 1952 the 1935 Copyright Ordinance in North Borneo was repealed by the imperial Copyright Act of 1911. Later when the United Kingdom Copyright Act of 1911 was replaced by the 1956 Copyright Act, it also extended to North Borneo and Sarawak and became the copyright law in force until the Federation of Malaysia was formed<sup>799</sup>.

By the time Malaysia was formed, there were four patent law statutes and three copyright law statutes. There was a realization that as a newly independent country, there was a need to have a unified system of laws, laws that would embody provisions that would be particularly relevant to

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<sup>797</sup> *ibid*

<sup>798</sup> Khaw Lake Tee (2008) *op.cit* pg 2-12

<sup>799</sup> *ibid*

Malaysia and that would encourage and promote innovation and creativity<sup>800</sup>.  
This is further discussed in the next section.

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<sup>800</sup> Lim Heng Gee(1997) op.cit pg 84-97

## 6.4 Malaysia-Post Colonisation

The discussion so far has shown how the situation in Malaysia changed significantly from the pre-colonial period when although there was an already established commercial system, there operated a relatively simple system of subsistence living to the transformation during colonisation with the introduction of the export industry.

Colonisation brought with it an even more successful commercial system and with that the introduction of English law and IP law. Malaysia achieved independence in 1957, after Independence Malaysia's export economy continued to thrive. There was also an exposure to the commercial significance of the country's natural resources coupled with the introduction of IP law encouraging innovation and creativity.

The transformation that occurred during colonisation also appeared to cause an escalation of the already existing local conditions which were not particularly of concern until the changes implemented during colonisation. This section examines the lingering effects of colonisation on the local conditions in Malaysia even after Malaysia became an independent nation.

### 6.4.1 Ethnicity

Malaysia's plural society could be said to be perhaps the most obvious effect of the colonial administration. By the time the British left, there was a clear conflict between the major groups which were the Malays, the Chinese and the Indians and the indigenous people referred to as the minorities leading to ethnic inequality.

This could be seen in the politics and economy of the country where the interest of each ethnic group had to be taken into account as part of the official framework of the constitution<sup>801</sup>.

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<sup>801</sup> Vidhu Verma (2002) op.cit, pg 41

The ethnic inequality became more intense as each ethnic group struggled to advance the interest of its members by improving their economic position and advancing their cultural interests politically. This naturally led to the struggle for power and political positions in the government<sup>802</sup>. The Malays were said to have constituted the governing class thereby exercising political control while the non-Malays dominated the capitalist class thereby controlling the economy<sup>803</sup>.

By 1969 after the third federal elections, the ethnic tension reached a peak leading to race riots. After this riot, the government of Malaysia came up with a plan to tackle the ethnic inequality and foster national unity. They adopted the National Economic Policy which was described as “*one of the several efforts to achieve national unity in view of the socioeconomic inequality inherited from the colonial period and consolidated in the post-independence years*”<sup>804</sup>. The policy aimed to reduce and eventually eradicate poverty for all Malaysians irrespective of their ethnic group and to correct economic imbalance with the goal of eliminating the identification of any particular ethnic group with an economic function<sup>805</sup>.

Even though some ethnic disparities still exist in the modern day Malaysia, compared to most developing countries that have had similar history and issues of ethnic inequality, Malaysia’s case has been described as exceptional<sup>806</sup>. The implementation of the New Economic Policy after the

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<sup>802</sup> Ibid @ pg 24

<sup>803</sup> Noh A (2010) op.cit pg3

<sup>804</sup> Jomo K S, ‘The New Economic Policy and Interethnic Relations in Malaysia’ (2004) Identities, Conflict and Cohesion Programme Paper Number 7 . UNRISD publication. Pg 12

<sup>805</sup> Mile R S, ‘The Politics of Malaysia’s New Economic History’ (1976) Pacific Affairs, Vol. 49, No. 2 pp. 235-262 pg 239

<sup>806</sup> Snodgrass D R, ‘Successful Economic Development in a Multi-Ethnic society: The Malaysian case (1995) Development Discussion Paper No. 503. Massachusetts: Harvard Institute for International Development. pg 3

1969 riots was said to be “*probably the most ambitious affirmative action programme ever undertaken in a developing country*”<sup>807</sup>.

Malaysia continues to manage its ethnic differences over the years and is now seen as a country that has a rich and diverse culture<sup>808</sup>. One author even said if this continued, the goal of being a fully developed nation by 2020 seemed plausible<sup>809</sup>.

Although credit is given to the Malaysian government for the exceptional way ethnic disparities have been managed between the major ethnic groups since colonisation, there is however another group of Malaysians that appears not to have benefitted from Malaysia’s National Economic Policy and they are the minorities of Malaysia, also the indigenous people of Malaysia.

As mentioned in the introduction to this chapter, the government of Malaysia stated that harnessing the country’s creativity, knowledge and skills was important towards achieving their vision 2020; this includes the TK and resources in Malaysia. It is usually acknowledged that the TK and resources generally reside with the indigenous people in any given country. Therefore the recognition, development and representation of the minorities would be essential to achieving Malaysia’s vision 2020. The next section discusses in more detail the situation of Malaysia’s indigenous people after colonisation.

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<sup>807</sup> ibid

<sup>808</sup> See Milne R S (1976) op.cit for a detailed account of the effect of ethnicity on Malaysia’s political parties

<sup>809</sup> Snodgrass D R (1995) op.cit. pg1

#### 6.4.2 Culture, Traditional Knowledge and Political System

After Malaysia got its independence, there was attention on the country's rich culture, TK and biodiversity which is seen throughout the several policies in place dedicated to the conservation and sustainable use of biodiversity<sup>810</sup> and also the development of the culture and TK in Malaysia.

As a result, due attention began to be given to the important markers of the country's cultural identity<sup>811</sup> one of which was reinstating the Malay language to its former position as the official language.

After independence, the Malay constitution provided that the Malay language was to be the official language in Malaysia. To make the transition from the English language to the Malay language easier, there was provision for the transition to be delayed for 10 years<sup>812</sup>. Since then there have been many amendments to the Malaysian Constitution, Article 152 (1) of the most recent amendment<sup>813</sup> still states that "*The national language shall be the Malay language...*"<sup>814</sup> In addition to the Constitution, there was the National Language Act which also made provision that the Malay language should be used for official purposes<sup>815</sup>.

This change from the English language to Malay language also had a significant impact on the education system in Malaysia. During the colonial

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<sup>810</sup> Like the National Policy on Biological Diversity and the National Forestry Policy. For a full list see Heng Lee L, 'Intellectual Property Protection of Traditional Knowledge: The Malaysian Experience' (2012) WTO-ESCAP-IIUM Regional Workshop on Intellectual Property. Kuala Lumpur

<sup>811</sup> UN Permanent Forum on Indigenous Issues (UNPFII), op.cit, pg53

<sup>812</sup> Milne R S (1976) , op.cit., pg 62

<sup>813</sup> This is the 2007 version and it is available on the WIPO website at <http://www.wipo.int/wipolex/en/details.jsp?id=6823> [accessed 18 March 2007]

<sup>814</sup> ibid

<sup>815</sup> Laws of Malaysia, *National Language Acts 1963/67, Act 32 (incorporating all amendments up to January 2006)* Malaysia. Available at <http://www.agc.gov.my/Akta/Vol.%201/Act%2032.pdf> [accessed 18 March 2013] This Act also provides for instances where English language may be used in Malaysia.

days the education system in Malaysia was mainly multilingual, there were many languages of instruction because schools were set up according to ethnic considerations. However, after the provision to restore the Malay language, while the education system still retained “national schools” where the language of instruction is Malay and “national-type schools” where the language of instruction is either Chinese or Tamil, English was then taught as a second language<sup>816</sup>.

The move to restore the Malay language was described as very significant towards improving the cultural solidarity in Malaysia’s multi ethnic society and also an attempt to restore the value of Malaysia’s culture seized during colonisation<sup>817</sup>. This is of course very good for the continuance of the various Malay cultures and TK of Malaysia which is usually passed on through indigenous languages.

The government in Malaysia did not however completely discourage the use of English language, they realised that for the country to be able to compete in a highly industrialised world and participate meaningfully in international trade, it was beneficial for them to retain the use of English language<sup>818</sup>.

This was the reason why in 2003 the government of Malaysia reinstated the English as the language of instruction in science and mathematics for schools. They expressed this as a necessary move for the country to be able to stay current in scientific and technological development which is mainly recorded in English<sup>819</sup>. English is also still in common use throughout the

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<sup>816</sup> Saadiyah Darus, ‘Current Situations and Issues of the Teaching of English in Malaysia’ (2010) *Ritsumeikan Studies in Language and Culture*. Vol. 22. No. 1. 19-28 Pg21-22

<sup>817</sup> Mandal S K (2000), op.cit pg

<sup>818</sup> *ibid*

<sup>819</sup> Pandian A , Ramiah R , ‘Mathematics and Science in English: Teacher voice The English Teacher’ (2004) Vol. 33 *Universiti Sains Malaysia* Available at <http://drjj.uitm.edu.my/DRJJ/TOBIAS/Pandian%20on%20PPSML.pdf> accessed [20/03/2013] pg1

country and permitted to be used officially in certain platforms such as addressing the Parliament and the Legislative Assembly<sup>820</sup>.

For TA providers, understanding the sensitive nature of Malaysia's language history could be relevant to the delivery of TA programs. In an interview with the senior director, policy and strategic planning division at the Intellectual Property Corporation of Malaysia (MyIPO)<sup>821</sup> she mentioned that one of the problems they have had in the delivery of TA is the language barrier between the providers and MyIPO officials. She pointed out that the difficulty the officials have had in understanding the providers has prevented them from fully realising the benefits of the programs. She gave an example of a situation where MyIPO staff participated in IP training which was delivered by Japanese speakers; unfortunately the participants did not understand the Japanese speakers and therefore did not benefit from the training provided<sup>822</sup>.

Whether Malaysia's language history and the following reinstatement of the Malay language as the official language has been a hindrance to any effort to provide some form of training in this respect to MyIPO staff is unclear at this point, however this is a local factor that is worth some consideration towards the successful implementation of future WIPO TA programs. Consideration of this local condition will also be useful if TA is to be extended beyond Malaysia's IP offices to the indigenous people of Malaysia regarding their TK and resources.

The importance of ensuring the participation of indigenous people and their communities in providing technical and financial assistance regarding benefitting from their TK and resources has often been emphasized because the needs, rights and interests of the indigenous people are said to not

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<sup>820</sup> See Laws of Malaysia, *National Language Acts 1963/67, Act 32*, op.cit for full provision on the use of Malay as the official language and where English is permitted to be used for certain official purposes.

<sup>821</sup> Mohamad S E [Senior Director, Policy and Strategic Planning Division, Intellectual Property Corporation of Malaysia] Web Interview 12 November 2012

<sup>822</sup> *ibid*

always be in line with those of their government<sup>823</sup>. This is particularly relevant to the indigenous people in Malaysia. In spite of the government effort in promoting and harnessing the country's creativity and TK resources, research and recent newspaper publications show that the indigenous people are still struggling for their concerns regarding their resources to be heard and protected by the government.

Malaysia's indigenous people known as the Orang Asli are currently struggling to have their rights respected and protected by the Malaysian government. They are reported not to have any independent organisations representing their interests and they do not have any input in policies affecting them<sup>824</sup>. This could potentially be a stumbling block for TA providers in correctly assessing the needs of these indigenous people which means that TA and capacity building programs cannot be tailored specifically to enable them make the most of their knowledge and resources. An explanation normally put forward by the government for excluding the indigenous people in policies that may affect them is their refusal to be modernised<sup>825</sup>.

According to Article 15(1) of the CBD Convention text, recognition is given to "*the sovereign rights of States over their natural resources*"<sup>826</sup> and provides that "*the authority to determine access to genetic resources rests with the national governments and is subject to national legislation*"<sup>827</sup>. In Malaysia this provision would work against the interest of indigenous people as it appears that there is a clear conflict between the needs and interests of the

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<sup>823</sup> WIPO, 'American Folklore Society Statement to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (2002) WIPO publication pg1; K Swiderska, 'Stakeholder Participation in Policy on Access to Genetic Resources, Traditional Knowledge and Benefit-Sharing : Case Studies and Recommendations (Biodiversity and Livelihood Issues)' International Institute for Environment and Development pg30

<sup>824</sup> See Gomes A G (2004) op.cit

<sup>825</sup> Idrus R (2011) op.cit, pg67

<sup>826</sup> Convention on Biological Diversity (CBD) *Text of the CBD* [Online] Available at <https://www.cbd.int/convention/articles/default.shtml?a=cbd-15> accessed [18/08/15]

<sup>827</sup> ibid

indigenous people and those of the Malaysian government over the country's natural resources. The government have been said to accuse the indigenous people of being backward and having an anti-development mentality.

Some of the government development efforts are also said to have had adverse effect on these indigenous groups. Research on the Orang Asli brings to light how the implementation of the government development plans have converted Orang Asli forests into plantations , land development and mines. These activities resulted in their displacement causing most of them to lose their source of livelihood as they had to leave behind their farms and producing orchards<sup>828</sup>. They were reported to have been allocated smaller land holdings to occupy with hardly any compensation for their loss<sup>829</sup>.

The system of government in Malaysia unfortunately is said not to encourage a platform where indigenous people are able to voice their concerns. The system of government in Malaysia is generally described as both a system of democracy and authoritarian. Even though democratic elections are held for Malaysians to elect those in the government, it is still said to be largely authoritarian because the government has a firm grip on power including the control of institutions and organisations such as the press and the IP office in Malaysia. For example all TA programs come through the government via the IP office in Malaysia. Also any opposition to the government or its policies are said to be generally discouraged and not open for public debate<sup>830</sup>.

The only representation for the Orang Asli which is called the Department of Orang Asli Affairs (JHEOA) is also regulated by the government. It was set up pursuant to the 1954 Aboriginal Peoples' Act created during the colonial administration<sup>831</sup> and it is charged with the responsibility of representing the interests of the Orang Asli<sup>832</sup>. The Orang Asli's are said to be concerned that

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<sup>828</sup> Gomes A G (2004) , op.cit

<sup>829</sup> Idrus R (2011) op.cit, pg67

<sup>830</sup> Crouch H, *Government and Society in Malaysia*, (1996) Cornell University Press pg 30-31; 85

<sup>831</sup> See Section 5.3.3

<sup>832</sup> Nicholas C (2000) op.cit. pg 108

this department has not been effective in securing their rights to their land, in fact the view of this government department as a representative of their interests at the national level has been described as “*distant, unapproachable and irrelevant*”<sup>833</sup>. This department has also been described as “*lacking independence, impartiality and objectivity...has become a mechanism for the government of Malaysia to regulate, control and assimilate the Orang Asli and not develop them*”<sup>834</sup>.

With no independent representation of their rights, the Orang Asli’s continue to suffer the loss of their livelihood. In a recent Malay newspaper publication<sup>835</sup> the author while talking about the 13<sup>th</sup> general election stated that with the current government, the Orang Asli department which has never been administered or managed by the Orang Asli themselves has remained the same since it was set up and the indigenous people still have no representatives in the government. For the Orang Asli indigenous people therefore, it would seem that they are generally helpless even when their knowledge and resources are exploited<sup>836</sup>.

In another recent publication by an Independent newspaper in Malaysia, it is reported that a particular group of the Orang Asli known as the Orang Asli Selentar have been desperately fighting hard for their voices to be heard<sup>837</sup>. This indigenous group are traditional fishermen and they have for many years survived on their catches. There has been major industrial

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<sup>833</sup> Asian Indigenous and Tribal Peoples Network, ‘Malaysia: Extinguishing Indigenous Peoples Rights’ (2008) Asian Indigenous and Tribal Peoples Network publication pg 5 Available at <http://www.aitpn.org/UN/UPR-Malaysia.pdf> accessed [ 04/04/13]

<sup>834</sup> Asian Indigenous and Tribal Peoples Network, *The Department for Orang Asli Affairs, Malaysia-An agency for Assimilation* (2008) Asian Indigenous & Tribal Peoples Network pg 1

<sup>835</sup> Sipaun S, Malaysia at 50: Inclusive development, nation-building and human rights. The Malaysian Insider, September 15 2013 [Online] Available at <http://www.themalaysianinsider.com/sideviews/article/malaysia-at-50-inclusive-development-nation-building-and-human-rights-> accessed [06/02/2015]

<sup>836</sup> Nicholas C (2004) op.cit

<sup>837</sup> Ramakrishnan S , Orang Asli Seletar given Short Shrift, FMT News. 25 November 2013 [Online] Available at <http://www.freemalaysiatoday.com/category/opinion/2013/11/25/orang-asli-seletar-given-short-shrift/> accessed [13/12/2013]

development along the coastal areas and Mangrove forest where they find their catches such as power plants, oil storage and high rise buildings. Unfortunately, the result of this industrial development is the decimation of large areas of mangrove forest and pollution of the rivers and coastal waters resulting in the destruction of the indigenous people livelihood and their TK resources. The indigenous people argue that even though these developments have brought in revenues for the government, the indigenous people themselves have not benefitted at all from their lands; on the other hand they have been excluded from these plans and lost their lands<sup>838</sup>.

In spite of the difficulties the indigenous people of Malaysia have had in being heard, it has not stopped them from expressing their needs and expectations for their TK when they have had the opportunity to do so. In a survey done in one local community in Malaysia, among their concerns was the prevention of the exploitation of their resources and also the preservation of their TK for the younger generation<sup>839</sup>.

Like many developing countries Malaysia still turns to IP for the protection of TK and resources. The Orang Asli people are particularly known for their culture of collective ownership therefore they generally do not regard their knowledge as property which can be owned<sup>840</sup>. It follows that the concept of IP in empowering them to make the best use of their knowledge and resources toward their development may naturally be foreign to them. TA will particularly be useful in educating them on the options that may be able to open to them concerning their knowledge and resources. The situation of the indigenous people in Malaysia is therefore a local condition worth considering before planning needs assessment programs in this area.

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<sup>838</sup> *ibid*

<sup>839</sup> San T P, Hanafi H, Tee K L, Mohd Anis M N, Ramy B, 'Protecting the Traditional Cultural Expressions of Indigenous Peoples: A case study of the Kadazandusun Penampang Community in Sabah Malaysia' (2010) *Borneo Research Journal*, Volume 4, 147-168 pg 151

<sup>840</sup> *ibid*

### 6.4.3 Intellectual Property Law Development and the Economy

As discussed in section 5.3.5, along with the reception of the English Common Law into Malaysia was also the introduction of English Commercial Law. Since independence however, Malaysia has developed a legal system moulded to fit the situation in the country.

Starting with the English common law, after Malaysia got its independence in 1957, the post-colonial constitution gave recognition to the application of common law in Malaysia under Article 160 by including the definition of the word 'law' to include common law, also Article 3 of the 1956 Civil Law Act made provision for the application of common law and rules of equity in Malaysia<sup>841</sup>.

The application of English Common Law has however evolved over the years in Malaysia, it cannot be said to be applied verbatim as it was applied during the colonial years and the early post-colonial years. In a paper written by a High Court Judge in Malaysia<sup>842</sup>, he expressed the view that even though in the years following independence in Malaysia and while Malaysia's legal system was developing, reliance was placed on the English Common Law by virtue of Article 3 of the Civil Law Act, this changed as Malaysia's legal system developed over the years. English law was modified and applied only to the extent that it suited the local conditions which eventually made the laws Malaysian. He went on further to point out that many of the Malaysian laws even though may appear similar to the English Common Law in application are in fact Malaysian Common Law and are therefore regarded as such<sup>843</sup>. This is reflected in Section 3 of the revised Civil law Act (1972)<sup>844</sup> of

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<sup>841</sup> Neoh J (2010) op.cit pg60, Laws of Malaysia, See also Civil Law Act 1956 (Revised 1972) , Malaysia [Online] Available at [http://www.commonlii.org/my/legis/consol\\_act/cia19561972179/](http://www.commonlii.org/my/legis/consol_act/cia19561972179/) accessed [22/03/2013]

<sup>842</sup> Dato Abdul Malek Ahmad, 'The Influence of Common Law on the Development of Law in Malaysia' (1991) 23 B. L. J. 9 pg 9

<sup>843</sup> ibid

Malaysia which states that “*in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956... Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary*”<sup>845</sup>.

This was also done regarding the IP laws in Malaysia. It was discussed in section 5.3.5 that after independence there was an attempt to have a unified system of IP laws in Malaysia that would embody provisions particularly relevant to Malaysia to encourage and promote innovation and creativity.

Therefore in the area of patent law, the Patents Act 1983 was enacted with the guidance of the legislation of other countries such as the United Kingdom with the assistance of consultants from WIPO and Sweden. This law was significant in that after independence was achieved it changed the patent application system to enable applications to be made again locally rather than in the UK patent office. This law was later implemented in 1986 with the latest amendment in 2006<sup>846</sup>.

Meanwhile in the field of Copyright, the Copyright Act of 1969 was enacted which was modelled after the Nigerian Copyright Bill, this law also repealed all the former copyright laws. This law had only been in force for a few years when technological advancement in the field of IP made it easier for copyrighted works to be infringed. With the infringement penetrating the industry there was a demand by the US and the UK for a review of the copyright legislation. In response to this, the Malaysian government came out with the 1987 Copyright law which then took into consideration the increasing

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<sup>844</sup> The civil Law Act 1956(Revised in 1972) available at [http://www.commonlii.org/my/legis/consol\\_act/cia19561972179/](http://www.commonlii.org/my/legis/consol_act/cia19561972179/) last visit 22/03/2013

<sup>845</sup> *ibid*

<sup>846</sup> Heng Gee L (1997) *op.cit* pg 84-97

technological development at the time<sup>847</sup>. The Copyright Act was last amended in 2012<sup>848</sup>.

Some are however of the opinion that the frequent updating of the IP legislations right from when the first set of laws were enacted was as a result of the influence of colonial interest groups who wanted to make sure that their interests in the trade and commerce industry were protected<sup>849</sup>.

An analysis done on the development of IP rights from the time it was introduced into Malaysia to the post-independence period and the following consolidation of the IP legislations show that IP law during colonisation was actually introduced in order to protect the interest of the foreign investors at the time. Therefore there seemed to have been no effort and no evidence that the British assisted Malaysians in educating them on harnessing their creativity and innovative efforts at the time, in fact record shows that all the patents registered in the Colony before 1953 were all made by foreigners<sup>850</sup>.

This situation did not seem to change even post colonisation; Malaysia's IP development in the years after colonisation appeared to have been greatly influenced by the demands of developed countries including their accession to various international treaties. For example the 1987 Copyright Law which was updated following the continued increase in technology at the time became insufficient because the increase in technology made it even easier for works to be disseminated across borders. It then became necessary for Malaysia to participate in international IP law for their IP laws to meet the expectations of developed countries<sup>851</sup>.

In 1990 Malaysia acceded to the Berne Convention and in order for the laws in Malaysia to be in line with the Berne Protocol the 1987 Copyright Act was

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<sup>847</sup> Khaw Lake Tee (2008) op.cit pg 2-12

<sup>848</sup> Malaysian Copyrights Act [Online] Available at <http://www.myipo.gov.my/hakcipta-akta> accessed [05/03/15]

<sup>849</sup> Heng Gee L (1997) ,op.cit pg 84-97

<sup>850</sup> Heng Gee L (1997) op.cit pg 84-97

<sup>851</sup> ibid

amended twice<sup>852</sup>. This accession to the Berne Convention was described as a result of the “*longstanding pressure from US government and Industry especially concerning copyright protection for audio and video tapes and computer software*”<sup>853</sup>. The same goes for Malaysia’s patent and trademark laws, both laws were said to have been amended to meet the expected international IP law standards.

In addition to the Berne Convention, Malaysia is also a member of the Paris Convention for the Protection of Intellectual Property (1990), Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (2007), Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, the World Intellectual Property Organization (1988), Patent Cooperation Treaty (“PCT”)(2006) and TRIPs (1994). Malaysia was actually one of the founding members of the WTO therefore being a signatory to the TRIPs agreement was particularly significant for the country<sup>854</sup>.

The TRIPs agreement requires a minimum standard of IP protection from all the signatories and developing countries were given until 2000 to be TRIPs compliant. Malaysia is classed as a developing country. Towards meeting their TRIPs obligation they made major amendments to their IP laws in 2000 to bring them to the level required by the TRIPs agreement. In addition to the amendments made to the IP laws, two new legislations were also enacted namely the Geographical Indications Act 2000 and Layout Designs of Integrated Circuits Act 2000<sup>855</sup>. The IP division of the Ministry of Domestic Trade and Consumer Affairs was charged with the responsibility of meeting

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<sup>852</sup> Khaw Lake Tee (2008) op.cit, pg 2-12

<sup>853</sup> Dylan A. MacLeod, ‘U.S Trade Pressure and The Developing Intellectual Property Law of Thailand, Malaysia and Indonesia’ (1992) 26 U. Brit. Colum.L. Rev. 343 pg 363

<sup>854</sup> Barpujari I, Nanda N, ‘Are weak IPRs acting as barriers to transfer of climate friendly technologies : Assessing IPR regimes in five Asian Countries’ (2012) The Energy and Resources Institute: TERI NFA Working Paper 2. Pg 12

<sup>855</sup> *ibid*

Malaysia's obligation under the TRIPs agreement and the present IP laws in Malaysia are now said to be TRIPs compliant<sup>856</sup>.

Even though these efforts have been attributed to pressures from developed countries, Malaysia has however come a long way from its colonial days. Malaysia over the years has found IP could be very valuable and it has been said that if harnessed properly, it could be a vital tool in helping the country achieve its goal to be a developed country by 2020<sup>857</sup>. Towards this goal, apart from modifying the existing intellectual property laws and meeting their obligations under international agreements such as TRIPs, Malaysia has also established intellectual property policies such as the National Biotechnology Policy, National Convention on Biodiversity Policy and the Intellectual Property Commercialisation Policy designed to promote creativity and encourage local innovation<sup>858</sup>. There are also negotiations on Free Trade Agreements as a member of the Association of Southeast Asian Nations (ASEAN) in pursuit of using IP to fuel the country's economy<sup>859</sup>. In addition to the above, the IP office MyIPO was established in 2005 in response to developing IP nationally and at global levels<sup>860</sup>.

What does it all mean for the country's economic growth? In a publication on the objectives of the IP commercialisation policy, it was stated that "*the aim of the Government of Malaysia is to encourage an environment where research and innovation will flourish. Innovation is of key importance in*

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<sup>856</sup> This was made in a statement by the delegation of Malaysia in a review of legislation undertaken by the Council's meeting of 27 to 28 November 2001. (May 2003) See WTO document IP/Q/MYS/1 available at [www.wto.org.tw/SmartKMS/fileviewer?id=31406](http://www.wto.org.tw/SmartKMS/fileviewer?id=31406) accessed [01/04/2013]

<sup>857</sup> Prime Minister of Malaysia, Y.A.B Dato' Seri Abdullah Bin Hj. Ahmad Badawi statement on the National Intellectual Property Policy [Online] Available at [http://www.myipo.gov.my/documents/10180/21979/ip\\_policy\\_eng.pdf](http://www.myipo.gov.my/documents/10180/21979/ip_policy_eng.pdf) 10/02/2015 accessed [10/02/2015]

<sup>858</sup> Shern Delamore and co, 'Time for Implementation of the Malaysian National Intellectual Property Policy' (2008) Vol 7 No 1.0 KDN. PP pg 1

<sup>859</sup> Antons C, 'Malaysia' In P. Goldstein & J. Straus (Eds.), Intellectual property in Asia: law, economics, history and politics (pp. 167-197) (2009) Heidelberg: Springer pg 172

<sup>860</sup> See MyIPO, Corporate Information [Online] Available at <http://www.myipo.gov.my/maklumat-korporat> accessed [10/02/15]

*spurring economic growth in a developing country like Malaysia*<sup>861</sup> This statement is in line with WIPO's promotion of the value of IP as stated in one of WIPO's publications by the Director General of WIPO Dr Kamil Idris that *"intellectual property is a "power tool" for economic development and wealth creation that is not yet being used to optimal effect in all countries, particularly in the developing world"*<sup>862</sup>

In an investigation conducted into the role of IP in Malaysia's economic development from 1986 to 2006<sup>863</sup> it was stated that patent applications in the country were clearly linked to the country's economic performance<sup>864</sup>.

The report showed an increase in the number of patent applications filed yearly since 1993; most of these applications were from the pharmaceutical industry, from about 10 patents in 1989 to 321 in 2006. The number of local patent applications too increased after the year 2000, from 2% in 1986 to 28% in 2007. Most of these were from the science and technology departments in universities<sup>865</sup>.

The reason for the increase in patent applications was attributed to factors such as the various reforms made to Malaysia's IP laws. The first was the enactment of the Patent Act of 1983 which changed the place of application from the patent office UK to the local application office. This Act made amendments that impacted on the number of patents filed by foreign applicants giving more commercial opportunities to the pharmaceutical

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<sup>861</sup> Ministry of Science, Technology and Innovation Malaysia (MOSTI), 'Intellectual Property Commercialisation Policy for Research & Development (R&D) Projects Funded by the Government of Malaysia' (2009) Ministry of Science, Technology and Innovation Malaysia Publication. Available at <http://www.mosti.gov.my/wp-content/uploads/policy/ipcommercializationpolicy.pdf> accessed [10/02/15] pg 3

<sup>862</sup> Idris K, *Intellectual Property: A Power Tool for Economic Growth* (2003) WIPO Publication No.888.1. pg1

<sup>863</sup> For a detailed report and figures see Heng Gee L, Azmi I M, Alavi R, 'Impact of Intellectual Property System on Economic Growth: Country Report Malaysia' WIPO-UNU Joint Research project. Pg 1-21

<sup>864</sup> *ibid*

<sup>865</sup> *ibid*

industry in Malaysia resulting in a boost in local investment. It also introduced the Utility Innovations which allowed for applications to be made for inventions that don't fully meet the patentability requirement. There was also the amendment made to the Copyright Act of 1987 which included computer programs as literary works, the reform to the 1996 Industrial designs Act which like the 1883 Patent Act also made provisions for application of industrial designs to be made locally. There was also Malaysia's accession to the Paris Convention and the TRIPs Agreement which increased foreign applications and investments<sup>866</sup>.

Another factor said to have caused an increase in patent applications was the fiscal measures introduced by the government including the investment and continuous financial support put towards research and development (R&D). There were incentive schemes to promote the commercialization of R&D in agriculture and those given to companies such as tax and tariff exemptions. R&D was also financed in universities and policies were created to stimulate IP creation in biotechnology sectors<sup>867</sup>.

It was the conclusion of the report that the improvements made to the country's IP have had a positive impact on the GDP growth in Malaysia<sup>868</sup>.

While the findings of the report show the efforts made by the government in increasing the IP standards of the country, the report also observed that some companies still found the ownership of IP as a culture relatively new<sup>869</sup>. According to a publication by WIPO, ownership of intellectual assets contributes significantly to the company's value and viability because IP is said to be one of the most valuable assets in commercial transactions now<sup>870</sup>. There is therefore perhaps the need for TA efforts to be intensified in

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<sup>866</sup> *ibid*

<sup>867</sup> *ibid*

<sup>868</sup> *Ibid*. This economic report done on Malaysia's intellectual property focussed on the most developed sector of Malaysia's economy which is its industrial sector.

<sup>869</sup> *ibid*

<sup>870</sup> WIPO publication No 888.1, Intellectual Property A Power Tool For Economic Growth (2003) op.cit pg7

this area towards achieving the government's vision for the country. However the ability of the government to direct TA efforts to educate companies could unfortunately be affected by the recent economic downturn in Malaysia<sup>871</sup> which has been said could slow down the progress of their IP development because of the lack of available resources.

It was mentioned earlier in this section that towards reaching its goal to be a developed nation by 2020, Malaysia has in place intellectual property policies in the area of TK and biodiversity designed to promote creativity and encourage local innovation. The next section will discuss how TK and biological resources are protected in Malaysia.

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<sup>871</sup> Mohamad S E [Senior Director, Policy and Strategic Planning Division, Intellectual Property Corporation of Malaysia] Questionnaire 8 May 2013

#### 6.4.4 Protection of Traditional Knowledge and resources in Malaysia

Malaysia is rich in traditional knowledge resources, in addition to their ethnic communities and diverse cultures, there is also a vast area of mega-biodiversity. The country is covered mostly by tropical forest which constitutes one of the most diverse ecosystems on earth. It is reported to have over 8000 species of fish, 286 species of mammals, 150,000 species of invertebrates, 1200 species of butterflies and 12000 species of moth. These resources are generally known to be the heritage of the traditional communities which depend on them for their survival<sup>872</sup>.

It should be noted that Malaysia is a Federal state therefore the laws that protect biological resources are split between the Federal and State governments<sup>873</sup>.

Malaysia does not have a specific legislation for the protection of traditional knowledge but it has some legislation in place generally for the protection of the environment and its resources such as the Protection of Wildlife Act 1972 and The National Forestry Act 1984<sup>874</sup>. Malaysia also has a national policy on Biodiversity which consists of a vision “*to transform Malaysia into a World centre of excellence in conservation, research and utilisation of tropical biodiversity by the year 2020*”<sup>875</sup> and this comes from the realization of the economic benefits that could be derived from biodiversity and its associated value to the country<sup>876</sup>.

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<sup>872</sup> Latiff A and Zakri A H ‘Biodiversity and Traditional Knowledge: The Malaysian Experience’ Chap. In *Promoting Traditional Knowledge : Systems, National Experiences and International Dimensions*, eds. S Twarog and P Kapoor (2004) United Nations Publications UNCTAD/TIDC/TED/10 pg 306

<sup>873</sup> Ibid @310

<sup>874</sup> Latiff A and Zakri A H, ‘Protection of Traditional Knowledge Innovations and Practices: The Malaysian Experience’ (2000) UNCTAD publication. pg13

<sup>875</sup> Ministry of Science, Environment and Technology, *Malaysia’s National Policy on Biological Diversity*, (1998) [Online] Available at <http://www.sabah.gov.my/jpas/laws/fwork/NBP.pdf> accessed [09/12/14]

<sup>876</sup> Latiff A and Zakri A H (2000) , op.cit.

Although traditional knowledge is not incorporated into the current Intellectual Property provisions, there is an acknowledgement that some forms of the current system of intellectual property can be used to protect their traditional knowledge by preventing acts of misappropriation by inventors<sup>877</sup>. Protection of traditional knowledge in Malaysia using intellectual property rights faces the same issues most developing countries contend with. In principle, it appears they are able to use copyright and patent but their traditional knowledge is in reality unable to fulfil the conditions to obtain protection under these rights. As previously discussed under the intellectual property and traditional knowledge debate, under copyright law, there is the problem of their traditional knowledge meeting the originality requirement and the fixation requirement and under the patent law, the difficulty of meeting the novelty and inventive steps requirements.

There was also a concern that the lack of accessible records by the patent examiner to be able to challenge the novelty or inventiveness of a patent application based on already existing traditional knowledge could enable it being passed off as new thereby facilitating biopiracy<sup>878</sup>.

Other categories of intellectual property that have been useful in protecting traditional knowledge in Malaysia include trademarks through the 1976 Trademarks Act and the New Plant Varieties Act 2004<sup>879</sup>. Even though the 1976 Trademarks Act does not contain specific provisions concerning traditional marks, it appears to be applicable as long as they are to be used in the course of trade and are distinctive<sup>880</sup>.

Malaysia also has a Geographical Indications Act since 2000 which has been noted to be particularly useful for protecting their traditional knowledge

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<sup>877</sup> Nordin R, Hassan K H, Zainol Z A, 'Traditional Knowledge Documentation: Preventing or Promoting Biopiracy (2012) *Pertanika J. Soc. Sci. & Hum.* 20 (S) : 11 - 22 pg2

<sup>878</sup> *Ibid* @pg12

<sup>879</sup> Heng Gee L, 'Intellectual Property Protection of Traditional Knowledge: The Malaysian Experience' (2012) Forum on IP and TK organised by WIPO and IPOPHL in cooperation with NCCA, NCIP and NM pg30

<sup>880</sup> *Ibid*

resources particularly because protection can be obtained without registration<sup>881</sup>. Part II number 3 of the Act provides that “*Protection under this Act shall be given to a geographical indication— (a) regardless whether or not the geographical indication is registered under this Act*”<sup>882</sup>. They also recognise that this form of protection is beneficial to their indigenous communities because it identifies with community rights. A whole community can apply for it through a representative of the group such as a tradesman or a competent authority can apply on their behalf<sup>883</sup>. Some products of the traditional communities can qualify as goods that can be protected under the Act where a name has been traditionally associated with a particular product in a given area. An example of such product is the Labu Sayong which is a black gourd shaped clay pitcher mainly found in Sayong located in the district of Kuala Kangsar, Perak Malaysia<sup>884</sup>.

Malaysia is one of the developing countries that have managed to reconcile the existing system of intellectual property with their traditional knowledge. One of the ways they have done that is through the development of the Malaysia Traditional Knowledge Digital Library (TKDL) in the area of patents. TKDL was developed in 2009 within the ambit of the Malaysia Intellectual Property Corporation (MyIPO) to collect all information on traditional knowledge from Malaysia and to serve as a point of reference for the patent examiner when processing traditional knowledge and genetic resources patent applications<sup>885</sup>. This knowledge will reduce significantly the number of patents that get accepted as being new after only minor modifications have been made to the original product.

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<sup>881</sup> Ibid @pg44-48

<sup>882</sup> *Geographical Indications Act 2000* (Act 602) Malaysia (Part II)

<sup>883</sup> Ibid @ (part IV)

<sup>884</sup> Heng Lee L (2012) pg 44-48

<sup>885</sup> Kinabalu K , Move to Protect traditional knowledge, genetic resources (2012) Daily Express. December 18 [online] . Available at <http://www.dailyexpress.com.my/news.cfm?NewsID=83694> accessed [10/12/14]

TKDL has been used in other developing countries such as India as a means of combating the issue of biopiracy by acting as a link between patent examiners and traditional knowledge as a prior art<sup>886</sup>. In developing this database, MyIPO's chairman then stated that any intellectual property policy would be useful to the country in protecting industries based on traditional knowledge and make it possible for the government to monitor and conserve the use of traditional knowledge in Malaysia<sup>887</sup>.

Also in the area of patents, since Malaysia has identified biotechnology as an area of growth due to the increase in patent applications in this industry, the government of Malaysia have focused on capacity building with the aim of helping indigenous capability to develop new and improved technology in this industry<sup>888</sup>.

Discussion on the protection of traditional knowledge in Malaysia show that in the absence of a specific legislation that addresses traditional knowledge issues, intellectual property is still currently being used as a viable alternative<sup>889</sup>; this also means that the successful implementation of technical assistance in this area is crucial to moving forward.

It was mentioned earlier in the chapter<sup>890</sup> that the participation of the holders of TK which are the indigenous people and their communities is important to the successful implementation of TA in this area. It was discussed how their participation may be particularly difficult as a result of the indigenous people's struggles for their concerns to be heard regarding their resources. For example, it has been pointed out that while the government may encourage the use of intellectual property rights to protect the traditional knowledge in

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<sup>886</sup> Gupta V K, 'Traditional Knowledge Digital Library' (2005) Asia-Pacific Cultural Centre for UNESCO (ACCU) pg 2-3

<sup>887</sup> Kinabalu K, Database to protect Traditional Knowledge (2012) Daily Express. October 12 [online]. Available at <http://www.dailyexpress.com.my/news.cfm?NewsID=82849> accessed [10/12/14]

<sup>888</sup> Heng Gee L, Azmi I M and Alavi R, 'Reforms towards Intellectual Property Based Economic Development in Malaysia' (2009) JWIP Vol 12 No 4 pg 320

<sup>889</sup> Heng Gee L (2012), op.cit pg5

<sup>890</sup> See section 6.4.2 under Culture, Traditional Knowledge and Political System

Malaysia, this form of protection may not be acceptable to the holders of the knowledge. This is because there is said to be a difference in the way the government and the holders perceive their knowledge, resources and the need for their protection. While the government and interested parties are interested in the commercialisation of these resources the holders of such knowledge are said to object to their privatisation. This could be a problem for technical assistance efforts in this area when the government efforts are viewed by the indigenous communities as attempting to fit traditional knowledge within a rigid intellectual property system instead of a means of securing their collective rights<sup>891</sup>. Also during a national roundtable on biodiversity and traditional systems to discuss maintaining Malaysia's rich biodiversity attended by almost 60 representatives of indigenous communities at the University of Malaya, the Orang Asli indigenous people emphasised that government intervention development activities must be in accordance with the needs and the culture of their communities as a condition for acceptance<sup>892</sup>.

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<sup>891</sup> L H Gee, I M Azmi and R Alavi (2009) op.cit pg320

<sup>892</sup> Nicholas C., Lasimbang, J., & Center for Orang Asli Concerns (Malaysia), *Deliberations at the National Roundtable on biodiversity and indigenous knowledge systems in Malaysia* (2004) Subang Jaya Malaysia: Center for Orang Asli Concerns pg 15-16

## 6.5 Conclusion

This chapter has discussed the situation in Malaysia before the introduction of intellectual property, the situation after the reception of intellectual property and the local factors developed from their history of colonisation.

This chapter discussed how Malaysia is one of the developing countries that have made good progress in developing its intellectual property towards their development. In the absence of a specific legislation to protect their TK, they have managed to reconcile the existing system of intellectual property with their traditional knowledge. One of the ways they have done that is through the development of the Malaysia Traditional Knowledge Digital Library (TKDL). The chapter however also showed the lingering effect of their history and how the local factors developed could impact the implementation of IPTA available to them that could have wider implications on their IP development and fully benefitting from their creative industries.

To recapitulate, the local factors discussed which could impact the effective implementation of IPTA programs in Malaysia include the recognition and the inadequate representation of the indigenous people of Malaysia which could prevent accurately assessing their needs and therefore the effective implementation of IPTA in the area of TK. Also the language barrier and Malaysia's language history which could prevent IPTA beneficiaries from understanding IPTA programs. The government's tight control over Malaysia's institutions was also discussed which does not encourage opposition and the concerns of Malaysians to be expressed freely regarding their needs which could also affect accurate IPTA needs assessment.

It has been said that for countries with emerging economies like Malaysia to reach their full economic potential they require an intellectual property regime that works<sup>893</sup>, the successful implementation of technical assistance programs will be beneficial towards achieving this.

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<sup>893</sup> Reichman J H, 'Intellectual Property in the twenty-first century: Will Developing Countries lead or follow?' (2009) *Houst Law Rev.* January 31; 46(4): 1115–1185. Pg 2

Going back to the WIPO DA country specific approach recommendation, the discussion on the development of the local factors showed why they are specific to Malaysia and considering them may to help move WIPO technical assistance programs forward in Malaysia.

## Chapter 6

# KENYA

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### 7.1 Brief Introduction to Kenya

Kenya is located in the equatorial region of East Africa and it is a country well known for its natural resources and wildlife<sup>894</sup>. Like Malaysia, Kenya is made up of diverse ethnic groups which have played a strong role in shaping the country; these ethnic groups are normally referred to as 'tribes' by the Kenyan people. There are up to 43 ethnic groups with diverse cultures and languages sharing the same boundaries. They are usually distinguished linguistically into three groups<sup>895</sup> the first group is the Bantu speaking people and they consist of the Kikuyu, Kamba, Luhya, Pokomo, Embu, Meru, Gusii, Mijikenda and Taita communities; the second group is often referred to as the 'People of the Nile' and they consist of the Teso, Kalenjin, Turkana, Luo and Maasia people; the third group is the Cushitic speaking people and they consist of the Rendille, Somali, Orma and Boran. In addition to the tribes above, there are also the European, Asian and Arab immigrants that have settled in Kenya.

Before independence, Kenyans were mainly agriculturists and pastoralists. The current main contributors to Kenya's GDP are tourism, agriculture, manufacturing and the trading industries but among these, agriculture is considered a major contributor to the country's GDP and it has often been described as a backbone of the economy<sup>896</sup>.

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<sup>894</sup> Segara, Kenya [Online] Available at <http://www.segera.com/kenya/> accessed [11/02/2015]

<sup>895</sup> Hornsby, C, Kenya, *A History Since Independence*, (2011) I.B Tauris London. Pg 21

<sup>896</sup> PricewaterhouseCoopers (pwc) *Agriculture: A brief overview of the agricultural sector in Kenya* [Online] Available at <http://www.pwc.com/ke/en/industries/agriculture.jhtml> accessed [01/05/2013]

Kenya like Malaysia is currently classified as a developing country but there is a long term development plan of turning Kenya into a new industrializing middle income country by 2030. The process was started by undertaking reforms in the country's main sectors to promote economic growth<sup>897</sup>. Towards this vision the government is also taking steps to encourage creativity and innovation in the country by strengthening the protection and management of its IP system.

IP has been linked to Kenya's economic development and sustainable industrialization<sup>898</sup>. The Kenyan government began talks with WIPO in 2005 towards developing a national IP Policy that will help to further enhance IP generating activities which will lead to the commercial exploitation of IP rights<sup>899</sup>.

The government of Kenya also showed its firm commitment to developing the country's IP by incorporating the protection of IP in the 2010 constitution. Chapter 2, Article 11(c) states that "*The State shall promote the intellectual property rights of the people of Kenya*"<sup>900</sup>. Other articles in the constitution that deal with IP include Article 40 which talks about the Right to Property and Article 69 which talks about protecting and enhancing the IP in indigenous knowledge, biodiversity and genetic resources of the communities<sup>901</sup>.

As previously mentioned, agriculture plays an important role in the country's economy and an important source for this industry as well as the pharmaceutical industry is the country's natural and biological resources. Article 69 1(a) of the 2010 Constitution specifically talks about the

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<sup>897</sup> Kenya Vision 2030, *The Vision*, op.cit

<sup>898</sup> Sihanya B, 'Intellectual Property for Innovation and Industrialization in Kenya' (2008) 4 Convergence 185 pg 186

<sup>899</sup> Opijah D, 'Towards a National Intellectual Property Policy and Strategy for Kenya' (2013) J D Supra LLC pg1-2 [Online] Available at <http://www.jdsupra.com/legalnews/towards-a-national-intellectual-property-13421/> accessed [01/05/2013]

<sup>900</sup> Laws of Kenya, *The Constitution of Kenya*, 2010 op.cit

<sup>901</sup> ibid

sustainable use and conservation of the environment and Kenya's natural resources<sup>902</sup>. Kenya is keen to explore this area and has worked with WIPO over the years through TA programs in developing these aspects of its IP.

The IPTA programs provided by WIPO to assist developing countries like Kenya have also evolved over time for example with the discussed WIPO DA recommendation to take into consideration the special needs of developing countries in the evaluation, design and the delivery of TA programs<sup>903</sup>.

For Kenya, like in the case of Malaysia discussed in chapter 5, the DA recommendation to be country specific implies that TA providers should factor in country specific conditions in Kenya in the implementation of the programs. Country specific conditions in Kenya will also be interpreted in this thesis to include the culture, the people, government and the economy.

Kenya like Malaysia is a country that has been shaped over time by its history. In an attempt to understand Kenya's country specific factors which may be relevant to the successful implementation of future IPTA programs, this chapter will start by understanding the situation in Kenya before the introduction of IP. This will comprise of the economic situation, political system, ethnicity, culture and TK before colonisation, then move on to the colonial period and finally post-colonisation.

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<sup>902</sup> *ibid*

<sup>903</sup> See WIPO Development Agenda recommendations for Technical Assistance, Cluster A, recommendation 1. Available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html#a>

## 7.2 Kenya- Pre-Colonial period

Embarking on this research, sources showed limited information on the traditions and cultures of the people of Kenya before colonisation. The dearth of information available on the subject was attributed to the traditional mode of transmission of information in Kenyan pre-colonial communities which was oral communication<sup>904</sup>, therefore there were no written records during that period.

According to the account given on this period, Kenya before colonisation like Malaysia did not have a single political unit as it is recognised today; it consisted of different ethnic communities dwelling in different parts of the country<sup>905</sup>. These communities were said to have moved around frequently, their boundaries were fluid and not fixed; the people basically adjusted their lifestyles to their surroundings and environment<sup>906</sup>. As a result of this, pre-colonial occupations consisted mainly of agriculturists and pastoralists while some communities survived by being hunters and gatherers. This section will start by discussing the economic situation.

### 7.2.1 Pre-Colonial Economy

Economically, production of goods was collective in nature, there was no individual gain or accumulation therefore goods produced were meant for the subsistence of the whole community. Marketing of their goods was in the form of trade by barter where people exchanged one article for another according to their needs. Occasionally there were fixed prices on some

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<sup>904</sup> Kang'ethe Iraki F, 'Language and Political Economy: A historical Perspective from Kenya'(2010) pg1 available at [http://www.inst.at/trans/17Nr/1-3/1-3\\_iraki17.htm](http://www.inst.at/trans/17Nr/1-3/1-3_iraki17.htm) accessed [06/05/2013]

<sup>905</sup> Hornsby (2011) op.cit pg 21

<sup>906</sup> Ndege P O, 'Colonialism and its legacies in Kenya' (2009) Lecture presented in the Fulbright-Hays Group project abroad program, Moi University main campus July5-July 6. Indiana University Available at <https://student.cc.uoc.gr/uploadFiles/181-%CE%91%CE%9D%CE%91%CE%9A375/Colonialism-and-Its-Legacies.pdf> accessed [06/02/15] pg1

products which were paid for in other goods usually done by exchanging goods but in particular quantities in relation to specific products<sup>907</sup>.

A significant aspect of the pre-colonial Kenyan economy was their complete dependence on their lands which included their natural resources. Their lands supplied most of their material needs and were therefore very important to the communities economically. Their lands were considered to be the '*foundation rock*' on which their tribal economy stood<sup>908</sup>. Research shows that the people that made up the area known as Kenya during this period appeared to be economically self-sufficient people.

### 7.2.2 Culture, Education and Traditional Knowledge

Kenya's makeup of the various communities settled all over the region resulted in diverse languages and cultures which were usually passed on orally from generation to generation. Skills were also passed on orally. TK and TCE's were mainly produced for the use of the communities and freely shared within the communities. For example, in the Gikuyu community, there were a few industries that the people had used skills perfected over time to develop tools they needed for survival. Some of these were the iron work industry where techniques had been developed for procuring iron ore from sand to make products such as spears, ear and finger rings, swords etc. There was also the hut-building industry, the pottery industry, basket making industry and the skin-tanning industry. The skills and the products produced by these industries were not for commercial purposes but used for their day to day lives<sup>909</sup>.

Directly linked to the survival of TK during the pre-colonial period was the education system. The main form of education that existed in most parts of

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<sup>907</sup> Kenyattta J, *Facing Mount. Kenya: The Tribal Life of the Gikuyu* (1965) Vintage Books Ed. Pg60

<sup>908</sup> Ibid @ pg 54 referring to the Gikuyu community

<sup>909</sup> Ibid

pre-colonial Kenya was in the form of traditional education usually passed on through story telling like folklore in the communities' native languages. There were a few communities that operated a more formal system of education. For example, the Waswahili people had a form of formal education which was said to have been taught in local schools in which the language of the community, the Kiswahili language was the medium of instruction<sup>910</sup>.

The education system at that time being closely linked to the cultures of the communities made it possible for information about their TK to be communicated even in the local schools. With the form of education system in place, literacy level and technological advancement during this period was said to be relatively low<sup>911</sup>.

### 7.2.3 Ethnicity

As mentioned above, pre-colonial Kenya consisted of ethnic communities with diverse cultures and languages. These communities were largely independent and the nature of the relationship between them at the time could not be described as one of conflict<sup>912</sup>. Many of the tribes had friendly relations and they were often divided by natural barriers such as heavy forests with dangerous animals that made it difficult to cross over to other tribes<sup>913</sup>.

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<sup>910</sup> Bunyi G, 'Rethinking the Place of African Indigenous Languages in African Education' (1999) Int. J. of Educational Development 337–350 pg 340

<sup>911</sup> Kameri-Mbote P, 'Intellectual Property Protection in Africa: An Assessment of the Status of Laws, Research and Policy Analysis on Intellectual Property Rights in Kenya' (2005) IELRC Working paper, International Environmental Law Research Centre pg 5

<sup>912</sup> Juma L, 'Ethnic Politics and the Constitutional Review Process in Kenya' (2001-2002) 9 Tulsa J. Comp. & Int'l L. 471 pg 482-483 pg 475

<sup>913</sup> Kenyatta J (1965) op.cit pg 200-203

There was no ethnic superiority or fights over territories, tribal fights during this period were mainly for economic reasons. For example, a tribe like the Masai who were mainly pastoralists and depended mainly on products from their livestock would raid another tribe for food if their livestock were killed by disease. These raids were carefully planned, involved few casualties and the purpose was mainly for their survival. Raids also did not happen very often as a generation could pass without experiencing any raids<sup>914</sup>.

The ethnic communities in Kenya during the pre-colonial period could therefore be described as having lived in a relatively peaceful co-existence.

#### **7.2.4 Political/Legal System**

Politically, during the pre-colonial period there were only a few ethnic political structures, for example, the Gikuyu community mentioned previously had a form of democratic government, there was a constitution which was mainly unwritten and it contained guiding principles for the government. The government was made up of representatives from the community which usually were the heads of several families; the eldest person among them was considered to have the most wisdom and therefore was usually the president<sup>915</sup>. For the other communities, the largest units were in the form of a collection of a few families that were blood related. Some of them had formal heads such as chiefs elected based on their age, supernatural abilities, wealth and wisdom while other did not have any heads. It was a relatively simple system where authority was mostly personal and local; disputes were usually settled by the heads of the families<sup>916</sup>.

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<sup>914</sup> ibid

<sup>915</sup> Kenyatta J (1965) op.cit, pg 179-203 Jomo Kenyatta referring to the Gikuyu community

<sup>916</sup> Kang'ethe Iraki F, 'Language and Political Economy: A historical Perspective from Kenya' (2010) [Online] Available at [http://www.inst.at/trans/17Nr/1-3/1-3\\_iraki17.htm](http://www.inst.at/trans/17Nr/1-3/1-3_iraki17.htm) accessed [05/03/2015]

The single political hegemony operating in Kenya was a product of colonialism; colonialism had a major impact on the lives of the communities in pre-colonial Kenya and transformed Kenya in many ways. This will be discussed in more detail in the next section.

### 7.3 Kenya - Colonial Period

Talking about Africa generally, one author pointed out that it is important to explore the continent's colonial experience in order to understand or explain Africa<sup>917</sup>. Looking at Kenya's colonial history, this statement rings true, the period that Kenya was colonised had a significant impact across the country's legal system, the economy, the political system and the government. To emphasize the extent of the impact of colonialism in Kenya, Charles Hornsby in his book described Kenya as “...*an artificial creation, delineated by the British for their purpose, lumping together neighbours, enemies and some communities that had previously had no contact whatsoever*”<sup>918</sup>

It is recorded that the Portuguese were the first Europeans to settle in Kenya. They were there to secure the control of trade in the area and they occupied the region for a number of years before the arrival of the British. The arrival and occupation of the British in Kenya was more significant than the Portuguese occupation because it marked the beginning of the history of Kenya as a political entity<sup>919</sup>. In order to facilitate the British colonial

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<sup>917</sup> Ndege P O (2009) op.cit, pg2

<sup>918</sup> Hornsby C (2011) op.cit, Pg21

<sup>919</sup> World 66, *History of Kenya* [Online] Available at <http://www.world66.com/africa/kenya/history> accessed [11/02/15]

administration, colonial boundaries were set and Kenya was divided into provinces and districts which all formed a large territorial entity<sup>920</sup>.

The lives of the communities as they knew it changed from that time, the legal system was changed into a centralised system of government, economy and trade patterns changed as cash was introduced, ethnic rivalry started because the once independent communities were forced to dwell together. These transformations define what Kenya is today and they will now be looked at in more detail.

### 7.3.1 Economic Situation

To recapitulate, economically pre-colonial Kenya was mainly self-sufficient, those that were agriculturists depended entirely on their lands, they produced food crops and cash crops to sustain them, the pastoralists depended on their livestock's. Their houses were cheap to build from materials locally available to them therefore most of the materials they needed through trading by barter were iron objects they used as instruments in their day to day lives<sup>921</sup>. With the arrival of the British, the economic system changed in various ways.

The first and perhaps the most important was the pre-colonial land system. During colonisation, laws were enacted that gave the British exclusive rights to the lands of the natives such as the 1915 Crowns Lands Ordinance which transferred ownership of all lands from the natives to the Crown<sup>922</sup>, this law ultimately displaced them from their properties. The colonial government did not recognise the prior ownerships or rights to the lands of the Kenyan

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<sup>920</sup> Hornsby C (2011) op.cit, Pg27

<sup>921</sup> Gatheru R M, *Kenya: From Colonization to Independence, 1888-1970* (2005) McFarland&Co Publishers. Pg31

<sup>922</sup> Juma L (2001-2002) op.cit, 479-480

people, all lands not held under any title regardless of whether they were occupied or not from then on belonged to the British government<sup>923</sup>.

One of the tribes greatly affected by this change was the Massai tribe. The Massai were mainly pastoralists and they owned grazing grounds where they herded their animals, they were found in areas surrounded by several lakes, the areas of Naivasha and the Great Rift Valley. The settlers were interested in the lands of the Massai and therefore proceeded to evict them from their lands which they did through a treaty that was signed between the British and the Massai elders<sup>924</sup>. The signing of the treaty was significant because it marked the first experience of the natives in entering into an agreement with the British which unfortunately resulted in the loss of most of their lands. The circumstances surrounding the signing of the treaty was said to be controversial because the Massai elders were illiterates, it was argued that they did not know what they were signing up for and it was even said that the treaty was signed under duress<sup>925</sup>.

The contents of the treaty alienated the lands of the natives for European settlement initially for a period of 99 years and eventually saw them removed from their lands in perpetuity<sup>926</sup> relegating them to reserves chosen by the colonial government<sup>927</sup>. This of course began to breed resentment on the part of the natives.

A large number of Kenyans were relegated to these reserves which although provided accommodation for them was heavily controlled, confined and the natives saw them as a reservoir for labour to serve the Europeans<sup>928</sup>.

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<sup>923</sup> Ibid pg 28-29

<sup>924</sup> Hornsby C (2011), op.cit, Pg27

<sup>925</sup> Ibid

<sup>926</sup> Ibid

<sup>927</sup> Gatheru R M (2005), op.cit pg31

<sup>928</sup> Njenga, G. N, 'A synopsis of the history of Kenya before colonization' (2010) Wisdom@ Strathmore series, Strathmore Business School 1-32 pg 23

The state of things sparked great anger towards the British and eventually led to the famous maumau rebellion. In 1952 there was a war between a body of natives who were referred to as the maumau and the Europeans in Kenya. This war resulted in many casualties from both sides but more of the natives were killed. Over the years there have been many reasons put forward as to the real reason behind this war and this research will not attempt to go into that argument; however it is important to mention this rebellion because it is generally believed that it ultimately began as an expression of the feelings of the anger and frustration of the natives over the loss of their lands<sup>929</sup>.

Another significant economic change during colonisation was the introduction of cash<sup>930</sup>. As mentioned previously before colonisation the Kenyan people did not pay for goods with cash, they operated a system whereby they exchanged goods by barter. This meant that they were basically self-sufficient and had no need to work for the Europeans to earn wages. The British government therefore designed a system where it was necessary to earn wages by introducing a tax system. The hut tax was introduced which had to be paid annually in cash, failure to pay the imposed amount resulted in severe punishment which included being put in concentration camps and even the burning of their huts to the ground. To be able to earn the cash needed, the African males were forced to work for the Europeans settlers. As time went on, the amount for the imposed tax increased, other taxes were also imposed such as the poll tax which also required cash payment therefore more labour for the British<sup>931</sup>.

As labour increased for the British, railroads were constructed to facilitate trade; an industrial workforce was established as a result of the significant increase in labour force. The increase in labour force also led to the increase

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<sup>929</sup> Gatheru R M (2005) , op.cit pg 146

<sup>930</sup> Ibid

<sup>931</sup> Gatheru R M (2005) , op.cit pg 31

in agricultural production especially in cash crops such as coffee and maize which created a large export market in Kenya<sup>932</sup>.

Colonisation therefore significantly changed the economic structure of Kenya; the economic practices that operated in Britain at that time were introduced into Kenya such as commercialisation, industrial base development and technological development<sup>933</sup>.

### 7.3.2 Political System

Pre-colonial Kenya did not have a single political hegemony. This changed when the British arrived and took control. Kenya was divided into administrative units based on the British settlers needs at the time and also their understanding of ethnicity in Kenya. The division was first into provinces, provinces were divided into districts and districts further divided into divisions, locations and sub-locations<sup>934</sup>.

The number of British at this time was inadequate to rule the whole of Kenya; they therefore ruled by indirect rule whereby they appointed Chiefs and local representatives to administer the laws and maintain order, these representatives then reported back to the governor. The governor maintained the structure of command and was the head of a small central government but the main head in charge that decided the overall policies was the colonial office in London<sup>935</sup>.

There was also a legislative council set up to make laws which at first consisted of all British, after some struggle on the part of the Indian settlers, one Indian was added to the council but Kenyans had no voice or

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<sup>932</sup> Njenga G N (2010) op.cit pg 24

<sup>933</sup> Ibid

<sup>934</sup> Hornsby C (2011) op.cit, Pg27

<sup>935</sup> ibid

representation in the making of policies that affected them, they were kept at a distance. As a result of this, there was little or no contribution to the advancement of Kenyan people<sup>936</sup>. The native chiefs that were placed in leadership positions by the British unfortunately also took advantage of their positions and some of them used the opportunity to acquire land and wealth for themselves. They were widely disliked by the people and were not considered true representatives of the interests of the natives<sup>937</sup>.

Through the British indirect rule Kenya gradually developed into a state with an established political system based on an agricultural export driven economy.

It was pointed out that an obvious characteristic of the colonial political system was that the development of the country's infrastructures was not so much a priority for the colonial government as advancing their own economic interests. It has been argued that the development of the Kenyan people and infrastructures alongside the changes brought by the British would have enabled the natives to sustain the system of international trade established during colonisation<sup>938</sup>.

### 7.3.3 Ethnicity

From the beginning of colonisation ethnicity has played a major role in the lives of the people of Kenya. There are up to 43 ethnic groups in Kenya with diverse cultures and languages sharing the same boundaries. It is impossible to examine Kenya without talking about ethnicity or tribalism as it is generally referred to in Kenya.

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<sup>936</sup> Gatheru R M (2005) , op.cit pg 33-35

<sup>937</sup> Hornsby C (2011) op.cit, Pg28

<sup>938</sup> Njenga G N (2010) op.cit pg 25

As previously described, the tribes in Kenya before colonisation were independent communities and fluid, there were no hardened boundaries. By the time Kenya was colonised, these communities were all brought together under one large territory and there was a division along ethnic lines into administrative districts. The purpose of this was so make the administration of colonial rule easier for the British and authoritarian force was used to rule and keep together these diverse communities<sup>939</sup>. The result of this was that communities that were once fluid and lived independently were forced to be coterminous, they had to learn to live together and they often had to compete for colonial resources which marked the beginning of negative ethnicity in Kenya<sup>940</sup>.

Another factor that contributed immensely to negative ethnicity was that the British ruled the ethnic communities differently. There was the belief that the colonial government openly favoured some ethnic groups more than others and this resulted in uneven development in the region<sup>941</sup>. In the areas where the people were mainly pastoralists, the British were concerned with livestock control and issues of security therefore they did not consider it important to develop those areas while in the more populated agricultural areas, labour was crucial to the settlers to help develop their new white farms and to develop their interests. Tribes like the Kikuyu were said to have worked on European farms in exchange for their right to live, keep livestock and cultivate crops within the settler dominated areas<sup>942</sup>.

It followed that the ethnic groups with more proximity to the white highlands<sup>943</sup> dominated by the Europeans and which had access to colonial rail or port and areas of colonial commerce had the advantage to more

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<sup>939</sup> Ndege P O (2009), op.cit, pg3

<sup>940</sup> ibid

<sup>941</sup> Alwy A, Schech S, 'Ethnic Equalities in Education in Kenya' (2004) IEJ Vol 5 ,No 2. Pg 268

<sup>942</sup> Hornsby C (2011) op.cit, Pg29

<sup>943</sup> Juma L (2001-2002) op.cit, pg 483

opportunities than other ethnic groups who did not. This unequal advantage also applied to education opportunities<sup>944</sup>.

There was also the stereotyping of ethnic groups based on their propensity, for example, the Kikuyu tribe were favoured to be good tradesmen and were thought to be able to realise the advantages of trading more than the other ethnic groups, while the Luo were thought to be prudent civil servants. The stereotyping was said to have brought an awareness of unequal power relations and hierarchy among the natives which further created ethnic consciousness<sup>945</sup>.

#### **7.3.4 Culture and Traditional knowledge**

The culture, education, language and TK in Kenya during the colonial time are grouped together because they were all intertwined during this period and it is impossible to discuss one without discussing the others.

As mentioned before, colonisation had a major impact across all the aspects of the lives of the communities in Kenya. Culturally the lives of the people of Kenya were tied to their lands; they managed the cultivation of their crops, developed and produced the tools that they used on their lands locally. This involved TK practices and skills that they had passed on from generation to generation which they used to manage their natural resources and the conservation of their lands.

During colonialism, the policies and practices introduced by the British had a major impact on their already established traditional practices.

The laws and practices of the indigenous people in the sustainable conservation of their natural resources were mainly embodied in their pre-colonial system of law which was unwritten. With the coming of the British,

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<sup>944</sup> Alwy A, Schech S (2004) op.cit, 268

<sup>945</sup> ibid

this system of law was abolished and replaced by the establishment of colonial legal framework which was used during the colonial period to manage the natural resources<sup>946</sup>.

These laws were designed to promote the interests of the British regarding the lands of the indigenous people which eventually helped them to acquire several productive lands for themselves. As a result of the changes made to the laws, the previous communal rational use of biological resources practised by the indigenous people was overlaid by a system that laid emphasis on private property rights<sup>947</sup>. This system made it possible for individuals and companies to be granted forest concessions which led to major deforestations and unfortunately also resulted in environmental degradation<sup>948</sup>.

It was mentioned under pre-colonial period in Kenya that before the coming of the British there were a few small scale industries such as the iron work industry, pottery and basket making and pottery which the people of Kenya engaged in by applying skills they had acquired over time<sup>949</sup>. With the introduction of industrialisation, there began a pattern of mass production of items that the people of Kenya had previously locally made, also industrial goods were imported from the UK which dominated the previously long established small scale industries that had existed. This had a major impact on the native's traditional trading industry because Kenya was then considered a market for British exports which caused the creation of policies that were against the local production of industrial goods<sup>950</sup>.

Apart from the introduction of new laws and policies, English language was also introduced to the Kenyan people. An important element to the

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<sup>946</sup> Ndege P O (2009) op.cit, pg5

<sup>947</sup> Wamicha W , Mwanje J, 'Environmental Management in Kenya: Have the National Conservation Plans Worked?' (2000) Environmental Forum Publication Series No 2 pg 26

<sup>948</sup> ibid

<sup>949</sup> Hornsby C (2011) op.cit, Pg 33-35

<sup>950</sup> ibid

preservation of traditional cultural practices and skills was the social relations between the elders and the youths which enabled the youths to be connected to their local lineages and enabled them to acquire such skills. With the coming of the British such social relations were weakened by the widespread use of the English language<sup>951</sup>.

The English language gradually overtook the use of indigenous languages among the youths and in schools. While the introduction of English language was not necessarily negative even in relation to the already established indigenous cultures, the fact that the youths abandoned their indigenous languages because they associated English with economic and political power had a negative impact on the preservation of traditional cultural practices. Some parents even thought language important enough that they chose English as the language of instruction for their children's education rather than their indigenous languages because the English language was considered "*the official vehicle and magic formula to colonial elitedom*"<sup>952</sup>. Consequently, social relations between the youths and elders were weakened and most of the young people lost contact with their traditional heritage<sup>953</sup>.

In addition to the introduction of the English language, the system of education throughout Kenya also changed from a system of a traditional education passed on from the elders to the youths to an established school system. The established school system was historically introduced by the missionaries that were in Kenya at that time. By the colonial period, the missionaries teamed up with the colonial government to provide a Western type education to the Kenyan people<sup>954</sup>. With these Western type schools that were established, there was said to be an attack on the cultures and traditional customs of the indigenous people due to the lack of a true

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<sup>951</sup> Bunyi G (1999) op.cit 341-344

<sup>952</sup> ibid

<sup>953</sup> ibid

<sup>954</sup> Bunyi G (1999) op.cit 340

understanding on these cultures<sup>955</sup> which further created more distance between the younger generations and their indigenous practices.

### **7.3.5 Introduction of intellectual property in Kenya**

Prior to the introduction of IP law was the introduction of the English common law system in Kenya. The English common law is often referred to as one of the legacies inherited from the British during the colonial period. By the time Kenya became a British Colony in 1897, the laws that operated in Britain then, that is the English common law in addition with the doctrines of equity and statutes of general application were extended to Kenya by the East Africa Order in Council 1897<sup>956</sup>.

Similar to the changes previously discussed that were introduced by the colonial administration, the introduction of English Common Law into Kenya was also seen by the people of Kenya as another form of colonial tool used by the dominant political and economic groups to control the natives<sup>957</sup>. This was because the practice of common law was mainly reserved for the British settlers; the natives were generally denied scholarships to study law as a form of control by avoiding training people that would eventually oppose the colonial regime<sup>958</sup>.

By virtue of the reception of the English common law into Kenya, British IP law was said to have also been extended into Kenya. Research shows that at the time IP was introduced into Kenya, there was little or no technological advancement in Kenya, very low literacy levels among the people of Kenya and there was no record of individual local innovation. Local skills and

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<sup>955</sup> Gatheru R M (2005) op.cit pg 74

<sup>956</sup> Wabwire M N, 'The Place of English Law in Kenya' (2003) 3 Oxford U. Commw. L.J. 51 pg51

<sup>957</sup> Joireman S F, 'The Evolution of the Common Law: Legal Development in Kenya and India' (2006) Commonwealth & Comparative Politics. Vol 44. No.2 190-210. Pg 200-202

<sup>958</sup> ibid

innovation at the time were purely needed for survival and mainly communal in nature<sup>959</sup>. As a result of this, it is argued that the introduction of IP law at the time was to protect and promote British interests and not to develop the creative industries of the people of Kenya.

The introduction of copyright law in Kenya was for example aimed at censoring publications that the British saw as contrary to their government policies, to limit the growth of the publishing industry in the country and more importantly to maintain and protect the monopoly rights of British publishers in Kenya<sup>960</sup>.

The East Africa Order in Council 1867 extended to Kenya the first copyright laws. There was the 1842 English Copyright Act which was the main body of law, the International Copyright Act 1844, the Copyright (Musical compositions) Act of 1888 and the Fine Arts Copyright Act of 1862 which supplemented the main body of law<sup>961</sup>.

The first patent law in Kenya was under the UK patent law and this was contained in the 1933 Kenya Patent Registration Ordinance and the Kenya United Kingdom Industrial Designs Act. Under these laws, patent applications had to first be registered in the UK, then certified patent application letters had to subsequently be produced in Kenya for re-registration<sup>962</sup>. The re-registration made the rights conferred on the patent holder in Kenya the same as the rights in the UK.

This system was said to have worked at the time because it encouraged foreign investors who found it easier to register their patents in the UK and also at the time the Kenyan patent office had very few skilled personnel that could register patents locally therefore it saved them the burden of having to

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<sup>959</sup> P Kameri-Mbote (2005) op.cit pg 6

<sup>960</sup> ibid

<sup>961</sup> ibid

<sup>962</sup> Odek J O , 'The Kenya Patent Law: Promoting Local Inventiveness or Protecting Foreign Patentees? (1994) Journal of African Law, 38,

pp 79103 pg 79

train people to fill the positions<sup>963</sup>. However it worked out to be an expensive process for the Kenyan people and also time consuming, limiting the ability to register patents to only the people who had access to the UK<sup>964</sup>.

By the time Kenya got independence, both the common law system and the IP laws were adjusted to be more suited to the local circumstances in Kenya. This is discussed under post-colonial Kenya.

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<sup>963</sup> *ibid*

<sup>964</sup> Kimeri-Mbote P (2005) *op.cit* ,pg 6

## 7.4 Kenya- Post Colonial Period

The previous sections have briefly given a picture of the situation in Kenya before and during colonisation. It discussed the changes implemented during the colonial period paying particular attention to how they have shaped Kenya's economy, culture, government and legal system.

Kenya got its independence in 1963 and this marked a great victory for the natives. Political power was transferred into the hands of the Kenyans with a political structure already established; the lands owned by the colonial government were transferred back into the hands of the new African government while the export sector and industrialisation established by the colonial government remained intact. There was strong economic growth during the first few years of independence<sup>965</sup> and a development plan was even launched by the first president, Kenyatta which was designed to build up the country<sup>966</sup>.

Even though Kenya experienced strong economic growth the first few years after independence, research shows that the people of Kenya struggled to continue with the changes implemented during the colonial period on their own and it has been pointed out that even in present day Kenya, the country continues to be built on colonial formations<sup>967</sup>.

Kenya is however now on its way to accelerating its development and becoming an industrialized middle income country by 2030 and the government stated that the development of its IP is important towards achieving this goal. This section will look at how the changes effected during the colonial period developed into local factors specific to Kenya. These local factors will be examined to see whether they are significant enough to be considered in the implementation of IP related TA programs.

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<sup>965</sup> Holmquist F W, Weaver F S, FordSource M D, 'The Structural Development of Kenya's Political Economy' (1994) African Studies Review, Vol. 37, No. 1 pp. 69-105 pg 75-77

<sup>966</sup> Hornsby C (2011) op.cit, Pg 128

<sup>967</sup> Ndege P O (2009) op.cit, pg8

#### 7.4.1 Ethnicity

By the time Kenya got its independence, the country's boundaries had been set, the different ethnic communities continued to be bound together under one administration. The negative ethnicity that began during the colonial period continued after independence and became worse as different ethnic communities continued to compete for resources. Ethnicity became a major factor in the country's economy, the government, education and politics of Kenya.

Ethnicity was an issue in politics right from the elections leading to Kenya's independence; the political organisations were formed along ethnic lines and their purpose was mainly about the fight for the control of the independent Kenyan state<sup>968</sup>.

The ethnic group in power had the power over the country's resources such as access to education, roads, land and health clinics, they had the power to manipulate the resources to benefit the ethnic groups they belonged to. The ethnic group in control also used their political power to mobilize the masses and acquire followers with a promise of a coalition which would give their followers the opportunity to acquire material benefits<sup>969</sup>. This was illustrated in the case of the first president of Kenya, Jomo Kenyatta who was said to have belonged to the Kikuyu tribe<sup>970</sup>. It was reported that when he became the president, he increased the members of his tribe in civil service and top government positions, top economic sectors were also headed by members of his ethnic group to the exclusion of the other ethnic groups. Preference was said to have been given to his ethnic group in the reallocation of the white highlands that were formerly occupied and owned by the British

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<sup>968</sup> Schatzberg M G, *The Political Economy of Kenya*, (1987) Praeger Publishers NY. Pg 29-30

<sup>969</sup> *ibid*

<sup>970</sup> Ajulu R, 'Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective' (2002) *African Studies*, Vol 61,2 pg259

settlers. The Kikuyu ethnic group was reported to have dominated all the sectors of the economy in Kenya and also controlled political institutions<sup>971</sup>.

This unfortunately set the pattern for the other administrations that followed in Kenya and has led to the uneven development among the different ethnic groups. It is therefore not surprising that even in present day Kenya, voting in political elections are reported to take place along ethnic lines<sup>972</sup>.

The issue being considered here is what the implication of the ethnic issues in Kenya may have on IP development and TA programs. According to a World Bank study conducted on African countries, it was stated that there was likelihood that ethnic issues and preferences could increase the possibility of a situation where a country adopts poor policies that would hinder their growth and development<sup>973</sup>. Although this was a general statement, this could be relevant to Kenya's IP development.

The extent of the impact of the ethnic issues in Kenya on the implementation of TA programs was illustrated in a case study on capacity building TA project that was executed in Kenya between 1976 and 1994<sup>974</sup>.

The study showed that first of all, the selection of the people that were to be trained for the TA programs was based on ethnic decisions. Careful selection had to be made by the TA providers to ensure a balance in the selection of trainees between the different ethnic groups<sup>975</sup>.

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<sup>971</sup> Juma L (2001-2002) op.cit, 490-491

<sup>972</sup> Schatzberg M G (1987) op.cit, 23-25

<sup>973</sup> Easterly W, Levine R, 'Africa's Growth Tragedy: Policies and Ethnic Divisions' (1997) World Bank Publication. Pg 9,10.

<sup>974</sup> These were capacity building technical assistance training projects in Kenya by the Harvard Institute of International Development. It involved a selection of Masters level trainees in the areas of rural planning management and resource management for rural development project. Details of this study can be found in Cohen J N, 'Ethnicity, Foreign Aid and Economic Growth in Sub-Saharan Africa: The case of Kenya (No 520) (1995) Harvard Institute for International Development. pg 1-14

<sup>975</sup> *ibid*

Secondly, it involved some amount of pressure from the senior officials in the government ministry on the TA providers to make final selection of the trainees from their ethnic groups. This of course meant that consideration was not given to the most appropriate people to be trained, candidates that would ensure the future development in the area that needed skilled workers were not selected if they did not belong to the 'right' ethnic group<sup>976</sup>.

The study also showed that ethnic selection affected the retention of the trained personnel in cases where the senior government officials openly discriminated against the trained personnel because they were not from the same ethnic group. This often made TA efforts and programs of no effect when such trained personnel were unable to stay in their roles or eventually leave the country<sup>977</sup>. The problem of retaining trained staff as a result of the effect of ethnicity

It was pointed out by the author of the study discussed above that "*ethnic interests have unanticipated effects on the design and implementation of foreign aid interventions*"<sup>978</sup>. The issues surrounding ethnic differences in developing countries are not new; most TA providers are likely to be aware of it including WIPO. The severity is however not the same in all the developing countries depending on how it is handled by the government.

As the study above shows, ethnicity in the case of Kenya impacts the major sectors of the country. Considering the findings in the study above about the effect of ethnic discrimination causing difficulty in retaining trained personnel, this is a country specific issue that could potentially impact the long term effectiveness of IPTA programs in Kenya. For example personnel from relevant IP institutions in Kenya that have benefitted from WIPO IPTA training and activities would be unable fulfil the purposes of their training long term if they are unable to remain in their roles as a result of ethnic discrimination.

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<sup>976</sup> ibid

<sup>977</sup> ibid

<sup>978</sup> ibid

### 7.4.2 Culture and Traditional Knowledge

The Chief Executive of Kenya's Copyright Board stated in a publication that towards Kenya's goal of being a middle income country by 2030, there should be a focus on "*the rich cultural diversity and genetic resources that Kenya has and the attendant TK*"<sup>979</sup>. She further stated that the country's natural resources could help in the development of their agricultural sector, the health sector, creative industries and in the preservation of their genetic resources<sup>980</sup>.

TK practices in Kenya reside with the indigenous people and the local communities who play a major role in the conservation and the sustainable use of biological resources<sup>981</sup>. Although the government is keen to develop and promote its TK and resources, the indigenous communities in Kenya are said to have struggled over the years to maintain their traditional lifestyles and retain their landholdings<sup>982</sup>.

As previously discussed under colonial rule, indigenous people suffered the loss of their lands, their traditional practices and cultures as a result of the changes introduced during the colonial period. Many of the legislations that were passed at the time did not give recognition to the indigenous people and their traditional practices. Those policies and legislations were carried on after independence<sup>983</sup>. This unfortunately resulted in indigenous people being exposed to biopiracy and eventually the loss of their biological resources.

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<sup>979</sup> Kenya Copyright Board, Traditional Knowledge and Traditional Cultural Expressions in Kenya, Kenya Copyright News (Issue 4, 2011) October-December 2011 [Online] Available at <http://www.copyright.go.ke/awareness-creation.html?...copyright-news-issue-4> accessed [10/02/15] pg 5

<sup>980</sup> ibid

<sup>981</sup> Mbeva J, Experiences and Lessons Learned Regarding the Use of Existing Intellectual Property Rights Instruments for the Protection of Traditional Knowledge in Kenya. Chap. in *Promoting Traditional Knowledge : Systems, National Experiences and International Dimensions*, eds Twarog S and Kapoor P (2004) United Nations Publications pg167

<sup>982</sup> Lyman A, Kew D, 'An African Dilemma: Resolving Indigenous Conflicts in Kenya' (2010-2011) 11 Geo. J. Int'l Aff. 37 pg38

<sup>983</sup> Mbeva J (2004) op.cit, 167

The losses have been in form of the commercialisation of their knowledge by foreigners without compensation<sup>984</sup>; in addition to this, the Kenyan government were also said to have used state power to deprive their indigenous communities of their lands and resources<sup>985</sup>.

Most of the lands owned by the indigenous communities were taken over by the state and declared as government property for tourism purposes. The Ogiek ethnic group was named as one of the communities affected by this; they had previously owned forests and lands that were their source of livelihood and their homes. After independence, with the titles to the lands back in the hands of the Kenyan government, their cultural rights to their lands were still not recognised by the government of Kenya which resulted in their removal from their forests and the loss of their traditional lands. This issue eventually resulted in a legal battle between the Ogiek community and the state government over the lands<sup>986</sup>.

The Ogiek case was however one of the few indigenous groups able to challenge the government; many of the indigenous communities in Kenya are grouped with the minority therefore they hardly have the political power or the financial means to fight for their rights. In the early post-independence years, they had no representatives in the government and any attempt by them to question the government in power was seen as opposition to the government in power and this was dealt with severely<sup>987</sup>. Kenya's previous constitutions, that is the independence constitution of 1963 and the 1967-2009 constitution were also generally silent on the recognition of the identities of minority/indigenous groups in Kenya and their land rights<sup>988</sup>. This situation is likely to have development implications for Kenya's TK.

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<sup>984</sup> ibid

<sup>985</sup> Makoloo M O, 'Kenya: Minorities, Indigenous Peoples and Ethnic Minority' (1995) Publication of the Minority Rights Group International. Pg 4

<sup>986</sup> ibid

<sup>987</sup> Lyman A, Kew D (2010-2011) op.cit 39

<sup>988</sup> Abraham K S, 'Kenya at 50: unrealized rights of minorities and indigenous peoples' (2012) Minority Rights Group International publication. Available at

The indigenous people however continued their struggle for their rights to be recognised and protected by the government. They eventually got involved in the review of the 2009 constitution by making their views known and submitting memoranda to the institutions involved in the making of the constitution<sup>989</sup>. Also in 2009 the Kenyan National Land policy was approved by Cabinet after extensive consultations with relevant stakeholders. For the first time since independence this land policy contained clearly defined provisions to help the minorities regarding their land. The policy was drawn up as a guide and a framework for laws aimed towards the efficient and sustainable use of the lands in Kenya<sup>990</sup>. It contains provisions to ensure the rights of indigenous people over their lands and it was said to have served as groundwork for the various provisions relating to Kenya's minorities in the 2010 Constitution<sup>991</sup>.

It was discussed in the previous section under Kenya-colonial period how the effect of colonialism created minorities and marginalised communities within Kenya. The provision regarding minorities in the 2010 Constitution was aimed at addressing this historical situation. It has been described as “*a progressive document that aims to address the failed legal and moral systems created by earlier colonial and postcolonial regimes*”<sup>992</sup>. The constitution was welcomed and generated positive reactions from Kenyans. A report by an indigenous organisation in Kenya called the Samburu Women for Education and Environment Development Organisation(SWEEDO) described the new constitution as “*a clean break with the past and provides*

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[http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MRG\\_Annex1\\_Kenya\\_HRC105.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MRG_Annex1_Kenya_HRC105.pdf) accessed [24 Jan. 14] pg19

<sup>989</sup> Ibid, pg.16

<sup>990</sup> Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy*, Kenya [Online] Available at <http://www1.uneca.org/Portals/lpi/CrossArticle/1/Land%20Policy%20Documents/Sessional-paper-on-Kenya-National-Land-Policy.pdf> accessed [10/02/2015]

<sup>991</sup> Minority Rights Group International, *World Directories of Minorities and Indigenous Peoples, Kenya Overview* (2012) [Online] Available at <http://www.minorityrights.org/3955/kenya/kenya-overview.html> accessed [22/01/15]

<sup>992</sup> Abraham K S (2012) , op.cit .pg.3

*several avenues for the pursuit and strengthening of indigenous peoples' personal and collective rights*"<sup>993</sup>.

The 2010 Constitution for the first time acknowledged the identities of the indigenous people in Kenya. Article 260 of the Constitution used the term "*marginalised community*" to include "*an indigenous community that has retained and maintained a traditional lifestyle and livelihood...*"<sup>994</sup> The Constitution in Article 7 made provision for the State to promote the use and the development of indigenous languages which is important for the preservation of the TK of the indigenous people<sup>995</sup>. The Constitution also recognises the collective rights of the communities to their lands in Article 61(1) and 63(4)<sup>996</sup>.

The 2010 Constitution also made it possible for indigenous groups to be represented politically by virtue of Article 27 (3&4)<sup>997</sup> which provides that women and men will have the right to equal treatment which includes political, cultural and social opportunities. The next section goes further to state that the State shall not discriminate against any person, either directly or indirectly on any ground including culture, ethnic or social origin. This provision for the first time ensured indigenous participation in the electoral processes and possibly an avenue for them to be actively involved in issues directly concerning them. Article 100 also makes provision for parliament to enact legislation to promote the representation of ethnic and other minorities in Parliament<sup>998</sup>.

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<sup>993</sup> Sumburu Women for Education & Environment Development Organisation (SWEEDO), 'Kenya's New Constitution Benefits Indigenous People' (2010) Cultural Survival Organisation [Online] Available at <http://www.culturalsurvival.org/news/kenya/kenyas-new-constitution-benefits-indigenous-peoples> accessed [07/02/15]

<sup>994</sup> The Constitution of Kenya Revised Edition 2010. op.cit.,pg 163

<sup>995</sup> ibid

<sup>996</sup> ibid

<sup>997</sup> The Constitution of Kenya Revised Edition 2010. op.cit.,pg 24

<sup>998</sup> ibid

Since the constitution came into force, some of the indigenous communities have taken advantage of the provisions relating to them. An example is the 2011 case of *Ibrahim Sangor Osman et al v. Hon Minister of State for Provincial Administration & Internal Security*<sup>999</sup> where the petitioners, Kenyan Somalis fought against their forced eviction from their ancestral lands. They were awarded damages and the court also declared that their fundamental right to life, right to human dignity and security, economic, social and specific rights among others had been violated as a result of the eviction and the demolition of their property by the Kenyan police<sup>1000</sup>. This was a great victory for this group of indigenous people and a landmark in similar cases.

It has however been pointed out that the courts have not always made decisions in accordance with the constitutional provisions for minority groups like in the case of *Ibrahim Sangor Osman et al v. Hon Minister of State for Provincial Administration & Internal Security*. In the 2011 case of *Engineer Charo Wa Yaa and Others v. Municipal Council of Mombasa and Others*<sup>1001</sup>, over 276 families in a community in Moroto Mombasa brought a case before the High Court for the protection of their houses and challenging their eviction from the public land they occupied which was sold to a private company. They relied on Article 43 of the constitution which provided for the protection of housing rights but the court ruled against them.

According to a report put together by interviewing focus groups constituted by indigenous people from four indigenous communities, the general feeling was that despite a few victories attributed to the provisions of the 2010 constitution, the indigenous communities still continued to suffer evictions

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<sup>999</sup> Ibrahim Sangor Osman & 1,122 others v The Minister of State for Provincial Administration and Internal Security & 10 others [2011] eKLR Constitutional Provision No 2 of 2011, High Court at Embu (per HO Muchelule, Judge, judgment of 16 November 2011)

<sup>1000</sup> A report by International Work Group for Indigenous Affairs (IWGIA), *Update 2011 – Kenya* [Online] Available at <http://www.iwgia.org/regions/africa/kenya/875-update-2011-kenya> accessed [3/02/2014]

<sup>1001</sup> Abraham K S (2012) op.cit, pg 21-23

from their lands and the courts make this worse by continuing to make determinations that contradict the minority provisions in the constitution<sup>1002</sup>.

The 2010 Constitution is however said to continue to receive a lot of support from the people of Kenya in spite of the unfavourable court determinations. It was pointed out in the report mentioned above that for the intended purpose behind the minority provisions contained in the 2010 Constitution to be realised, administrative implementation must necessarily follow<sup>1003</sup>. In order to avoid creating a situation where there is more frustration among the indigenous people which would further marginalise them, the importance of implementing positive legal provisions and favourable judicial decisions to support the Constitutional provisions concerning minorities was emphasised<sup>1004</sup>.

Whether the 2010 Kenyan Constitution will achieve its intended goal, only time will tell, however presently there is a willingness on the part of the government to promote the country's IP and TK which means the indigenous communities need proper representation in the government and the continuous effort of the government not just in recognising but also in enforcing their rights regarding their resources.

Regarding representation for the indigenous people, according to Mrs Kahuria, the senior legal and principal state counsel for the Kenya Copyright board<sup>1005</sup> the indigenous communities are currently being represented by the Ministry of Culture Kenya. She stated that this office is directly involved with the indigenous communities and acts as a direct link between the government and the communities. This is timely as Kenya is in the process of putting in place a legislative framework for TK. Mrs Kahuria further pointed out the importance of the Ministry of Culture as a recognised representative

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<sup>1002</sup> *ibid*

<sup>1003</sup> *Ibid* @ pg 3-5

<sup>1004</sup> *ibid*

<sup>1005</sup> Kahuria C B [senior legal and principal state counsel Kenya Copyright board] Telephone interview. 15 February 2013

of the indigenous people in being actively engaged in the formulation of the legislative framework for TK and to also get involved in WIPO TA programs. This would also make it easier for the indigenous peoples' needs to be correctly assessed.

Talking about the just mentioned legislative framework for TK, Mrs Kahuria emphasised the importance of having a legislative instrument in place like China with the Intangible Cultural Heritage law and India with the Biological Diversity Act for Kenya to successfully develop its IP and TK. She pointed out that even though Kenya has a policy framework in place for the protection of TK which is the National Policy on TK, genetic resources and TCE, the legislative framework would be useful as groundwork for the implementation of any TA from providers like WIPO.

It is clear that the Kenyan government has made considerable efforts in recognising the rights of the indigenous people considering the relevant laws and policies in place. This thesis however agrees with the suggestion that it must be taken further by translating the language of the Constitution into a substantive and administrative language. It has also been suggested that there is the need for operational guidelines for state officials, a change in the attitude of the government towards the indigenous people and local capacity building efforts to educate the indigenous people on the provisions of the constitution that are relevant and useful to them<sup>1006</sup>.

### **7.4.3 Intellectual Property Law Development in Kenya and the Economy**

The introduction of IP law into Kenya which was by extension of the English common law was discussed under section 6.3.5. Since Kenya got its independence, the Kenyan government has worked towards tailoring the

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<sup>1006</sup> Abraham K S (2012) op.cit pg 25-26

laws inherited from the colonial government to meet the specific situation in Kenya.

Regarding the English common law, even though the Kenyan legal system was founded on the English common law doctrine, the primary sources of law are the Kenyan constitution and the local written laws in Kenya and so they are superior to English Common law in practice<sup>1007</sup>. Similar efforts have been made in the case of IP law.

After independence, Kenya enacted the Copyright Act in 1966 to repeal the previous copyright laws that were in place during the colonial period. Even though the content of this law did not change much from the previous laws, it was nevertheless a significant step towards removing colonial legal instruments from the laws of Kenya<sup>1008</sup>. The 1966 Act was further amended in 1975, 1982, 1989 and 1995 with the most significant amendment to date in 2001 to make Kenya's copyright law TRIPs compliant. The 2001 Copyright Act also established the Kenya Copyright board which is charged with the responsibility of administering all copyright related matters in Kenya<sup>1009</sup>.

Regarding Kenya's patent law, after the first patent law which was the 1933 Kenya Patent Registration Ordinance, no independent patent law was enacted until 1989. This Act was enacted to respond to Kenya's economic needs and to address some of the difficulties the 1933 Act had such as the registration of patents in the UK<sup>1010</sup>.

The 1989 Industrial Property Act was thereafter enacted and this came into force in 1990. This Act like the Copyright Act was amended a few times until the most recent one which is the Industrial Property Act No 3 of 2001<sup>1011</sup>. This Act also established the Kenya Industrial Property Institute (KIPI) which

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<sup>1007</sup> Wabwire M N (2003) ,op.cit pg53

<sup>1008</sup> Kamari-Mbote P (2005) op.cit pg5-6

<sup>1009</sup> ibid

<sup>1010</sup> Odek J O ,op.cit pg79

<sup>1011</sup> Kamari-Mbote P (2005) op.cit pg6-7

is charged with the registration of patents and other functions such as promoting inventiveness in Kenya and providing the public with industrial property information<sup>1012</sup>.

After independence, Kenya in addition to the Patent and Copyright laws also enacted laws that addressed other aspects of IP such as the 1972 Seeds and Plant Variety Act (last amendment in 2002)<sup>1013</sup> that deals with seed certification. The Kenya Health Plant Inspectorate Service was established to administer the Seeds and Plant Variety legislation<sup>1014</sup>.

On the international front, Kenya also joined IP international agreements such as the Paris Convention for the protection of Industrial Property in 1965 and the Berne Convention for the protection of literary and Artistic works in 1993. Others include membership of IP-related multilateral treaties, IP regional treaties and international organisations such as the WTO and WIPO<sup>1015</sup>.

As a member of the WTO, Kenya is a signatory to the TRIPs Agreement and as a developing country Kenya was given a period of 5 years from the entry of the agreement into force to implement its obligations under TRIPs. Towards complying with the TRIPs agreement, Kenya had a period of revising its national IP laws to bring them in conformity to the requirements of the TRIPs agreement<sup>1016</sup>. Kenya's IP legislation was found to be generally TRIPs compliant in a review carried out by the WTO in 2001<sup>1017</sup>.

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<sup>1012</sup> *ibid*

<sup>1013</sup> Laws of Kenya, *The Seeds and Plant Varieties Act 1972 -Chapter 326* Kenya

<sup>1014</sup> Sikoyo G M, Nyukuri E, Wakhungu J W, *Intellectual property Protection in Africa: Status of Laws, Research and Policy Analysis in Ghana, Kenya, Nigeria, South Africa and Uganda* (2006) Acts Press Nairobi Kenya. pg 18

<sup>1015</sup> WIPO , *Kenya Country profile* [online] Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=KE> accessed [23/01/15]

<sup>1016</sup> Wekesa M, An Overview of Intellectual Property Rights (IPRs) Regime in Kenya' Chap. in *Intellectual Property Rights in Kenya*, eds, Sihanya B, Wekesa M (2009) Konrad Adenauer Stiftung Kenya pg 6-8

Going by the theory that stronger national IP systems eventually result in economic benefits<sup>1018</sup> Kenya has worked towards strengthening its national IP system by reviewing and updating IP legislations in order to fulfil their obligations under the TRIPs agreement.

In terms of what these efforts have meant in encouraging creativity and economic growth in Kenya, according to a record of the applications filed at the KIPi from 1990 to 2001, the number of applications made for trademarks and service marks by foreigners totalled 1303 compared to 539 domestic applications. Also the number of patent applications granted between 1998 and 2003 was 89 foreign applications compared to 29 domestic applications<sup>1019</sup>. Since then the KIPi has been involved in a number of awareness raising activities in the form of agricultural related shows, exhibitions and technology and innovation expositions to encourage creativity among Kenyans<sup>1020</sup>. These activities seem to have yielded positive results according to the latest annual report published by the KIPi<sup>1021</sup>. According to the report, between 2008 and 2012 the number of patent applications made by Kenyan nationals was 51% compared to 49% made by other countries. Although the most active applications were made by foreign pharmaceutical companies this was still a real growth for Kenya<sup>1022</sup>.

In the area of industrial design, national registration totalled 80% of all the industrial designs registered while in the area of trademarks in 2011/2012, 3,458 applications were said to have been received which was a 6.7%

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<sup>1017</sup> Lewis-Lettington R, Munyi P, 'Willingness and Ability to Use TRIPs Flexibilities: Kenya Case Study' (2004) DFID Health Systems Resource Centre London. Pg 16-17

<sup>1018</sup> Butler A, 'The Trade-Related Aspects of Intellectual Property Rights: What is at Stake?' Federal Reserve Bank of St. Louis Review (1990) 34-46.

<sup>1019</sup> Kimeri-Mbote P (2005) op.cit pg14

<sup>1020</sup> Kenya Industrial Property Institute (KIPi), *Outreach Programme* [Online] Available at <http://www.kipi.go.ke/index.php/outreach-programme> accessed [23/01/15]

<sup>1021</sup> Kenya Industrial Property Institute (KIPi), *KIPi Industrial Property Annual Report 2011/2012*, Available at [http://www.kipi.go.ke/images/docs/kipi\\_annual\\_report\\_%202011\\_2012.pdf](http://www.kipi.go.ke/images/docs/kipi_annual_report_%202011_2012.pdf) accessed [23/01/15]

<sup>1022</sup> *ibid*

increase from the previous year. According to the KIPI this increase showed the active growth of the manufacturing and service sector of the country as a result of the increased awareness among Kenyans on the importance of trademarks<sup>1023</sup>. The Managing Director of KIPI however stated in the annual report that in spite of the growth recorded, there was still some concern about the actual number of patents granted to Kenyan nationals compared to the applications made due to their acceptability which he attributed to limited capacity on the part of the applicants. He however stated that the organisation was making the effort to organise seminars on patent drafting to address this issue<sup>1024</sup>.

It has been pointed out that there is no research done yet to establish that IP as a whole actually contributes to Kenya's economic growth and the overall development; therefore the actual impact of IP on Kenya's economy is not known.<sup>1025</sup> Nevertheless, going by the figures published in the KIPI annual report just discussed, there has been an increase in innovative efforts and creativity with the increased applications and registrations of IP. This is of course valuable for the building up of the sectors of the economy which contribute directly to Kenya's GDP. Some examples include biotechnology and agro-biodiversity to increase crop production and agricultural practices in the agricultural sector and the horticultural sector; the access and development of medicines in the pharmaceutical sector; innovation and creativity in its TK, cultural and industrial sector<sup>1026</sup>.

What the above shows is that IP development is beneficial to Kenyan economy as a whole which the government of Kenya have also recently acknowledged with their vision 2030<sup>1027</sup>.

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<sup>1023</sup> *ibid*

<sup>1024</sup> *ibid*

<sup>1025</sup> Kameri-Mbote P (2005) *op.cit* pg24

<sup>1026</sup> See Sikinyi E, Plant Variety Protection [Plant Breeder's Right] in Kenya' Chap. in *Intellectual Property Rights in Kenya*, eds, Sihanya B, Wekesa M (2009) Konrad Adenauer Stiftung Kenya pg 73-107

<sup>1027</sup> See introduction to Kenya section 6.1

In addition to the already discussed local factors, financial constraints may be a factor that could slow down the growth of IP in Kenya. The managing director of the KIPI mentioned in the annual report how financial constraints have limited their participation in relevant international IP meetings<sup>1028</sup>. Kenyan scholars in the field of IP have also pointed out that the Kenyan government has a thin budget for IP research such as in the area of biotechnology therefore they end up leaving public research institutions to be funded by multinationals. They stated that the problem with multinational companies financing research in public research institutes is that they determine the agenda for the researchers and the results of such research and innovations would belong to the companies<sup>1029</sup>. A country owned research and development would be beneficial to TA programs from WIPO to build on and would also support TA implementation to ensure the success of the programs in Kenya. This is perhaps an area the Kenyan government needs to pay more attention to but all the same a country specific issue.

In addition to the development of intellectual property rights in the area of the industry type creativity, chapter 4 discussed the significance of TK and biological resources to a developing country's economy like Kenya. IP is also relevant in this area therefore the next section looks at how Kenya managed to reconcile the existing system of IP with their TK.

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<sup>1028</sup> KIPI , *Industrial Property Annual Report 2011/2012* , op.cit.

<sup>1029</sup> Muraguri L, Boadi R, Wekesa M, IPRs, Agriculture and Food Security' Chap. in *Intellectual Property Rights in Kenya*, eds, Sihanya B, Wekesa M (2009) Konrad Adenauer Stiftung Kenya pg 58

#### 7.4.4 Protection of Traditional Knowledge and resources in Kenya

Kenya is rich in biological resources, it is known to have an estimated 35,000 species of plants, animals and micro-organisms and these biological resources provide vital services for the country such as food, medicines, pulpwood, firewood, industrial inputs and construction materials among other things. As a result of this, about 80% of the country relies directly or indirectly on the rich biodiversity<sup>1030</sup>. For example, the Gwasi hills community which is located in the South-Western part of Kenya is well known for its natural forests and boasts of rare ethno-botanical plants rich in medicinal properties. This community and surrounding communities have been said to possess “*immense inter-generation knowledge of the medicinal uses of forest derived products...*”<sup>1031</sup> surrounding them.

The country’s biological resources also contribute significantly to the economy and development; industries such as the agro-based industries and the service industries like tourism rely on them<sup>1032</sup>.

Kenya has a vision to transform “*into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030*”<sup>1033</sup> and it recognises that the use and effective protection of its traditional knowledge and associated resources will contribute towards realising this vision<sup>1034</sup>.

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<sup>1030</sup> The Kenya National Biodiversity Strategy and Action Plan (NBSAP) (2000), Ministry of Environment and Natural resources publication. Pg (v) Available at <https://www.cbd.int/doc/world/ke/ke-nbsap-01-en.pdf> accessed [05/12/14]

<sup>1031</sup> Tanui J, Kinuthia I, ‘ Biodiversity, Traditional Knowledge and Intellectual Property in Kenya: The Legal and Institutional Framework for Sustainable Economic Development’ (2011) Ministry of Economic Affairs Nairobi, Kenya. Pg 53-54

<sup>1032</sup> Ibid

<sup>1033</sup> Full text of Kenya Vision 2030 see Kenya Vision 2030, *The Vision* [Online] Available at <http://www.vision2030.go.ke/index.php/vision> accessed [05/12/2014]

<sup>1034</sup> Kenya Copyright Board, *Traditional Knowledge and Traditional Cultural Expressions in Kenya* (2011) Copyright News Issue 4. Pg 7

In 2010, Kenya reviewed its constitution to incorporate intellectual property rights<sup>1035</sup> which also included provisions for the country's traditional knowledge protection. Chapter 2 section 11(2a) of the Kenyan Constitution provides that the State shall..."*promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage*"<sup>1036</sup>.

Chapter 2 section 11(2c) states that the state shall "*promote the intellectual property rights of the people of Kenya*"<sup>1037</sup>.

Chapter 2 section 11(3a) further provides that "*Parliament shall enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage; and*" 11(3b) "*recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya*"<sup>1038</sup>.

The above provisions show that the Kenyan government recognises the intellectual property rights existing within the country's traditional knowledge and therefore states the importance of promoting and protecting the interests of the holders of such resources and knowledge in their various forms.

Kenya also has a number of legislations in place for the conservation of biodiversity and protection of its traditional knowledge resources such as the Wildlife(Conservation and Management) Amendment act 1989 Cap 376, the Forest Act 2005, Environmental Management and Coordination Act 1999, Science & Technology Act 1977 Cap 250, Fisheries Protection Act, 1977 Cap 379, National Museums &Heritage Act 2006 , the Seed & Plant Variety Act Cap 326, the Copyright Act 2001 and the Industrial Property Act 2001<sup>1039</sup>.

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<sup>1035</sup> See Laws of Kenya, *The Constitution of Kenya, 2010* (c.2 s.11(2a) )National Council for Law Reporting Publication Kenya

<sup>1036</sup> Laws of Kenya, *The Constitution of Kenya, 2010*, op.cit

<sup>1037</sup> Ibid

<sup>1038</sup> Ibid

<sup>1039</sup> Ibid

The Industrial Property Act 2001 is the legislation that deals with the administration of certain aspects of the country's intellectual property. Its main objective is stated to "*provide for the promotion of inventive and innovative activities, to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs...*"<sup>1040</sup>

The Act also established the Kenya Industrial Property Institute (KIPI) in 2002 to generally administer and oversee all intellectual property issues in Kenya. Within KIPI, there is a traditional knowledge unit established specifically to address intellectual property issues relating to traditional knowledge. This institute was established as a result of the national and international recognition of intellectual property, genetic resources and traditional knowledge issues<sup>1041</sup>.

Kenya is reported to have lost a significant amount of its biological resources to industrialized countries as a result of biopiracy<sup>1042</sup>. KIPI states that the issue of biopiracy had been made worse overtime because the country's traditional knowledge and genetic resources had not been given the deserved attention as a part of the country's intellectual property rights to be protected<sup>1043</sup>. Therefore KIPI as the institute that deals with patent issues is charged with the responsibility of taking the lead in strategizing ways of dealing with biopiracy issues associated with traditional knowledge<sup>1044</sup>.

An example of a biopiracy case involving Kenya's traditional knowledge which KIPI had to deal with was the case of the Kikoi Fabric. Kikoi is a distinctive word used to describe a popular colourful fabric worn in East Africa. In 2008, a British company applied to register "kikoy" as its trademark,

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<sup>1040</sup> Laws of Kenya, *The Industrial Property Act ,2001 ( Part 1)* Kenya. Available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=128384](http://www.wipo.int/wipolex/en/text.jsp?file_id=128384) accessed [05/12/2014]

<sup>1041</sup> See Kenya Industrial Property Institute (KIPI) *KIPI Traditional Knowledge Unit* [Online] Available at <http://www.kipi.go.ke/index.php/traditional-knowledge> accessed [05/12/14]

<sup>1042</sup> Tanui J, Kinuthia I (2011) , op.cit pg6

<sup>1043</sup> See Kenya Industrial Property Institute (KIPI) *KIPI Traditional Knowledge Unit*, op.cit

<sup>1044</sup> Ibid

a trademark that if it had been successful would have given the company sole commercial rights to the use of the name and make it impossible for Kenyans, the owners of the fabric to export their fabric into the international market. This application threatened to cause thousands of East Africans the freedom to use a term in their language, threatened to cause them to lose their livelihood and make their economic situation worse than it already was. When the KIPi received information from another company in the UK trading in Kikoi products, it was able to successfully oppose the registration of this trademark with the help of a law firm in the UK<sup>1045</sup>.

Apart from the Industrial Property Act and the KIPi, another significant legislation which helps protect the interest of traditional knowledge holders is the Copyright Act 2001. Section 3, CAP 130 of the Act established the Kenya Copyright board which is responsible for administering and enforcing copyright related rights in Kenya<sup>1046</sup>.

The Copyright Act defines folklore as *“literary, musical or artistic work presumed to have been created within Kenya by an unidentified author which has been passed from one generation to another and constitutes a basic element of the traditional cultural heritage of Kenya...”*<sup>1047</sup> however like all copyright laws, there is a provision for a period of the duration of any protected work which is generally 50 years after the death of the author and also requires the work to be fixed to be eligible for copyright protection<sup>1048</sup>.

In one of the publications by the Kenya Copyright Board, the Chief Executive Officer (CEO)<sup>1049</sup> stated the importance of noting the difference between copyright law generally which protects fixed works for a limited duration and

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<sup>1045</sup> VNZOMO, *The intellectual property tale of how Kenya almost lost the Kikoi fabric* (2012) [online] : weblog]. Available at <http://ipkenya.wordpress.com/2012/01/16/the-intellectual-property-tale-of-how-kenya-almost-lost-the-kikoi-fabric/> accessed [08/12/14]

<sup>1046</sup> See Kenya Copyright board [Online] Available at <http://www.copyright.go.ke/?q=the%20board> accessed [08/12/14]

<sup>1047</sup> Laws of Kenya, *The Copyright Act 2001-Chapter 130* (Part 1) Kenya

<sup>1048</sup> Ibid

<sup>1049</sup> Copyright News Issue 4 (2011), op.cit. pg 4-5

the Kenya Copyright Act or proposed amendments which incorporate the protection of Traditional Cultural Expressions (TCE) and offer the form of protection that recognises the nature of traditional knowledge<sup>1050</sup>. The CEO also pointed out that Section 49(d) of the Copyright Act makes provision for anybody wishing to use TCEs such as performances and recordings to obtain the permission of the Attorney General. This provision has been taken advantage of by artists in Kenya such as Kenyan artist Ms Linda Muthama who incorporated lullabies from the Meru indigenous community into her music<sup>1051</sup>.

The Copyright board also stated that it was in the process of drafting a legal instrument for the protection of traditional knowledge and traditional cultural expressions and continues to represent Kenya at the WIPO Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (IGC)<sup>1052</sup>.

According to the KIPi, the laws in Kenya do not yet make provisions for the use of Geographical Indications for the protection of traditional knowledge. However there have been some activities, first there was the acknowledgement that it would be a useful form of protection for the many potential geographical indication products originating from Kenya such as the Kenyan Coffee and Tea<sup>1053</sup>. In 2001, KIPi began the process of creating a geographical indication legislation by preparing drafting instructions for the Kenyan Geographical Indication Bill and geographical indications rule which

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<sup>1050</sup> Ibid

<sup>1051</sup> VNZOMO , *Traditional Knowledge and Traditional Cultural Expressions in Kenya*(2012) [online] : weblog]. Available at <https://ipkenya.wordpress.com/2012/02/29/traditional-knowledge-and-traditional-cultural-expressions-in-kenya/> accessed [08/12/14]

<sup>1052</sup> Ibid

<sup>1053</sup> Ramba G M, 'Protection of Geographical Indications in Kenya: EU/ARIPO/KIPi Workshop on Geographical Indications ' (2013) KIPi publication . Available at [http://ec.europa.eu/agriculture/events/2013/gi-workshops/kenya/session1-geoffrez-ramba-protection-of-geographical-indications-in-kenya\\_en.pdf](http://ec.europa.eu/agriculture/events/2013/gi-workshops/kenya/session1-geoffrez-ramba-protection-of-geographical-indications-in-kenya_en.pdf) accessed [08/12/14]; See also KIPi, *Swiss-Kenyan project on Geographical Indications (SKGI) Press Statement* [Online] Available at [https://www.ige.ch/fileadmin/user\\_upload/Juristische\\_Infos/e/swiss\\_kenyan\\_project\\_press\\_statement\\_e.pdf](https://www.ige.ch/fileadmin/user_upload/Juristische_Infos/e/swiss_kenyan_project_press_statement_e.pdf) accessed [08/12/14]

was passed on to the Attorney General. Meanwhile in January 2006, KIPi sent a proposal to the Swiss Federal Institute of Intellectual Property for a technical cooperation project in the area of geographical indications to help Kenya establish an effective geographical indication system and raise awareness among the Kenyan people how this system could benefit them. This proposal was approved in 2008 between the two countries<sup>1054</sup>.

After consultation with various stakeholders, the Bill and drafting instructions was published in 2009 followed by the Attorney General issuing the Geographical Indications Bill 2010 which is still awaiting approval by the Kenyan Parliament<sup>1055</sup>. The reason given for this slow progress is that it has been a costly process for Kenya and like other developing countries; they don't have the financial capacity to speed up the process<sup>1056</sup>.

For Kenya to be able to use the available intellectual property system to protect its traditional knowledge, research<sup>1057</sup> done among several communities in Kenya have highlighted the issue of awareness raising to enable them to have an understanding of the relevant intellectual property laws that apply to traditional knowledge and associated biological resources. This research also shows that there has been work done in this area including capacity building on the role of intellectual property rights<sup>1058</sup>.

Non-governmental organisations in Kenya have also contributed significantly to raising awareness among indigenous communities in Kenya on the use of

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<sup>1054</sup> Girsberger M, 'Swiss-Kenyan Project on Geographical Indications (SKGI)' (2014) IGE/IPE publication. Available at <https://www.ige.ch/en/legal-info/international-cooperation/completed-projects/kenya.html> accessed [08/12/14]

<sup>1055</sup> Blakeney M, Coulet T, Mengiste G, Mahop M T, *Extending the Protection of Geographical Indications: Case Studies of Agricultural Products in Africa* (2012) Earthscan from Routledge Oxon. Pg 216

<sup>1056</sup> Opijah D P, *Geographical Indications- Much Expectation Yet No Law in Sight*, (2010) [online] IP4all .Available at <http://ipkenya.ip4all.com/?p=113> accessed [08/12/14]

<sup>1057</sup> The Institute of Economic Affairs Kenya held four focus group discussions with different communities around Kakamega Forest, Lake Victoria, Gedi Forest Malindi and herbalist from the larger Baringo District examining the the impact of the existing legal and institutional framework for biodiversity conservation and bioprospecting. J Tanui, I Kinuthia (2011) op.cit pg 53-61

<sup>1058</sup> Ibid

intellectual property to meet their needs and expectations. An example is the Maasai Intellectual Property Initiative<sup>1059</sup> founded by a non-governmental organisation called the Light Years IP in 2011 to assert the intellectual property rights of the Maasai people. This initiative was founded to give this distinctive group of indigenous people control over their traditional knowledge brand by enforcing their intellectual property rights to enable them strengthen their economy<sup>1060</sup>.

The efforts made on the part of the Kenyan government and NGO's to enforce the intellectual property rights of indigenous people in Kenya show their belief that intellectual property rights is useful in protecting their traditional knowledge and can contribute to their development. While Kenyan government with the assistance of technical assistance programs continues to work to bring indigenous communities to a level where they can make the most of intellectual property to protect their traditional knowledge, it has been pointed out that for such efforts to properly take root there is a need for them to be "*indigenized in accordance with their culture*"<sup>1061</sup>.

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<sup>1059</sup> See Maasai Intellectual Property Initiative, *Who we are* [Online] Available at <http://maasaiip.org/> accessed [08/12/14]

<sup>1060</sup> World Intellectual Property Review (WIPR), *Root Cause: protecting traditional knowledge*, (2013) Available at <http://www.worldipreview.com/article/root-cause-protecting-traditional-knowledge> accessed [08/12/14]

<sup>1061</sup> Ole Karbolo M K, 'Promoting Development among the Indegenous Loita Massai Pastoralists of Kenya', Chap. In *Promoting Traditional Knowledge : Systems, National Experiences and International Dimensions*, eds. Twarog S and Kapoor P (2004) United Nations Publications UNCTAD/TIDC/TED/10 pg 273

## 7.5 Conclusion

Kenya like many developing countries continues to focus on developing their IP system to enable them make the most of their creative industries especially concerning their TK and biological resources. They also have the assistance of organisations like WIPO to help them achieve their IP goals in the form of IP related TA programs.

This chapter started by discussing the situation in Kenya before colonisation, then the introduction of western concepts such as commercialisation, technological development, English law and IP during colonisation which eventually caused changes to their pre-colonial way of life. This chapter also discussed how the local conditions developed as a result of the changes implemented during colonisation still have lingering effects generally on Kenya's development.

The findings in this research show that the local conditions discussed also impacts the effectiveness of IPTA programs to Kenya. Such local conditions include ethnic divisions and conflicts which permeate the major sectors of the country, the struggles of the indigenous people with whom the TK of the country reside to be recognised and to be heard regarding the loss of their traditional lifestyles and resources. Also discussed was the lack of administrative support to ensure the implementation of the constitutional provisions currently in place to recognise and protect the customary rights of the indigenous people. The government is also said to dedicate limited financial resources towards developing the country's IP in form of infrastructures and research which is necessary to support and continue the work of IPTA programs to the country.

Considering the DA agenda's recommendation for WIPO programs to be country-specific, this chapter shows that the local factors discussed in Kenya are indeed specific to Kenya as a result of Kenya's history.

The local conditions discussed are by no means exhaustive but it is the hope that it a start to understanding how they interact with the development of IP in

Kenya and the importance of factoring them into the design of IPTA programs for effective implementation.

## **8. Country Specific Factors and IP Technical Assistance**

The objective of this thesis has been to find out how the WIPO DA country-specific recommendation for IPTA programs can improve the effectiveness of the IPTA programs in developing countries.

The CDIP second session preliminary implementation report mentioned adopting a comprehensive approach in implementing the DA recommendations. Focusing on Malaysia and Kenya, this research has attempted a comprehensive approach by adopting a historical perspective. It was mentioned under the context of this research that studying a subject's earliest phases and evolution will help to sharpen one's view of the present. This research used this method first to trace developing countries participation generally in global IP to understand the reasons for their IPTA needs. Then it was used to identify and understand how the local factors in Malaysia and Kenya that interact with IP developed, how they may impact the effective implementation of IPTA programs and in particular what makes these local factors country-specific to each country.

The local factors discussed in each country appear without close examination to be very similar; however from the findings in this thesis, an understanding of how the local factors developed and handled confirmed that one size definitely does not fit all.

For instance regarding the ethnic diversity in both countries, ethnicity in Kenya today appears to be more severe in Kenya than in Malaysia although this could be because of the difference in their ethnic make-up.

In Malaysia, it was mainly as a result of immigrants who came to settle in Malaysia through trading relations creating three major ethnic groups of three different origins that is the Malays, the Chinese and the Indians. In Kenya on the other hand, while there are some immigrants, the animosity is mostly within Kenyan tribal groups.

Before colonisation, in Malaysia and Kenya these ethnic groups found a way to co-exist without conflict but colonisation brought stereotyping and favouritism which caused disadvantages to some of the ethnic groups.

In Malaysia, the Chinese were considered to be hard workers and more industrious so they dominated the capitalist class while the Malays were thought to have lacked industry therefore were engaged in low productivity occupations and the Indians were considered a useful source of labour.

Similarly in Kenya, the colonial government were said to have openly favoured some ethnic groups more than others, for instance the Kikuyu's who had better access to the European highlands had the advantage to more economic opportunities than the other ethnic groups.

In the case of Malaysia, soon after independence the government realised the effect of ethnic division on the country's development and tackled the issue by trying to achieve national unity through the adoption of the National Economic Policy and also through a system of ethnic quotas<sup>1062</sup> targeted towards regulating the access the ethnic groups had to state assistance, education and business opportunities. These efforts were said to have reduced the ethnic issues in the country and as stated in section 5.4.1 , compared to other developing countries that have had similar history and issues of ethnic inequality, Malaysia's case was then described as exceptional.

In Kenya's case, there have been some interventions from human rights organisations to resolve the ethnic conflicts and the mobilization of security forces by the government in an attempt to stop ethnic attacks however the results have not been as successful as in the case of Malaysia as ethnic disparity is said to still permeate the main sectors of Kenya and especially high in Kenya public offices<sup>1063</sup>. For instance one of the challenges said to be

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<sup>1062</sup> UNRISD, *Combating Poverty and Inequality: Structural Changes, Social Policy and Politics* (2010) UNRISD Publication pg93

<sup>1063</sup> Okombo O, Kwaka J, B Muluka, Sungura-Nyabuto B(2011) op.cit pg144

facing Kenya's Judiciary is ethnicity and nepotism<sup>1064</sup>, also past political regimes which have been dominated by particular ethnic groups in Kenya are said to have appointed judges that have supported their cause to further their political agenda<sup>1065</sup>.

In Malaysia's case, even though the government has been successful in significantly reducing the ethnic rivalry in the country, the method of ethnic quota adopted by the government is said to have favoured the Malays more than the other ethnic groups. Malaysia's civil service is said to be dominated by Malays while non-Malays appear to be excluded, although the non-Malays are said to be making efforts to change this situation<sup>1066</sup> it however does not appear to be a local condition that would impact the effectiveness of IPTA programs like in the case of Kenya.

It could also be argued here that the strategy the Malaysian government adopted by using ethnic quotas to regulate access to opportunities in favour of the Malays was easier to accept because the Malays are arguably the true Malaysians as opposed to the other ethnic groups which are not originally Malays. This is not the case in Kenya; Kenya's ethnic tribes are all originally from Kenya which points to the difference in the ethnic make-up of the two countries. It shows that ethnic issues in Malaysia and Kenya may appear to be similar but on closer look are actually different and specific to each country.

Stemming from this is the situation of the indigenous people in both countries. In Malaysia and Kenya the indigenous people in whom the TK reside appear to have little or no representation in the government and

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<sup>1064</sup> Sihanya B, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' (2011-2012) FES Kenya Occasional Paper, No. 5 Pg 12

<sup>1065</sup> Oluoch F, 'Kenya: New Constitution faces Implementation Challenges' (2010) News from Africa [Online] Available at [http://www.newsfromafrica.org/newsfromafrica/articles/art\\_11984.html](http://www.newsfromafrica.org/newsfromafrica/articles/art_11984.html) accessed [13/03/15]

<sup>1066</sup> Berman E M, *Public Administration in South Asia, Thailand, Philippines, Malaysia, Hong Kong and Macao* (2011) CRC Press Taylor & Francis Group pg152

continue to struggle to retain the ownership and titles to their lands against government laws and policies.

Section 5.4.2 discussed the importance of ensuring the participation of indigenous communities in matters regarding their TK and resources. In Malaysia this will have to come through the government. In a questionnaire completed by the Senior Director, Policy and Strategic Planning Division, Intellectual Property Corporation of Malaysia<sup>1067</sup>, she stated that TA programs “*come through Government via the IP Corporation of Malaysia*”. Ensuring the participation of the Malaysian indigenous communities in IPTA programs regarding their TK could be affected by the relationship between the government and the indigenous communities which is currently described as a testy one<sup>1068</sup>.

In a recent Malaysian newspaper publication, a Malaysian professor was quoted to have pointed out that the ethnic policies that the government put in place to end ethnic inequality which was designed to favour the Bumiputera<sup>1069</sup> continues to miss out the minorities in Malaysia. This is as a result of the further classification between the Bumiputera-Malays and Bumiputera-minorities which means that the policies benefit only the Bumiputera-Malays while the minorities are still struggling to be acknowledged by the government<sup>1070</sup>. Since this is the case, programs designed to assist the minorities may not reach them.

The indigenous people in Kenya are also said to continue to suffer the loss of their lands and biological resources to the government. The World Bank chief

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<sup>1067</sup> Mohamad S E [Senior Director, Policy and Strategic Planning Division, Intellectual Property Corporation of Malaysia] Questionnaire 8 May 2013

<sup>1068</sup> Mahavera S, Helping Orang Asal speak with one voice. The Malaysian Insider. 2 December 2014 [online]. Available at <http://www.themalaysianinsider.com/malaysia/article/helping-orang-asal-speak-with-one-voice> Accessed [27/01/15]

<sup>1069</sup> Bumiputera means sons and daughters of the soil. See chapter on Malaysia section 5.1

<sup>1070</sup> Shukry A, Race-based policies will raise tension among Bumiputras, warns academic. The Malaysian Insider 16 January 2015 [online] Available at <http://www.themalaysianinsider.com/malaysia/article/race-based-policies-will-raise-tension-among-bumiputeras-warns-academic> Accessed [28/01/15]

was reported to have recently reached out to the Kenyan government regarding the eviction of thousands of indigenous people from their forests for the purpose of water conservation. It was agreed that the customary rights of the indigenous people were not recognised and protected by the government<sup>1071</sup>.

It was discussed in section 6.4.2 how the 2010 Constitution now contains provisions to ensure the rights of indigenous people over their lands and how some indigenous communities have taken advantage of some of the provisions by fighting against forced evictions from their lands in court. Two such cases were discussed, while one was successful, the other was not. While there is a call for the administrative implementation of the Constitution to ensure more favourable court determinations in favour of Kenya's indigenous people, the challenges facing the implementation of the constitution regarding indigenous people and their lands could also be attributed to the problem of ethnicity and nepotism in Kenya's Judiciary.

However in the case of Kenya's indigenous people, in spite of the challenges they face, they are said to have had some IPTA from WIPO in the form of funding to ensure their participation in a task force seminar and validation seminar in 2009 and 2013<sup>1072</sup>. The indigenous people (minorities) in Malaysia are said to have not yet had similar opportunity<sup>1073</sup>.

Chapter 4 discussed the significance of TK to developing countries generally and in particular how Malaysia and Kenya intend to use the economic benefits from their traditional resources towards their development. The situation of the indigenous people in both countries could hinder the effectiveness of WIPO TA programs in this area.

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<sup>1071</sup> Vidal J, World Bank chief steps in over evictions of Kenya's indigenous people. The Guardian . 6 October 2014 [online] Available at <http://www.theguardian.com/global-development/2014/oct/06/world-bank-chief-kenya-indigenous-people> Accessed [28/01/15]

<sup>1072</sup> Kahuria C B [senior legal and principal state counsel Kenya Copyright board] Questionnaire 8 July 2013

<sup>1073</sup> Mohamad S E [Senior Director, Policy and Strategic Planning Division, Intellectual Property Corporation of Malaysia] Questionnaire 8 May 2013

Another local condition discussed which is common to both countries is regarding their official languages. Both Malaysia and Kenya are multilingual countries as a result of their ethnic composition however apart from the use of English language; they both have official languages which are the Malay language in Malaysia and the Swahili language in Kenya. During colonisation with the introduction of English language, both countries saw the displacement of their local languages.

In Kenya the widespread of English was said to have weakened social relations causing young people to lose contact with their traditional heritage and also resulted in attacks on their cultures and traditions. In Malaysia the situation was similar as they saw the Malay language displaced and considered it a devaluation of their cultures and traditions and a disregard for their identity as a people.

After colonisation however, Malaysia and Kenya approached the effect of colonisation on their languages in different ways.

In Kenya, the colonial language policy that was in place which put English language as the preferred language over the local languages was maintained immediately after colonisation<sup>1074</sup>. Once Kenya became an independent nation the official language was declared to be English while Swahili was taught in schools as an optional language. Today the official languages are both English and Swahili, however English is pointed out to be the favoured official language even though it is said that a significant number of indigenous people can barely communicate in English.

The situation in Malaysia is different. After colonisation, the Malaysian government reinstated the Malay language to its former position as the official language even though English remained in use throughout the country and in certain official platforms. This was said to have been a significant step for Malaysians towards restoring the value of Malaysia's culture because they considered their language to be the soul of their nation.

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<sup>1074</sup> Nabea W, 'Language Policy in Kenya : Negotiation with Hegemony' (2009) *The Journal of Pan African Studies*, vol.3, no.1 pg125

The language history of both Malaysia and Kenya show that while this is a local condition that could impact the effectiveness of IPTA programs in Malaysia, it is not the case in Kenya.

In Kenya, language does not appear to be a local condition affecting IPTA implementation, even though it has been pointed out that Kenyans will like to see their local languages more in use, the government is said to be satisfied with the language situation which is maintained across the country. In Malaysia on the other hand, language is a more sensitive issue and often a barrier preventing IP office staff from fully benefitting from IPTA programs. An official of the Malaysian IP office stated this when she talked about her experience participating in IPTA training delivered by Japanese speakers. The result was that the Malay participants did not understand the Japanese speakers and therefore did not benefit from the training provided. This particular IPTA training resulted in poor implementation and a waste of time and resources because the providers did not consider language barrier as a local factor specific to Malaysia that could impact IPTA implementation.

Another local factor which may be relevant to the implementation of IPTA is the ability and willingness of the relevant stakeholders in recipient countries to share knowledge of factors that could facilitate or impede IPTA implementation such as relevant information about local conditions in the country. Such information could also assist in the needs assessment process which was discussed under section 4.4.6 as an important step towards providing well-tailored IPTA programs.

It was observed while interviewing the staff of the MyIPO that while they were willing to give information about the types of IPTA they have received, there was generally a reluctance to give detailed information about their experiences participating in the programs and about local conditions in Malaysia that could be relevant to IPTA implementation. It was also observed that the information given during the interview process was generally controlled. Four people were interviewed specializing in different aspects of IP but only one person was allowed to speak to the interviewer even when the questions were directed at the other staff. An explanation for this could be

that this is generally the culture in Malaysia. Newspaper publications in Malaysia have however written about the government's control over freedom of expression in Malaysia<sup>1075</sup> therefore it could also be attributed to the government's tight control of institutions and organisations such as the press and the IP office in Malaysia<sup>1076</sup>.

On the other hand while interviewing the staff of Kenya Copyright Board, there was a willingness to answer all the questions, the interviewee spoke freely about situation in Kenya and her IPTA experience.

This is therefore a local factor that could be relevant in Malaysia but not particularly relevant to Kenya regarding IPTA programs.

Another local factor is the budget the government allocates towards IP development. The external review team stated in their report<sup>1077</sup> that one of the conditions necessary for facilitating impact and sustainable results of IPTA programs include institutional and economic conditions in beneficiary countries<sup>1078</sup>.

It was discussed in section 6.2.1 and 7.2.1 that Malaysians and Kenyans before colonisation were economically sufficient people. Although Malaysia was said to have had a fairly established commercial system, they started on similar paths of subsistence living. During colonisation both countries were introduced to western concepts such as commercialisation, technological development and IP. After colonisation both countries were also recorded to have set out on similar development paths<sup>1079</sup>, during the 1960's their economies were said to have been in step but this changed from the 1980's

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<sup>1075</sup> Centre for Independent Journalism, [Malaysia] Disappointments and promises in freedom of expression, May 6, 2015. Southeast Asian Press Alliance (SEAPA) [Online] Available at <http://www.seapa.org/?p=10942> accessed [28/08/15]

<sup>1076</sup> Discussed under section 6.4.2

<sup>1077</sup> Discussed in chapter 3 under section 4.4.7

<sup>1078</sup> Deere Birkbeck C, Roca S, op.cit.,pg71

<sup>1079</sup> Vlasblom D, 'The Richer Harvest Economic Development in Africa and Southeast Asia Compared: The Tracking Development Study 2006-2011.(2013) African Studies Centre Publication, Leiden. Pg13

with Malaysia's economy becoming more successful. The reasons given for the economic decline in Kenya include weaknesses in Kenya's governance, the previously discussed ethnic problems and also corruption in public offices while Malaysia was said to have had similar issues but managed to overcome them<sup>1080</sup>.

Malaysia therefore appears to have more economic and institutional capacity to support IPTA programs than Kenya. This can be seen from the increase in the number of patent applications in Malaysia from 1993 discussed in section 6.4.3 which was attributed to the reforms made to their IP laws and the continuous financial support the government put towards IP R&D which helped to stimulate IP creation in Malaysia. Although Kenya also recorded a significant increase in the number of IP applications from 2008 which was the result of the awareness raising efforts of the KIPi among the Kenyan people on the importance of IP, the managing director of KIPi however pointed out that their efforts have been limited by financial constraints.

The above confirms one of the points made in the external review team's report that the effectiveness of the WIPO IPTA could be affected where WIPO's resources are not being supplemented by the commitment of adequate national resources<sup>1081</sup>, although this is a local condition common to many beneficiary countries of WIPO IPTA, it however appears to affect Kenya more than Malaysia.

Comparing the local conditions relevant to the effectiveness of IPTA programs in Malaysia and Kenya showed them to be similar when they were identified, they could therefore be easily grouped together as problems common to most developing countries. The historical approach however proved beneficial by showing how the conditions evolved differently in each country making them country-specific factors that should be considered in implementing the WIPO DA TA recommendations.

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<sup>1080</sup> Ibid

<sup>1081</sup> Ibid

## 9. CONCLUSION

There is today the acknowledgement that IP is an important contributor to the economy and development of most countries, it has therefore been pointed out that IP discussions have moved beyond the question of whether IP rights should be instituted<sup>1082</sup> even in developing countries. The question here is how IPTA programs to developing countries can successfully bridge the gap between global IP norms and local conditions<sup>1083</sup> to provide effective IPTA programs

This research started by discussing the transplant of IP into developing countries and how they have participated in global IP while explaining their need for IPTA. Using the historical approach the research traced the earlier forms of IPTA programs which were said to have mainly promoted the importance of IPRs for the economic development of developing countries while disregarding wider development implications. The historical method also showed the flaws of the earlier forms of IPTA programs when developing countries expressed concerns about the pro IP focus of the programs and criticised the programs for not being development oriented.

The research focused on the work of WIPO in this area following developing countries struggles in implementing their obligations under the TRIPs agreement and their ability to take advantage of the flexibilities contained in the agreement. The research went on to discuss the WIPO DA recommendations and the importance of well implemented IPTA programs to IP development generally and to the creative and cultural industries which is one of the strongest potential development areas for many developing countries.

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<sup>1082</sup> Yu, P K, 'The Trust and Distrust of Intellectual Property Rights' (2004) MSU Legal Studies Research Paper No. 02-04 pg 9

<sup>1083</sup> Lihong Li (2009) op.cit, pg120

It was discussed under section 5.5 whether the current IP system is reconcilable with developing countries TK and whether the TRIPs related TA provided to developing countries would be useful for their TK matters. While examining the protection of TK in Malaysia and Kenya, it was observed that both countries have managed to reconcile the existing system of intellectual property with their traditional knowledge. Malaysia for example through the development of the Malaysia Traditional Knowledge Digital Library (TKDL) and Kenya through various legislations such as the establishment of the Copyright Act which makes provision for the protection of some forms of TK. It was also discussed under section 5.4.3 that there are on-going discussions within the TRIPs Council on proposals amending the TRIPs Agreement to include disclosure requirements which would bring TK within the scope of the TRIPs Agreement.

The discussion then focused on local conditions in Malaysia and Kenya from a historical point of view which provided a comprehensive approach into identifying and understanding the relevant local conditions which interact with IP development. This goes to the heart of the WIPO DA country-specific recommendation which is an important step towards bridging the gap between global IP norms and local conditions by considering each country's special IPTA needs in the design and delivery of such programs.

The findings of this research suggest that the impact of local factors in Malaysia and Kenya on almost every aspect of their development means that the proper implementation of the country-specific recommendation will contribute significantly to the effectiveness of IPTA programs in both countries. The importance of paying attention to country-specific factors in the delivery of IPTA programs was seen in a study conducted by the UK IPO on the impact assessment of IPTA provided by developed countries over the period 2005-2010 in four emerging and transition economies<sup>1084</sup> discussed under section 4.4.6. The study found that IPTA programs focused on similar areas in each country instead of paying attention to the different country

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<sup>1084</sup> The study looked at Brazil , Poland, India and Thailand . See SAANA Consulting (2011) UK IPO Report, op.cit

contexts<sup>1085</sup>. This resulted in IPTA targeting urgent IP needs in some country while this was not the case in other countries.

The proponents of localization emphasize the role local factors play in translating international rules into actual behaviour<sup>1086</sup>. While the effect of localization varies from country to country, the findings in this thesis show that the discussed local conditions in Malaysia and Kenya at varying degrees impact the development of IP therefore a beneficial prerequisite to factoring them into IPTA programs would be to first of all understand what makes them specific to each country.

In the report of the external review team, it was mentioned that in evaluating the effectiveness and the results of WIPO IPTA “*it is important to ask what factors are within or beyond the control of WIPO*”<sup>1087</sup>, while this research acknowledges that the local factors discussed in Malaysia and Kenya are beyond the control of WIPO, the findings show that they are significant enough to impact the result of the WIPO DA TA recommendations.

There is therefore a need to approach the implementation of the country-specific recommendation from a holistic perspective to first identify the relevant local conditions in relation to each WIPO IPTA beneficiary country and an understanding of what makes them specific to each country to help correctly factor them into the design and the delivery of IPTA programs.

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<sup>1085</sup> *ibid*

<sup>1086</sup> *ibid*

<sup>1087</sup> *ibid*

# Appendices

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## **Appendix 1-Interview Questions**

1. Tell me generally about IPTA programs to your country
2. Who are the major providers of IPTA to your country?
3. Who are the usual recipients of IPTA?
4. What type of TA have you had from WIPO?
5. Have you benefitted personally from WIPO IPTA?
6. Have you found them effective?
7. What do you think WIPO can improve on for IPTA programs to be more effective
8. Does WIPO follow up on the programs?
9. Do you have knowledge of the WIPO DA?
10. Do you see a difference between WIPO IPTA before the DA and after the DA?
11. Are there local factors in your country that WIPO should consider in designing IPTA programs?
12. Is IP the main protection for TK in your country?
13. Have you had IPTA in the area of TK to your country?
14. Is there contact between the indigenous people in your country and WIPO?

## **Appendix 2- Questionnaire**

1. Are you familiar with intellectual property technical assistance programs to your country?
2. Which organisations are generally the main IP technical assistance providers to your country?
3. Who are the usual recipients of these IP technical assistance programs?
4. In what order do technical assistance programs reach the recipients from the providers such as WIPO? Can you please explain the hierarchy?
5. Are your needs assessed before the technical assistance programs are introduced to you?
6. If you answered yes above, please describe how your technical assistance needs are assessed
7. What type of IP related technical assistance programs have been offered and in what areas of IP?
8. In your opinion, what form of technical assistance programs have had the most impact and why?
9. Can you write in your view how generally effective the programs to your office have been, particularly the programs from WIPO
10. Are there local factors in your country that in your view may affect the effectiveness of technical assistance programs?
11. What issues, if any, would you advice WIPO to take note of to improve their technical assistance programs to your country?
12. Are you familiar with the new WIPO Development Agenda?
13. If you have answered yes above, Please give details of technical assistance programs that you have had as a result of the WIPO Development Agenda.

14. In your opinion, is there a difference or an improvement in the implementation of technical assistance programs before the Development Agenda compared to after the Development Agenda?

15. Is your office involved with the use of intellectual property to protect traditional knowledge and resources?

16. If you answered **No** to question 1 above, please provide the name of the institution in your country that oversees the protection of traditional knowledge.

17. If you answered yes to question 1 above, please answer the following:

a. Please give as much detail as you can to what extent intellectual property is used to protect traditional knowledge in your country

b. Have you had intellectual property technical assistance in the area of traditional knowledge from WIPO to your office?

c. If you have answered yes above, please give details of the type of assistance you have had.

d. What issues should WIPO take note of to improve the implementation of technical assistance programs in the area of traditional knowledge?

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