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Editorial

The *Indian Journal of Politics and International Relations* (IJPAIR) enters the third year of its publication in 2010. The four issues of the last two volumes covered a wide range of themes that cut cross the traditional disciplinary boundary of Social Sciences and offered critical insights on a variety of subjects having contemporary relevance. The responses to the papers already published are extremely encouraging and we move ahead with profound confidence and commitment. In this third year, we are glad to offer combined issues of the third volume with a special focus on Intellectual Property Rights (IPR).

Needless to say, IPR has become one of the crucial issues of concern in contemporary international relations. Central to such a concern has been the level of protection sought/contested on the rights rendered in recognition of the intellectual input/creativity underlying an invention or an artistic expression. The debate over IPR has acquired an all-pervasive dimension in the wake of the TRIPs agreement, with the WTO at its centre. The new IPR regime that has come into being seems to have vital linkages with the revolution in the New Generic Technologies (NGT), Information and Communication Technology (ICT) and Biotechnology (BT) in particular. The New Generic Technologies, by virtue of being capital and research intensive in nature together with their monopoly control by Transnational Corporations, seem to have ushered in a new era characterised by new forms of hegemony and control, with far-reaching implications for developing countries. In that sense, the new IPR regime with its extended scope and reach has not only introduced new dimensions to the development debate, but seems to be shaping the nature and direction of contemporary international relations as well.

The New Generic Technologies, with their generic nature, are capable of redefining not only industrial growth and economic development, but fundamental social transformation as well. Of late, the world increasingly characterised by the international exchange of information, technologies and creative goods and services. In this environment, it is widely argued, the economic value of products, services and technologies is primarily a function of the creativity that goes into them and how they apply to market needs. A crucial component of this process is that, while the focus of competition shifts increasingly toward invention and innovation, the cost of many creative activities rises even as it is becoming much easier to copy them. In this context, the international protection of Intellectual

Property Rights (IPR) forms a core component of the advancing global regulatory framework.

Historically, Intellectual Property Rights were governed by various international conventions such as the Paris Convention, Berne Convention, Universal Copyright Convention, etc… However, all such proprietary rights have now been brought under the purview of WTO, with a strong enforcement mechanism. Meanwhile, the nature and the scope of IPR have been widened with a view to enhancing maximum protection and control by the western countries. The various ministerial conferences of the WTO held since then seem to have strengthened the position of the holders of the proprietary rights rather than the developing countries. The enforcement mechanism also appears to be skewed in favour of the industrially and technologically advanced western countries. Institutionalisation of IPR through TRIPs has given a new twist to the entire development debate, especially on its implications for social development. Developing countries consider technological advancement as a means of economic development, which, in turn, needs to stimulate social development. Several perspectives have emerged over the primacy of public domain over private and vice versa, both in developed and developing societies. Invariably, an in-depth examination of IPR with its emphasis on emerging patent regime and its implications for biodiversity and India appears to be in order.

Discussing the long-term implications of the new IPR regime, Prabhat Patnaik argues that the "uniform adoption of a twenty-year patent life is without any rationale and constitutes an arbitrary imposition." He says that it is "an attempt to establish the monopoly position of the MNCs in Third World markets against the latter's bid to develop a degree of technological self-reliance. At the same time it is a means of extracting monopoly super-profits from hapless Third World consumers." Patnaik suggests that "to prevent these super-profits, the Third World State must, at the very least, claim the right to introduce compulsory licensing, not just in cases of working the patent without undertaking local production, but also in cases where it believes that "public interest" is being violated." Martin Khor and Chee Yoke Ling remind us that "the global harmonisation of IP laws (towards the standards and practices of developed countries), especially through the WTO, WIPO and bilateral/regional agreements, has contributed to the imbalances and the spread of conditions that make it more difficult for developing countries and their enterprises and institutions to compete." Gustavo Ghidini and Emanuela Arezzo argue that the protection of biodiversity and related traditional knowledge presents a conflict of interests between Northern (developed) and Southern (developing) countries of the World. Inevitably, the unequal bargaining power of the contracting parties leads to biased licensing schemes whereby indigenous communities are only rewarded for the biodiversity they provide but they are excluded from any participation whatsoever in the results of the researches conducted on it. Michael Blakeney and Paul Borja also deal with various issues related to the IPR regime with specific focus and case studies. The other essays in this volume would focus on questions relating to state, nationalism, caste etc.

India and the New Global Intellectual Property Rights Regime

Prabhat Patnaik

India had a Patents Act passed in 1970, after nearly two decades of prolonged and intense discussions, which was acknowledged by several scholars in the field as a model for the Third World. It provided only for process patents and not product patents, and for a patent life of seven years, which *inter alia* made possible the local manufacture of a number of drugs at relatively affordable prices. This Act was amended to become TRIPs-compatible. The amended Act provides for product patents and a patent life of twenty years, which virtually institutionalises the monopoly position of a handful of multinational corporations located in the advanced capitalist countries. Of special relevance in the Indian context is the fact that it institutionalises the monopoly position of a handful of drug multinationals to the detriment of the common people. To be sure, the amended Act that was actually passed was a much improved version over what was originally presented to Parliament, incorporating certain crucial provisions about compulsory licensing. But the fact that the amended Act nonetheless represents a retreat, that the introduction of product patents constitutes an enormous step backwards cannot be denied.

Similar legislation has been passed in other Third World countries as well. The fact that so many countries, which had no intentions whatsoever of amending their patents regimes that had served them well over the years, were cajoled into doing so through an international process that originally had not even figured in the agenda of world trade negotiations, underscores the remarkable strength that the MNCs have come to enjoy, of late, in world affairs. The behind-the-scenes manoeuvres leading up to the TRIPs agreement have been written about by one of the active participants in the process, a former executive of Monsanto named James C. Eynart. He revealed how an idea hatched by a few MNCs was successfully 'sold' first to the US administration, and through it subsequently to the world as a whole, reversing in crucial ways the trend towards breaking the global monopoly of the MNCs which had been ushered in by the decolonisation of the Third World.

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What makes this reversal particularly remarkable is the poverty of the intellectual justification for it. And that is the issue which is primarily addresed here. I would argue that there is no valid economic argument for the institutionalisation of intellectual property rights. Joseph Schumpeter, an ardent admirer of capitalism, who has been described, not inappropriately and by no means critically, as "the bourgeois Marx," provided an intellectual defence of capitalism precisely on the grounds that the system was based on 'innovations' which anybody with 'entrepreneurship' could undertake, even if he or she owned no capital, by obtaining credit from banks. He saw the 'entrepreneur' neither as a capitalist (capital was provided by the banks), nor as a risk-taker (that role *ipso facto* was played by the banks who provided the `capital'), but as a `leader', a person who could spot a profitable opportunity when others could not. Such profitable opportunities were provided by `innovations' (which he defined precisely as the carriers of such opportunities), since new processes, new products, and new `combinations' in general, created the scope for `profit-making' at the pre-existing prices. (`Profits' consisted precisely in what accrued to the `entrepreneurs' and were zero on the old combinations). Thus, as against Marx's perception that profits arose from `ownership', Schumpeter argued that profits arose from `leadership' and slipped out of the hands of a particular firm as others began imitating its innovation. What is more, since the leadership role did not inhere in one person or one family, new firms came up and old ones declined over time, so that even though society was marked by inequalities there was social mobility: some were always at the `top' but their identities kept changing.

I mention Schumpeter only to emphasise the fact that the technological dynamism of the system, in the eyes of the most persuasive intellectual defender of the system and the most cogent expositor of such dynamism, sprang from *innovations being liable to imitation without any restraint.* If profits were based on monopoly then Schumpeter would have lost the argument to the Marxists. But his argument precisely was that profits were not based on monopoly and did not require monopoly. And he produced an enormous amount of evidence in his monumental two-volume study *Business Cycles*, which was supposed to be a "theoretical, statistical, and historical" analysis, to demonstrate that profits were not based on, and did not require, monopoly and exclusion.

Of course patents had existed prior to Schumpeter's study and he was not unaware of them. But he drew a distinction between `invention' and `innovation'. If an inventor patents an `invention' and sells it to an `entrepreneur', then he or she in effect is getting a part of the `profit" (or its capitalised value), in the same way as the bank which gives credit to the entrepreneur gets a part of the profit in

the form of interest earning. Schumpeter referred to interest as "a tax on profit"; likewise we can define the proceeds of the sale of patent by an inventor to an entrepreneur as the present value of a discounted stream of "taxes on profits." *But this has nothing to with, and does not require, any monopoly position on the part of the innovator.* Schumpeter therefore was logically consistent in portraying capitalism as excluding `exclusion' despite the known presence of patents.

The current discussion of intellectual property rights is concerned with the exclusion of imitation of an innovation for which there is no theoretical justification in the classic exposition of innovativeness under capitalism.

Those who defend intellectual property rights in their current sense would argue that the nature of the innovation process has changed. Innovations today are not based on the inventions of some brilliant maverick scientists working in splendid isolation, surrounded at best by a group of doting students, but upon the expenditure of enormous amounts of money which the firms themselves undertake. Expenditure on research will not be undertaken unless it yields a certain rate of return via the profits it generates when its outcome is incorporated into the production process, as an innovation. If it did not yield that rate of return then it would not be undertaken; and if it is not undertaken there will be no technical progress.

To earn that rate of return, however, the firm must have the privilege of temporarily excluding competitors. If an innovation gets quickly imitated, if the additional profits generated by it slip through the fingers of the innovator with extraordinary rapidity, then this rate of return will never be earned. Every firm would prefer to be an imitator rather than an innovator, waiting for the other firms to do the innovating. And since every firm would act in this way, the rate of technical progress will atrophy. It follows that to keep up the rate of technical progress, to maintain a high tempo of innovations, which is actually socially desirable, firms must be allowed to earn a certain rate of profit in the event of their carrying out an innovation, and this requires exclusion of rivals from imitating them for a certain period, i.e. intellectual property rights.

There is a secondary argument added to it. Even if it is the case that a firm's "best guess" is that it may earn the desired rate of return even in the absence of the `exclusion' of rivals for a certain period from imitating it, it cannot be sure. Hence there is a risk associated with undertaking an innovation based on research financed by the firm; and this would deter the firm from such research. This argument is really not very different from the first one, and we can lump the two together by saying that the firm would undertake research only if its risk-adjusted rate of return exceeds what it considers adequate. And to ensure this, a period of exclusion of rivals should be built into the legal system of each and every country.

The problem with this argument however is that it implicitly assumes not only that imitation entails no lags, but also that it is costless. Typically, however, even imitation requires substantial expenditure on research. Innovation and imitation both require the maintenance of substantial research establishments. Now, if all firms in an industry are maintaining such substantial research establishments, then the "free rider" argument ceases to hold. Not to innovate but to wait until some other firm has done so and then to imitate that firm's innovation, ceases to be a superior strategy from the point of view of profitability.

Let me put the matter differently. The conventional argument for an intellectual property rights regime can be expressed as follows. Suppose there is an industry with two firms. In the absence of intellectual property rights, the pay-offs to the firms from innovation would be the following. If both innovate, then given the costs of research, each gets a negative return; if one innovates and the other imitates then the innovator gets a negative return while the imitator gets a positive return, while if neither innovates then each gets a zero return. With each firm following a `maximin' strategy, the equilibrium in such an industry would entail that neither firm innovates. But this is in the absence of `exclusion.' If exclusion is ensured through a property rights regime then the optimal (maximin) strategy for each firm, under reasonable assumptions, would be to innovate. Hence it follows that an intellectual property rights regime is good for progress and humanity.

Against this conventional argument, however, if we assume that the costs of innovation and imitation hardly differ, or, more realistically, that they cannot be separated, then it would be unwise, even meaningless, for a firm to be a pure imitator, whether or not there is an intellectual property rights regime.

Of course it may be argued against this that under the pre-TRIPs system, with metropolitan firms innovating and third world firms imitating, it can hardly be claimed that the costs of innovation and of imitation were either similar or indistinguishable. But the imitation by third world firms pertained to only a small subset of the products innovated by the metropolitan firms, and they competed only in a small segment of the markets occupied by the metropolitan firms. The latter's inducement to innovate could hardly be said to have been dampened by such competition; and in any case no evidence of such dampening has ever been adduced to justify an intellectual property rights regime of the sort that came with the WTO. On the contrary, the computer industry, both its hardware and software sides, provides a classic example of how innovations are stimulated, rather than dampened, in a regime of fierce competition as opposed to a regime of monopoly of the sort engendered by the TRIPS.

It follows then that the basic argument advanced in favour of an intellectual property rights regime is not only without any substantial empirical support but is even theoretically untenable.

Let us, for argument's sake however, accept for a moment the proposition that innovations require a regime of intellectual property rights. The reason, to recapitulate, has to do with the fact that firms need a certain rate of return net of risks to induce them to undertake the substantial expenditure needed for research that can eventually result in innovation; and that exclusion of the possibility of imitation for a certain number of years is a means of providing them this rate of return.

Clearly, however, the length of the required period of exclusion would depend upon three factors: the required rate of return for undertaking innovation expenditure; the additional profit per unit period promised by an innovation; and the magnitude of innovation expenditure that has to be undertaken for realising it. In particular, the required rate of return can be achieved less quickly in a situation where price controls keep the increase in profit margins on account of innovations limited, compared to one where there are no such controls. Thus, the required length of the patent, even assuming that patents are necessary, *is a variable depending upon a host of other factors.* The uniform adoption of a twenty-year patent life is without any rationale and constitutes an arbitrary imposition. To claim that there is something sacrosanct about it is intellectually indefensible. It is an attempt to establish the monopoly position of the MNCs in Third World markets against the latter's bid to develop a degree of technological self-reliance. At the same time it is a means of extracting monopoly super-profits from hapless Third World consumers.

To prevent these super-profits, the Third World State must, at the very least, claim the right to introduce compulsory licensing, not just in cases of working the patent without undertaking local production, but also in cases where it believes that "public interest" is being violated, e.g. where exorbitant prices are being charged by the patentee on locally produced output itself. The amended Indian Patents Act is rather ambiguous on this score. It will be of immense benefit to the people if we can suggest ways of minimising the adverse consequences for them of the new patent regime, given the fact that we have willy-nilly introduced such a regime.

Intellectual Property and Development:
Issues and Challenges in Formulating and Implementing a National IP Strategy

Martin Khor and Chee Yoke Ling

For a developing country with technological and production potential, two core elements when formulating an intellectual property (IP) strategy are *innovation* and *competitiveness*. This paper focuses on patents, although the general observations on the role of intellectual property are applicable for other types of claims.

The first core element in the protection of intellectual property is the encouragement of research and innovation. An appropriate IP system should not establish monopoly rights for foreign firms, institutions and individuals in such a way that prevents domestic firms and individuals from innovating. Neither should an IP system create monopolies or oligopolies for local firms and individuals that would be against the public interest (including consumer welfare, the competition from other producers, and national development prospects).

Patents held by foreigners means that there is a big outflow of profits in the form of royalties and licensing fees. This could create problems for domestic innovation, production and competitiveness. This brings us to the second core element: competitiveness. In a market economy, competition is seen by most as generally important and indeed essential to curb market distortions, induce efficiency in use of resources, prevent monopoly or oligopoly, maintain prices at fair levels, as low as possible, prevent excessive or monopoly profits and promote consumer interests and welfare. A challenge for developing countries is to maintain competitiveness. This is important because agriculture and industrial tariffs in most developing countries are already quite low. Therefore the main way forward is to increase the competitiveness of domestic firms and enterprises through enhanced support for innovations.

There is also a need to distinguish between different forms of intellectual property rights (IPRs). The term "intellectual property rights" which is now commonly used assumes that all IPRs are `private' IPRs. Thus those who advocate for stronger protection of IPRs are in effect seeking for more private IPRs. This is, however, challenged by some economists. There are many pieces of knowledge

that are publicly or communally owned, and therefore subject to different rules (Chang 2001). For countries that conduct considerable public research, this is an important consideration in formulating a national IP strategy.

The view that private IPRs are an essential part of a market system was not necessarily the dominant view at all times in all countries. There are historical and locational specificities on what can be owned and what cannot be owned (Chang 2001). In current times, there are thus differences between developed and developing countries that shape the appropriate IP strategy for a country. More than 90 per cent of world patents are now held by developed countries. The World Bank estimated that the obligations on developing countries to implement the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) will result in increased payments by such countries of US$60 billion a year (Finger 2002). Patent ownership by essentially foreign parties, with the majority of patents in a country held by foreigners can have a negative impact for domestic innovations, and on consumer prices for essential products such as medicines and food.

Therefore, respect for IPRs needs to be in accordance with the level of development of a country, and that level of development should primarily be measured by per capita income. In that regard, it is useful to examine what other countries did, when they developing and what their corresponding optimal levels of intellectual property protection were at that time. For example, the Swiss chemical and pharmaceutical industries achieved their successes in the nineteenth and twentieth centuries because of the refusal to grant patents on chemical substances until 1978.

The balance that developed countries (when they were developing) struck between IP protection and the development of their respective domestic industries and manufacturing sectors offers lessons for developing countries today. With new and emerging technologies being applied to biological resources, the patenting of genetic resources has become another area of controversy.

This paper outlines some of the issues and challenges in formulating and implementing a national IP strategy. We suggest that an optimal level of IP protection would be one that promotes domestic innovation and maintains competitiveness at a level where there can be sustained development for a country as a whole, thus raising per capita income and standards of living for the people at large. With this as the basic philosophy of a national IP strategy, we then suggest some policies and measures to reach that optimal level of IP protection.

IPRs, Monopoly and Competition, and the Public Interest

There are inherent tensions between IPRs and competition. In a market economy, competition is seen by most as generally important and indeed essential to curb

market distortions, induce efficiency in use of resources, prevent monopoly or oligopoly, maintain prices at fair levels, as low as possible, prevent excessive or monopoly profits and promote consumer interests and welfare.

An IPR is seen by many as a *privilege* granted by the State in recognition of the need of the holder to recoup costs incurred in the research and innovation process, so as to maintain incentives for further innovation. Thus an IP entails an exclusive right for a limited time, enabling the holder to charge a higher price than the marginal cost of production. That higher price reduces access of consumers to the product, and access of other producers to production inputs and methods. The monopoly granted prevents or deters competition from rivals that can sell as lower prices. These are costs that are seen to be short-term (since the exclusive right is of limited duration), but which are supposed to be outweighed by the long-term benefits brought about by the innovation which IPRs encourage. As noted by the Commission on Intellectual Property Rights1 (CIPR 2002: 15),

> the optimal degree of protection (where social benefits are judged to exceed social costs) will also vary widely by product and sector and will be linked to variations in demand, market structures, R&D costs and the nature of the innovative process. In practice IPR regimes cannot be tailored so precisely and therefore the level of protection afforded in practice is necessarily a compromise. Striking the wrong compromise – whether too much or too little – may be costly to society, especially in the longer term.

There is thus a balancing required between the monopoly privilege granted to the IP holder and the public interest (including consumer welfare, the competition from other producers, and national development prospects). The appropriate balance requires the right policies that enable that IPs be appropriately given for correct reasons and to the correct parties, and that they be of an appropriate period, and that flexibilities and exemptions and exclusions are provided to safeguard vital public interests. If the balance is tilted excessively to the IP holder, then one consequence is that the IP facilitates a stream of monopoly profits beyond what is justified for recovering the costs of innovation, and society bears the costs unreasonably. These may include prevention of access to goods and services (including essentials such as medicines, food and information, and important inputs for production), curbing of industrial development, an overall reduction in competition and its benefits for resource allocation, and a monopolisation in products, sectors or the economy as a whole.

For developing countries, in particular, it is thus important that the standards of IPs be appropriate, that there be adequate exclusions and flexibilities, and that the framework enables IPs to be awarded appropriately for the right inventions and to the right parties, and that there be sufficient provisions policies and legal provisions that counter abuse of IP privileges when they occur.

Shifting of the Balance between IP, Monopoly and Development

There are benefits to be derived from an appropriately designed and implemented IP strategy geared to the public interests and to development needs, that takes account of the factors requiring balancing, and that attains the right balance. However, when the strategy is inappropriately designed, or when the proper balance is not struck, there can be adverse effects of IPs on domestic innovation, competition, the public welfare and development requirements. As described above, when many developed countries themselves were industrialising, they had little or no constraints on their domestic policy space to design their own IP systems. The Paris (industrial property) and Berne (literary and artistic works) Conventions which were first forged 120 years ago, maintained the flexibilities of member countries. For example, the Paris Convention allows exemptions of fields of technologies, the determination of the period of patent protection by each country and compulsory licensing, among many tools.

Due to the TRIPs Agreement, several flexibilities that countries had in their IP policies have been narrowed. For example, TRIPs mandates that national treatment be provided for patents and patent applications; patents have to be given for both products and processes, and there cannot be different treatment on a sectoral basis. This has affected many developing countries that had previously excluded from patentability certain sectors (such as medicines, food and chemicals) or certain categories (especially product patents in medicines). TRIPs sets minimum standards for a wide range of IPs that are mandatory to implement. Many analysts have concluded that TRIPs has very significantly tilted the balance in favour of IPRs holders, most of whom are in developed countries, vis-à-vis consumers and local producers in developing countries and vis-à-vis development interests.[2]

Recent trends in major developed countries have shifted the balance further in favour of IPRs holders. A study (Jaffe and Lerner 2004) analyses the developments in the US patent system and their effects. In the early 1980s, the judicial appeal system for patent cases in the federal courts was changed so that the appeals were all heard by a specialised appeals court; and in the early 1990s the structure of fees and financing of he US Patent and Trademark Office was changed so that costs of operations were covered by patent application fees. These two developments resulted in significant changes to the US patent practice. The new appeals court interpreted patent law to make it easier to get patents, to enforce patents against others and obtain large financial awards from such enforcement, and harder for those accused of patent infringement to challenge the patents' validity.

The results are that: (a) The new orientation of the patent office combined with the court's legal interpretations make it much easier to get patents. Patents on inventions that are trivially obvious, such as the process of making a particular type of sandwich, or a method for swinging on a swing, are being given; (b) Patents have become weapons for firms to harass its competitors; (c) Patents have enabled companies to win huge damages awards and put rivals out of business; (d) Patent approvals are extended to new areas including purported discoveries that are actually familiar, such as patents on previously well-known option pricing formulas (Jaffe and Lerner 2004: 2-3). While some innovators who obtain the patents are rewarded, the activities of many others who are competitors are inhibited or even stopped, including their potential innovation activities. Three important reports from US agencies have each recommended that the US establish a new system for post-grant patent review to provide a rapid, effective and less expensive forum for validity challenges. These are the USPTO report entiled "Post-grant Review of patent Claims" (http://www.uspto.gov/web/offices/com/strat21/action/sr2.htm), the Federal Trade Commission report entitled "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" http://www.ftc.gov/os/2003/10/innovationrpt.pdf) and the National Academy of Sciences report entitled "A Patent System for the 21st Century" http://newton.nap.edu/html/patentsystem/).

The FTC report stated that poor patent quality and legal standards and procedures that inadvertently may have anti-competitive effects can cause unwarranted market power and can unjustifiably increase costs (USPTO (nd.) FTC (2003) NAS (2004). At the same time, according to the National Academy of Sciences report, the sheer volume of applications to the U.S. Patent and Trademark Office—more than 300,000 a year—threatens to overwhelm the patent examination corps, degrading the quality of their work or creating a huge backlog of pending cases, or both. The costs of acquiring patents, promoting or securing licenses to patented technology, and defending against infringement allegations in court are rising rapidly. The benefits of patents in stimulating innovation appear to be highly variable across technologies and industries, but there has been little systematic investigation of the differences. In some cases patenting appears to have departed from its traditional role, as firms build large portfolios to gain access to others' technologies and reduce their vulnerability to litigation (NAS 2004).

Meanwhile, IP policy and practice in developed countries have been exported to the rest of the world through international harmonisation programmes and treaties. The TRIPS Agreement is the best example of these. The agreement was mainly prompted by and even designed by representatives of certain industries in developed countries, which succeeded in getting their governments to

successfully advocate their cause in the Uruguay Round, overcoming the initial strong resistance of many developing countries (This is well documented, for example in Raghavan 1990, Drahos 2003 and Sell 2003). At the conclusion of the Uruguay Round of trade negotiations, the pharmaceutical corporation Pfizer paid for a full page advertorial in *The Economist* magazine, celebrating the successful conclusion of the TRIPS Agreement. The article explained how the industry organisations successfully lobbied the US, European and Japanese governments to include IPRs into the trade agenda.

The World Intellectual Property Organisation (WIPO) has also been an active forum for IP harmonisation, for example through its 1996 Copyright Treaty. The current negotiations for possible new treaties relating to patents and to broadcasting are other examples. In fact, WIPO has become a more active forum for negotiations for new treaties aimed at harmonisation of IP systems and rules than the WTO. If current patent harmonisation negotiations proceed along the lines advocated by the developed countries in the substantive patent law treaty process, there is a strong possibility that the results of recent developments in the major countries (such as the relaxing of criteria of patentability and the much easier granting of patents) will be disseminated to the rest of the world. There is thus a danger that what many analysts consider a dysfunctional system will be disseminated to developing countries.

Bilateral and regional agreements, that involve developed countries with developing countries, are other channels through which new aspects of IP are being transferred to developing countries. Many of these arrangements have TRIPS-plus provisions, requiring the parties to undertake obligations that narrow their policy space to choose between options. For example, they may contain conditions for compulsory licensing that are more restrictive that that permitted under TRIPS, or that require parties to commit to a provision on data exclusivity preventing the use of test data in the drug approval process relating to generic drugs, that is not required by TRIPS.

The Situation of Developing Countries and the Development Context

The models and practices that serve as the basis for harmonisation are generally tilted in favour of IP holders, with serious implications also for innovation and competition. When they are transferred to developing countries, so too are the imbalances. However, the effects on developing countries are even more serious, as there are systemic reasons why upward harmonisation towards developed countries' IP standards are inappropriate and damaging for most developing countries.

The overwhelming share of patents in developing countries are held by foreigners, and thus most of the commercial benefits of IP accrue to these foreign institutions. There are large and growing patent rents transferred from developing to developing countries. Since the patents are owned by foreigners, local researchers and enterprises are blocked or restricted in their use of the patented materials. Local industries will also find it difficult or impossible to produce similar products as those patented. In terms of the effect on competition, the situation confers monopoly rights on foreigners, and local enterprises are placed in a situation in which they face high or even insurmountable obstacles to compete. Those local firms are often unable to develop as the IPs in their own territory are owned by foreigners.The kind of reverse engineering undertaken by today's now-developed countries during their development phase, or by industrially successful developing countries such as South Korea, when they did not have to adhere to the TRIPS agreement's high IP standards, will be extremely difficult or impossible to undertake today (See, for example, Chang 2001 on this point).

Moreover, whilst developed countries may have instruments within their IP system or outside of it (for example in anti-trust regulation and competition law) to curb anti-competitive practices and other abuses by IP holders, most developing countries lack the capacity to have or use similar instruments. In other words, the anti-competitive effects of high IP standards in developing countries are serious, and may become even worse if these countries lose even policy space for using existing flexibilities due to further "upward harmonization" through new international treaties or through bilateral and regional trade and economic agreements.

Studies show the high extent of costs incurred by developing countries. The former chief of trade policy research in the World Bank, Michael Finger (2002), estimates that the obligations on developing countries to implement TRIPS will result in increased payments by them of US$60 billion a year. A report by the World Bank (2002) estimates that the net annual increase in patent rents resulting from TRIPS for the top six developed countries in this field will be US$41 billion (with the top beneficiaries being the US with US$19 billion, Germany US$6.8 billion, Japan US$5.7 billion, France US$3.3 billion, UK US$3 billion and Switzerland US$2 billion). Developing countries that will incur major annual net losses include South Korea (US$15.3 billion), China (US$5.1 billion), Mexico (US$2.6 billion), India (US$903 million) and Brazil (US$530 million).

Weisbrot and Baker (2002) argue that the World Bank's patent rents estimates, already high enough, significantly understate the actual costs to developing countries, as these only measure the direct outflow of patent rents from these

countries. In addition there are economic distortions as the IP protection causes goods to sell at prices far above their marginal costs, thus giving rise to "deadweight costs." Citing other studies, they estimate the deadweight costs to be twice the size of the estimated patent rents.

In addition, there are costs for administering and enforcing IP laws and policies, requiring law reform, enforcement agencies and legal expertise. According to Finger (2002), World Bank project experience indicates that it will cost a developing country US$150 million to get up to speed on three new WTO areas (IPRs, SPS and customs valuation). He notes that this amount is more than a full year's development budget in many LDCs.

Many analysts believe the developing countries received a bad deal in accepting TRIPS in the Uruguay Round. "Through TRIPS developing countries took on as legal obligation a cost of US$60 billion per year, but there is no legal obligation in the agreement on any Member to provide anything in exchange" (Finger 2002: 11). Finger adds that the Uruguay Round 'grand bargain' was that developing countries would take on obligations in the new areas and in exchange developed countries would provide better access to their markets, particularly on agricultural products and on textiles and clothing. He concludes that compared with the outcome of the market access negotiations, the TRIPS amounts (i.e. net rents) are big money. The US obtained 13 times more benefit from annual patent rents arising from TRIPS than from liberalisation of industrial tariffs with Germany, France and UK gaining 3.6 times more. Conversely, the loss from TRIPS obligation is 18 times greater for Korea than gains from Uruguay Round tariff liberalisation, and the costs outweigh benefits 7 times for Mexico and 4.7 times for China.

Well-known trade economists who advocate free trade have also written harshly on the imbalances of TRIPS and the adverse effects on competition caused by the upward harmonisation of IP standards induced by TRIPS. Jagdish Bhagwati (2001), professor of economics at Columbia University, in a letter to the *Financial Times,* argued that the WTO must be about mutual gains in trade whereas IP protection is a tax on poor countries' use of knowledge, constituting a wealth transfer to the rich countries. "We were turning the WTO, thanks to powerful lobbies, into a royalty-collecting agency by pretending, through continuous propaganda that our media bought into, that somehow the question was 'trade related.' He advocated that the TRIPS agreement be removed from the WTO.

T.N. Srinivasan (2000), professor of economics at Yale University, also advocates taking TRIPS out of WTO altogether or at least renegotiating some of its provisions. The arguments put forward as benefits to developing countries of high IP standards are that this would encourage local innovation, and foreign enterprises would be more willing to transfer technology and to invest.

> These a priori arguments are based on the premises that first IPR protection of the type imposed by TRIPS is needed to encourage innovation and second that foreign enterprises place a significant weight on the strength of IPR protection regime. The theoretical justification for and even more importantly the empirical evidence in support of both these premises is not at all strong….It would appear that patent protection as a spur to innovation does not appear to be powerful in the real world. And the cost to the general public of restricting access to new technology through patenting may be high.

In relation to balance of gains and losses and to the effect on competition, Srinivasan states:

> Most of the gainers from TRIPS are in rich developed countries and only a few, if any, in poor countries. This being the case, even if gains outweigh losses, international transfers would be needed to compensate losers. No such transfers from gainers to losers are envisaged as part of TRIPS. Besides, TRIPS, unlike tariff reductions, involves the creation or strengthening of the monopoly position of developed country producers in the markets of poor countries. Thus, TRIPS creates a distortion of monopoly in developing countries, the rents from which accrue to the rich. Besides, any acceleration of innovative activity, which is the only rationale for granting monopoly rights, if it comes about at all, will take place mostly in rich countries. Whether some of the benefits from any acceleration of innovation in the rest of the world will accrue to poor countries is arguable. In any case the benefits, if any, are uncertain and in the future, but the costs to developing countries are concrete and at the present.

Experiences of Developed Countries

Most countries that are now developed established their patent laws between 1790 and 1850. They established other parts of their IP system, such as copyright laws and trademark laws in the second half of the nineteenth century. All of these systems were highly `deficient' by the standards of our time (Chang 2001). Few of these countries allowed patents on chemical and pharmaceutical substances (as opposed to processes) and this continued in many countries until the later part of the twentieth century.

Numerous examples are cited by economist Ha-Joon Chang. For example, patents on chemical substances were allowed only in 1967 in West Germany, 1968 in the Nordic countries, 1976 in Japan, 1978 in Switzerland, and 1992 in Spain. Pharmaceutical products were patentable only in 1967 in West Germany and France, 1979 in Italy and 1992 in Spain (Chang 2001:7). A very relevant feature of the laws of many of those countries at that stage of their development was that the IPRs of foreign citizens were given very inadequate protection. For example, many of the patent laws were very lax on checking the originality of the invention,

and in most countries the patenting of imported invention by their nationals was often explicitly allowed (Britain, the Netherlands, Austria and France).

Until 1836, the patent law of the US did not require proof of originality in granting a patent, thus imported technologies were allowed to be patented by US citizens. The Netherlands abolished its patent law in 1869, in part due to the widespread anti-patent movements in Europe at that time. This movement condemned patents as being no different from other monopolistic practices. The case of Switzerland is well studied and offers useful insights. Chang cites a study by Schiff (1971), which concluded that in the late 19th century, despite the lack of a patent law, the Swiss were one of the most innovative people in the world. There was no evidence that the absence of a patent system worked as a deterrent to foreign direct investment. The absence of a patent law, on balance, actually helped the country's industrial development, especially in the dye, chemical and electro-technical sectors (Chang 2001: 17).

Until 1888 there was no patent law in Switzerland. Even then, the law was limited to protecting only mechanical inventions. A group of experts commissioned by the Federal Council of Switzerland declared in 1883 that modern developments in chemistry constituted "discoveries" and were therefore not patentable. In the same year, eleven leaders of Swiss industry expressed their hope "in the interest of the general welfare of our industries and commercial enterprises," that "the 'cup of sorrow' of patented protection might pass from us untouched." This statement was signed by among others, Benziger, Buhler, Geigy, Jenny, Rieter, Steiger, Schwarzenbach and Ziegler (Gerster 2001). Steiger, the textile manufacturer said at that time that "Swiss industrial development was fostered by the absence of patent protection. If patent protection had been in effect, neither the textile industry nor the machine-building industry could have laid the foundations for subsequent development, nor would they have flourished as they did."

A new law was made in 1907 but this still had many exclusions. Thus Swiss industries were free to copy foreign inventions without restrictions. When accused by the German Reichstag of being a "pirate state" and a "predator state" for copying products such as aspirin and heroin without permission, leading manufacturer Benziger said: "Our industries owe their current state of development to what we have borrowed from foreign countries. If that constitutes theft, then all our manufacturers are thieves" (cited in Gerster 2001: 7).

In particular, the Swiss chemical and pharmaceutical industries achieved their successes in the nineteenth and twentieth centuries because of the refusal to grant patents on chemical substances until 1978. The balance that developed countries (when they were developing) struck between IP protection and the development of their respective domestic industries and manufacturing sectors offers lessons

for developing countries today. An optimal level of IP protection would be one that promotes innovation and maintains competitiveness at a level where there can be sustained development for the country as a whole, raising per capita income and standards of living.

If this is the basic philosophy of a national strategy, then a system should be devised that ensures quality and appropriate patents. In the granting of a patent, there should be avoidance of broad or frivolous patents. The three classical criteria of patentability (inventive step, novelty and industrial applicability) need to be defined in an appropriate manner under national patent law. Developing countries must take care to avoid ending up with a "dysfunctional" IP system as the US system is now described (Jaffe and Lerner, 2004).

Effects of IPRs on Development Priorities

As earlier stated, a proper balance is required between the monopoly granted to IP holders and the needs of the public to use the inventions. The upward harmonisation of IP standards has shifted the balance adversely for the public interest and for development needs in developing countries. Recent developments in developed countries have also tilted the balance much more towards the IP holders. There have been adverse effects and below are examples of the effects of patents, and one example of copyright.

The monopoly provided by patents enables the patent holder to block or otherwise discourage rival firms entering the market, or even in some cases to undertake reseach and innovation. This may be justified if the patents are given correctly, and for the right duration, and moreover if the IP holder does not abuse his right (for example by harassing competitors).

The trend in some developed countries in relaxing the criteria, standards or practice of granting patents, and the practice of some companies owning patents in harassing rivals is increasing the anti-competitive effects of IPs. The study by Jaffe and Lerner (2004) provides useful insights. The number of patents in the US tripled from 1983 to 2002 (from 62,000 to 177,000), accompanied by a proliferation of patent awards of dubious merit, for example "inventions" that are not new or are trivially obvious.[3] There has also been a corresponding explosion in patent lawsuits.

One recent trend is that an established firm with many patents demands rivals to take out licenses to its patents and many of the rivals choose to settle rather than fight (even if they do not believe they infringe) as they do not have the means to fight expensive cases. Many large companies engage in this patent enforcement activities as a line of business; for example, Texas Instruments is netting almost US$1 billion annually from patent licenses and court settlements due to an aggressive enforcement policy, and in some years this source of revenue has

exceeded net income from product sales. Besides paying royalties, the small firms may reduce their R and D investment, shying away from innovations in areas where big firms have patents. Thus, the effect is the suppression of innovation by younger and smaller firms, and the reduction of competition in the market.

A second trend is the emergence of individual inventors who hold up established firms. The individuals have been granted patents of dubious validity, with overly broad claims. The established firms often choose to settle rather than face the uncertainty of a court case.

One example of a `trivial' patent affecting competition is the case of giant jam and jelly maker J.M. Smucker (which holds a patent for a "sealed crustless sandwich" with fillings in between pieces of bread) threatening to sue Albie's Food, a small grocery in Michigan state (US) for selling crustless peanut butter and jelly sandwiches. The case went to the federal court, with Albie arguing that this type of sandwich had been popular in Michigan since the nineteenth century. Eventually the two parties reached a settlement. Other examples of dubious patents are "method for exercising a cat" and "method of swinging on a swing."

According to Jaffe and Lerner (2004: 34-35), the US Patent Office has become so overtaxed and its incentives so skewed to granting patents that the tests for novelty and non-obviousness (to ensure only true inventors get patents) have become largely non-operative. Simultaneously, changes in the court system have made patents more powerful legal weapons than they used to be, with a patentee more likely to win an infringement suit against a broader array of possible infringers than before. "The result has been a dangerous and expensive arms race, which now undermines rather than fosters the crucial process of technological innovation."

Jaffe and Lerner propose that the way to get the system back on track is to restructure the incentives of all the parties (patent office, potential applicants, other inventors, and patentees) to reduce the flow of applications, improve the rigor of examination and reduce the incentive to use patent litigation as a competitive weapon. It has also been argued that higher standards of IP can lead to transfer of technology as foreign firms would be encouraged to invest in developing countries and make use of their technologies. However, there is also a counter-argument that foreign firms that have obtained patents in developing countries are able to make inroads and profits in these countries without having to produce the patented products there, as they can import the products and sell them at monopoly prices. On the other hand, there are several ways in which a strong IPR regime can hinder access of developing countries to technology (Khor 2002: 87-101). Obstacles to technology transfer make it difficult for developing countries

and their firms to upgrade productivity which is necessary for them to compete successfully. They thus impede competition and innovation.

First, a strict IPR regime can discourage research and innovation by locals in a developing country. Where most patents in the country are held by foreign inventors or corporations, local R&D can be stifled since the monopoly rights conferred by patents could restrict the research by local researchers. Strict IPR protection, by its apparent bias, may actually slow the pace of innovation in developing countries, and increase the knowledge gap between industrial and developing countries. In such situations, the IPR system favours those who are producers of proprietary knowledge, vesting them with greater bargaining powers over the users (Oh 2000). The CIPR report (2002: 126-130) also provides analysis and examples of how the patent system might inhibit research and innovation.

As pointed out by Gahuur Alam (1999) in reference to developing countries complying with the TRIPS Agreement:

> The proposed changes to the IPR policies of developing countries have raised a number of important issues. One of the most important of these is the likely impact of these changes on a developing country's ability to undertake research and development in agriculture. We are particularly concerned about the impact of a strong IPR system on research aimed at the development of new plant varieties and genetically engineered plants.

In relation to biotechnology reasearch, Gahuur states:

> The research in this area is completely dominated by firms in developed countries, while public sector research institutions (both international and national) are very weak. The adoption of an IPR system which includes patents for biotechnology based techniques and products will be extremely detrimental to local research. As our study of cotton and rice research in India has shown, most of the important techniques and genes used in the development of genetically engineered plants are already owned by firms in developed countries. As these patent rights are not applicable in developing countries, local researchers are able to undertake research on local problems. However, once these rights become applicable in developing countries, research and its commercialisation will face serious problems.

Secondly, a strict IPR regime makes it difficult for local firms or individual researchers from developing or making use of patented technology. Thirdly, should a local firm wish to "legally" make use of patented technology, it would usually have to pay significant amounts in royalty or license fees. As pointed out earlier, TRIPS increases the leverage of technology-suppliers to charge a higher price for their technology. Many firms in developing countries may not afford the cost. Even if they could, the additional high cost could make their products unviable. Moreover, there could be a large drain on a developing country's foreign exchange

from having to pay foreign IPR holders for the use of their technology. Many developing countries with serious debt problems will be unable to afford to pay the cost of using the technologies.

Fourthly, even if a local firm is willing to pay the commercial rate for the use of patented technology, the patent holder can withhold permission to the firm, or impose onerous conditions, thus making it impossible or extremely difficult for the technology to be used by the firm. Patent holders can refuse to grant permission to companies in the South to use the technologies, even if they are willing to pay market prices; or else the technologies may be made available at high prices (due to the monopoly enjoyed by the patent holders). Firms in the developing countries may not afford to pay at such prices, and if they do their competitiveness could be affected.

An example of IP hindering technology diffusion to developing countries was the experience of some Indian firms in trying to produce substitutes for chloroflourocarbons (CFCs), chemicals used in industrial processes as a coolant, that damage the atmosphere's ozone layer. Under the Montreal Protocol, countries have committed to phase out the use of CFCs and other ozone-damaging substances by certain target dates.

Under the Montreal Protocol, developed countries originally agreed to eliminate production and use of CFCs by the year 2000, whilst developing countries are given a ten-year grace period to do the same. A fund was set up to help developing countries meet the costs of implementing their phase-out, and the protocol's article 10 provides for technology transfer to developing countries. Each Party is obliged to take every practical step to ensure that the best available and environmentally safe substitutes and related technologies are expeditiously transferred to developing countries, under fair and most favourable conditions.

A study of the effect of IPRs on technology transfer in the case of India in the context of the Montreal Protocol has been conducted by Watal (1998). She points out that technology transfer provisions in the Montreal Protocol are particularly relevant for developing countries which are producers of ozone-depleting substances (ODS), such as India, Brazil, China, South Korea and Mexico. In India, Korea and China, such production is dominated by local-owned firms, for which the access to ozone-friendly technology on affordable terms has become a central issue of concern. The study concludes: "Efforts at acquiring substitute technology has not been successful as the technologies are covered by IPRs and are inaccessible either on account of the high price quoted by the technology suppliers and/or due to the conditions laid down by the suppliers. This would require domestically owned firms to give up their majority equity holding through joint ventures or to

agree to export restrictions in order to gain access to the alternative technology." Moreover, financial assistance to acquire the technology was also not effective.

The study also showed how the attempts by Indian companies to manufacture HFC 134a (an approved substitute for CFCs, used as a coolant in the refregerators and air-conditioners (RAC) were blocked by the foreign holder of the patents. Only a few companies in the developed countries control the patents and trade secrets related to HFC 134a, and thus developing countries either have to pay high royalty fees to produce them locally or lose the local and international markets for this alternative. One of the Indian companies that sought to access the technology was quoted a very high price of US$25 million by a transnational company that produces HFC 134a and that holds a patent on the technology. The supplier also proposed two alternatives to the sale, that the Indian firm allow the supplier to take majority ownership in a joint venture to be set up, or that the Indian firm agree to export restrictions on HFC 134a produced in India. Both options were unacceptable to the Indian company, whilst the quoted price was also unrealistically high as it was estimated that the technology fee should at most have been between US$2 to $8 million and not the quoted level.

Effects on Prices and Access to Essential Products

The monopoly rights granted to patent holders enables them to restrict competition and charge monopoly prices. Proponents of IP point to the need for innovators to recoup the cost of research, and thus a mark up on normal profits is needed. However, critics claim that in some cases the balance is tilted in favour of the patent holders, who make excessive or even exorbitant profits by over-charging consumers excessively high prices, even after taking account of the need to recoup research costs. In order for policy makers to be able to judge whether the balance is struck, or how far it has been missed, it is important to be able to obtain data on costs and prices from the companies that hold the patents.

In medicines, the effect of patent monopolies on prices is demonstrated by data that compare prices of patented/branded and generic products; the prices of the same product sold in different countries; and the prices of raw materials used in producing medicines in the open competitive market and in transfer-pricing practices of TNCs. The following are some conclusions.

(i) Prices of branded or patented products are often far higher than prices of generics. A comparison of HIV/AIDS medicines in 2001 show that the US price of 3TC (lamivudine) by Glaxo was USUS$3,271 per patient per year while the Indian generic producer Cipla's price was US$190. For viramune

(nevirapine), the branded product sold in the US for US$3,508 while the Cipla generic price was US$340 (Singh 2001).

(ii) When generic competition is introduced, prices of the patented product will fall. For example, the drug simvastatine was sold in branded version in Malaysia (where there was no generic competitor) for US$1050 per 100 units; in India the same brand was sold for US$18 as there was a generic competitor which sold for US$11 (Balasubramaniam 2002). In Brazil, when the government started producing generic versions of AIDS drugs, the prices of equivalent branded products dropped by 79 per cent (Médecins sans Frontières 2001).

(iii) When a drug company sells the same product in different countries, it differentiates the prices according to "what the market can bear." Where alternative or generic medicines are available, a branded product is usually priced lower; the same brand will sell at higher price levels in countries where there is no competition. The same brand zantac sold cheaply in India (US$2 for 100 tablets) because it faced generics competition. It sold at US$3 in Nepal, US$9 Bangladesh, US$30 Vietnam, US$37 Thailand, US$55 Malaysia, US$61 Sei Lanka, US$63 Philippines and US$183 Mongolia. It also sold at US$23 in Australia, US$77 Canada, US$196 Chile, US$132 El Salvador, US$150 South Africa and US$97 Tanzania (Health Action International 1998).

(iv) TNCs practice transfer pricing in the trade of raw materials used in the drugs, raising the cost of medicines in developing countries. A study in Pakistan found that TNCs exported raw materials to their subsidiaries in Pakistan at much higher prices than the prices of the same raw materials if purchased from the open international market at competitive rates. In the case of a dug produced by a German company, the price for raw materials charged to the company's subsidiary in Pakistan was US$11,092 per kg whereas the competitive international price was US$320, a price difference of 3,360 per cent. An Italian company charged its Pakistan subsidiary for raw materials at a price 7,044 per cent more than the international market price (Health Action International 1994).

(v) Some surveys show that drug companies can charge more in developing countries than in developed countries for the same branded products. For example, in 1998, retail prices of 10 out of 13 commonly used drugs were higher in Tanzania than in Canada; the average retail prices of 20 commonly used drugs in 10 countries of Central and South America were all higher than the average retail prices of the same drugs in 12 OCED countries (Health Action International 1998).

In the area of copyright, there is increasing concern that strict copyright laws can have an adverse impact on access to knowledge for educational purposes, especially in developing countries.

The Consumers International (Asia Pacific Office) conducted a study on 'Copyright and Access to Knowledge' which included a review of the copyright laws of 11 developing countries in Asia (Bhutan, Cambodia, China, India, Indonesia, Kazakhstan, Malaysia, Mongolia, Papua New Guinea, the Philippines and Thailand). The study was to determine to what extent these countries have made use of the flexibilities in three international copyright instruments (the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty) in their national copyright legislation.[4]

In the report published in February 2006 (www.ciroap.org/A2K), it was revealed that:

(a) The international instruments have progressively ratcheted upwards the scope of the works protected by copyright, the rights accorded to copyright owners and the duration of protection for copyright owners;
(b) All the 11 developing countries have not taken advantage of all the flexibilities available to them in the international treaties they signed and in fact, provide copyright owners far more rights than they need to under the treaties they signed;
(c) The WIPO draft laws on copyright do not provide for all the flexibilities available in the international treaties and is more restrictive of public access to knowledge.

The study looked at access to educational materials, because schools, universities and libraries need access to affordable teaching and learning materials in order to educate people. Consumers International contends that the copyright law of developing countries should provide for public access to educational materials where this is already permitted and that all available flexibilities in the international copyright instruments should be relied on to achieve this purpose. The study found that this has not happened in the 11 countries. Some of the flexibilities that were not used, or that were used in a limited manner, include: parallel import provision; power to deal with anti-competitive practices; inclusion of a general "fair use" provision; exceptions for teaching purposes; exceptions for quotations; uses in broadcasting.

IP, Biological Resources and Traditional Knowledge

An area of increasing concern over abuse of the patent system is in the patenting of biological resources and the misappropriation of these resources and associated

traditional knowledge. The patenting of biological resources (including marine, forest, micro-organisms, agricultural resources) can lead to monopolisation of these resources by corporations, mainly of developed countries, thereby affecting the competitiveness and research/innovation prospects of developing countries.

Article 27.3(b) of the TRIPS Agreement lacks clarity and scientific logic as to the rationale of differently treating categories of life forms and processes in relation to their possible exclusion from patentability. There is an artificial distinction made between plants and animals (which may be excluded) and micro-organisms (which may not be excluded); and also between "essentially biological" processes for making plants and animals (which may be excluded) and non-biological and microbiological processes (which may not be excluded).

TRIPS thus obliges WTO members to grant patents for micro-organisms and non-biological and micro-biological processes for the production of plants and animals. There is no reason why these have been singled out for patentability, whereas WTO Members are given the discretion to prohibit patents on plants and animals, and on biological processes.

By stipulating compulsory patenting of micro-organisms (which are natural living things) and microbiological processes (which are natural processes), the provisions of Article 27.3(b) contravene the basic tenets on which patent laws are based: that substances and processes that exist in nature are a discovery and not an invention and thus are not patentable. Moreover, by giving Members the option whether or not to exclude the patentability of plants and animals, Article 27.3(b) allows for life forms to be patented.

In recent years, there has been a great patent race among companies and institutions (mainly in developed countries) to obtain patents for genes, microorganisms and other biological substances. This "gene patent rush" was the subject of an investigation by GeneWatch UK and *The Guardian* (London), and the *Guardian* published a special report on *The Ethics of Genetics* on 15 November 2000. Using a comprehensive commercial database, its study covered the patents on DNA sequences (partial and complete gene sequences) in 40 patent authorities worldwide including the US, European, World, Japanese and German patent offices.

The investigation found that as of November 2000, patents were pending or had been granted on more than 500,000 genes and partial gene sequences in living organisms. Of these, there were over 9,000 patents pending or granted involving 161,195 whole or partial human genes in early November 2000. The remainder of the genes where patents are pending or granted are related to plants, animals and other organisms.

This "gene patent rush" indicates that the corporations believe they can make substantial profits from owning patents to genes and micro-organisms. However, people in developing countries are adversely affected. Most of the patents are to institutions in developed countries and they obtain the monopolies and the benefits. The granting of patents prevents developing countries not having the patents from making use of the patented materials. Moreover, many of the genes and micro-organisms may originate in developing countries, and thus "misappropriation" or biopiracy is taking place. Also, the genetic material may be inserted via vectors such as bacteria into plants and animals, and all these living things (the genetic material, the genetically-modified bacteria, and the genetically-modified plants and animals) may then be patented. The result is a concentration of ownership of patents and a concentration of the benefits from owning the patents in a few people or institutions, with detrimental effects on competition, innovation and on the social and economic situation (including food security and livelihood of farmers) especially in developing countries.

The Government of India recently submitted a summary of a 2004 report on biopiracy to the Secretariat of the Convention Biological Diversity at a recent negotiations session on an international regime on access and benefit sharing (30 January to 3 February 2006 in Granada, Spain).[5] Analytical work was conducted on misappropriation of genetic resources and associated traditional knowledge from India, by the National Institute of Science Communication and Information Resources (NISCAIR), India.

The Institute conducted detailed studies in the years 2000 and 2003 on misappropriation of genetic resources and associated traditional knowledge from India. The 2000 study covered patents granted at the US Patent and Trademark Office (USPTO). A broader 2003 study looked at patents granted at USPTO, the European Patent Office and the UK Patent and Trademark Office.

In the year 2000, there were 4869 references on 90 medicinal plants in the USPTO database of which 80 per cent of the references were on seven medicinal plants, i.e. Kumari, Mustaka, Tamraparna, Garjara, Atasi, Jambira, and Kharbuza. 408 references were available on Aloe vera for March 2000 alone. 762 patents on medicinal plants were studied, of which about 360 could be categorized as traditional. In the year 2003 there were more than 15000 references on 53 medicinal plants in USPTO, EPO databases and hence a threefold increase in the number of granted patents. In the year 2004 the study was carried out on 119 Priority Medicinal Plants for the number of granted patents, which further validated the fact that there were increasing numbers of biopiracy cases. In 2000 the number of patents granted at the USPTO for 119 Medicinal Plants was 17329. In 2002 there

was a 16.8 per cent increase to 20835 patents. In 2004, this further increased by another 13 per cent to 23956.

The study also revealed that Aloe vera has the maximum number of granted patents among them, with the figure of 1063 in 2000, 1458 in 2002 increasing to 1811 in 2004. Similarly, Cyperus rotundus had 872 granted patents in 2000, 924 in 2002, and 954 in 2004. In view of the above study, the Institute also carried out an illustrative study on patents granted on endemic plants from developing countries like China, India, South Africa, Mexico, Sri Lanka and Malaysia, searching the USPTO and EPO databases for possible cases of biopiracy. The study was carried out by studying the assignee/inventor's country and the original source of biological material.

Two examples of biopiracy in India were provided by the Institute's study and the extracts are as follows:

Turmeric (Curcuma longa Linn.) The rhizomes of turmeric are used as a spice for flavouring Indian cooking. It also has properties that make it an effective ingredient in medicines, cosmetics and as a colour dye. As a medicine, it has been traditionally used for centuries to heal wounds and rashes. In 1955, two expatriate Indians at the University of Mississippi Medical Centre (Suman K. Das and Hari Har P. Cohly) were granted a US patent (no.5, 401,504) on use of turmeric in wound healing. The Indian Council of Scientific & Industrial Research (CSIR), New Delhi filed a re-examination case with the US PTO challenging the patent on the grounds of prior art. CSIR argued that turmeric has been used for thousands of years for healing wounds and rashes and therefore its medicinal use was not a novel invention. Their claim was supported by documentary evidence of traditional knowledge, including ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association. Despite an appeal by the patent holders, the USPTO upheld the CSIR objections and cancelled the patent. The turmeric case was a landmark judgment case as it was for the first time that a patent based on the traditional knowledge of a developing country was successfully challenged. The US Patent Office revoked this patent in 1997, after ascertaining that there was no novelty; the findings by innovators having been known in India for centuries.

Neem (Azadirachta indica A. Juss.) Neem extracts can be used against hundreds of pests and fungal diseases that attack food crops; the oil extracted from its seeds can be used to cure cold and flu; and mixed in soap, it provides relief from malaria, skin diseases and even meningitis. In 1994, European Patent Office (EPO) granted a patent (EPO patent No.436257) to the US Corporation W.R. Grace Company and US Department of Agriculture for a method for controlling fungi on plants by the aid of hydrophobic extracted Neem oil. In 1995 a group of international NGOs and representatives of Indian farmers filed legal opposition against the patent.

They submitted evidence that the fungicidal effect of extracts of Neem seeds had been known and used for centuries in Indian agriculture to protect crops, and thus was a prior art and unpatentable. In 1999 the EPO determined that according to the evidence all features of the present claim have been disclosed to the public prior to the patent application and the patent was not considered to involve an inventive step. The patent granted on was Neem was revoked by the EPO in May 2000.

In both cases, the high costs of challenging the `bad' patents had to be borne by the Government of India (in the turmeric case) and by 3 public interest organisations[6] (in the case of neem). At the same meeting in Granada, Spain a report entitled "Out of Africa: Mysteries of Access and Benefit Sharing" (http://www.edmonds-institute.org), was released by the Edmonds Institute and the African Centre for Biosafety, both public interest, non-profit groups in the US and South Africa, respectively. In just one month of searches of various databases including the website of the US Patent and Trademark Office, the researcher discovered numerous potential cases across the African continent of patents given or being claimed.

The biological resources concerned are for medicinal, agricultural, hoticultural and cosmetics uses. In most cases there are no evidence or even information of benefit sharing agreements. Some of the patents claimed appear highly questionable too. Below is a list of findings that is suggestive of biopiracy. Each case thus requires further investigations.[6]

Medicine from Biodiversity	Out of	Remarks
Diabetes Drug Produced by a Microbe	Kenya	Patent held by Bayer. No evidence of a benefit-sharing agreement related to the microbe from which the drug was derived.
A Treatment for Diabetes	Libya, Egypt	Patent held by Phytopharm Plc., UK. Cannot find company intellectual property policy on the traditional knowledge it patents nor any evidence of a benefit-sharing agreement related to this patent.
Antibiotics from a Termite Hill	Gambia	Patent held by Glaxo SmithKline. No information about any benefit sharing arrangements between the company and Gambia.
An Antifungal from a Giraffe	Namibia	Patent held by Merck. No information on any benefit-sharing agreements

Medicine from Biodiversity	Out of	Remarks
Infection-fighting Amoeba	Mauritius	Patent filed by Sutherland Maciver, Director of Amoebics, UK. No information on a benefit-sharing agreement between any institution in the UK and Mauritius.
A Treatment of Impotence	Congo (Brazzaville)	Patent held by Option Biotech, Canada. No evidence of a benefit-sharing agreement between company and Congo or any other country where the raw materials were found.
Vaccines from Microbes	Egypt	Cambridge Biostability plans to commercialise vaccine but no evidence that the company intends to share any benefits from it.
Four Multipurpose Medicinal Plants	Ethiopia and neighbouring countries	Patent filed with no information about benefit-sharing arrangement.
Hoodia, the Appetite Suppressant	Namibia, South Africa, Angola, Botswana	Patented by the South African Council for Scientific and Industrial Research with exclusive rights sold to British company, Phytopharm. The San people received miniscule royalty.
Antibiotics from Giant Land Snails	West Africa, from Sierra Leone to Nigeria	Patent issued in Europe and pending in Canada, the US and Japan. Additional research is needed to find out if and how this patent is being further developed.
Drug Addiction Treatment from Iboga	Central and West Africa	Patent application made by Myriad Genetics and Washington University. No discussion of benefit-sharing agreement.
Multipurpose Kombo Butter	Central and West Africa	A series of patent claims have been filed but no evidence of any benefit-sharing agreement.

Cosmetics from Biodiversity	Out of	Remarks
Skin Whitener from an Aloe	South Africa and Lesotho	Patent held by US form Unigen. No evidence of benefit-sharing agreement.
Beauty and Healing from Okoume Resin	Gabon and Western Central Africa	Patents held by Dior. No evidence of benefit-sharing agreement.

Cosmetics from Biodiversity	Out of	Remarks
Skin and Hair Care from Argan Tree	Morocco	Patent pending. No clear evidence of benefit-sharing arrangement.
Skin Care Plus from 'Pharaoh's Wheat'	Egypt	Claims by company marketing the product questionable.
Skin Care, Etc. from Bambara Groundnut	Sub-Saharan African	Patent held by Cognis. No benefit-sharing agreements are found.
Skin Care from 'The Resurrection Plant'	Southern and Eastern Africa	Patents filed in US and Europe. No evidence of benefit-sharing agreements.

Agricultural and Horticultural Products from Biodiversity	Out of	Remarks
Endophytes and Improved Fescues	Algeria and Morocco	Patent issued to New Zealand's AgResearch. No evidence of benefit-sharing agreements.
More Endophytes for Improving Fescues	Morocco and Tunisia	Patent filed by University of Arkansas, US. No evidence of benefit-sharing agreements.
Nematocidal Fungi	Burkina Faso	Swiss company, Casale group holds patent in US. Also applied for patents in Europe, China, Norway and Africa. No information on any benefit-sharing agreements.
Groundnuts	Malawi	One of the varieties C-99R was collected by the US Department of Agriculture (USDA) 50 years ago and has since been commercialized. No evidence of benefit-sharing arrangements.
More Groundnuts	Senegal, Mozambique, Sudan, Nigeria	A 2003 USDA report urged new collections of peanut varieties including from Africa.
Impatiens with a Trailing Growth Habit	Tanzania	Patents filed by Syngenta in Europe and the US. No evidence of benfit-sharing arrangements.
Molluscides	Somalia, Ethiopia, Egypt and elsewhere	Patents pending in Europe, Canada and the US. No evidence of benefit sharing arrangements.

Biodiversity Acquisitions for Further Investigation	Out of	Remarks
Ocean Riches	Cape Verde, Comoros, Egypt, Eritrea, Kenya, Mauritius, Mozambique, Seychelles and South Africa	Many patents issued for marine resources in Africa. No evidence of benefit-sharing arrangements.
Cosmetics from 'Kokori Fruit'	Nigeria	Patent issued for a fruit that could be called by a different name in Nigeria.
A Skin Treatment from Tamarind	Africa	A US patent has been issued on prevention and treatment of sunburned using tamarind. Is this really a patentable invention?
The Cancer Fighter from Bitterleaf	Most of Sub-Saharan Africa	Plant is native to many countries. Is this invention actually new?
Infection-Fighting Mycobacteria	Uganda	Patent has been taken out five times in the US. No evidence of benefit-sharing agreements.

Biodiv ersity Acquisitions Under Investigation	Out of	Remarks
Industrial Enzymes from Microbes	Kenya	US Genencor claimed patent ownership of the microbes and enzymes which the Kenyan government is contesting.
Teff	Ethiopia	Dutch company Soil and Crop Improvement is attempting to take over ownership of the teff varieties from the Ethiopian government.
The Infection Fighter	Zimbabwe	Patents taken out by University of Lausanne which was then commercialized by a US firm. Its benefit-sharing arrangement is questionable.
Medicinal Plants	Gabon, Nigeria	Patents issued to Sanofi-Aventis for extract from *Uvaria klaineri* in Gabon but no mention of how company obtain the plant. In Nigeria, plant extracts whose intellectual property is up for sale by the US Army.

Biodiv ersity Acquisitions Under Investigation	Out of	Remarks
Skin Cream from Coco-de-Mer	Seychelles	Japan's Kao Corporation claim the use of coco-de-Mer in one of its products. Unclear if this is true but a patent application is pending in Europe.
Cosmetics from the Baobab Tree	Africa	Cognis filed patents on use of baobab leaves. But the plant has traditionally been widely use in Africa so 'invention' is not new.

It would be useful for such a study to be conducted for each country, especially in the Asian region where there is a long history of knowledge and innovations in the use of biological resources for medicinal and food purposes.

Meanwhile, the IP dimension of biological resources and associated knowledge is under discussion and negotiation at the Working Group on Access and Benefit Sharing under the Convention on Biologcial Diversity (CBD), the WTO TRIPS Council (mandated to examine the relationship between the TRIPS Agreement and the CBD and WIPO. The WTO TRIPS Council still needs to complete its work in reviewing Article 27.3(b) to define the **scope of patentability.** This requires consideration of the patenting of plants, animals, micro-organisms and parts thereof, as well as human genetic material.

A group of developing countries at the TRIPS Council has proposed that there should be an amendment of the TRIPS Agreement to include three **disclosure requirements** in patent applications relating to genetic resources and/or associated traditional knowledge. These are disclosure of: country/source of origin, evidence of prior informed consent under national law, evidence of a fair and equitable benefit sharing arrangements under national law. This is their response to the mandate to examine the TRIPS-CBD relationship. The 6th Ministerial Conference of the WTO in December 2005 requested the WTO Director General "to intensify his consultative process" on the relationship between TRIPS and the CBD. "The Director-General shall report to each regular meeting of the [Trade Negotiation Committee] and the General Council. The Council shall review progress and take any appropriate action no later than 31 July 2006."

A clear national IP strategy would be valuable in determining the positions to be taken by a country in those various international processes.

Policies and measures towards an optimal level of IP protection

This section discusses some of the policies and measures that developing countries can take to strive towards an optimal level of IP protection that can meet development objectives and the public interest.

Respecting the integrity of an appropriate IP system

Although the TRIPS Agreement is a milestone in shifting IPRs towards private rights (from their origins as privileges), some developing countries negotiated the retention of the underlying public policy and development objectives of IP systems as well as the right to implement the TRIPS provisions in accordance with national law.

Three important provisions of the TRIPS Agreement that preserve the right of a State to shape its own appropriate IP system are as follows:

Article 1.1 on Nature and Scope of Obligations: "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

Article 7 on Objectives: "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."

Article 8 on Principles: "1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

Specific provisions that can ensure access to essential products, research and innovation as well as competitiveness should be implemented within an overall national strategy with clear socio-economic objectives and goals.

Limit the Granting of IPs According to Correct Criteria

The wrong granting of IP extends monopoly rights needlessly or to the wrong parties, and thus widens the extent of anti-competitive behaviour and market distortions. Perhaps the most important measure to promote competition principles vis-à-vis IP is that governments institute policies that enable or ensure the appropriate granting of IPRs and that the proper conditions are set (for example with regard to duration of patent, copyright, etc). The nature of appropriateness

of the grant should be in accordance with the need to attain the right balance between the need for incentives for the right holder, and society's need for access and use of the inventions.

The examination and granting of patents should be in accordance with the principle that they be provided for inventions and not discoveries, and that they meet the criteria of inventive step, novelty and industrial applicability. Thus, patents that do not meet these tests should not be given. An efficient system should be in place to ensure this. For example, applications for trivial or frivolous patents should not be treated favourably. Patents should also not be given for biological materials that are naturally occurring. Moreover, patents should not be given for genetic resources or associated traditional knowledge that belong to other parties or that are in the public domain. For that purpose, the patent regime nationally and internationally should require that applications in this area should be accompanied by disclosure of sources and countries of origin, evidence of prior informed consent of such sources of origin, and evidence of adequate access and benefit-sharing arrangements.

A useful set of guidelines is provided in CIPR (2002: 49 and 114) which states that the underlying principle in developing country legislation should be to aim for strict standards of patentability and narrow scope of allowed claims, with the objective of: limiting the scope of subject matter than can be patented; applying standards such that only patents which meet the requirements for patentability are granted and that the breadth of each patent is commensurate with the inventive contribution and the disclosure made; facilitating competition by restricting the ability of the patentees to prohibit others from building on or designing around patented inventions; providing extensive safeguards to ensure that patent rights are not exploited inappropriately;and considering the suitability of other forms of protection to encourage local innovation. The CIPR report also provides details on the implementation of each of the objectives

The duration to be given to patents, copyright and other IP should be appropriate in that it be sufficient to enable the innovator to recover the costs of research and innovation but not so much as to enable excessive profits. Prices can be regulated to ensure that the right of consumers to access to essential good and services is respected.

Providing for and Making Use of Exceptions, Exemptions and Limitations

There should be policy space, especially for developing countries to have adequate provisions for exceptions, exemptions and limitations to IPs in accordance with development needs and requirements, and the rights to access of essential goods and services.

Where such exceptions and limitations exist or are allowed in international laws such as the TRIPS Agreement, developing countries should make use of them. This would reduce the extent of monopoly and increase the extent and scope of competition in the economy, as well as catering to the fulfillment of rights and access to essential goods and services.

An important provision is Article 27.2 of the TRIPS Agreement: "Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law." This provides considerable scope for exclusions that are consistent with the values of a society.

Organisations like the WTO, WIPO and other UN agencies should provide technical assistance to developing countries on how to make use of the exceptions, exceptions and limitations allowed by international laws, by incorporating them in domestic law and thereafter in practice.

Existing international laws should be examined for whether the exceptions, exemptions and limitations are adequate in providing the necessary balance, and to allow the fulfilment of rights and access to essential goods and services. The review should then result in the appropriate clarifications and amendments. Negotiations for new IP-related treaties or new provisions or amendments to existing treaties should fully take these factors into account. Bilateral and regional trade/economic arrangements should not have TRIPS-plus provisions.

Design and Implementation of Flexibilities

Besides exceptions, international frameworks should also contain adequate flexibilities especially for (but not limited to) developing countries to enable or even encourage them to take measures that may be required to offset IPRs that are granted. Such measures are meant to uphold the principles of competition and meeting the needs of access to essential goods and services.

Among these safeguard measures are compulsory licensing, parallel importation and government and non-commercial use. Technical assistance should be provided in (i) raising the knowledge of developing countries and their institutions about the existence, rationale and use of flexibilities, (ii) instituting the flexibilities in national law and (iii) implementing these measures.

The existing international treaties should also be examined for their adequacy in providing for these safeguard measures, and clarifications or amendments made to strengthen these where needed. Negotiations for new treaties should fully take into account the need for adequate safeguards. Bilateral and regional trade and

economic arrangements should not contain provisions that restrict the flexibilities that are allowed by international treaties such as the TRIPS Agreement.

At the national level, governments should review existing legislation to fully incorporate the flexibilities that are allowed, and then institute policies and mechanisms to implement them, such review is an important part of a national IP strategy.

Competition Principles and Legal Provisions in Laws Relating to IP and Beyond

Pro-competition principles and measures that exist in IP related international treaties should be fully recognised and appreciated and technical assistance should be provided to developing countries to enable them to be aware of these and to incorporate them where possible in national legislation, policy and practice.

For example, Article 8.2 (on Principles) of the TRIPS Agreement states that appropriate measures (consistent with the agreement's provisions) may be needed to prevent abuse of IPRs by right holders or the resort to practices which unreasonably restrain trade or adversely affect technology transfer. As pointed out in Roffe (1998), while licensing is a legitimate activity of IPR holders and in most cases can be seen as pro-competitive in legitimizing access to technology to third parties, these activities may also (as noted by the OECD) be "anti-competitive where they are a mere sham for a cartel arrangement, where they restrict competition between technologies that are economic substitutes for one another or where they exclude new technologies from the market."

Section 8 of TRIPS on "Control of anti-competitive practices in contractual licenses" has an Article 40 that recognises that some licensing practices or conditions pertaining to IPRs which restrain competition may have adverse effects on trade and impede technology transfer and dissemination. Article 40.2 says that nothing in the agreement shall prevent members from specifying in their legislation licensing practices or conditions that abuse IPRs, having adverse effect on competition, and a member may adopt appropriate measures to prevent or control such practices, including exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in light of relevant laws and regulations of that member. Article 40.3 also provides for consultations and cooperation among members (including through supply of non-confidential information) to deal with IPR owners that are undertaking anti-competitive practices in violation of a requesting member's laws.

Several developed countries have laws or regulations that hold certain anti-competitive practices as *per se* unlawful (Watal 2001: 304-309). The US Antitrust Guidelines for the Licensing and Acquisition of IPRs 1995 states that among the

restraints that have been held *per se* unlawful (by courts in the past) are naked price-fixing, output restraints and market division among horizontal competitors, as well as certain group boycotts and resale price maintainence. To determine whether a particular restraint in a licensing arrangement is given *per se* or rule of reason treatment, the agencies will assess whether the restraint will contribute to an efficiency-enhancing integration of economic activity. The EC in its Technology Transfer Block Exemption Regulation, 240/96, (effective 1996) in general has 8 categories on its black list including restrictions relating to price or output, competing markets, exports to territories within the common market, customer allocations, R&D activities or full grantbacks of license improvements. Japan's Guidelines for Regulation of Unfair Trade Practices with respect to Patent and Know How Licensing Agreements (introduced in 1989) treats 5 types of restrictions as unfair trade practices, unless specific justification can be shown to the contrary; these are restrictions n domestic prices of patented goods, prohibitions on handling or using competitors' goods or technology or requirements on payment of royalties after license expiry, R&D restrictions and exclusive grant back requirements. Some Commonwealth countries, following the UK, have a provision in their patent laws that certain anti-competitive practices in patent licenses are automatically deemed to be null and void. For example, Australia's Patents Act 1990 hold invalid any conditions that restrict the licensee from purchasing or using a product or process supplied by the licensor's competitors or that requires the licensee to acquire a product not protected by the patent from the licensor; in addition the Australian Trade Practices Act 1974 specifically prohibits 5 activities: anti-competitive agreements (including price fixing and exclusionary provision), misuse of market power, exclusive dealing, resale price maintainence, mergers and acquisitions with a substantial lessening of competition.

According to the above regulations, the mentioned features in contractual IP licenses are anti-competitive *per se* and thus deemed unlawful in general; thus it would not require a case-by-case examination to determine whether the mentioned activities are anti-competitive.

Following the example of developed countries, developing countries should specify anti-competitive conditions in IPR licenses to be *per se* null and void. As seen from the above examples, there is leeway for countries to determine what licensing conditions can be considered to have anti-competitive effects *per se* and this flexibility should be retained. However, as pointed out in Watal (2002: 307), in many cases it is not the restrictive nature of IPR licenses that are a cause of concern but the outright refusal to transfer technology without other cross licensing arrangements, to which developing country enterprises may have no access. Also, the question as whether refusal to deal or license a patent by the right holder can

be considered a patent misuse, has to be clarified. Roffe (1998) provides a useful account of the evolution of international negotiations in and outside the TRIPS agreement, on restrictive practices, and their implications for interpreting and implementing TRIPS.

There are other provisions in TRIPS that deal with competition issues. For example, Article 31 on use of patents without authorisation of the right holder, has a sub-paragraph (k) relating to anti-competitive practices. If a compulsory license is granted to remedy a practice determined after judicial or administrative to be anti-competitive, the obligations in subpara (b) (that before a compulsory license can be given, efforts have to be made to obtain voluntary license) and in subpara (f) (that a compulsory license has to predominantly for the supply of the domestic market) are waived. Moreover "the need to correct anti-compeitive practices may be taken into account in determining the amount of remuneration in such cases" and authorities can refuse termination of authorisation if and when conditions which led to such authorisation are likely to recur. Developing countries should include this pro-competitive safeguard provision and measure in their national legislation and policy.

Generally, it would be important for developing countries to incorporate the pro-competition principles and elements in their national laws and regulations relating to IP. Moreover, they should establish provisions within national competition law and regulations that prohibit anti-competitive practices in IP-related licenses, as referred to above.

Conclusion

A national IP strategy would need to be based on the level of development of the country concerned, and require the re-examination of existing international and national laws and practices, and the path taken by developed countries when they were industrialising and innovating. An appropriate IP system should provide an optimal level of IP protection that promotes innovation and competitiveness at the domestic level.

The present IP system, at the international and national levels, should be evaluated in light of the crucial need for "balances" in the IP system, to enable both innovation and the meeting of the public interest and development needs.

In recent years, this balance has shifted worldwide too much to the side of IP holders in both international IP frameworks and in national law or practice of many countries. This is of concern particularly for developing countries as the characteristics and conditions of such countries make them especially susceptible to adverse effects.

The global harmonisation of IP laws (towards the standards and practices of developed countries), especially through the WTO, WIPO and bilateral/regional agreements, has contributed to the imbalances and the spread of conditions that make it more difficult for developing countries and their enterprises and institutions to compete.

Thus, a review of the international IP frameworks is required to determine the sources of the imbalances, while a review of national frameworks are also required so that the existing flexibilities can be properly made use of. Meanwhile, further harmonisation initiatives at international level should be reviewed in light of the need to regain balance. A clear and sound national IP strategy would enable a country to respond and be pro-active in international discussions and negotiations related to IP.

Notes

1. The CIPR, chaired by John Barton of the US, was set up by the UK Government and started its work in 2001. Its report "Integrating Intellectual Property Rights and Development Policy" was released in 2002. The full report is available at: www.iprcommission.org
2. While differential treatment is recognised under TRIPS, these are very narrow and time-bound, except for "least developed countries" which for different reasons are not availing themselves fully of their entitled flexibilities.
3. US patent law defines "invention" to include discoveries and this gives rise to problems in applying the criterion of "inventive step" and "novelty".
4. Of the 11 countries, China, India, Malaysia and Thailand are in the category of those which are bound by the Berne Convention and the TRIPS Agreement. These countries are amongst the majority of the countries in the world, i.e. 80 countries as at 28 November 2005. The flexibilities available to this group of countries are the same as those available to countries that are parties to only the TRIPS Agreement.
5. UNEP/CBD/WG-ABS/4/5 – submission by India on the occurrence, nature, nature extent and cost of misappropriation of genetic resources to the 4th Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit Sharing, under the Convention on Biological Diversity.
6. International Federation of Organic Agriculture Movements (IFOAM), Research Foundation for Science, Technology and Ecology, New Delhi and The Greens/ European Free Alliance in the European Parliament, Brussels.

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The Protection of Traditional Cultural Expressions

Michael Blakeney

Probably the first step towards establishing a political agenda for the protection of traditional cultural expressions was an African Study Meeting on Copyright, held in Brazzaville in August 1963 which had advocated copyright concessions for developing countries, including reductions in the duration of protection and the protection of folklore.[1] At the time of the Stockholm Conference for the Revision of the Berne Convention, which was convened in June 1967, there were 10 African states[2] included in the 58 Members of the Berne Union

The Stockholm Conference witnessed the first significant agitation from developing countries for an acknowledgement of their particular circumstances. In the preparations for the Stockholm Conference, it was proposed that the concerns of developing countries could be accommodated in a separate protocol. This question was the subject of some fairly acrimonious debates at Stockholm (Ricketson 1987: 607-620). The critical issues for developing countries were the definition of developing country translation rights and compulsory licensing. The establishment of a protective regime for folklore was a burgeoning consideration. Although a Protocol was grudgingly adopted by the final plenary session of the Stockholm Conference it did not come into force as it failed to secure the requisite number of ratifications. This Protocol became an Appendix to the Paris Act, which was adopted by the Paris Revision Conference of 1971.

The enduring effect of this Protocol is potentially quite significant, given that Article 9 of the TRIPs Agreement obliges Members of the WTO to comply with "Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto." Unfortunately, the Protocol and the Appendix failed to address the issue of TCE.

The failure of developing countries to secure an effective protection of folklore within the regime administered by the World Intellectual Property Organisation, explains initiatives undertaken within other international organisations. In April 1973, the Government of Bolivia had sent a memorandum to the Director General of UNESCO requesting that the Organisation examine the opportunity of drafting an international instrument on the protection of indigenous creative works in the form of a protocol to be attached to the Universal Copyright Convention, which

is administered by UNESCO. Following that request a study was prepared in 1975 by the Secretariat of UNESCO on the desirability of providing for the protection of the cultural expressions of indigenous peoples on an international scale. Because of a perception of the broad scope of this analysis, in 1977 the Director General of UNESCO convened a Committee of Experts on the Legal Protection of Folklore, which in a report in 1977 concluded that the subject required sociological, psychological, ethnological, politico-historical studies 'on an interdisciplinary basis within the framework of an overall and integrated approach' (UNESCO/ WIPO 1977).

Pursuant to a resolution adopted by the General Conference of the UNESCO in Belgrade, in September-October 1980 and a decision taken by the Governing Bodies of the World Intellectual Property Organisation (WIPO) in November 1981, a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore was convened. After a series of meetings the Committee formulated *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action* which were adopted by the two organisations in 1985. The General Conference of UNESCO at its 25th session in 1989 adopted a Recommendation on the Safeguarding of Traditional Cultures and Folklore, which proposed a programme of measures to be taken at the national level for the identification, conservation, preservation and dissemination of the cultural works of indigenous peoples.

The Pejorative Connotations of "Folklore"

Since the mid 1980s, when WIPO and UNESCO had convened a Group of Experts on the Protection of Expressions of Folklore by Intellectual Property, there has been a lively debate about the terminology which should be used to describe the creations of a cultural community. The representatives of the Spanish-speaking countries at the 1985 meeting of the Group of Experts took the position that "folklore" was an archaism, with the negative connotation of being associated with the creations of lower or superseded civilisations. However, over that objection, the 1985 meeting adopted the following definition:

> Folklore (in the broader sense, traditional and popular folk culture) is a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

This definition was elaborated in the resultant *WIPO/UNESCO Model Provisions for National Laws for the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions*. The misgivings expressed about the negative

connotations of the term folklore were deflected by participants at the 1985 meeting who pointed out that "in recent times the term 'folklore' obtained a new meaning and is widely accepted as a term suitable for the purposes of a relevant international treaty."[3]

This terminological approach persisted until the conclusion of the World Forum on the Protection of Folklore, convened by WIPO and UNESCO in Phuket in April 1997. That Forum was convened in response to the recommendations in February 1996 of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and the Producers of Phonograms, that arrangements be made for the organisation of an international forum to explore "issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore and the harmonisation of different regional interests."[4]

At the Forum, a number of speakers referred to the negative connotations and eurocentric definition of the term "folklore." For example, Mrs Mould-Idrissu, in a paper on the African Experience on the preservation and conservation of expressions of folklore[5], observed that the western conception of folklore tended to focus on artistic, literary and performing works, whereas in Africa it was much more broad; encompassing all aspects of cultural heritage (Ibid). For example, she noted that under the Ghanaian Copyright Law of 1985, folklore included scientific knowledge (Ibid). Speakers criticised the western attitude to folklore as something dead to be collected and preserved, rather than part of an evolving living tradition (Janke 1997:104-109). In a statement issued by Indigenous Australian representatives at the Forum, exception was taken to the use of "folklore" as being too narrowly defined and implying an inferiority of the cultural and intellectual property of Indigenous peoples to the dominant culture (Ibid: 110). The Indigenous Australian representatives expressed a preference for the term "Indigenous Cultural and Intellectual Property", which had been coined by Ms Erica Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (WGIP 1993).

The expressions "Traditional Cultural Expressions" or "Traditional Knowledge," accommodate the concerns of those observers who criticise the narrowness of "folklore." However, the latter term significantly changes the discourse. Folklore was typically discussed in copyright, or copyright-plus terms. Traditional knowledge, on the other hand, also embraces traditional knowledge of plants and animals in medical treatment and as food. In this circumstance the discourse would shift from the environs of copyright to patents law (Blakeney1997a) and biodiversity rights(Blakeney1998). This shift is, in part, an explanation of the

suggestions for *sui generis* solutions to the protection of traditional knowledge. Thus Simpson adopts Daes' view that it is inappropriate to subdivide the heritage of Indigenous peoples "as this would imply giving different levels of protection to different elements of heritage" (Simpson 1997:55).

Indigenous Peoples' Declarations

A significant initiative during the UN International Year for the World's Indigenous Peoples was the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples which was convened by the Nine Tribes of Mataatua in the Bay of Plenty Region of Aotearoa, New Zealand in June 1993. The resultant *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* insisted that the protection of the rights of indigenous peoples in their traditional knowledge was an aspect of the right of indigenous people to self determination. The *Mataatua Declaration* recommended in art.1 that in the development of policies and practices, indigenous peoples should:

1.1 Define for themselves their own intellectual and cultural property.

1.2 Note that existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights.

1.3 Develop a code of ethics which external users must observe when recording (visual, audio, written) their traditional and customary knowledge.

1.4 Prioritise the establishment of indigenous education, research and training centres to promote their knowledge of customary environmental and cultural practices....

1.6 Develop and maintain their traditional practices and sanctions for the protection, preservation and revitalisation of their traditional intellectual and cultural properties....

1.8 Establish an appropriate body with appropriate mechanisms to:

(a) preserve and monitor the commercialism or otherwise of indigenous cultural properties in the public domain;

(b) generally advise and encourage indigenous peoples to take steps to protect their cultural heritage;

(c) allow a mandatory consultative process with respect to any new legislation affecting indigenous peoples cultural and intellectual property rights.

1.9 Establish international indigenous information centres and networks.

The *Mataatua Declaration* in art.2.1 recommended that in the development of policies and practices, States and national and international agencies "should recognise that indigenous peoples are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.' In art.

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2.2 it urged the recognition that 'indigenous peoples also have the right to create new knowledge based on cultural traditions'. The insufficiency of existing protection mechanisms was asserted in art. 2.3. Article 2.5 provided for the development

...in full cooperation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:

- collective (as well as individual) ownership and origin- retroactive coverage of historical as well as contemporary works;
- protection against debasement of culturally significant items;
- co-operative rather than competitive framework;
- first beneficiaries to be the direct descendants of the traditional guardians of that knowledge;
- multi-generational coverage span.

The conference delegates recommended that the UN incorporated the *Mataatua Declaration* be incorporated in its Study on Cultural and Intellectual Property of Indigenous Peoples.

The Statement issued by the International Consultation on Intellectual Property Rights and Biodiversity organised by the Coordinating Body of the Indigenous Peoples of the Amazon Basin (COICA), held at Santa Cruz de la Sierra, Bolivia in September 1994 reiterated the assertion of the *Mataatua Declaration* that

> All aspects of the issue of intellectual property (determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation) are aspects of self determination.

The COICA Statement was extremely critical of the current intellectual property regime. Article 8 declared that

Prevailing intellectual property systems reflect a conception and practice that is:

- colonialist, in that the instruments of the developed countries are imposed in order to appropriate the resources of indigenous peoples;
- racist, in that it belittles and minimises the value of our knowledge systems;
- usurpatory, in that it is essentially a practice of theft.

The COICA Statement in art.9 pointed to the danger of distortion to indigenous systems in adjusting them to the prevailing intellectual property regime. The Statement formulated short and medium term strategies to deal with these problems. In the short term it identified intellectual property principles and mechanisms which were either inimical to or useful for indigenous peoples. For example, art.12 recognised that 'there are some formulas that could be used to enhance the value of our products (brand names, appellations of origin), but on the understanding that these are only marketing possibilities, not entailing monopolies of the product or of collective knowledge.'

The Statement in art.14 proposed the design of a protection and recognition system in the short and medium term of mechanisms which 'will prevent appropriation of our resources and knowledge.' These would include 'appropriate mechanisms for maintaining and ensuring rights of indigenous peoples to deny indiscriminate access to the resources of our communities or peoples and making it possible to contest patents or other exclusive rights to what is essentially indigenous.' Although the COICA Statement was largely concerned with indigenous peoples rights in biodiversity,[6] it called for the training of indigenous leaders in aspects of intellectual property.

In Australia, the *Julayinbul Statement on Indigenous Intellectual Property Rights*, was adopted by a Conference on Cultural and Intellectual Property held at Jingarrba on 25-27 November 1993. The *Julayinbul Statement* affirmed the unique spiritual and cultural relationship of Indigenous Peoples with the Earth which determined their perceptions of intellectual property. The Statement asserted that "Aboriginal intellectual property, within Aboriginal Common Law, is an inherent inalienable right which cannot be terminated, extinguished or taken." The Statement called on governments to review legislation and non-statutory policies which did not recognise indigenous intellectual property rights and to implement such international conventions which recognised these rights. The Conference also issued a *Declaration Reaffirming the Self Determination and Intellectual Property Rights of the Indigenous Nations and Peoples of the Wet Tropics Rainforest Area.* This *Declaration* was primarily concerned with bioprospecting and the intellectual property rights of indigenous peoples to traditional knowledge (Blakeney 1997a).

In April 1995 the South Pacific Regional Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights, was held in Suva, Fiji in April 1995. The Final Statement issued by the Regional Consultation declared 'the right of indigenous peoples of the Pacific to self-governance and independence of our lands, territories and resources as the basis for the preservation of indigenous peoples' knowledge.' Article 7 urged the strengthening of indigenous networks and encouraged the UN and regional donors to continue and support discussions on indigenous peoples' knowledge and intellectual property rights.' Article 8 pointed out the importance of strengthening 'the capacities of indigenous peoples to maintain their oral traditions, and encourage initiatives by indigenous peoples to record their knowledge in a permanent form according to their customary access procedures.' Finally, the Final Statement urged 'universities, churches, governments, non-governmental organizations and other institutions to reconsider their roles in the expropriation of indigenous peoples' knowledge and resources and to assist in their return to their rightful owners'.

One of the results of the United Nations International Year for the World's Indigenous Peoples, was the promulgation of a *Draft Declaration on the Rights of*

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Indigenous Peoples. Article 12 of the *Draft Declaration* recognised the right of indigenous peoples to 'practice and revitalize their cultural traditions and customs, including the right

...to maintain, protect and develop the past, present and future manifestations of their cultures, such as ...artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 29 recognised the entitlement of indigenous peoples 'to the full ownership, control and protection of their cultural and intellectual property'. This article also asserted the right of indigenous peoples 'to special measures to control, develop and protect their...cultural manifestations, including ...oral traditions, literatures, designs and visual and performing arts.'

The growing self-realisation of indigenous peoples that the international recognition of their intellectual property rights in their cultural expressions would depend upon their own efforts, has resulted in the development of international solidarity through international conferences of indigenous peoples. These conferences have promulgated intellectual property declarations, formulating norms for the protection of traditional knowledge.[7]

Traditional Cultural Expression and Intellectual Property

The criticism that the concept of "folklore" was derived from Eurocentric precepts is equally applicable to the concept of intellectual property itself. The propertisation of traditional knowledge implies, rights such as authorship, ownership, alienation and exploitation. An intellectual property regime which provides for the protection of traditional cultural creativity should also permit the natural development of culture through permissible borrowings. A particularly problematic instance of cultural borrowing is the use of sacred beliefs in apparently profane contexts. Salman Rushdie's *Satanic Verses* is an example of this genre. It is interesting to note in this regard that English copyright law began life as a system for the political censorship of works. In the debate about the protection of traditional cultural expression, the implied beneficiaries of this protection are traditional peoples. Invariably, these are referred to as "Indigenous Peoples". A definitional issue related to the delineation of the content of traditional knowledge, is defining the groups or communities who can assert property rights over this knowledge.

The definition which appears to enjoy widest support, is that of Martinez Cobo who describes indigenous communities, peoples and nations as "those which, having historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors

of the society now prevailing in those territories or parts of them." However, it should be acknowledged that a number of representatives of these groups have asserted that the diversity of the worlds indigenous peoples renders problematic an all-embracing definition and that efforts by the international community to develop a binding, all-inclusive definition are a diversion of energies.

Erica-Martin Daes identifies four factors which provide practical definitional guidance:

(a) priority in time with respect to the occupation and use of a specific territory;
(b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
(c) self-identification, as well as self-recognition by other groups; and
(d) an experience of subjugation, marginalisation, dispossession, exclusion, or discrimination, whether or not these conditions persist (Daes 1996:28).

A perceived corollary to an acceptable definition of the concept "Indigenous Peoples" is the expectation that as peoples they will be able to avail themselves of the protections conferred by international instruments such as the UN Charter, which in Article 1 refers to "the principle of equal rights and self determination of peoples" and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which similarly refer to the "right of all peoples to self-determination." However, as General Assembly Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, subsequently provided, the rights of peoples are subordinated to the sovereignty of states. This statist interpretation of the rights of peoples has been a barrier to the recognition of various political and property rights, including intellectual property rights, of Indigenous Peoples and traditional communities.

Why Protect Traditional Cultural Expressions?

Alan Jabbour suggested a taxonomy of four "inchoate" concerns or anxieties which have led to international proposals for the protection of folklore (Jabbour 1982: 11-12). First, a concern for the authentication of folklore in the face of the economic, psychological and cultural threat from alien sources. Secondly the expropriation, not only of physical objects, but also the documentary and photographic record of traditional societies. Thirdly, the issue of compensation for appropriation and cultural harm. Fourthly, the issue of nurture, or cultural health.

In Australia, these concerns have been manifested in five main areas: (a) the infringement of the copyright of individual artists; (b) the copying of works not authorised by aboriginal groups and communities; (c) the appropriation of

Aboriginal images and themes; and (d) the culturally inappropriate use of Aboriginal images and styles by non-Aboriginal creators.

Each of these problems is addressed below, together with a consideration of the efficacy of existing intellectual property law to provide a remedy.

Copyright Infringements

There are numerous instances of the designs of Australian Aboriginal artists being reproduced without their permission. The Australian Copyright Act 1968 provides a remedy to artists whose works have been copied without authorisation. The first case which attracted significant attention concerned the 1989 action brought by John Bulun Bulun and 13 other artists to obtain compensation concerning the unauthorised reproduction of their works on T-shirts.[9] The case attracted some attention as it came immediately after the Bicentennial celebrations and injunctions and an out of court settlement of $150,000 was obtained in this matter (Ibid). A more recent reported case, concerning the unauthorised copying of the designs of Aboriginal artists was *Milpurrurru v. Indofurn Pty Ltd.*[10] This concerned the importation by a Perth-based company of carpets manufactured in Vietnam, upon which were reproduced the designs of George Milpurruru, Banduk Marika, Tim Payungka Tjapangati and five deceased Aboriginal Artists. These designs had been copied from a portfolio of artworks produced by the Australian National Gallery. The defendants in this case were obliged to pay substantial damages.[11]

Copying Not Authorised by Aboriginal Groups and Communities

Although, the Australian Copyright Act provides a remedy in relation to the unauthorised copying of the works owned or licensed by individual creators it does not recognise the communal harm which may result from the unauthorised reproduction of Aboriginal designs**.**

The claim of communal proprietorship in sacred images was rejected by the Federal Court in *Yumbulul v. Reserve Bank of Australia.*[12] That case concerned an attempt by representatives of the Galpu Clan to prevent the reproduction by the Reserve Bank, of the design of a Morning Star Pole on a commemorative banknote. The pole had been created by a member of the clan who had obtained his authority and knowledge to create the pole through initiation and revelatory ceremonies. The Galpu asserted that the communal obligation of the artist was such that he owed an obligation to the clan to prevent the design of the pole from being used in any way which was culturally offensive Although sympathetic to this argument, the trial Judge considered that the artist who had created the pole had successfully disposed of his intellectual property rights in it through a legally binding agreement. He lamented that "Australia's copyright law does not provide adequate

recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin,"[13] and concluded by recommending that "the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators."[14]

A related issue to the failure of the courts to recognise communal proprietorship of traditional works is their failure to compensate communal harm(Blakeney 1998). In *Milpurrurru,* mentioned above, the court awarded damages for breach of copyright to a number of Aboriginal artists whose designs were wrongfully reproduced on carpets. The court agreed that this was a particularly egregious breach of copyright, involving a culturally demeaning use of the infringed works. However, the court considered itself unable to compensate the communities whose images were used in culturally inappropriate ways, as 'the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories.'[15]

Indeed a major problem, which has been identified in analysing traditional knowledge and cultural expression in conventional intellectual property terms, is the observation that "indigenous peoples do not view their heritage in terms of property at all...but in terms of community and individual responsibility. Possessing a song, story or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected" (Daes 1993; Puri 1995:308).

The most recent Australian case concerned with the communal rights of an Aboriginal people in Australia, *Bulun Bulun & Anor v. R & T Textiles Pty Ltd,*[16] arose out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, John Bulun Bulun, in his work "Magpie Geese and Water Lillies at the Waterhole." The proceedings were commenced on 27 February 1997 by Bulun Bulun and by George Milipurrurru. Both applicants were members of the Ganalbingu people. Ganalbingu country is situated in Arnhem Land in the Northern Territory of Australia. Bulun Bulun sued as legal owner of the copyright in the painting and sought remedies for infringement under the Australian Copyright Act 1968. Milpurrurru brought the proceedings in his own name and as a representative of the Ganalbingu claiming that they were the equitable owners of the copyright subsisting in the painting.

Upon commencement of the proceedings, the respondents admitted to infringement of Bulun Bulun's copyright and consented to permanent injunctions against future infringement. In its defence to Milpurruru's actions the respondent pleaded that as Bulun Bulun's claim had been satisfied, it was unnecessary to

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consider the question of the equitable ownership of the copyright. Milpurrurru sought to continue the action as a test case on the communal intellectual property rights of indigenous Australian peoples arising from the copyright infringement.

The principal questions for the court to address were whether the communal interests of traditional Aboriginal owners in cultural artworks, recognised under Aboriginal law, created binding legal or equitable obligations on persons outside the relevant Aboriginal community. This depended upon there being a trust impressed upon expressions of ritual knowledge. The Court acknowledged that amongst African tribal communities, tribal property was regarded as being held on trust by the customary head of a tribal group (Asante 1965:1145). However, in the instant case the court considered there to be no evidence of an express or implied trust created in respect of Bulun Bulun's art. This was an issue of intention and the court found no evidence of any practice among the Ganalbingu whereby artworks were held in trust.

In an extensive *obiter dictum* in this test case, the court was prepared to impose fiduciary obligations upon Bulun Bulun, as a tribal artist, to his people. The factors and relationships giving rise to fiduciary obligations under equity law do not admit of easy definition (Finn 1975:4; Sealy 1995:37). In the instant case, the Court found the subsistence of a fiduciary relationship between Bulun Bulun and his people, arising from the trust and confidence reposed in him, that his artistic creativity would be exercised to preserve their integrity, law, custom, culture and ritual knowledge. The fiduciary obligation imposed on Bulun Bulun was "not to exploit the artistic work in such a way that is contrary to the laws and customs of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work."

Simulation of Aboriginal Images by Non-Aboriginal Creators

A controversial issue in recent years in Australia, has been the creation of works or products: (a) which are claimed to be produced by Aboriginal creators or which are got up in the style of Aboriginal schools of art; (b) by people who think that they are Aboriginal creators; (c) or which are allegedly inspired by Aboriginal spirits or muses.

In relation to works which are falsely claimed to be produced by Aboriginal persons, trade descriptions remedies would seem to provide an adequate remedy. Because of these remedies, some traders pass their work off as "Aboriginal-style" or "Aboriginal inspired." This sort of qualification may well avoid liability, but it remains as a dilution of the repute of genuine Aboriginal creations. A particular problem which has arisen in a couple of instances in Western Australia, is that of

works produced by persons who assert that they are of Aboriginal descent or who claim to be inspired by an Aboriginal muse. In the first category are the books of Colin Johnson, written under the name of 'Mudrooroo Nyoongar' and the books of Leon Carmen written as those of an Aboriginal woman, 'Wanda Koolmatrie.' Similarly, the Western Australian artist, Elizabeth Durack, painting under the pseudonym, 'Eddie Burrup' claims to be inspired by an Aboriginal spirit. These impostures, range from the malicious to the misguided, but each has been criticised as offensive to Aboriginal Peoples (Berg 1998). On the other hand, in western eyes, the reinterpretation of classical stories is often considered to stand at the heart of some modern literature.

Culturally Offensive Use of Aboriginal Images and Themes

The adoption of Aboriginal themes and motifs in products has sometimes caused harm to those Aboriginal Peoples for whom those matters have great spiritual and cultural significance. The National Indigenous Arts Advocacy Association, Inc (NIAAA) reported the use of the use of the Wandjina spirit as a logo for a surfboard company.[17] The Wandjina are the Creation Ancestors of the Kimberley Aboriginal People and their painted images are found in the rock galleries in that region. The question of authorship is impossible to resolve as it is believed that the paintings were done by the Wandjina (Isaacs 1980:73). In any event, the antiquity of these images means that their authorship is unknown. Wandjina images may be retouched or painted today, provided that appropriate deference is given to the ancient spirits. The Kimberley Aborigines believe that inappropriate treatment of these images will cause death and devastation (Ibid: 74). However, there is currently no law to prevent the use of these images by commercial enterprises (Golvan 1995).

In *Foster v Mountford*[19] an anthropology text, *Nomads of the Desert*, which was written to document the life of the Pitjantjatjara People, reproduced images which were forbidden to uninitiated members of the Pitjantjatjara. The court in this case was prepare to grant an injunction to prevent the book being distributed in the Northern Territory because the author had been shown these sacred matters in confidence.[20]

However, Aboriginal Peoples have no right equivalent to those which are conferred under the action of blasphemy. The NIAAA Report refers to a story used in the television series 'Heartlands' which belonged to a Western Australian Aboriginal community, but which was represented as coming from New South Wales.[21] Because the story was in the public domain, the relevant community had no rights to prevent the transmission of this programme. The law does not currently recognise the proprietary interests of Aboriginal peoples in their Dreamings, stories, sacred images or dances.

Related to the culturally offensive use of Aboriginal themes is the misrepresentation of Aboriginal cultural life. A recent spectacular instance of this concerns the publication in 1990 of the book *Mutant Message Down Under*, by American author, Marlo.Morgan This book contained an account of Morgan's alleged travels among 'cannibalistic' Western Australian Aboriginal tribes. The book was on the US best sellers list for 25 weeks and was shortlisted for the 1995 American Booksellers Book of the Year, and the author merchandised CDs and videos to promote the work and her form of new age spiritualism. Following a detailed investigation for the Kimberley Law Centre, it was revealed that the author had never visited Australia. And she confessed that the work was a hoax.

Another factor which has played an important role in agitation for the protection of traditional cultural works, is economics. As in other areas of piracy and counterfeiting, Ralph Oman, has highlighted the developments in communications and reprographic technologies, which have exposed formerly isolated cultures to digital imitation and to global transmission, without compensation (Oman 1996). As with the exploitation of developing countries through bioprospecting, the exploitation of traditional cultural resources without exploitation raises similar issues (Wiener 1987:67). Indeed Chengsi has suggested that folklore protection has become a "trade-related issue" (Chengsi 1996:93).

Modalities for the Protection of Traditional Knowledge

Proposals of mechanisms for the protection of traditional knowledge have ranged across two axes. Along one axis are various suggestions to improve the private law rights of the creators or custodians of traditional knowledge. These suggestions range from proposals to modify existing copyright law through to the creation of sui generis traditional knowledge rights. Along another axis are suggestions to deal with the protection of traditional knowledge as a public law right. These suggestions range from the creation of a public protection authority, through *domaine public payant* proposals, to the empowerment of Indigenous peoples' protective agencies. These various suggestions are considered below.

At the minimalist end of discussions concerning the protection of traditional knowledge are suggestions to deal with the perceived inadequacies of existing intellectual property laws by supplementary legislation. It should be noted at the outset that a number of commentators have questioned whether traditional knowledge is amenable to private law remedies. For example, Rosemary Coombe has raised the issue of the applicability of private law concepts to cultural expressions (Coombe 1998(a); Coombe 1998 (b)). Puri, questions whether property concepts are cognizable under customary Aboriginal law (Puri 1995). Daes, explains,

> …indigenous peoples do not view their heritage as property at all- that is something which has an owner and is used for the purpose of extracting economic benefits- but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights (Daes 1993).

However, bearing these reservations in mind, the various private and public law suggestions for the protection of traditional knowledge are canvassed below.

Copyright

As has been indicated, in the survey of Australian cases above, existing copyright law does not easily recognise communal authorship and to a lesser extent, communal ownership. Both of these matters can be dealt with by statutory amendment. For example, a form of representative or class action, could be brought by Indigenous and communal groups.

Another ownership issue, is the matter canvassed in the *Yumbulu*l case, discussed above, whether notwithstanding an assignment of copyright, a communal group retains the underlying right to the folklore. It has been suggested that this could be dealt with by the recognition of an underlying equitable right in the communal group. This right would seem to have a similar quality to the moral rights which are recognized in civil law jurisdictions.

A major limitation of western copyright law, is its insistence upon material fixation as a precondition for protection. The Tunis Model Law on Copyright for Developing Countries, 1976, in s1(5*bis*) provides a useful precedent of the fixation requirement being waived for folklore. The limited duration of copyright protection has been perceived as a problem for traditional works, some of which may have originated many thousands of years ago. Again this is a problem which could yield to appropriate legislative drafting. It has been suggested that the unauthorised appropriation of the styles of Indigenous peoples, could be dealt with by the concept of copyright in derivative works. In general, the view of many commentators and committees of review is that the legal structure of copyright, with its emphasis on private proprietorial rights, is ill suited to protect traditional works.

Moral Rights

Another copyright possibility for the protection of traditional knowledge is within the rubric of moral rights. Each of the moral rights of publication, paternity and integrity, have an applicability to the protection of traditional knowledge. The

right of publication allows a creator to decide whether a work should be made public. This would permit the creators of spiritually sensitive works to control their dissemination. The right to have paternity acknowledged, would be useful in securing the authentication of traditional works. Most important is the right of integrity, which protects works from distortion, alteration, or misrepresentation.

Domaine Public Payant

To deal with the fact that copyright works fall into the public domain after a finite time, a number of states have introduced legislation to prevent or sanction the use of such works, which would prejudice their authenticity or identity.[22] Additionally, a fee may be imposed for the use of such works. The moneys thereby received can be diverted to the promotion of cultural activities. This scheme is particularly suited for the nurturing of traditional works. The Tunis Model Law on Copyright encourages the use of domaine public payant to assist developing countries to "protect and disseminate national folklore."[23] However, the extent to which this sort of law can protect traditional works has been questioned (Jabbour 1982).

Authentication Marks

A suggestion emanating from IP Australia, the Australian intellectual property office, is the appending of an authentication mark to works of Indigenous creativity. This would be in the nature of a certification mark (Annas 1997), although, of course, it will be limited to certain manifestations of traditional knowledge.

Public Protection Models

The approach to protection, which was adopted in the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action*, envisaged a system of prior authorisation to be administered by a competent authority which representing the relevant traditional community's interest in protecting its folklore. Authorisation was required for commercial uses of folklore other than in the traditional and customary context, subject to the supervision of the competent authority.

Where folklore was used in a traditional context, an authorisation was needed for the publication, recitation, performance or distribution. Use of folklore outside its traditional context would have to seek the prior consent of the community or an authorised person. Authorisation was not required for uses of expressions of folklore if the purposes relates to research, conservation and archiving. Furthermore, there is no need for authorisation, outside of the traditional or customary context, when an expression of folklore was used: for educational purposes; by way of illustration;for creating an original new work; for reporting

of a current event; and where folklore is permanently situated in a public place.

The Model Law prohibited unauthorised commercial use of expressions of folklore. It provided that where the competent authority granted authorisation, it could set the level of remuneration and collect fees. The fees would be used for the purpose of promoting or safeguarding national culture or folklore. The commentary on the Model Law suggested that it would be advisable to share this fee with the community from which the folklore originated. The Model Law provided for offences relating to distortions of expressions of folklore. The offence provisions required the element of "wilful intent", with fines and imprisonment imposed as punishment. There were also civil sanctions and seizure provisions.

The *Model Law*, was anticipated in Australia, by the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore,* which envisaged the appointment of Commissioner of Aboriginal Folklore to exercise a protective jurisdiction. The Commissioner, rather than Indigenous peoples would initiate litigation against infringing activities. This Report was commended in the 1982 WIPO/UNESCO meeting of experts on folklore[24], but it was not implemented. The notion of a protective jurisdiction would certainly not find favour today. Certainly in Australia, the notion of a government-administered, protective, jursidiction has been thoroughly discredited, particularly because of the disastrous consequences of other paternalistic policies of protectivism.

However, in countries which have not endured this sort of colonial experience, the protective model is considered unobjectionable. For example, the folklore provisions of the Nigerian Copyright Act 1988 are based extensively on the WIPO/UNESCO Model Law and the supervision of the exploitation of cultural works is conferred upon the Nigerian Copyright Council (Shyllon 1998).

Traditional Cultural Expression and Self Determination

The discourse about the protection of traditional knowledge assumes the necessity for this protection and also assumes that the primary beneficiaries of this protection will be Indigenous peoples and community groups. However, the state as guardian of its people's cultural heritage, also has an interest in the preservation of the traditional knowledge which exits within it (Niec 1976). The various African laws which seek to protect folklore, stress its significance as part of the national heritage.[25] Multiculturalism has begun to replace nationalist uniformity as the new orthodoxy. An incidental beneficiary will be the nation state, first from the vigour of cultural health and secondly, from the commercial exploitation of traditional knowledge.

A corollary to the assumption of the necessity to protect traditional knowledge, is the assertion of the right of Indigenous peoples and traditional communities

"to determine the appropriateness of the use being made of their culture" (Pask 1993:61). Thus Erica-Irene Daes, declared that "each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used" (Daes 1993).

The increasing involvement of Indigenous peoples in models for the protection of traditional knowledge can be seen in the Australian experience. In the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore*, proposed the establishment of a Commissioner for Aboriginal Folklore, who would exercise a protective jurisdiction on behalf of traditional peoples. Further reports in 1987,[26] 1989[27] and 1994[28] made recommendations which envisaged an increasing role for Indigenous peoples in the protection of traditional knowledge. In 1998-99 Australian Inigenous Peoples conducted their own inquiry, based on a discussion paper *Our Culture, Our Future: Proposals for the recognition and protection of Indigenous cultural and intellectual property.*[29]

Today in Australia, Indigenous peoples regard the protection of traditional knowledge as an issue of self-determination (Fourmile 1989:45). For other countries, with a less unfortunate colonial history, the issue of who controls the protection and conservation of traditional knowledge might be less politicised.

Among the political issues which have been raised in Australia are: whether eurocentric intellectual property law can be trusted with the subject of traditional knowledge (Maddocks 1988:6) Similarly, it has been suggested that "a suspicious eye should be cast over any assertion of legal or moral authority by non-Indigenous people to adjudicate disputes between traditional and non-traditional artists" (Gray 1996).

TCEs in UNESCO

The difficulties of action within WIPO and the WTO has permitted UNESCO to step into the vacuum. Member States of UNESCO in 2001 adopted the UNESCO Universal Declaration on Cultural Diversity and its action plan. This instrument recognized cultural diversity as the "common heritage of humanity" and committed UNESCO to "pursue its activities in standard-setting, awareness-raising and capacity-building in the areas related to the present Declaration within its fields of competence." The first paragraph of the action plan recommended "taking forward notably consideration of the advisability of an international legal instrument on cultural diversity." The Director-General in his preliminary study on the technical and legal aspects relating to the advisability of a standard-setting instrument on cultural diversity proposed a number of options including a binding

standard-setting instrument on the Protection of the Diversity of Cultural Contents and Artistic Expressions.

The elaboration of this new instrument, was undertaken in two stages: first three meetings of independent experts took place between December 2003 and May 2004 for preliminary deliberations with a view to producing a first preliminary draft convention along with a preliminary report. Secondly, From September 2004, a series of intergovernmental meetings were held in order to finalize the preliminary draft Convention and report. At these meetings a draft text for the convention was elaborated.

The preamble to the draft text included the following:

> Affirming the fundamental right of all individuals and societies to share in the benefits of diversity and dialogue as primary features of culture, as the defining characteristics of humanity,
>
> Being aware that cultural diversity, the common heritage of humanity, is a mainspring of sustainable development, and that it is thus as vital for humankind as biological diversity is for living organisms,
>
> ….
>
> Recognizing the fundamental right of social groups and societies, in particular of members of minorities and indigenous peoples, to create, disseminate and distribute their cultural goods and services, including their traditional cultural expressions, to have access thereto, and to benefit therefrom for their own development,
>
> Emphasizing the vital role of the creative act, which nurtures and renovates cultural expressions, and hence the vital role of artists and other creators, whose work needs to be endowed with appropriate intellectual property rights,
>
> Being convinced that cultural goods and services are of both an economic and a cultural nature, and that because they convey identities, values and meanings, they must not be treated as ordinary merchandise or consumer goods,

The objectives of the Convention, were stated in Article 1 to include:

(a) to protect and promote the diversity of cultural expressions;
(b) to give recognition to the distinctive nature of cultural goods and services as vehicles of identity, values and meaning;
(c) to facilitate the development and adoption of cultural policies and ppropriate measures for the protection and promotion of the diversity of cultural expressions;

…

Article 7 of the Convention obliges signatories to promote the diversity of cultural expressions, declaring that:

1. States Parties shall provide all individuals in their territory with opportunities:
   (a) to create, produce, disseminate, distribute, and have access to their own cultural expressions, goods and services, paying due attention to the special circumstances and needs of the various social groups, in particular, minorities and indigenous peoples;
   (b) to have access to the cultural expressions, goods and services representing cultural diversity in other countries of the world.
2. States Parties shall also ensure:
   (a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;
   (b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

Article 8 imposes an obligation to protect forms of cultural expression which are "deemed to be vulnerable to or threatened by the possibility of extinction or serious curtailment".

An interesting innovation, in Article 11 is the obligation on States Parties to "encourage civil society to assume its share of responsibility for the protection and promotion of the diversity of cultural expressions, and shall foster the participation of civil society in their efforts in this domain."

UNESCO, WIPO and WTO

An important political issue is how the proposed UNESCO convention will fit into the TCE landscape, which is already occupied by WIPO and the WTO. This is sought to be addressed in Article 19, which provides two options:

Option A

1. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.
2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

Option B

> Nothing in this Convention shall affect the rights and obligations of the States Parties under any other existing international instruments.

It will be interesting to see how this turf dispute plays out.

Notes

1. See [1963] Le Droit d'Auteur 250.
2. Cameroon, Congo, Dahomey, Gabon, Ivory Coast, Madagascar, Mali, Niger, Senegal, Upper Volta [1967] Le Droit d'Auteur 132-133.
3. 'Report', [1985] Copyright: Monthly Review of the World Intellectual Property Organization, 40-41.
4. '1967, 1982, 1984: Attempts to Provide International Protection for Folklore by Intellectual Property Rights', WIPO doc., UNESCO-WIPO/FOLK/PKT/97/19 (March 21,1997), 15.
5. WIPO doc, UNESCO-WIPO/FOLK/PKT/97/1 (March 17,1997)
6. On the biodiversity rights of indigenous peoples see Blakeney (1997 b).
7. See Appendix 1 for a full list of Indigenous Peoples' Declarations.
8. Study of the Problem of Discrimination Against Indigenous Populations, E/CN.4/Sub.2/1986/7 and Add.1-4.
9. Bulun Bulun v Nejlam Pty Ltd, Federal Court of Australia, Darwin, 1989 (unreported), referred to in Golvan, 'Aboriginal Art and copyright. The Case for Johnny Bulun Bulun', [1989] 10 European Intellectual property Reporter 346 (C. Golvan 1992: 51).
10. (1995) 91-116 CCH Australian Intellectual Property Cases 39,051.
11. See also the discussion of this case in Miller,(1995)
12. (1991) 2 Intellectual Property Reports: 481.
13. Ibid: 490.
14. Ibid: 492.
15. (1995) 91-116 CCH Australian Intellectual Property Cases at 39,077.
16. [1998] 1082 FCA (3 September 1998), reported at <http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1082.html>.
17. NIAAA, Stopping the Ripoffs, Sydney, May, 1995, 5.
18. See also Golvan (1995).
19. (1976) 14 Australian Law Reports 71
20. Applied also in Pitjantjatjara Council Inc. v. Lowe (Unreported, Vic. Sup Ct, 26 March 1982) noted in (1982) 4 Aboriginal Law Bulletin 11.
21. NIAAA (1995).

22. See Australian Copyright Council, n.xiii, at 43-44.
23. For a recent survey, see Berryman, 'Towards a More Universal Protection of Intangible Cultural Property', (1999) <www.lasch.uga.edu/~jipl/vol.1/berryman.html>.
24. See, 'Study of Comparative Copyright Law: Protection of Works in the Public Domain' (1981) 15(2) Copyright Bulletin 33.
25. Tunis Model Law on Copyright for Developing Countries, s.17.
26. UNESCO/PRS/CLT/TPC/II/3, 30 November 1984.
27. Eg the Copyright Acts of Angola, Gabon, Demoocratic Republic of Congo, Malawi, and Tunisia, discussed in Shyllon (1998).
28. Committee of Inquiry into Folklife, Folklife: Our Living Heritage(Canberra: AGPS, 1987).
29. Department of Aboriginal Affairs Review Committee, The Aboriginal Arts and Crafts Industry (Canberra: AGPS, 1989).
30. Ministers for Justice, Aboriginal and Torres Strait Islander Affairs, Communications and the Arts, Stopping the Rip-Offs- Intellectual Property Protection for Aboriginal and Torres Strait Islanders. (Canberra: AGPS, 1994)
31. Available at http://www.icip.com.au

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IPRs and Developing Countries

The Philippine Experience with the Plant Variety Protection Act

Paul Borja

As a developing country, the Philippines' economy still relies to a significant degree on agriculture. It is estimated that the farming sector contributes about 15 per cent of the country's GDP although in terms of labour distribution around 36 per cent of the labour force depends on agriculture. With a national poverty rate of around 40 per cent, many of the country's poor are in agriculture, burdened by such widespread problems as landlessness, low productivity, deficient government services, and lack of market access, among others.

Most of the country's farmers are small shareholders and landowners, with an average farm size of only two hectares. In addition, there are numerous landless farm workers that are the most economically marginalised. For these resource-poor farmers, farm-saved seeds are important for their livelihood and survival. The ability to save, re-use and have access to seeds is critical to small farmers' production system and therefore to local food security.

When the Philippines joined the World Trade Organisation (WTO) in 1996, the country committed itself to implementing all the component agreements of the treaty including the Trade Related Intellectual Property Systems (TRIPS). Under the Sec. 23 (b) of the TRIPS as regards plant varieties, States had the option to adopt a patent system or a sui generis (of its own) system of protection or a combination of both patent and sui generis system.

Undermining democracy

In 2002, Congress passed the Philippine Plant Variety Protection Act of 2002 (PVPA), which was declared as the country's compliance legislation with TRIPS 23 (b). The passage of the PVP Act came under strong criticism from civil society and farmers' movements in the country for three main reasons: a) the procedure in which it was legislated; b) the substance of the Act itself; and c) its implications for the country's farmers. I will deal with each issue one by one.

Having been the Philippines' coloniser for more than 40 years from 1898 to 1945 and its closest trading partner up to the present, the United States government

continues to play an important and sometimes decisive role in Philippine political and economic affairs. This is true even in legislation.

Through the US Assistance for International Development (USAID), the US put up a programme called Accelerating Growth, Investment and Liberalisation with Equity (AGILE) in the Philippines. AGILE aimed to provide technical assistance to the government's policy formulation processes in line with the liberalisation of the country's political economy. The AGILE hired a consulting firm, Development Alternative Initiatives (DAI), which set up offices or desks in key government agencies, including the Department of Agriculture (DA), to facilitate the programme's technical assistance to the government. One of AGILE-DAI's accomplishments was in fact the PVP Act, which it basically drafted for the DA and Congress.

Procedure-wise, the drafting and passage of the PVP Act basically contradicted sovereign and democratic principles of law-making, considered inviolable in modern States. It was mainly the result of foreign intervention in national policy making, masquerading as official development aid (ODA) technical assistance. During the drafting of the bill, the DA and Congress failed to undertake widespread consultations with farmers' and civil society organisations across the country. However, a few groups, including SEARICE, submitted proposals that emphasised farmers' rights rather than PBR but these were generally ignored in the final version of the law. Even during the final deliberations on the law before Congress adopted it AGILE consultants sat in purportedly as resource persons, which is anomalous in itself since these final meetings are usually exclusive to legislators.

For our part, SEARICE was instrumental in helping expose the role of AGILE in the drafting and passage of the PVP Act when we released a paper on this issue. Later, the Philippine Senate conducted investigations into the activities of AGILE-DAI after media reported on the other activities of the programme influencing government policymaking. Some Senators criticised the US government for political interference and the Philippine government as well for allowing such interference. Unfortunately, nothing came out of the Senate investigations and AGILE promptly adopted a low profile in its activities, changed the name of the programme, and had any references to it removed from the USAID website.

The Philippine experience with the PVP Act shows that a supposedly sovereign act as lawmaking can be taken over and directed by larger political economic interests and relationships. In the case of the PVP Act, the Philippine government, as often has been the pattern in our country's relationship with the US, allowed US government interference in the drafting of the law as part of a technical aid package under the US's official development assistance. No doubt, US interests behind the PVP Act was to ensure protection of the intellectual

property rights (IPRs) of US seed companies doing business in the Philippines in the context of a fast-liberalising and privatising agriculture sector. As we shall see later, this resulted in the passage of a law, the PVP Act, which catered mainly to corporate interests without considering the prevailing realities of small-holder agriculture in the country and Farmers' Rights.

Failing Farmers' Rights

TRIPS 23 (b) itself allows for flexibilities that any member-State can avail of to suit its national realities and needs. The sui generis option available mainly provides such flexibility and this had been made use by countries such as India, Thailand, and to some extent Malaysia and Indonesia. In their national legislations, these countries opted to exercise sui generis flexibilities by allowing for varying degrees of protection and recognition of farmers' varieties and farmers' rights to seeds, which are not otherwise possible or are severely restricted in a purely plant breeders' rights (PBR) legislation.

On the other hand, the 1991 version of the UPOV is considered the model legislation on PBR, which has also been promoted as being TRIPS-compliant as well. Indeed, UPOV has been presenting itself to developing countries as an option under TRIPs and is campaigning for membership to its treaty.

In general, the Philippine PVP Act hews closer to the UPOV 1991 model than to the sui generis system along the lines of the Indian and Thai legislations. No doubt, US government intervention during the drafting greatly influenced the substance of the PVP Act as the US has been one of the countries favoring and strongly campaigning for adoption of UPOV under TRIPs.

Among the salient features of the PVP Act and their possible implications for farmers are the following:

- first to file rule: The law favours the person who is the first to file for a PVP application and places the burden of proof on those who wish to challenge the claim. In this case, farmers would be at a disadvantage when one of their varieties is misappropriated and filed for PVP protection by another person on the basis of having been "discovered" by the latter. As we know, farmers lack access to information with regard to government laws and procedures and they simply do not have the resources to assert their claims under the existing legal framework. We all know about cases of bio-piracy in which biological resources were claimed, patented and commercialised by persons or companies to the detriment of source communities and countries. Without any protection for farmers' varieties, the PVP law makes it possible for farmers' varieties and genetic resources to be legally mis-appropriated from them.

- Filing and varietal testing requirements: The requirements and standards for filing a PVP application are complicated and tedious enough that no ordinary farmer would contemplate availing of the protection under the law. The filing fees and other expenses to meet the law's requirements are certainly way beyond what farmers can afford. Only institutions and seed companies have the capacity to do so, which makes the law ultimately favourable to them.
- Essentially derived varieties: The protection provided under the PVPA extends to varieties considered essentially derived from the protected variety. Essentially derived varieties refer to varieties developed from an original material and which express many of the same traits from the latter. This type of protection in effect discourages further breeding and improvement of varieties, which is a common practice among farmers when they use a new variety. Farmers would either do selection from an existing population or use the variety for breeding in order to develop more adapted varieties. For farmers, there is really no "final variety" to speak of but all genetic materials are subject to development and improvement whether by natural or human selection. IPRs do not recognise the dynamic nature of genetic resource conservation and development but places them in a kind of "legal freezer." So rather than spur innovation and improvement in plant breeding, the PVPA restricts this important aspect of agricultural development, and not only in the case of farmers but also for scientists, especially in the public sector, who may want to create new varieties out of protected varieties.
- Restrictions on farmers' rights to seeds: The PVPA supposedly recognises the traditional rights of farmers to save, use and exchange seeds. At the same time, however, it places several conditions and restrictions on these rights when it comes to protected varieties. In general, the law provides that farmers may save, use, exchange, share and sell seeds of protected conditions only under the following conditions:
  a. the sale is not for the purpose of reproduction under a commercial marketing agreement
  b. the exchange or sale of seeds among and between farmers is for reproduction and replanting in their own land; and,
  c. the sale does not involve the tradename or trademark.

Prior to the PVP, a farmer would not have any problems using a plant variety in whatever way he or she does. With PVP, however, the farmer is forced to walk a narrow line between what is allowed and what is prohibited by law, therefore placing a virtual "Damocles sword" over him or her. It is farmers' practice, and

part of his or her means of livelihood, to exchange and sell seeds to other farmers. The PVP, however, restricts such a practice and therefore potentially deducts from the income generating activities of our already impoverished farmers. More importantly, the law goes against farmers' rights, which is essentially a recognition of the important historical role of farmers in the conservation and development of plant genetic resources over generations. On other hand, it protects the rights of plant breeders, who in the first place have made use of farmers' and indigenous varieties for their breeding activities without any restrictions whatsoever from the source communities or farmers. The Philippine law, in fact, does not provide for any benefit-sharing mechanisms to farmers in cases where a protected variety is derived from materials originating from farmers or local communities.

Moving Forward

On the other hand, however, India and Thailand were able to adopt TRIPS-compliant legislation that did not hew to UPOV in many respects but were more sui generis in substance and cognisant of the realities of their farmers' sector and of farmers' rights vis-à-vis seeds. How these differences came about have to do basically with the fact that, unlike Thailand and India, the Philippine legislation was largely influenced by US government intervention, which represented a specific policy agenda with regard to IPRs. It was, thus, a difference between sovereign and democratic processes and one that was essentially not. To the misfortune of millions of Filipino farmers, they are now saddled with a law that criminalises the very acts that are basic to their survival and to their rights as farmers. Nevertheless, farmers have not lost hope but are working to reclaim and assert their rights to seeds in various ways.

For example, a number of farming communities are exploring local models of recognising and protecting their rights to seeds and plant varieties, using the power of local governments and the protection afforded by the principle of "prior art," that is by declaring their plant genetic resources in the public domain. Different models of public declaration or protection of genetic resources are being developed by farmers and supporting legislative measures are being worked out and lobbied with local governments. At the same time, farmers continue with their efforts to conserve and improve crop varieties and to share and exchange seeds among themselves. Increasingly, farmers are linking up into networks for seeds conservation, improvement and exchanges that are the embryo of a dynamic movement for farmers' rights in the country. In the end, given the current legal situation of the Philippines, farmers themselves will have to assert their rights actively and innovatively in ways that will make farmers' rights a reality in their lives, if not yet a legal one then at least a moral one.

Squaring of the Circle?
Or, Stimulating the Production of Biodiversity-based Drugs...

Gustavo Ghidini and Emanuela Arezzo

The beneficial properties of the *Azadirachta Indica,* commonly known as the Indian neem tree, have been known and employed by Indian farmers for centuries and yet only a few decades ago they have attracted the interests of foreign biotech and pharma companies. At the beginning of the seventies, many biologists and etnobotanists moved to India to investigate neem trees' attributes and the fruits of their work, entirely based on local germ plasm and knowledge, led to the patenting of a several range of products, from pesticides to toothpaste. Needless to say, not a single penny went to Indian farmers or to the Indian Government.[1]

The neem tree is probably the most well-known case of biopiracy – better defined as biosquatting[2] - but unfortunately is not the only one.[3] Developed countries' companies have recently come to understand the immeasurable value of the biodiversity that indigenous communities, mainly located in developing countries, have carefully studied and cherished across centuries.[4] Moreover, they have come to acknowledge the value of the so called traditional knowledge associated with it.[5]

As it has been pointed out, the protection of biodiversity and related traditional knowledge presents once again a conflict of interests between Northern (developed) and Southern (often developing) countries of the World; the former technology-rich industrialised countries, located primarily in the zone of the northern hemisphere, and the biodiversity-rich developing countries, located primarily in the tropics and southern hemisphere (McManis 1998). The cooperation between these two groups of countries could bring about significant innovations in a variety of products, ranging from drugs to agricultural products, cosmetics and so on. Sometimes this cooperation has carried good revenues for developing countries. Nevertheless, in the best case scenario, the unequal bargaining power of the contracting parties leads to biased licensing schemes whereby indigenous communities are only rewarded for the biodiversity they provide but they are excluded from any participation whatsoever in the results of the researches

conducted on it. Often such agreements do not take place at all. There are plenty of examples of local communities that are constantly reaped off their biological heritage and there have been cases where developing countries, incapable of trading their own biodiversity, and have blown up their natural resource to feed their own people.[6]

This article stems from an in-depth rethinking and broadening of perspectives of the substantive issues and normative solutions dealt with by one of us in a previous essay (Ghidini 2005). This work is composed of four parts. The first chapter is aimed at analysing the current international legal framework while the second presents an overview of the current state of the debate, examining the most recent proposals advanced within the WIPO and other international *fora*. The third part of this work is meant to analyse how and to what extent modern intellectual property systems, shaped to preserve the interests of an industrial society, are likely to damage developing countries. As we are about to see, many of the issues concerning traditional knowledge and germ plasm stem from their peculiar features, like the cumulative way knowledge is produced and shared within the community, as well as its disembodied and unfixed nature. Developed industrialised countries look at traditional knowledge through the lenses of modern intellectual property systems. They reason in terms of inventiveness and novelty, they look for a specific author/inventor to reward and when they do not find any of the above, they just assume they have the right to take indigenous countries' scientific knowledge without giving anything in return. The last part of the work concentrates, on the one side, on recent proposals advanced in order to grant indigenous communities some sort of entitlement towards their tangible and intangible knowledge and, on the other side, on the possibility of reestablishing the local working requirement within patent law as an instrument to protect indigenous communities against the commercial exploitation of traditional knowledge based–patents in their own territories.

I. Convention on Biological Diversity and the Bonn Guidelines

The need to spur cooperation between Northern and Southern countries is well reflected in the provisions of the Convention on Biological Diversity (hereinafter "the Convention" or simply CBD).[7] The Convention, promoted by the United Nations, recognises the value of biodiversity as *world* heritage and stresses the need that all Contracting Parties, no matter if holders or not of such heritage,[8] enact measures aimed at protecting and safeguarding such inheritance. The Convention aims at spurring the aforementioned cooperation while preserving the general and globally shared interest towards the preservation of biodiversity and the diverse interests of Contracting Parties.

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We can conceptually dissect the Convention in three subsections. The first set of provisions pose on *all* Contracting Parties a set of duties to promote sustainable uses and conservation (*in-situ* and *ex-situ*[9]) of biological resources and encourages them to "[…] create conditions to facilitate access to genetic resources for *environmentally sound uses* […]" (emphasis added).[10] A second set of norms recognise States' sovereignty over natural resources and their right to give access to third parties.[11] Therefore, although the Convention clearly aims at encouraging the sharing of biological resources, it firmly recognises States' prerogatives and to that goal it further establishes that access to genetic sources must be subject to prior informed consent of the party providing such resources; once consent has been given, terms of access must be mutually agreed.[12] Last, and surely not least, the Convention promotes "the fair and equitable sharing of the benefits arising from the utilization of genetic resources."[13] Specifically, the Convention establishes that each Contracting Party shall take appropriate measures in order to afford (to the party providing the germ plasm) equitable sharing of: the *results* of research and development, and the *benefits* arising from the commercial and other utilization of genetic resources.[14]

While the Convention rightly devotes a huge deal of attention to the issue of access to genetic biological resources, it affords much less consideration to the equally important matter of traditional (medical) knowledge associated with germ plasm. In fact, the promotion of innovation and practices based on traditional knowledge and the sharing of the benefits arising from its utilisation is expressly envisaged – within the Convention — as instrumental to promote *in-situ* conservation of biological resources.[15] However, the concern for traditional knowledge, innovations and practices of indigenous and local communities, *inter alia,* has led to the creation, by the Conference of the Parties (hereinafter: CoP), the very same governmental body of the Convention, of a Working Group to specifically address the implementation of art. 8(j) CBD,[16] and later on to the adoption of the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation, approved by decision VI/24 of the Conference of the Parties in 2002.[17] The Guidelines are meant to provide a set of voluntary inputs for Contracting Parties involved in the process of drafting legislative, administrative or policy measures on access and benefits sharing (ABS) provisions set forth by the CBD, in particular articles 8(j), 10(c), 15, 16 and 19.

Among the most relevant provisions, the Guidelines strengthen the important of prior informed consent (PIC) as a means to prevent misappropriation of genetic resources. At this regard, the Guidelines establishes that the PIC should be granted for certain specific uses of the biodiversity provided and that any change of such

use should prompt a new application for PIC; that competent local authorities could be involved in the mechanism of PIC certification, for example by handling the applications for access. The guidelines also deal with some aspects of the role of intellectual property in the access and benefit sharing process, proposing the disclosure of the country of origin of genetic resources in (patent) applications as a possible means to track compliance with PIC.

Notwithstanding the relevance of the principles set forth in the Convention, the international scenario on the protection of biodiversity seems still dubious and uncertain. On the one side, harmonisation on the international level seems still far away. Although Contracting Parties do have a legal obligation to comply with CBD provisions, the CBD has not been ratified by some of the most economically significant countries, like the United States of America.[18] And even the same Bonn Guidelines, promoted by the CoP, are not mandatory for Contracting Parties to implement. On the other side, the international status of the Convention, outside the realm of WTO (and TRIPS), makes its practical enforcement hard, if not impossible at all.[19]

The necessity of reconciling the provisions set forth in the CBD and the TRIPS Agreement has been acknowledge during the Doha Declaration where the TRIPS Council has been appointed to examine, *inter alia*, the relationship between the TRIPS Agreement and the CBD, and the protection of traditional knowledge and folklore.[20] Several proposals are currently being discussed in order to bring into effect the provisions set forth in the Convention. An *ad hoc* Committee has been created within WIPO to address issues relating traditional knowledge and folklore.[21] Besides the proposal advanced in that forum, others have been suggested within the CoP.[22] Others have come from the academics and eminent scholars. In what follows we are going to examine the on-going proposals presented to comply with the provisions of CBD.

II. Disclosure of Origin of the Source of Genetic resources and Traditional Knowledge

As we are about to see, many countries have repeatedly proposed, at different lengths, the amendment of (*international*) patent law in order to introduce the mandatory disclosure of the origin of genetic resources and traditional knowledge in patent applications.

The employment of biodiversity is rarely recognisable by merely looking at the final product and not even through an accurate analysis could indigenous people find out when biological resources have been taken without PIC, not to mention ABS. The same applies for traditional knowledge. When the invention consists of the very same use of the plant to solve a certain technical problem the

link between the biological resource and the patent is apparent; nonetheless, sometimes traditional scientific knowledge only provides *lead time* advantage in the form of useful leads that bioprospectors use to screen only certain plants over others. The isolated molecules and compounds can then show other extra properties (beside the ones identified by indigenous communities) or the same properties can be studied and implemented for other purposes. In the latter case, the link between TK and final product blurs along the way towards patent offices and indigenous people will not be able to find out about – and hence to oppose efficiently to — biosquattings.

The introduction of the disclosure (of origin) requirement would increase transparency and help developing countries in monitoring the actual compliance to the provisions set forth in the Convention regarding PIC and the sharing of the results and the benefits *at large* flowing from the utilisation of tangible and intangible indigenous resources. The implementation of such requirement at a *supranational* level appears fundamental because, as it has been rightly observed, germ plasm and related TK are employed by biotech and pharma companies to satisfy the demand of their own markets.[23] Chances are that final products will be mostly – if not entirely — commercialised in rich developed countries – think for example about cosmetics based on the *aloe vera.* Therefore, even though the requirement has been implemented — to different extents — by several contracting parties of the CBD,[24] mostly developing countries, it is fundamental for the latter that developed countries implement it first.

A. Swiss Proposal: Disclosure of Origin of Genetic Resources

As hinted above, many negotiations are taking place in different *fora* at the moment. During the seventh session of the working group on the reform of the Patent Cooperation Treaty held within the WIPO, Switzerland reiterated its proposal to amend some of the rules accompanying the PCT in order to allow national patent systems to require the disclosure of source of origin of both genetic resources and related traditional knowledge.[25] Swiss delegates presented the same proposal at the "Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing" organized by the Conference of the Parties of the CBD.[26]

The proposal would add a new provision to rule 51bis1, allowing national patent laws to be modified in such a way to require applicants to furnish: "(i) a declaration as to the source of a specific genetic resource to which the inventor has had access, if the invention is directly based on such a resource; (ii) a declaration as to the source of traditional knowledge related to genetic resources, if the inventor knows that the invention is directly based on such knowledge."[27] The proposal defines the term "source" as "the entity competent (1) to grant access to genetic

resources and traditional knowledge, and/or (2) to participate in the sharing of the benefits arising out of their utilization."[28]

Because of the great divergence in the views on transparency measures, Switzerland decided to leave the adoption of the requirement optional. However, thanks to minor adjustments to rules 4.17 and 48.2, once domestic patent laws implement the requirement the disclosures would become part of the international application as well; hence, they would be published *internationally* as part of the international patent application.[29]

Conversely, it is not clear within the proposal what would happen if parties whose countries have implemented the requirement into national patent laws fail to conform to it. The proposal explains that the extra disclosure obligation would be part of formal patentability requirements but does not say whether its disregard would bring about the same legal consequences.

B. Proposal from Southern Developing Countries

A second — somewhat more articulated — proposal has been gradually presented from a group of developing countries,[30] namely: Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela. Differently from the Swiss proposal just addressed, this second one aims at amending patent provisions contained in TRIPS in such a way to make developing countries benefit from WTO dispute settlement procedure. Moreover, this proposal articulates three sub-points and goes far beyond the disclosure of source of origin of genetic resources and traditional knowledge.

The first obligation regards the disclosure of the source and the country of origin of the biological resources and/or traditional knowledge used in an invention within the patent application.[31] Like Switzerland, these countries explain that the above disclosure would help solving a variety of problems related to patent law from mere patentability issues to cases regarding disputes on inventorship, entitlement to claim an invention and infringements. However, their proposal is somewhat more effective in that it specifies that the obligation of extra disclosures would be triggered even by a minimal use of the tangible or intangible resources[32] and envisions a detailed set of legal consequences in case of wrongful or missing disclosure. In particular, the proposal distinguishes between cases where the wrongful or missing disclosure is discovered before the patent has been granted or examined and, conversely, circumstances where the lack of the requirement is found out at a later stage, when the title of protection has already been issued. In the former case, the patent application should not be processed any further until the applicant complies with the obligation.[33] In the latter case, three different set of consequences are envisioned: a) revocation of the patent, in

case the proper disclosure would have turned down the application because of lack of novelty or reasons of *ordre public* or morality; b) full or partial transfer of the rights to the invention, in case proper disclosure would have shown that the applicant was not the true inventor; c) narrowing the scope of the claims, in case the proper disclosure would have cause them to be curtailed.

The second issue regards the disclosure of evidence of PIC under relevant national regime.[34] Accordingly, patent applicants should bear the burden of providing evidences that national authorities of the country of origin and/or the local or indigenous community have approved the taking of their tangible and/or intangible resources. In case of non-compliance with this extra disclosure requirement a set of legal measures have been proposed, similar to the ones already analysed above for the disclosure of source of origin.[35]

The third element of the checklist regards the insertion, within the patent application, of documents providing evidence of benefit sharing. Parties explained that such requirement is meant not only at "ensuring that there is benefit-sharing per se but that sharing of benefits is fair and equitable among the parties, taking into account the circumstances of each particular case."[36] Such further proof would be provided by showing evidence of an arrangement among the parties for the fair and equitable sharing of any benefit that may arise out of the utilisation of the resources.[37] Similar legal measures have been envisioned in case of non-compliance with such requirement.

C. Position of the European Union

The European Union is at the same time user and producer of biological resources. Not only the EU has been largely using biological resources for the research and later development of vast range of products, but it also is in itself holder of a variety of genetic resources. The core Mediterranean lands are still rich of biodiversity and many institutions, botanic gardens, etc, own big collection of biological resources. This could surely explain the European proactive involvement in the conservation and protection of such heritage at the international and national level.[38] Nonetheless, the position of the European Community with regard to the proposed introduction of an extra-disclosure burden for patent applicants has not been straightforward.

On the one side, the EC claims that many provisions already exist within EU laws that are in line with the proposed disclosure of origin requirement. For example, art. 13(1)b of Directive 98/44/CE establishes that where an invention involves the use of biological material not accessible to the public and that cannot be described in such a way to enable the person skilled in the art to practice it, the description of the invention is not deemed *sufficient* unless, *inter alia,* the application

contains all the relevant information on the characteristics of the biological material deposited. Therefore, the obligation to disclose information regarding the source of origin of certain resources could be already requested, in some cases, by the EC Directive. This is further confirmed by recital 27 of the same Directive stating that "if an invention is based on biological material of plant or animal origin or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known." A similar obligation stems from Regulation n. 2100/94 on Community Plant Variety Rights where art. 50 requires applicants for a community plant variety right to state the geographic origin of the variety.[39]

On the other side, however, the EC recognises that these provisions do not impose an overall obligation to disclose the country of origin of the biological resources. And indeed the same recital 27 of the aforementioned Directive conditions the disclosure obligation to the circumstance that it does not prejudice somehow the processing of the patent application or the validity of the rights arising from the granted patents. Likewise, the disclosure obligation contained in art. 50 is limited to the variety and does not cover the parent material from which the variety had been developed.

Accordingly, the EC has examined the possibility of inserting the proposed extra disclosure requirement with regard to the source of origin of the biological material. Like the South American countries, European Communities' Member States stand for the implementation of the requirement in a mandatory way at international and national level;[40] nonetheless, as the Swiss proposal, their request is only limited to the disclosure of the country of origin of the genetic resources and traditional knowledge; and such disclosure would be conditioned both to the circumstance that the invention is directly based on such resources and that the inventors still know about it.[41] Moreover, the EC shares, at least partially, the American fear about the consequences that lack of compliance with the new requirement could bring about in patent law. Therefore, the EC Members explicitly ask that the disclosure requirement does not amount, *de facto* or *de jure*, to an additional formal or substantial patentability criterion and that in case of incorrect or incomplete information, "effective, proportionate and dissuasive sanctions should be envisaged outside the field of patent law."[42]

D. Conclusive Thoughts

The proposal of the amendment of international patent laws to insert the above discussed extra-disclosure burden have met strong opposition by the United States and Japan. Ironically enough, but not surprisingly, the same United States who repeatedly called – and still call – pirates people and countries not respecting

American intellectual property laws now refuse to give any recognition in their country to indigenous communities' intellectual works nor are they willing to allow the introduction of any legal mechanism that could somehow grant them some protection against big companies. According to American delegates the CBD does not explicitly mention any extra disclosure requirement whose introduction would have the perilous effect of destabilising the patent system by rendering the application mechanism excessively burdensome and the very same validity of the title of protection uncertain.[43]

We tend to agree with the criticism towards a tripartite disclosure requirement *as shaped* by developing countries' proposal that would be too cumbersome and quite beyond the certification function that patent offices are entitled to perform. Patent officers do not have the skills and the time to check agreements on access and sharing of resources to determine whether indigenous communities are truly granted a fair share of the returns and benefits. However, we don't see any obstacle in amending international patent provisions in order to request disclosure of origin of genetic resources. After all, art. 62 TRIPS expressly states that member states can condition the acquisition or maintenance of patents to compliance with *reasonable* procedures and formalities, provided that they are consistent with the provisions of the Agreement; hence it leaves margin for the envisioning of other formal requirement insofar as they match the reasonability test.

As we have mentioned earlier, patent law often encompasses extra (disclosure) burdens like the American best mode requirement or the European duty to deposit a sample of the biological material at an accredited institution.[44] We do not think that the simple request to specify in the patent application the country of origin of the genetic material used in the invention amounts to an excessive burden to cope with; hence, it fits with the *reasonableness* standard requested by art. 62 TRIPS.

The issue is somehow more sensitive with regard to the likely effects arising when patent applicants willfully omit to disclose the requested info. As hinted above, the United States argued that patent invalidation following lack of disclosure of these other information would result in increased uncertainty in the patent system, to the detriment of the whole innovation process. We tend to disagree, because we do not believe that the extra disclosure brings about a burden too heavy to carry; conversely, patent invalidation represents the only credible threat to make patent applicants comply with it.

In our opinion, while the disclosure of origin requirement may be a valuable *defensive* instrument to protect indigenous people from the issuance of bad patents embedding their TK, it would not suffice in itself to both solve the biopiracy problem and to ensure ABS.

CBD provisions want indigenous people to benefit *at large* from the results and benefits of the research conducted upon their shoulders, no matter whether

they might later be embedded in an intellectual property right or kept as trade secrets. Therefore putting all the hopes on the disclosure of patent application – however, a significant element — does not solve the issue in that it is not sure that the results of the research will end up in something patentable or that foreign companies will decide to recur to patent protection in the first place.

III. A Colonialist Model of Intellectual Property?

As briefly hinted above, the provisions set forth in the CBD calls for two set of faculties to be granted to indigenous communities: namely, the right to be protected against the reaping off their resources and the right to benefit from whatever exploitation of such resources third parties might make. This last faculty is further divided in two following ones: the *access* to the results of research conducted on biodiversity and TK and *equitable sharing* of economic benefits flowing from the exploitation *at large* of the result of the research. We believe that the latter faculties depend strongly on the recognition of some form of indigenous communities' entitlements towards their tangible and intangible resources. In particular, we think that the right to an economic compensation from the commercial exploitation of the biodiversity finds its justification in the property rights local communities should hold towards their genetic resources. Such rights, further affirmed in the CBD, should be easily recognisable by developed countries because of the tangible character of the resources.

Conversely, we believe that the right to access the results of the research conducted on biodiversity and TK lies on the different assumption that developed countries borrow scientific knowledge from indigenous people and therefore, with a logic that resembles the open source movement, the latter should not be excluded from benefiting from the follow-on applications of their knowledge. However, the intangible character of TK makes the recognition of right over traditional knowledge more difficult. As it has been pointed out, indigenous people have their own system and traditions for the use and employment of their knowledge. Unfortunately, foreign companies filter traditional medical knowledge through the lenses of industrialised intellectual property systems, and get the misconceived perception that TK is free for everyone to take and make profits out of it. Moreover, there's a set of provisions in western, especially American, intellectual property laws that makes even more difficult to envisage some protection for TK.

A. The Concept of Authorship

As many have reasonably observed, current intellectual property systems are specifically framed to reward and protect the innovator of the industrial revolution and end up disfavoring developing countries' ways of contributing to science and

culture.[45] According to Professor Boyle, the first sign of this imbalance can be found in the concept of authorship which "stands as a gate through which one must pass in order to acquire intellectual property rights."[46] A significant passage from the Bellagio Declaration expresses clearly the concept:

> Contemporary intellectual property law is constructed around the notion of the author, the individual, solitary and original creator […]. Those who do not fit this model – custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties, for example — are denied intellectual property protection.[47]

Allegedly, developing and developed countries differ in that the collaborative creative process of the former (opposed to the individualistic one typical of the latter) makes it somehow hard to identify and reward, through the granting of an exclusive right, the true author/inventor. This difficulty is somewhat increased by the ephemeral – *rectius:* unfixed – character of the innovations that are orally passed from one generation to the other.[48] Furthermore, this very same collaborative process is a highly cumulative one that slowly advances through generations. All the members contribute in different amounts and in different moments to the enlargement of the knowledge so that no significant breakthrough can be identified at a certain time, but rather only a continuous flow of small bit of innovations.

Industrialised intellectual property systems reward only the creative efforts and transformation of raw inputs giving no value to the raw materials in themselves which traditionally have represented developing countries' competitive advantage.[49] We do not criticise this aspect of intellectual property laws. IPRs are meant to solve the public good problem caused by the intangible nature of the creations/innovations. IPRs came about to protect intangible works therefore it is no surprise that IPR paradigms do not rewards raw materials. But this is not because raw materials have no value. It's simply because raw materials, being tangible, should be normally subject to traditional property rights. Unfortunately, however, in some cases, those entitlements are not recognised, not even in a compensatory form, and that is the risk CBD wants to avoid.

On top of all of this, and maybe as a consequence, developed countries' firms tend to assume that (genetic resource and) traditional knowledge lie in the public domain and are free for everyone to take. As we have hinted above, this circumstance is attributed to the fact that foreign countries look at traditional knowledge through the lenses of industrialised intellectual property systems and because the majority of these communities do not recur to patents, they consider TK as forming part of the public domain.[50] This assumption is further corroborated by the fact that often western ethnobotanists and biologists use to publish – with no authorisation — the result of their studies based on investigation of indigenous

communities' scientific knowledge. Obviously, northern companies prefer to refer to such knowledge, unlawfully disseminated, as to "public domain."[51]

B. Protectionist Measures

In the American case *In re Cruciferous Sprout Litigation*,[52] the CAFC affirmed the district court decision invalidating three patents for anticipation. The patents regarded methods of preparing food products (specifically: sprouts) containing certain enzymes (Phase 2 enzymes) with a chemoprotective effect against cancer. The Court found that the inventions were not novel because the alleged properties claimed by the applicant were *inherent* to the sprouts, no matter whether the persons skilled in the arts were or were not aware of it.[53] The rationale of the decision being that society was already getting the beneficial properties *inherent* to the sprouts, hence there was not need to grant a patent.

This rigor unfortunately does not apply if the beneficial properties belong to a plant growing on a developing country's soil. Indeed, U.S. patent system establishes that anticipation can be caused only by what was "known or used by others in this country [USA] or patented or described in a printed publication in this or a foreign country, before the invention thereof [...]."[54] This means that no matter how well-known and widespread the (indigenous) scientific knowledge might be, no protection whatsoever can be granted (against patents) if the ("foreign") information is not contained in a formal publication. This over-protectionist attitude cannot longer be justified in today's environment where technology not only allows people to travel extensively but also allows knowledge to be spread even more rapidly – with no need to be embedded in a formal scientific publication.[55]

A smoother approach seems to come from European countries where the state of the art comprises "everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the […] patent application."[56]

India applauded the Board of Appeal of European Patent Office's decision that turned down a (American) patent application based on the Azadirachta Indica's chemical properties (i.e. a method for controlling fungi on plants by the aid of hydrophobic extracted neem oil).[57] The Opposition Division of the EPO, pursuant to art. 102(1) EPC, found that public prior use had been proven on the basis of A.D. Phadke's testimony[58] and related affidavit, and that the patent therefore had been anticipated. The Opposition Division held that the patent lacked inventive step also.[59] Although the Board of Appeal did not further investigate on whether Phadke testimony could be part of the prior art and it rejected the Opposition Division finding about novelty, it nonetheless confirmed that the

invention lacked inventiveness.[60] Please note that such result would not be possible under US patent law where prior arts cannot be combined for non-obviousness purposes lacking an express motivation.[61]

C. Why this Approach is Flawed and What Needs to be Done

Art.16(5) of the CBD provides that "The Contracting Parties, recognising that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives." However, what we have seen in the previous paragraphs show a substantial ineptness of classical IPR paradigms *as such* to cope with protection of traditional knowledge. As we have hinted above, the recognition of some form of entitlement on traditional knowledge holders is fundamental for their participation in the follow-on applications of their resources under a twofold perspective: on the one side, it is essential for them in order to compel follow-on users to bring dependent innovations back on the common research pools at their own disposal; on the other side, it is crucial to justify their entitlement to economic compensation from whatever employment of their knowledge, be it patented or not.[62]

After all, the envisioning of some sort of entitlement to TK holders is not so far from IPRs principles as big corporations want to argue. At a closer look, the concept of authorship has been stretched at will to accommodate companies' needs; surprisingly enough, mostly in copyright (rather than in patent) law where creativity and authorship should be even more carefully sheltered.[63] If corporations can be attributed authorships of software programmes (probably created by a group of programmers deprived even of the paternity of the work), of phonograms and broadcastings, why shouldn't indigenous people be recognised authors and, therefore, owners of their scientific knowledge? Especially in the North American IP system where the authorship requirement, in both patent and copyright law, has a constitutional basis,[64] wouldn't it be easier to prove authorships for indigenous people rather than judicial entities?

The second critique moved against the attribution of exclusive rights to TK owners comes from the cumulative and incremental process which gives birth to indigenous medical culture. But also in this case, if we think about it, the above features fully characterise today's innovation nature which is usually pursued by equips of researchers who all together, day by day, bring about negligible steps.[65]

The collective and cumulative model of traditional knowledge's creation closely resembles the mechanism underlying *open source software*. OSS works thanks to the fictitious stretch of copyright subject matter to cover, mainly, sub-patentable

inventions. Copyright law today, in practice, affords almost no protection at all to software but it proves successful in granting programmers entitlements to the know-how embedded in their innovations. Thanks to this modicum of protection programmers are able to create and share a common pool of resources which they all come to advance with mutual effort but also common enjoyment. While we do not applaud the adoption of copyright protection for software, we cannot avoid recognizing that a licensing scheme based on the recognition of a limited entitlement has had great results for innovation in the software industry. We do not exclude that a similar model could greatly benefit developing countries' traditional knowledge.

IV. Towards a Fair and Equitable Sharing of the Benefits Associated to Germ Plasm

Both the extra disclosure burden discussed above and likely modification of national and international patent systems are surely necessary but not enough to comply with the goals of CBD.[66] In particular, beyond the general provisions about the sharing in a fair and equitable way of the results and benefits set in art. 15(7) CBD, the Convention more explicitly establishes that:

> each Contracting Party shall take […] measures […] with the aim that Contracting Parties, *in particular those that are developing countries,* which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, *including technology protected by patents and other intellectual property rights* […] (emphasis supplied).[67]

Even more specifically, the Convention underlines the need to grant the countries providing genetic resources *effective participation in biotechnological research activities*[68] and *priority access* on a fair and equitable basis to the *results and benefits arising from* ***biotechnologies*** *based upon genetic* resources.[69]

At the moment, the transfer of germ plasm (and supposedly its associated traditional knowledge) is dealt with through licensing practices whereby a firm located in a developed country get to exploit the biological material provided by the indigenous community (often represented by an official local governmental entity). This license allows the recipient industries, which typically enjoy much greater bargaining power, to pay the biogenetic providing local communities *a just financial return*, either as a lump sum or a royalty (or both), from commercial exploitation of the new biogenetic-based drug or food product.[70] Of course, the contractual framework can provide, and sometimes actually does provide for more advanced schemes, whereby, for instance, a duty is placed on the "industrialised party," licensee of the biological material, to "grant back" to the providing licensor (the local community) a non-exclusive license "for research use."[71]

Even in this more advanced example, however, the license was "not for any commercial use,"[72] and thus it could not be invoked by, and shared with, a locally operating industry. Moreover, this contract expressly stated that, while the indigenous people remained free to continue to make and sell their traditional products, the new drugs developed and patented by the industrial licensee could not possibly be deemed an expression of "traditional knowledge" within the ambit of this provision. Hence, there is no provision for any participation by the local communities in the industrial development of the new products. It clearly emerges, indeed, that the biogenetic-related innovation, whether patented or not, will not belong, not even in part, to the indigenous people who provided the genetic resources.[73]

As said earlier in this study, we think it is crucial to grant some form of entitlement to traditional knowledge owners in order for them to benefit at large from third parties' exploitation at large. In order to achieve this goal, we strongly suggest a twofold action: the crafting of an entitlement for traditional knowledge owners and the reestablishment of the local working requirement, in the past repealed from the TRIPS Agreement.

A. Crafting Entitlement for Traditional Knowledge Owners

We think the two proposals being presented are worth analysing. The first proposal comes from the academia and it is the fruit of legal and economic expertise joined together. The second proposal has been prepared by the WIPO Secretariat to be presented at the forthcoming session within the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, to be held in Geneva, at the end of April 2006. We will analyse both proposals in turn.

1. Can Liability Rules Help Indigenous Communities?

For the reasons outlined above, supporters of strong IP protection tend to underline traditional knowledge incompatibilities with current IP regimes. Conversely, "public-interest advocates" fear the introduction of any form of proprietary rights in traditional knowledge because of the likely adverse effect on the public domain.[74]

An interesting intermediate proposition has been put forward by Reichman and Lewis to regulate traditional knowledge under a *compensatory liability* regime.[75] According to their model, elaborated by Reichman in two previous articles,[76] traditional knowledge owners would be provided, for a limited time, of the following rights: a) the right to prevent second comers from entering TK owners'

product market with a slavish imitation of their product; b) the right to a reasonable compensation from follow-on innovators who make improvement upon their scientific knowledge; and c) the right to make use of second comers' own technical improvements for purposes of further improving their very initial products.[77]

The core of the proposal closely resembles what we have suggested elsewhere for computer programmes.[78] The authors convincingly explain that developing countries could greatly benefit from an entitlement system based on liability rules rather than property rights for at least two reasons. On the one side, developing countries' industries are often characterised by a set of small and medium-sized enterprises rather than big and powerful companies. This means that titles of protection like patents, for example, which are costly both to obtain and to litigate, may not be the first best option to spur technological progress. It is well known that developing countries, like India or Korea for example, have largely benefited from imitation rather than creation.[79] On the other side, the author stresses the nature of traditional knowledge as sub-patentable subject matter, technical know-how that would – in modern IP terms – be otherwise left out in the public domain because, for the reasons expressed above, it does not meet both copyright and patent eligibility requirements.[80] A CLR system would place genetic resources and TK in a *semi-commons* pool where scientific information can be easily shared because access is not forbidden. Conversely, free-riding is.

We think this proposal is one of the most interesting suggestions advanced so far. A system which entitles indigenous people to get compensation while giving third parties access to tangible and intangible resources could probably spur innovation *within* developing countries; nonetheless such system carries some significant limitations. In particular, beyond its likely conflict with the very aims of the CBD which expressly refers to the developing countries' sovereignty over biodiversity related resources as a fundamental right (hence, negotiating tools with developed countries), it is not clear how such a regime could coexist with traditional IPR systems either in or outside developing countries territories.

Developing countries (at least most of them) have adhered to TRIPS Agreement and sooner or later they will all be compelled to shift from their local (property) system towards internationalized IPR standards.[81] This means that a CLR system, adopted in a developing country, would have to coexist with traditional IPRs, especially with patent law. (The authors claim that) arguably, this should not be considered a problem because patent law is supposed to have higher standard of protection, filtering only truly non-obvious innovations. However, it is also well known that this trend, at least in the United States, has been sensibly lowered, therefore it is not crystal clear how the two regimes could dissect separate sphere

of application. Moreover, even assuming that such a separation could actually be feasible, it is not clear what would happen if, let's say, an inventor would pay compensation for the taking of TK off the semi-commons pool and then, thanks to a breakthrough discovery, would succeed in patenting his invention.[82]

Besides these concerns, we think the (unlikely) coexistence of a CLR system in foreign countries and with foreign IPRs systems it's even more worrisome. The authors clearly state that, lacking any treaty obligation, "members would not be entitled to demand for their citizens that foreign countries reciprocally provide similar CLR protection abroad."[83] Nonetheless, they argue that this circumstance is not as troubling as it may initially seem because both Paris Convention and TRIPS would allow developing countries to claim patent and utility model rights abroad, in those countries that do not have a similar CLR system (at the moment, all). This is certainly true but so far we have being looking at the issue from a different angle. In other words, as outlined earlier on in this paper, the problem at issue here does not concern the fostering of developing countries' industries through the exploitation of traditional knowledge and their imports abroad. Indeed, it is very well clear that indigenous people (whose countries are TRIPS signatories) are entitled to ask for patents or utility model protection abroad once their innovations fulfil the requirements set forth by foreign legislations. Quite on the contrary, our concern here is about biopiracy, i.e. about how to impede third foreign parties to collect developing countries' germ plasm and traditional knowledge, bring it back to their own countries, obtain there patents and/or other property rights and then either commercialise the results only in their territories or ask for IP protection in developing countries in such a way to impede them to further use their own resources. Therefore, our attention is especially focused on the implementation or amendment of *supra national* provisions that can protect local communities against act of misappropriation that usually take place abroad.[84]

Although – as we will explain later – the CLR comes close to the sort of entitlement we would like to shape for traditional knowledge, this regime does not solve the issue of biopiracy.

2. WIPO's Proposal for a Misappropriation Regime

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter "the Committee") presented a document[85] where it sketched out the frame for a misappropriation regime for traditional knowledge.[86]

The proposal gives an ample definition of traditional knowledge as comprehending the know-how, skills, innovations, practices and knowledge that form part of indigenous and local communities' lifestyle; and it stresses the variety

of field that TK can cover from agriculture to environment and medicine.[87] The *intergenerational* character of TK and, in general, its *collective* nature is also stressed insofar as it represents the requirement to filter out which traditional knowledge deserves protection and who should be the holder.[88] Art.5 establishes that protection may benefit communities themselves that hold collectively the knowledge as well as recognised individuals within these communities and people. The proposal further envisages no formalities for the recognition of the protection which should last as long as the requirements listed in article 4 stayed fulfilled.[89]

As the CLR regime outlined above, WIPO proposal does not imply the creation of a new intellectual property right; rather, like it happens in Europe with regard to companies' goodwill, it recognises the value of traditional knowledge as shared scientific know-how, innovations and practices, and afford to the legitimate owners the right to stand against the misappropriation of their intangible knowledge.

The provision eloquently recalls general unfair competition principles, well rooted in civil law countries but it is also dense of *ad hoc* caveats for the specific subject matter. Accordingly, article 1 reads as follows:

any acquisition, appropriation or utilization of traditional knowledge by *unfair or illicit means* constitutes an act of misappropriation. Misappropriation may also include deriving *commercial benefit* from the acquisition, appropriation or utilisation of traditional knowledge when the person using that knowledge knows, or is negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities *contrary to honest practices* that gain inequitable benefit from traditional knowledge (emphasis supplied).[90]

An international implementation of such *ad hoc* misappropriation regime, maybe through TRIPS, would strike a balanced equilibrium between developed countries access to germ plasm and traditional knowledge and preservation of TK owners interests' in terms of participation to the benefit.

B. Toward the Reestablishment of the Local Working Requirement

As previously hinted — and as several examples show — there is a serious risk that we might never attain the goal of equitable sharing within a purely private contractual framework characterized by the substantial disproportion of contractual and economic power between developed and developing countries. This imbalance is often aggravated by robust, not always transparent, political pressures from developed countries' governments towards their developing country counterparts: a not-so-private third party intervention in a so-called private agreement.

To avoid such a risk, it is essential to ensure the substantive compliance of any agreement between recipients and providers of biological resources with basic

legal principles, internationally acknowledged, that support the broad goal of equitable sharing. To this end, the cooperative approach mentioned above should be implemented under procedural guarantees capable of ensuring a mutually satisfactory equilibrium of interests, and not just a simple reflection of the existing imbalance of power between the parties.

As for the first point, reference should be made both to the CBD and to the TRIPS Agreement, and especially to their *interaction*, that is, the need to implement both instruments "in a mutually supportive way," as the European Commission suggested.[91] As noted, article 15.7 of the CBD empowers each Contracting Party to adopt legislative, administrative or policy measures aimed to achieve the requisite fair sharing with respect to both R&D results and the commercial benefits arising from the use of genetic resources. For its part, the TRIPS Agreement allows WTO Members "in *formulating or amending* their laws and regulations, [to] adopt *measures necessary* to promote the public interest in sectors of vital importance to their *socio-economic and technological development*."[92] The TRIPS Agreement also specifically allows Members to impose compulsory licences on patent rights holders, a provision that should be read in the light of both articles 8.1 and 7.[93]

1. Compulsory Licenses and Local Use Requirement

In our opinion, the tensions in this legislative framework empower the providing country's government to adopt, upon the granting of a domestic patent, a set of ad hoc measures requiring patent holders either to establish local production of the biodiversity-based innovative products or processes or to licence to domestically located industries the production and sale of products covered by their patent. In other words, under this scheme, should the patent owner refuse to produce locally (even by appointing a local licensee or co-venture of its own choice), the country providing the biogenetic resource could grant a compulsory license to a local third party. This licence, in compliance with article 31 of the TRIPS Agreement, should be non-exclusive, non-discriminatory, based on fair terms (fair, of course, also to the provider country in view of its essential contribution to the innovation in question).[94] Such a licence should primarily focus on the supply of the local market and thus exclude, except perhaps marginally, any export activities of the licensee.[95]

This proposal does not express a one-sided view of the developing countries' interests. Rather, it represents a reasonable compromise solution, one that is respectful of both CBD's and TRIPS' principles. It safeguards the exploiting industries' competitive advantages as derived from their patents better than would be the case of a straightforward imposition of a compulsory license under articles 31 (and 8.1) of the TRIPS Agreement.

Accepting these arguments, and thus that biodiversity-providing countries can *de lege lata* require the working *in situ* of the pharmaceutical innovation developed thanks to the exploitation of their own indigenous knowledge, would provide a joint, balanced benefit to both parties. The developing country would get an effective chance to progressively enhance their own R&D capacity and develop (even in view of the time when the patent will be elapsed) a domestic industrial and commercial skill and experience in the pharmaceutical sector. The pharmaceutical industries (even let aside "image returns": themselves, though, also economically valuable) would avert the risk of a substantial "expropriation" of their productive and distributive faculties and powers of control (including efficient control against re-import of the drugs into the richer markets) otherwise associated to compulsory licenses and "Government use."

2. Clarifying the Uncertain Status of a Local Working Requirement

A possible objection to the foregoing proposal is its inconsistency with the widely held, although still much debated, view that the TRIPS Agreement (as well as subsequently amended national patent laws) repealed the long established principle of local working of patented inventions at the national level. In fact, while art. 5A of the Paris Convention,[96] incorporated into the TRIPS Agreement via art. 2.1,[97] requires a patentee to produce the patented goods in the country where protection is sought if the country issuing a patent so desires, and treats a failure to work the patent locally as an abuse of the patentee's exclusive rights, art. 27.1 TRIPS makes "patent rights enjoyable without discrimination as to the place of invention […] and whether products are imported or locally produced." On the least favourable assumption, the need to reconcile these two provisions means that WTO Members can no longer consider a patentee's failure to work the patent locally as a *per se* abuse, notwithstanding the plain language to the contrary of article 5A of the Paris Convention.[98]

According to this not universally shared thesis,[99] patentees—while retaining the right to manufacture, hence actual capability to implement the relevant know-how in their own homeland or in any other country they deem convenient—would commit an "abuse" within the meaning of article 5A (and thus become subject to a compulsory licence under the same article of the Paris Convention) *only* if they should not provide, even by mere exports, enough products to the country that granted the patent. In other words, under-supplying the market would displace a failure to work the patent locally as grounds for abuse under this interpretation.[100]

If this interpretation holds, there would be no legal means for developing-country governments to require the foreign patentees of products derived from locally generated biogenetic resources to work their patents locally (in addition

to paying compensation under private agreements) without resorting to compulsory licenses rooted in either a government use provision or the public interest rationale that article 31 of the TRIPS Agreement expressly permits.[101] The patentee would enjoy a TRIPS guaranteed right to supply the local territory by means of imports while discharging the duty to pay compensation. In so doing, however, we may note that an across-the-board application of article 27.1 of the TRIPS Agreement along these lines would in fact allow the foreign holders of the relevant patents to renew the typical colonial scheme of trade whereby the developing country exports its raw materials, and the industrialized country returns its finished goods.[102] This trade-off, disregarding any other considerations,[103] would substantially delay the diffusion and acquisition of industrial know-how among developing countries and help to keep them in a long-term condition of economic and technical dependence.

Nevertheless, we do not think that the reference to article 27.1 of the TRIPS Agreement truly settles the question.If one compares the compulsory licenses that WTO Members may generally impose under article 31 of the TRIPS Agreement with the local working requirement rooted in the Paris Convention, it will readily appear that the latter inflicts a much smaller restriction on the patentee's freedom of action than the former. In terms of the adverse affects on the patentee's competitive advantage that could result from either option, it seems clear that working the patent locally (or through a partner or licensee of choice) would yield a considerably more diluted and slower spill-over of industrial and commercial know-how than would be the case under general compulsory licenses that would directly breed competitors. Local working would less significantly reduce the patentee's lead-time advantage over competitors than would a compulsory license in favor of third parties.[104] At the same time, the developing country that enforced a local working requirement would not necessarily experience a net loss of public benefits because one would logically expect the patentee's provision of technical know-how and financial resources to equal or exceed, in quality as well as in quantity, those of an unrelated compulsory licensee.

If these premises hold true, then the need to reconcile the obligations that the CBD imposes in articles 1, 8(j), 16, 15.7 and 19[105] with the reserved power of WTO Members under articles 7, 8.1, and 31 of the TRIPS Agreement[106] could be leveraged to support a derogation from the patentee's exclusive right to import (under article 27.1 of that Agreement), at least enough to justify imposition of a local working requirement in connection with a private agreement to transfer biogenetic resources to foreign entrepreneurs. While the Developing Countries that implement this option must continue to observe the conditions set out in article 31,[107] they would

have chosen a relatively less intrusive instrument than a straightforward compulsory license in favor of third parties with which "to promote the public interest in sectors of vital importance to their socio-economic and technological development," within the plain language of article 8.1 of the TRIPS Agreement.[108]

Let us emphasise that the proposal outlined above would not violate any interpretation of article 27.1 of the TRIPS Agreement *as an expression of a general principle*. To the extent that the Agreement effectively repealed local working requirements as a matter of *general principle*, that repeal would continue to apply in all other countries, whereas the exception we advocate would concern only the biodiversity providing countries and only for this specific purpose.

Notes

1. The neem tree case has been reported by many authors as the leading case of biopiracy. The neem tree saga has recently come under worldwide attention when, in March 2005, the European Patent Office has turned down a (American) patent embedding Azadirachta Indica's chemical properties. See para. III.B.
2. The term "biosquatting" seems to be better suited then "biopiracy" to indicate the misappropriation of "intangible components of genetic sources and/or traditional knowledge that could be in the public domain as well as the unauthorized claiming of traditional knowledge that is in control of Indigenous people and local communities." See Carvalho (2005).
3. For other famous examples, see the "turmeric patent" case and the "quinoa patent" case, in G. Dutfield, Intellectual Property Rights, Trade and Biodiversity: Seeds and Plant Varieties, 1999. In a recent report Jay McGown provides an extremely long and detailed list of African genetic resources misappropriated by foreign investors with no proof whatsoever that any of the huge profits these companies made has been passed on local population. See McGown (2006).
4. Specifically, we will use the term 'biodiversity' as a broad concept comprehending both 'biological diversity' and 'biological resources', as described in the Convention on Biological Diversity. The Convention, indeed, describes the former as "the variability among living organism from all source including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are parts"; and describe the latter as "(….) genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity". See Convention on Biological Diversity, (CBD), done at Rio de Janeiro, Brazil, 5 June 1992, art.2.
5. The term "traditional knowledge" (hereinafter also "TK") has been the subject of many conceptualizations. Usually, scholars employ generally the term to cover a broad range of "indigenous subject matters", ranging from folklore to shamanic knowledge. However, a distinction needs to be made between so called traditional knowledge *stricto sensu* vis-a-vis *expressions* of traditional knowledge, like "traditional cultural expressions" ("TCEs") and expressions of folklore. The WIPO Secretariat rightly points out that the latter category shows close similarity with copyrightable subject matter

(i.e. copyright, performers' rights, design rights), while the former bears close resemblance to industrial property (not just with patents but also trade secrets and know-how). Although the Secretariat admits that the different forms of TK can sometimes overlap, it defines TK *stricto sensu* as "*ideas* developed by traditional communities and Indigenous people, in a traditional and informal way, as a response to the needs imposed by their physical and cultural environments […]" and adds that "those ideas contrast with the respective expressions, such as folk tales, poetry, and riddles, folk songs and instrumental music, dances, plays, etc." (see WIPO/GRTKF/IC/5/7 available at http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_7.pdf).

The analysis of issues realting to folklore and cultural intangible in general are outside the scope of this paper. We will specifically analyze the traditional knowledge strict sensu, specifically referring to medical and "scientific" knowledge associated to the germ plasm and biodiversity. To that end, we endorse here the definition provided by M. Johnson who defines TK as a "body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self management that governs reources use"(see M. Johnson, *Research on Traditional Environmental Knowledge: Its Development and its Role in Lore: Capturing Traditional Environmental Knowledge*, 3, 3-4, IDRC, 1002).

6. Madagascar appears to be one of the richest countries in terms of biodiversity (it should have about the 5% of the world's species) but it has blow up most of its forests to feed its people. (Boyle 1996:128)
7. Convention on Biodiversity (CBD), *done at* Rio de Janeiro, Brazil, 5 June 1992, in force since 1993.
8. Recall, indeed, that some countries are holders *ex situ* of genetic resources, like many European Countries where botanic gardens and big depositories of genetic resources are located. Those countries similarly share the duty to preserve and conserve biodiversity.
9. Ibid. arts 6, 8 and 9.
10. Ibid. art. 15.2.
11. Ibid. art. 15.1.
12. Ibid. arts 15.5, 15.4.
13. Ibid. arts. 1, 8(j), 15.7, 19.2. The principle is also supported by the FAO International Treaty on Plant and Genetic Resources for Food and Agriculture, adopted with Resolution 3/2001, in November 2001 (art. 9 – Farmers' Rights, para. 2, b). *See* Blakeney (2002), *Protection of Plant Varieties and Farmers' Rights*, E.I.P.R., 9.; *see also* EC Directive 98/44, above n. 2 (Preamble, recitals 56 and 11).
14. CBD, art. 15.7. The article further specifies that "Such sharing shall be upon mutually agreed terms".
15. The Convention establishes at article 8(j) that Contracting Parties shall: "*subject to its national legislation,* respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities […] and promote *with the approval and involvement of the holders of such knowledge,* innovations and practices and *encourage the equitable*

sharing of the benefits arising from the utilization of such knowledge, innovation and practices" (emphasis supplied). It is interesting noting that this provision does not compel countries to enact new legislation to pursue the goals outlined above (as it does in most of the other provisions).

16. Information can be found at http://www.biodiv.org/programmes/socio-eco/traditional/default.asp.
17. A copy of the Bonn Guidelines can be found at http://www.biodiv.org/decisions/?lg=0&dec=VI/24.
18. The United States of America signed the Convention on June 1993 but they did not ratify it. The complete list of adhering countries can be found at http://www.biodiv.org/world/parties.asp.
19. This is expressly recognized in a document presented by a group of countries (namely: Bolivia, Brazil, Colombia, Cuba, India and Pakistan), IP/C/W/459, which we will discuss later on in this article.
20. Ministerial Declaration, adopted on 14th November 2001, WT/MIN(01)/DEC/1, para. 19 (available at http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.htm) instructing the TRIPS Council to examine the relationship between the TRIPS Agreement and the CBD, particularly in lights of arts. 7 and 8 TRIPS. See generally, G. Dutfield, Intellectual Property Rights Trade and Biodiversity, London, chapters 3-6, (2000).
21. In October 2000 WIPO created an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore which was meant to create an international forum for discussion concerning the interplay between intellectual property rights and the issues of traditional knowledge, genetic resources and expression of folklore and cultural indigenous knowledge. Moreover, the just mentioned issues have also been discussed within another WIPO working group: the working group on reform of the Patent Cooperation Treaty.
22. The documents from the next meeting organized by the Conference of the Parties, scheduled for the end of March 2006 in Brazil can be found at http://www.biodiv.org/doc/meeting.asp?lg=0&mtg=cop-08.
23. This point is clearly stressed in a document proposed by a group of Developing Countries where they argue that: "[…] biopiracy is a global problem and […] involves the acquisition of material in one country and seeking of a patent in another country. This means that relying on national measures alone is not sufficient to address the biopiracy problem". See document IP/C/W/429/Rev.1., para. 17. We will analyze this document in detail in following para. B.
24. Understandably, many Developing Countries (Bolivia, Colombia, Costa Rica, Ecuador, Egypt, India, Peru, and Venezuela) have amended their patent law in such a way to establish the requirement as a patentability element. Other countries, like the European Community' Members have included the requirement only as recommendation (see in more details at para. C). Eventually, some other countries have restricted the application of the requirement only to some subject matters (like Egypt and India where it can only apply to patent law). For more detailed information see N. Pires De Carvalho, From the Shaman's Hut to the Patent Office, p. 123 and ff.

25. See Proposals by Switzerland Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications, WIPO documents PCT/R/WG/4/13 and, with identical contents, PCT/R/WG/5/11 Rev., available at www.wipo.int/pct/en/meetings/reform_wg/pdf/pct_r_wg_5_11_rev.pdf. Also see the recent document: Further Observations by Switzerland on Its Proposals Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications, WIPO document PCT/R/WG/7/9, available at www.wipo.int/edocs/mdocs/pct/en/pct_r_wg_7/pct_r_wg_7_9.doc.
26. "Measures to support compliance with prior informed consent of the contracting party providing genetic resources and mutually agreed terms on which access was granted in contracting parties with users of such resources under their jurisdiction", document UNEP/CBD/WG-ABS/4/INF/12, 17 January 2006, available at www.biodiv.org/doc/meetings/abs/abswg-04/information/abswg-04-inf-12-en.doc.
27. WIPO document PCT/R/WG/7/9, Appendix p. 9.
28. WIPO document PCT/R/WG/7/9, *supra* at footnote 22, para. 14. The proposal further distinguishes between primary and secondary sources: namely, on the one side the Contracting Party providing genetic resources and indigenous and local communities and, on the other side, *ex situ* collections such as gene banks, botanical gardens, databases on genetic resources and traditional knowledge, and scientific literature. The proposal gives a detail explanation on which sources must be disclosed and in which circumstances. *Ibidem,* para. 15.
29. For an in-depth explanation of the proposal see *ibidem,* para. 12.
30. These countries have first submitted a checklist of issues to be dealt with in order to prevent misappropriation of biodiversity and associated traditional knowledge and permit the fulfillment of the other remaining goals of the CBD (basically: ABS). The checklist, which encompasses a set of matters previously discussed at length within the TRIPs Council since 1999, is contained in document IP/C/W/420, 2 March 2004. Each proposed issue has been later articulated in depth during following meetings.
31. See document IP/C/W/429/Rev.1., 27 September 2004, presented by Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela.
32. "[…] Any use, the disclosure of which is necessary to determine the existence of prior art, inventorship or entitlement to the claimed invention, the scope of the claim and/or is necessary for understanding or carrying out the invention, would be sufficient to trigger the disclosure obligation. In this regard, even where the use was only incidental, it would be sufficient to trigger the obligation if the disclosure of the source and country of origin is relevant for prior art, inventorship or entitlement determinations, the scope of the claim and/or for understanding or carrying out the invention". *Ibidem,* para. 8.
33. The applicant would have also a time limitation to comply with the disclosure requirement to avoid withdrawal of the patent application. See *Ibidem,* para. 12.
34. This second element has been elaborated in document IP/C/W/438, 10 December 2004.
35. In case of non-compliance before the granting of the patent, the application would not be processed any further until the requested documentation is provided. If a specific

time limitation has been set and the inventor does not comply with it, the application would be withdrawn. In case of non-compliance after the patent has been granted, legal measures could include the revocation of the patent or criminal and/or civil sanctions.

36. See document IP/C/W/442, 4 March 2005, para. 3.
37. Ibid. para. 10.
38. Already in 1995 the European Community funded a study on the best possible measures to implement articles 15 and 16 of the CBD. The results of this study have been presented at the third Conference of the Parties within the CBD. The EU has been very active during the negotiation leading to the adoption of the Bonn Guidelines which have been implemented in 2003. See Communication from the Commission to the European Parliament and the Council, The implementation by the EC of the "Bonn Guidelines" on access to genetic resources and benefit-sharing under the Convention on Biological Diversity, Brussels, 23.12.2003, COM(2003) 821 final, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2003/com2003_0821en01.pdf.
39. Council Regulation no. 2100/94 of July 27th 1994, on Community plant variety rights, OJ L 227, p. 1.
40. However, the EC envisions likely modification to the Patent Law Treaty and the Patent Cooperation Treaty, and to regional agreement like the European Patent Convention, but not the TRIPS Agreement.
41. According to the Swiss proposal, the inventor can also declare that he doesn't know the source of origin of the resources employed in his invention (this would be rule 51bis1, g, iii).
42. See the document "Disclosure of origin or source of genetic resources and associated traditional knowledge in patent applications, Proposal of the European Community and its Member States to WIPO, 16 December 2004, para. 8, g, available at www.wipo.int/tk/en/genetic/proposals/european_community.pdf and WTO document IP/C/W383, 17 October 2002, available at http://docsonline.wto.org/DDFDocuments/t/IP/C/W383.doc. The EC has recently restated its position in a document that submitted, on the 17th of May 2005, to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, where it has clarified that national patent offices must not be required to make an assessment on the (extra) disclosure information submitted nor must they be obliged to check whether the applicant has gained access to the relevant material in a way that is compatible with the CBD principles of benefit-sharing and prior informed consent. See: WIPO/GRTKF/IC/8/11, available at www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_11.pdf, para. 5.
43. See documents IP/C/W/434 and IP/C/W/449.
44. See art. 13 of Directive 98/44 on the legal protection of biotechnological inventions.
45. As Professor Blakeney has vividly pointed out, traditional knowledge (and folklore) is at odds with all common intellectual property principles: "Authorship is replaced by a concept of *interpretation through initiation*. Ownership yields to a concept of custodianship of dreamings, or legend. Alienation is contradicted by the concept of immutable communal property. Exploitation is subject to cultural restrains and taboos".

M. Blakeney, *The protection of traditional knowledge under intellectual property law,* in E.I.P.R. 2000, 22(6), 251.

46. J. Boyle, Shamans, Software and Spleens, p. 125.

47. The Bellagio Declaration (whose text can be found in Boyle, Shamans, Software and Spleens, p.192 and ff.) has been signed in 1992 by lawyers, anthropologists, environmentalists, computer experts, literary critics and activists to address the growing worldwide concerns given by the expansionist trend of intellectual property laws. Specifically, the Declaration was meant to condemn the effect that intellectual property laws have on Developing Countries.

48. Indeed, recall that for both patent and copyright paradigms the fixation of the subject matter represents, for different reasons, a precondition for the granting and/or recognizing of protection.

49. J. Boyle, Shamans, Software and Spleens, p. 126.

50. In fact, quite often notwithstanding the circumstance that their countries have implemented intellectual property regimes, local communities respond to their oral traditions and rules and do not ask for patent protection.

51. Indeed, such knowledge is often subjected to *local* ipr-like property system and an unauthorized publication should not be considered by Developed Countries' companies as putting the innovation in the public domain; rather, as it happens with the publication of patent applications, such disclosure should have the effect of preserving the knowledge contained therein but clarifying its belonging to the state of the art.

52. In re Cruciferous Sprout Litigation, 301 F.3d 1343, cert. denied, 538 U.S. 907 (2003).

53. This is the so called "inherency doctrine" which is part of the novelty inquiry. More generally on the subject, *See* M. Lemley & D. Burk, *Inherency* , 47 William and Mary L. Rev. 371 (2005).

54. 35 U.S.C. 102(a).

55. Think indeed that much scientific information is nowadays informally shared through the internet: is it that a publication to the sake of section 102(a) of the American Patent Act? Furthermore, what'd be the value of a scientific documentary broadcasted on TV. This is surely fixed but it's not a publication. Can it anticipate a patent?

56. The text reported above is art. 54 of the EPC. Although such article does not expressly mention foreign publication and prior uses, such thing is clear from EPO case law. Moreover, a further confirmation of the different European attitude can be found in the text of the U.K. and Italian patent laws which expressly include foreign prior arts. (Art. 2(2) U.K. Patent Act 1977 reads: "The state of the art in the case of an invention shall be taken to comprise all matter (whether a product, a process, information about either, or anything else) which has at any time before the priority date of that invention been made available to the public (*whether in the United Kingdom or elsewhere*) by written or oral description, by use or in any other way". Emphasis supplied. Similarly, Italian Patent Law, now codified in the new Italian Code of Industrial Property establishes that: "Lo stato della tecnica è costituito da tutto ciò che è stato reso accessibile al

pubblico nel territorio dello Stato o all'estero prima della data del deposito della domanda di brevetto, mediante una descrizione scritta od orale, una utilizzazione o un qualsiasi altro mezzo" (art.46(2)).

57. Case Thermo Trilogy Corporation et al. v. Aelvoet Magda. MEP, the Green Group in the European Parliament et al., Decision T 0416/01, 8th March 2005.

58. Mr. Phadke witnessed that he had carried himself some of the test on the fungicidal effect of the neem tree with two farmers in summer 1985 and 1986.

59. After having defined the state of the art, the Opposition Division defined the technical problem to be solved as the finding of alternative methods for controlling fungi or protecting plants. Given the fact that neem trees' properties in that sense were already known, the EPO found the invention obvious because the skilled person would have easily turned to lower concentration of neem oil extract as obvious cheap alternatives of the know formulations. *Ibidem,* para. IV.

60. Please note that the Board of Appeal did not rule out the possibility for oral prior art to form the "state of the art" for novelty and inventiveness analysis; rather, in the case at issue, the Board preferred not to inquire further because the appellant argued that such prior use was not enough documented. Since the affidavit confirmed what was contained in the oral testimony, the Board decided not to investigate further the issue.

61. Even though CAFC seems to have recently endorsed a more relaxed approach. See Ruiz v. A.B. Chance *Co.*, 357 F.3d 1270, 1276, 69 USPQ2d 1686, 1690 (Fed. Cir. 2004).

62. G. Ghidini, *Equitable sharing of Benefits from Biodiversity-Based Innovation: Some Reflections under the Shadow of a Neem Tree,* in International Public Goods And Transfer Of Technology Under A Globalized Intellectual Property Regime, edited by J.H. Reichman and K. Maskus, Cambridge MA, 2005, at 697.

63. Indeed, in European Patent laws the inventor always keeps the paternity of the invention although very often he is forced to pass his exclusive rights to the employer. Quite differently, copyright law has many example (take the work for hire and software) where a work directly created by a certain people is attributed to another who's usually not even a physical person. In this case, the true author does not retain any right towards the creation.

64. The so called "Copyright Clause", at article 1, section 8, US Constitution, reads: "To promote the Progress of Science and useful Arts, by securing for limited Times to *Authors* and *Inventors* the exclusive Right to their respective Writings and Discoveries" (emphasis supplied).

65. Many eminent scholars agree on this point. See, among them, J.H. Reichman, "Saving the Patent System from Itself, Informal Remarks Concerning the Systemic Problems Afflicting Developed Intellectual Property Regimes" (2003) in F.S. Kieff, ed., Perspectives on Properties of the Human Genome Project, Elsevier Academic Press, Oxford, 289; J. H. Reichman & T. Lewis, Using Liability Rules to Stimulate Local Innovation: Application to Traditional Knowledge, in International Public Goods And Transfer Of Technology Under A Globalized Intellectual Property Regime, edited by J.H. Reichman and K.Maskus, Cambridge MA, 2005.

66. At the moment a proposal has been presented for the amendment of anticipation rule in US patent law which would allow also foreign prior uses to invalidate an American patent.
67. Art. 16(3) CBD.
68. Art. 19(1) CBD.
69. Art. 19(2) CBD.
70. *See e.g.* such U.S. contractual models as the Diversa-Yellowstone CRADA—Cooperative Research and Development Agreement—, and INBio-Merck, both involving mere profit-sharing: *reference in* AIPPI YEARBOOK *2001/II, XXXVIIIth World Intellectual Property Congress, Melbourne, Australia, 23 – 30 March, 2001, Report of the US Delegation on Question 159 "The need and possible means of implementing the Convention on biodiversity into patents law",* 388.).
71. *See, e.g.,* Art.6.03 of the Agreement between the Peruvian Communities representing the Aguaruna and Huambisa peoples, and a U.S. Company, G. D. Searle & Co., of Monsanto Group, *in* Charles McManis, *Recent Publications on Indigenous Knowledge Protection – New Directions in Indigenous Knowledge Protection,* ATRIP 1999 Collected Papers, at 71).
72. See Ibid.
73. G. Ghidini, Equitable sharing of Benefits from Biodiversity-Based Innovation: Some Reflections under the Shadow of a Neem Tree, supra note 63, at 697 and ff.
74. T. Cottier & M. Panizzon, *Legal perspectives on traditional knowledge: The case for intellectual property protection,* in International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime, edited by K. Maskus & J.R. Reichman, Cambridge, 2005, p. 577 and ff.
75. J.H. Reichman & T. Lewis, *Using liability rules to stimulate local innovation in Developing Countries: Application to traditional knowledge,* in International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime, edited by K. Maskus & J.R. Reichman, Cambridge, 2005, p. 337 and ff.
76. J.H. Reichman, Legal Hybrids between the Patent and Copyright Paradigms, 94 Columbia L.Rev. 2432 (1994); and: Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation, 53 Vand. L. Rev. 1743 (2000).
77. J.H. Reichman & T. Lewis, Using liability rules to stimulate local innovation in Developing Countries: Application to traditional knowledge p. 349 and ff.
78. Our proposal draws on the scheme laid out by art. 31(*l*) TRIPS establishing a cross-licensing mechanism for high-profile innovations whereby only truly innovative second comers are entitled a license on the first blocking patent and, in turn, are compelled to grant access to first inventors to their dependent innovation. See G. Ghidini & E. Arezzo, *Patent and copyright paradigms vis-à-vis derivative innovation: the case of computer programs*, in IIC, n.2, 2005, p.159.
79. Funnily enough, Developed Countries referred to this as free-riding but are reluctant to see any kind of seemingly phenomenon in the biosquatting of genetic resources and TK.

80. Especially, authors stress that traditional knowledge would not pass the non-obviousness hurdle.
81. At the end of November 2005, the WTO's Council for TRIPS decided to extend least Developing Countries' transition period for the implementation of IP provisions (which was supposed to expire on January 1st 2006) by seven and a half years. See "Poorest countries given more time to apply intellectual property rules", available at http://www.wto.org/english/news_e/pres05_e/pr424_e.htm.
82. That's why we prefer a compulsory licensing regime within patent law as embedded in art. 31(*l*) TRIPS.
83. J.H. Reichman & T. Lewis, Using liability rules to stimulate local innovation in Developing Countries: Application to traditional knowledge, p. 364.
84. Our point of view is shared by Cottier and Panizzon who explain that: "Protection of TK is only effective if it binds industrialized and deceloping countries alike. This is only possible with a global-scale protection". See T.Cottier & M. Panizzon, *supra,* at 581.
85. See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, document prepared by the Secretariat, WIPO/GRTFK/IC/9/5, January 9th 2006, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_5.doc.
86. As is well known TRIPS adopted, via art.2.1, the unfair competition provisions contained in art.10bis of the Paris Convention for the Protection of Industrial Property. Although the list contained in art.10bis point 3, is not exhaustive and art.10bis point 2 explains that "[A]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition", the lack of express mentioning of misappropriation has led to the different shaping of unfair competition in different countries. For example, in the United States unfair competition provisions are contained in half provision of the Lanham Trademark Act (namely: section 1125(a)) and only ban (in broad terms) conducts aimed at ingenerating confusion relating to the origin of the goods and misleading advertisings. A misappropriation doctrine has been developed but apparently it regards very fact-specific issues. See INS v. AP, 248 U.S. 215 (1918).
87. See Document WIPO/GRTFK/IC/9/5, *supra,* III. Substantive Provisions, art. 3(2).
88. Art. 4 holds that protection should be extended, *at least,* to TK which is: "(i) generated, preserved and transmitted in a traditional and intergenerational context; (ii) distinctively associated with a traditional or indigenous community or people which preserves and transmits it between generations; and (iii) integral to the cultural identity of an indigenous or traditional community or people which is recognized as holding the knowledge through a form of custodianship, guardianship, collective ownership or cultural responsibility. This relationship may be expressed formally or informally by customary or traditional practices, protocols or laws.
89. Ibid., article 11 and 9.
90. Ibid., art.1(2). The article further lists in para.3 a group of behaviors that should be specially prevented. Among these it is noteworthy the acquisition of traditional knowledge in violation of the legal measures that require prior informed consent as a condition of access to the knowledge (art.1(3)(ii)).

91. See, respectively, Communication by the European Communities and their Member States on the Relationship Between the Convention on Biological Diversity and the TRIPs Agreement, April 3,2001; and Communication by the European Communities and their Member States to the TRIPS Council on the Review of Article 27.3(b) of the TRIPs Agreement, and the Relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge and Folklore—"A Concept Paper", Sept.12,2002.
92. TRIPS Agreement, above n. 21, art. 8.1; see also id., art. 7. G. Ghidini, Equitable sharing of Benefits from Biodiversity-Based Innovation: Some Reflections under the Shadow of a Neem Tree, at 700.
93. Ibid., art. 31. *See* Carlos M. Correa, Intellectual Property Rights, the WTO and Developing Countries, 241et seq. (2000). *See also* B.Remiche & H. Desterbeq, *Brevet et GATT: quel intere^t?,* 1996 Rev. droit intellectuel-L'ingegnieur-conseil, 81, 94 et seq. ; *Les brevets pharmaceutiques dans les accords du GATT:l'enjeu?,*in 1996 REV. INT. DR. ECON., 7 at 43-46.
94. *See* above n. 27.
95. TRIPS Agreement, above n. 21, art. 31(f).
96. Paris Convention for the Protection of Industrial Property of 20 March 1883, *as last revised at* Stockholm on July 14, 1967 and as amended on September 28, 1979, art. 5A.
97. TRIPS Agreement, above n. 21, art. 2.1. J.H.Reichman with C.Hasenzahl, Nonvoluntary Licensing of Patented Inventions:Historical Perspective,Legal Framework under the TRIPS Agreement,and an Overview of the Practice in Canada and the United States, Draft, UNCTAD/ICTDS,2002,II,C,2.
98. See Joseph Straus, Implications of the TRIPs Agreement in the Field of Patent Law,in Beier-Schricker,Eds., From GATT to TRIPs, ICC Studies, vol.18, 1996, 204.
99. For a skeptical view of this position, *see* Reichman with Hasenzahl, above n. 32, II.C.2.
100. *Cf.* TRIPS Agreement, above n. 21, arts. 8.2, 40.2.
101. *Id*., art. 31. See generally Reichman with Hasenzahl, above note 99. One should note, that any residual flexibility left in the TRIPS Agreement, which requires technical mastery to exploit, "could be squeezed out by high protectionist standards incorporated into a new international agreement on patents." G. Ghidini, *Equitable sharing of Benefits from Biodiversity-Based Innovation: Some Reflections under the Shadow of a Neem Tree,* at 701 and ff.
102. The repeal of the local working requirement for patents functions as a truly anti-protectionist, pro-competitive legal instrument within a context of developed economies. However, in a North-South context it basically sanctions, as hinted in the text, a colonial-type scheme of international trade, where Developing Countries act as mere importers of advanced finished goods from Developed Countries.
103. Such as those related to the traditionally strong price imbalance between the cost of raw materials in poor countries and the price of finished products, as well as the growth of employment in Developing Countries generally.
104. G. Ghidini, Equitable sharing of Benefits from Biodiversity-Based Innovation: Some Reflections under the Shadow of a Neem Tree, supra note 63, at 703.

105. CBD, above n. 3, arts. 1, 8(j), 15.7, 16, 19.

106. TRIPS Agreement, above n. 21, arts. 7, 8.1, 31.

107. *See* TRIPS Agreement, above n. 21, art. 31(a)-(k).

108. Ibid., art. 8.1. See also Remiche-Desterbeq, [BREVET ET GATT], 98.

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The African Neopatrimonial State as a Global Prototype

Daniel C. Bach

The concept of neopatrimonial rule was first applied to Africa in 1978, when Jean-François Médard undertook to account for the Cameroonian state's lack of institutionalization and "underdevelopment" (Médard 1979: 39). The lack of distinction between office and officeholder, Médard went on, is masked behind discourses, juridical norms and institutions that nourish the illusion of a legal-bureaucratic logic. In the absence of a legitimizing ideology, the ruler owes his ability to remain in power to his capacity for transforming his monopolistic control over the state into a source of opportunities for family, friends and clients.

Neopatrimonialism in Africa is still classically viewed as the outcome of a confusion between office and officeholder within a state endowed, at least formally, with modern institutions and bureaucratic procedures. The introduction of "neo" as a prefix, means that neopatrimonialism is freed from the historical configurations to which patrimonialism had been associated by Weber (Bach and Gazibo : 2011). The display of legal-bureaucratic norms and structures coexists with relations of authority based on interpersonal rather than impersonal interactions (Bratton & van de Walle 1994: 458). This coexistence of patrimonialism with legal-bureaucratic elements, begs the key question of the forms of interaction and their outcomes. Indeed, neopatrimonialism infers a "dualistic situation, in which the state is characterized by patrimonialisation, as well as by bureaucratization" (Bourmaud 1997: 62). Such dualism translates into a wide array of empirical situations. What is ultimately at stake, however, is the state's capacity (or lack thereof) to produce 'public policies: political systems where patrimonial practices tend to be regulated and capped should be distinguished from those where the patrimonialisation of the state has become all-encompassing, with the consequent loss of any sense of public space or public policy.

Regulated Forms of Neopatrimonialism

In Africa, regulated forms of neopatrimonialism have been usually associated with the introduction of a policy of ethnoregional balance. The distribution of

resources and prebends by the ruler takes place on an inclusive base. The emphasis laid on cooptation and redistribution, rather than coercion, contributes to promote a culture of mutual accommodation. The expected outcome is an increased state capacity to penetrate society and ensure compliance. Even though such notions as public ethics and common good may be undercut, regulated neopatrimonialism conveys its own brand of "moral economy" in so far as it favours redistribution processes that target the nation as a whole (Olivier de Sardan 1999: 25-52).

The regimes of Jomo Kenyatta and by Félix Houphouët-Boigny were good examples of regulated neopatrimonialism. Within the Kenyan state, impersonal rules were made to co-exist with neopatrimonial practices designed to alleviate the risks that political competition might carry for the Nation-State (Bourmaud 1991: 262). Synergies between presidentialism, the single-party system and what amounted to an institutionalised system of patronage facilitated the incorporation of the periphery by the centre. Similarly, in Côte d'Ivoire, the regime of Félix Houphouët-Boigny (1960-1993) exemplified the combination of personal rule with regulated neopatrimonialism. Direct control was exerted over the recruitment of the political élite so as " to balance ethnic, generational and even personal rivalries"(Crook 1989: 214). The outcome was a hybrid political system where "strong personal power ... through patron-client relations [combined with] the use of modern bureaucratic agencies." As in Kenya, the imprint of neopatrimonialism was regulated, capped and ring fenced.

The 1970s were the golden age of regulated neopatrimonialism in Africa. Commodity export prices were still high, the states often had access to significant resources for redistribution and comforting the rulers' personal power seemed compatible with ensuring state- (if not nation-) building. As a result, the integrative virtues of the resulting processes were often extolled.

Predatory Forms of Neopatrimonialism

Predatory forms of neopatrimonialism refer in Africa to systems where personal rule and resource control have reached a paroxysmic level, with a consequent "failure of institutionalisation... and thus of the state" (Médard 1991: 339). The corollaries are the absence of a public space, and of any capacity to produce 'public' policies. Indeed, the privatization of the public sphere is carried to such extremes that it becomes conducive to its dissolution.

The Mobutu regime (1965-1997) is commonly associated to a thoroughly patrimonialised system. Mobutu's brand of neopatrimonial rule, observes René Lemarchand, differed from others on the continent due to an "unparalleled capacity to institutionalize kleptocracy at every level of the social pyramid and his unrivalled talent for transforming personal rule into a cult and political clientelism into

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cronyism" (Lemarchand 2003: 31). Also described by other authors as arbitrary, predatory or kleptocratic, Mobutu's Zaire has called for parallels with sultanism –the term coined by Max Weber to characterize those extreme instances where the ruler's domination relies less upon traditional foundations than on the leader's arbitrary and uncontrolled power.

To summarise, the distinction between regulated and predatory forms of neopatrimonialism signals the two extremes of a diversity of empirical configurations. In the case of integral and predatory forms of neopatrimonialism, the ruler is the state. Conversely, regulated neopatrimonialism infers some capacity to craft 'public' policies. To put it differently, an operational distinction has to be drawn between patrimonial practices *within* the state and the patrimonialisation of the entire state.

The African State as an 'anti-developmental' State

The foundations of a political economy of neopatrimonialism were laid by Richard Sandbrook who had undertaken in the 1980s to relate the private appropriation of the state's powers to the developmental failure of African states (Sandbrook 1985). The neopatrimonial state, he subsequently argued, is an archetype of the anti-developmental state, with "economic objectives [subordinated] to the short-run exigencies of political survival" for the rulers and his regime (Sandbrook 2000: 97). Göran Hyden similarly described bluntly as an "institutionalized curse" the spread of neopatrimonialism in Africa (Hyden 2000: 19). By then, the African state, stereotyped as desperately corrupt and "klepto-patrimonial" (Searle 1999: 8), provided an anti-model to the literature that, globally, attempted to conceptualize the developmental state.

The typology of Peter Evans, drawing from the experience of the first wave of emerging countries in East Asia (Japan, South Korea and Taiwan), identified three archetypes in accordance to the states' propensity to promote economic development. The model of the predatory and anti-developmental state was found to be in Africa, where, as in Mobutu's Zaire, "the preoccupation of the political class with rent seeking has turned the rest of society into prey" –a confirmation, Evans concluded, that "it is not bureaucracy that impedes development so much as the lack of capacity to behave like a bureaucracy" (Evans 1989: 570)

Similarly, Atul Kohli's more recent overview of development and industrialization processes in 'peripheral' or 'emergent' countries draws from Africa his prototype of a highly ineffective and anti-developmental "neopatrimonial" state. Its characteristic feature is the absence of an "effective public arena" clearly differentiated from private interests, organizations and loyalties (Kohli 2004: 408). Nigeria is seen as a near-perfect example of such a prototype that is also considered

relevant to describe "almost all African states." Africa is hyphenated with predatory and integral forms of neopatrimonialism.

Beyond Africa

In Latin America, South-East Asia or the Communist and post-Communist societies of Europe and Central Asia, the diffusion of the concept of neopatrimonial rule has remained limited. Ongoing references to patrimonialism have also been adjusted to suit specific debates, as reflected by a rich crop of lexicographic and conceptual innovations.

In Latin America, patrimonialism still commonly refers to the legacy of the three centuries of Spanish and Portuguese presence (Zabludovsky 1989: 51-66; Roett 1984**)**. In the late 1950s, Richard Morse famously noted that patrimonialism could account for the persistence in contemporary South America of patterns of governance that drew their roots from Spain's imperial policy (Morse 1964: 157-58). Similarly in Brazil, the state is commonly depicted as "a bureaucratic state that traditionally has been at the service of a patrimonial order" (Roett 1984: 1; Uricoechea 1980). Such commonly used notions as "patrimonial society," "patrimonial regime," or "patrimonial order" seek to stress the existence of continuities that transcend regime changes or the type of elites in power (Roett 1984:23).

One of the outcomes is that, in Latin America, the dividing line between 'tradition' and 'traditionalism' is often blurred. References to patrimonialism have, for instance, been extended so as to include the return of totalitarian rule, as in Brazil, Argentina or Peru during the 1970s. Patrimonialism became then a metaphor for the capture of the state by traditionalist corporate interests (Schwartman 1977:89-106). Neopatrimonialism, which Oszlak was the first to apply to Latin America, merely refered then to "contemporary cases in which personalist government turns states into the private government of those possessing the necessary power for the exercise of political domination" (Oszlak 1986 :229). In contrast with neopatrimonialism in Africa, personal rule was not associated with processes of disinstitutionalisation. The postulate was that a neopatrimonial regime could even have a developmental impact if the Dictator happened to be surrounded by a "true 'Court' of 'trustworthy men'...who act as placemen at key institutions, and a small staff of professionals in charge of the administration of certain large programmes (ie. public works, industrial promotion) (Ibid: 232)" There, as in other and more recent studies, the underlying assumption has been the lack of incompatibility between patrimonialism and the rise of a bureaucratic and capitalist state. Latin American references to neopatrimonialism have also been exempt from any teleological assumption that the state was inexorably dissolving into informality.

In Africa and Latin America, the concepts of patrimonialism or neopatrimonialism have been linked to the discussion of institution- and state-building. In East and Southeast Asia it is the impact on the development of capitalism that provides an analytical thread. The outcome is a multiplicity of expressions designed to account for the interactions between state bureaucracies and private business – e.g cronyism, oligarchic patrimonialism, predatory, rentier and even, in the case of Malaysia, ersatz capitalism (Kunio 1988; White 2004: 389-90). The relationship between bureaucrats and business circles has also been central in debates on the conceptualization of the 'developmental state'. By contrast with the much celebrated economic performances of Japan, Taiwan and South Korea in the 1960's, prospects for capitalist development in Malaysia, the Philippines, Indonesia or Thailand were initially overlooked. Corruption and cronyism among rulers, bureaucrats and big business, were considered too intense. The intimation of a thoroughly patrimonialised state conveyed by this pessimistic prognosis was eventually challenged by the economic performance of Malaysia, Indonesia, the Philippines and Thailand in the 1990s. In Malaysia, for instance, the rise of internationally competitive forms of capitalist entrepreneurship was now treated as the counterpart of a state bureaucracy that was more regulated despite the persistence of "highly patrimonialistic relations between the state and business"(Searle 1999: 8).

In the post-Communist states of Europe, the concept of patrimonialism still bear the imprint of Weber's writings on the administrative system of Petrine Russia (Maslovski 1996: 295). Patrimonialism, as applied to Communist and post-Communist political regimes is associated with two distinct yet closely intertwined strands of interpretations. A first type of reading stems from the analysis of patrimonialism as a historical or cultural model. Mikhail Maslovski, for instance, sees the development of patrimonialism within the Stalinist system as a 'reversal'(Maslovski 1996: 302)" Hans van Zon similarly depicts post-Communist Ukraine as "a patrimonial state [that]...furthers anti-modern tendencies in society" (Van Zon 2007: 72). A second type of reading, broadly coincides with what the notion of regulated neopatrimonialism stands for. The concept describes modern political systems with a capacity to produce public policies. When Yoram Gorlizski characterizes the day-to-day working of the Stalinist state as 'neopatrimonial', he is insistent that he is not referring to a traditional system where " autocratic rule [rests] on institutional confusion and disarray, but...[to]... patrimonial authority coexisting alongside quite modern and routine forms of high level decision-making"(Gorlizki 2002: 699-736).

A third type of interpretations specifically refers to situations where patrimonialisation tends to become integral. The analyses also acknowledge the

influence of Africanist literature on interactions between personal rule, patronage and the disinstitutionalization of the state. Thus, in Ukraine, the political system dominated by Leonid Kuchma (1994-2005) has been characterized as neopatrimonial, in view of "the disintegration of the state apparatus, the capture of the state by ruling clans [and] the spread of corrupt practices in the state bureaucracy"(van Zon 2001: 72). Integral forms of neopatrimonialism, however, find an almost perfect match with Islam Karimov's regime in Uzbekistan. The assimilation of neopatrimonialism to the disinstitutionalisation and informalisation of the post-colonial African state is echoed in this case by the 'creeping capture' of the political-administrative system inherited from the Soviet Union by networks of patronage and private interests(Ilkhamov 2007: 75). The informalisation of interactions within the state is exacerbated by a system of personal domination based on the conversion of clanship alliances into patronage ties and the redistribution of state resources. The related rise of a "parallel power network, matching existing state hierarchy" (Ibid: 71) –sketches a pattern reminiscent of the "shadow state" of Reno 1995). In fine, neopatrimonialism in Uzbekistan amounts to an almost perfect illustration of the development of institutional underdevelopment.

Conclusion

The dissemination of the concept of neopatrimonialism in Africa has been particularly successful. Neopatrimonialism is extensively and casually discussed in studies and programmes conducted under the aegis of multilateral institutions, NGOs, 'think tanks', and international donor agencies, with the result of an association of the notion to an increasingly diverse range of subjects. Such a trajectory, however, has not been without a price. Described by some as "endemic" (Pitcher, Moran, Johnston 2009: 125-156; Erdmann & U. Engel 2007: 95-119), stigmatized by others as "a paradigm for all African seasons"(Therkildsen 2005: 36) neopatrimonialism is commonly equated to predatory and integral forms of personal rule. The outcome is a *doxa* that depicts the African state as quintessentially anti-developmental and infers its inevitable descent into informality and capture by criminal networks.

Neglected for all too long, the study of regulated or capped forms of African neopatrimonial rule calls for fresh empirical and theoretical attention. Reasserting the empirical relevance of regulated forms of neopatrimonialism will contribute to restore the foundations for a truly comparative approach both within Africa and across world regions. The developmental trajectory of the different waves of emerging countries is a powerful reminder that neopatrimonialism – i.e. the coexistence of patrimonial and legal-rational elements with a political system -

does not predetermine outcomes. In Africa as elsewhere monitoring cases of regulated or capped interactions between public space and private interests should have never ceased to call for attention.

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Understanding Nationalism

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A major phenomenon that has played a crucial role in the political history of the last two centuries is nationalism. It has inspired numerous political movements and led to countless wars that have broken up empires and created many sovereign states. It has also paved the way for the construction of collective identities and has inspired and mobilised millions of people. National assertions have resulted in the formation of the nation-state which, even now, is seen as the ideal political institution that embodies the aspirations of the people. One feature of nationalism is its enormous mobilising power. Nationalism inspires and unites unknown millions into a single unit. The nation and its symbols arouse passion. Its triumphs, failures and sorrows are ardently shared by the masses. Even in our globalising world, nationalism continues to be an inspiring force. Such a survival of nationalism is contrary to the expectations of nineteenth century scholars, both liberals and Marxists, who saw it as a passing phenomenon giving way to universalism.[1] Nationalism, however, has not only survived but has become one of the most influential factors in world politics. And, as observed by Hobsbawm, the history of the last two centuries is incomprehensible without having some understanding of the nation and the terms derived from it (Hobsbawm 1990:1).

Contesting Perceptions of Nationalism

The emergence of nationalism is generally viewed in association with the French Revolution. The revolution acknowledged and incorporated in the *Rights of Man and Citizen*, perhaps for the first time in history, the nation as the source of political authority. Since then nationalism has immensely influenced political developments all over the world. In Europe, during the nineteenth century, a series of national movements emerged which had, at their core, the hopes for liberation and unification of many oppressed or fragmented people. Italy, Germany and Poland were the most significant among them. The influence of these national assertions spread beyond the borders of these countries and inspired many communities in the rest of the Europe. Leaders like Mazzini and his writings had a pan-European impact.

The twentieth century witnessed the universalisation of the national movements. In the first half of the century Europe remained the centre of national assertions. However, in the second half, colonial peoples raised the slogan of nationalism resulting in the emancipation of a large number of Afro-Asian states from colonial rule. Later, in the last quarter of the century, a new wave of nationalism, what is generally referred as ethnic or ethno-nationalism, appeared on the political landscape.

In spite of being a prominent political phenomenon for a long period, there is a lot of confusion about the exact nature of nationalism. This is because scholars on nationalism hold divergent views. They see it as a political doctrine, a sentiment, a movement or as an instrument to capture power. Thus, without producing a lucid understanding, academic discussions engage us in diverse positions and debates. Even an accomplished scholar like Anderson observes that the nation and nationalism is notoriously difficult to define (Anderson 1991: 3).

A careful observation of the phenomenon will help us to uncover a few causes that make it a complex subject. These are : a) occurrence of nationalism in highly diverse circumstances across time and place; b) manifestation of nationalism in relation with a number of other phenomena like religion and culture and is usually specified as ethnic nationalism, civic nationalism, linguistic nationalism or religious nationalism, etc.; c) nationalism is not bound to any particular social programme and this enables various groups with different outlooks to appropriate it and become the champions of nationalism. All these factors give nationalism its characteristic ambiguity. According to Nairn, nationalism is a "Protean phenomenon" and it informs modern history to such a large extent that one may of course maintain there is no such thing as an "archetype" for it, and no single form which displays its meaning (Nairn 1977: 347).

Despite all these ambiguities, a careful reading of the important studies on nationalism can help us identify certain major and recurring notions of it that scholars agree upon. One major idea about nationalism gives prominence to the nation and the loyalty expressed by a people towards it. According to this view, nationalism is a feeling or an approach that places the nation at the centre of all activities and tries to uphold its concerns and values.[2] This view has been articulated by Hroch who defines nationalism as "that outlook which gives an absolute priority to the values of the nation over all other values and interests" (Hroch 1996: 80).[3] Connor (1972) also shares a similar view.[4] A natural extension of this view considers nationalism as love or loyalty towards one's state which is similar to patriotism. Common parlance like Indian nationalism, Russian nationalism, American nationalism, etc, often conveys this dimension of the phenomenon.

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Another prominent view of nationalism is that it is a movement. Nationalist movements have been an inseparable part of the political milieu of the last two centuries and have played a significant role in moulding the political character of the period. Seton-Watson considers this as one of the two aspects of nationalism and describes it as an "organized political movement, designed to further the alleged aims and interests of the nations" (Seton-Watson 1977: 3) Smith also considers nationalism as an ideological movement (Smith 1983: 343).[5]

A closely related notion of nationalism is that of a response, or an awakening, of people who encounter adverse situations. The situations can be economic, cultural or political or a combination of these factors. The sense of backwardness, collective grief, humiliation or fear of a threat awakens and inspires people to change existing conditions, and this may culminate in a movement. While Nairn considers nationalism as a response of exploited societies (Nairn 1977: 336), Minouge describes it as a political movement depending on a feeling of the collective grievance against foreigners (Minouge quoted in O' Leary 2003:102)

Some scholars view nationalism in the instrumentalist sense and argue that a precise understanding of it is possible only by comprehending the instrumental nature of it. They also argue that nationalism has been a weapon in the hands of various sections of society to achieve their goals and control the state or the people. In other words, various sections that hold different, even opposite aims, can appropriate nationalism. In fact, paradoxically it has been noted that nationalism is a politics of interest, not identity, so it must be explained in instrumental terms, that is, by focusing on the calculation of the elites. It has, thus, been argued by Breuilly that "to focus upon culture, ideology, identity, class or modernisation is to neglect the fundamental point that nationalism is, above and beyond all else, about politics, and that politics is about power. Power, in the modern world, is primarily about control of the state. The central question, therefore, should be to relate nationalism to the objective of obtaining and using state power" (Breuilly 1982: 2). The underlying perception of Marxists, who consider nationalism as an ideological weapon in the hands of an emerging bourgeoisie to achieve a big national market and for construction of the trans-class hegemony, is similar to this.

Although the above-mentioned views are recurrent in academic discussion, it is much better to consider nationalism as a political doctrine or principle. This doctrine is based on the assumption that every nation requires its own political institutions for the preservation and reproduction of their identity, cultural and economic development. Breuilly describes three fundamental assumptions of the doctrine: There exists a nation with an explicit and peculiar character. The interests and values of this nation take priority over all other interests and values. The

nation must be as independent as possible which, usually, requires the attainment of political sovereignty (Breuilly 1982; 3). This idea of nationalism finds expression in the writings of Kedourie (1960) and Seton-Watson (1977).

Gellner articulates, arguably, the most well known definition of nationalism as a political doctrine. According to him nationalism is a "political principle which holds that the national and political unit should be congruent" (Gellner 1983: 1). Gellner supports the idea that a national group, which is culturally homogeneous, has the right to have its own state. And this relationship between national and political unit explains, in association with one another or as an apriory condition, the legitimacy of the state. The result is that nationalism becomes "a theory of political legitimacy, which requires that ethnic boundaries should not cut across political ones, and, in particular, ethnic boundaries within a given state" (ibid).

The nationalist doctrine that appeared during the French Revolution received universal acceptance afterward. It awoke the oppressed people by conveying the message that they are the real source of political power and inspired them to assert their right to be independent. It is through such movements many societies, which are severely fragmented on the basis of religion, region, caste, language, class, etc., are knit together and transformed into a unit by national consciousness. It is in this sense that national movement becomes the motor behind the formation of a nation. It also spread the message that the legitimacy of the states comes from the nation, which prompted states to engage in activities to build one within their boundaries. These two developments that flared out of the nationalist doctrine recurred in the subsequent periods, in various forms, in great variety of social settings and with wide variety of political and ideological constellation. In other words, nationalism that emerged on the political landscape during the French Revolution, along with other modern ideas like democracy, liberty, and equality has immensely influenced the political developments in the later years.

A discussion on nation would enhance our understanding of the important role played by nationalist doctrine in its formation.

Nation

Perhaps the most important human association in our time is the nation. In the modern period people can be members of various communities based on caste, religion, language, territory, etc. Such associations often play a very significant role in our lives and during moments of crisis like inter-community rivalries, wars, natural calamities, people make great sacrifices. All these features are applicable to the nation also. The question that repeatedly arises in the discussion on nation is how we can differentiate the nation from other communities. In other words, to develop a clear idea of the factors that make the nation unique is unavoidable

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to understand it. In this context definitions like "intense group identifications" (Armstrong 1982), which can be applicable to other communities also, become inadequate and a more rigorous inquiry becomes necessary.

However, developing a clear understanding of nation is not an easy task. Although there has been intense discussions and debates on this question, the concept is so elusive that Seton-Watson ruefully comments that "no scientific definition of a nation can be devised, yet the phenomenon has existed and exists" (Seton-Watson (1977:5).

In order to understand the concept adequately we should begin by asking whether nation is a feature of the modern period or it existed in the past also. Some scholars believe that the nation is much older than the modern era. Smith points out two broad strands, primordialism and perennialism. According to the first view, the nation is primordial and natural and is part of the human condition which is outside time and history (Smith & Hutchinson 2000: xxvi). Perennialists, on the other hand, do not consider nations as the constituent part of the natural order. They are perennial and immemorial, but not primordial and natural. Perennials like Hastings argue that nations are immemorial, that they have their roots in pre-modern epochs, usually in the Middle Ages. However, nations like that of Jews, the Armenians and the Persians have their roots in the ancient world (Hastings 1997:24) Armstrong (1992) also holds a similar view.[6]

Modernists see the nation as a modern political community that evolved in the context of modern developments. According to Hobsbawm, for example, the characteristic of the nation and everything connected with it is its modernity. In his book *Nations and Nationalism*, he carefully studies the meaning of the word nation in major European languages and points out that the current notion of nation – as a body of citizens whose collective sovereignty constitutes them a state – arose only in the eighteenth century (Hobsbawm 1990: 19). Scholars like Gellner, Anderson, and Nairn also consider the nation as a modern phenomenon. We can arrive at some conclusion only by developing a clear idea regarding the nation.

Objective Factors

One of the methods of defining the nation is on the basis of the objective elements that constitute it. The most recurrent elements are language, religion, ethnicity, territory, shared history, etc. One well-known definition based on these grounds is by Stalin who defines the nation as a "historically evolved, stable community of language, territory, economic life and psychological make-up manifested in a community of culture" (Stalin 1985: 5). A closer analysis of the major factors would help us in understanding their role in the formation of the nation.

Perhaps the most discussed factor in the formation of the nation is language. The role played by language in building national communities is no doubt unparalleled in history. It has also been a barrier in inter-community communication and thus an important criterion that distinguishes one group from others. In Europe, during the nineteenth century, language functioned as the core element in the formation of the nation and consequently scholars who studied European nationalism stressed the role of language in the development of national consciousness. The leaders of several national movements in the twentieth century were also keen on developing a common language for multi-lingual people. Gandhiji's attempt to propagate Hindi and Israel's attempt to revive Hebrew are examples.

In the practical realm, language functions as the means of communication and for administrative and other related purposes. Apart from this, language also acts as the medium for intellectual interaction and the storehouse of cultural resources. Such interactions at the intellectual, cultural, political and administrative domains eventually facilitate the construction of a society. According to Anderson, the most significant feature of language is its capacity for generating imagined communities, building in effect particular solidarities (Anderson 1991:133). Breuilly, however, suggests that the idea of language as a basis for making political distinctions is modern and the reasons that make language a criterion for the formation of a political community is not just its importance in building the culture of that community. In his opinion, "Only when language was rendered institutionally significant in the three modern components of nationality – law, polity and economy – did it acquire political significance. In other words, language becomes significant not merely as a repository of the national culture and memory, as a store house of myths, but also as a matter of political, economic, legal and educational interest" (Breuilly 2000:330).

The significant role that language has played in the formation of the nation is reflected in the vast literature devoted to it. Some early theoretical inquiries can be seen in the writings of German romantics like Herder and Fichte. The well-known Marxist scholar Kautsky also believes that the basis of a national community is to be found in the development of a national language.

Germany, Italy and Bangladesh are some of the states built on linguistic nationalism. Instances of long-standing linguistic national movements are that of the Tamils in Sri Lanka and French in Quebec. However, development of a large community on the basis of a language is not always a straightforward process. In many cases it is the result of various factors like the conscious and persistent efforts of the state, a unified education system, growth of print and other communication facilities. For example, when Italy became independent in 1860 only 2.5 per cent

of the population used Italian in their day to day life and in France at the time of Revolution (1789) only 12 to 13 per cent spoke French correctly (Hobsbawm 1990: 60). In both these cases state policies played a crucial role in the development of the national language. Modern Hebrew is also the result of state supported efforts. This is also true of many nations that claim language as the uniting bond.

Religion is another objective element. Historically religion has played a major role in building trans-local communities, and it is not surprising that it functions as one of the main elements in the formation of the nation. A religion builds community feeling among its adherents through common practices and rituals and distinguishes them from others. It also renders various symbols, images, icons and, in some cases, a sacred language – all of which can function as a powerful means to build an "unselfconscious coherence" among people (Anderson 1991:16). Gellner, based on the African experience, argues that communities converted into "world religions" such as Islam or Christianity, as they linked to a literate high culture, are better equipped to develop an effective nationalism than others; and he points out Somalia and Ethiopia as examples (Gellner 1983: 83). The Marxist scholar Hobsbawm also observes that the links between religion and national consciousnesses can be very close and the relationship is much stronger when nationalism becomes a mass force than when it is a minority ideology and activist's movement (Hobsbawm 1990: 67).[7]

There are several historical examples that show the close link between religion and nation. During the Indian national movement both the Muslim League and the Hindu Mahasabha envisioned a nation based on religion. In Europe too religion played a major role in the formation of nations like Ireland and Poland. Israel is another important case where religion is the sole basis of the nation.

Ethnicity is another important element that plays a significant role in the formation of the nation. However, ethnicity is a complex term, which is used in various senses. In general usage it means that those belonging to an ethnic group feel that they have certain things in common which make them a community and distinguishes them from others. These differentiating elements can be a common descent or perception of common descent, history, culture, physical features, etc.[8]

The key debate over ethnicity is whether it is given or a constructed entity. Some scholars consider ethnic identities as given or relatively fixed from birth or early life, and rooted in the non-rational foundation of the human personality. To them common descent and ancestry or a belief in them are important factors.[9] In contrast to the above view many scholars consider ethnic identity as constructed and emphasise the cultural aspect of it.[10] According to this position, formation and crystallization of an ethnic group or other identities are the result of economic,

social and political developments.[11] Barth, moving away from both these positions, defines ethnicity as the existence of recognised group boundaries (Barth 1969).[12]

In spite of all these debates, scholars like Connor, Armstrong and Smith consider ethnicity as a crucial factor in the development of the nation. According to Smith, most nations are formed on the basis of myths, memories, traditions and symbols of older 'ethnines' by bureaucratic incorporation or by the vernacular mobilisation of the people. He cites examples from Western Europe for the first case, from Eastern Europe and Asia for the second (Smith 1991: 123).

Race is another important element in the formation of nations and it is closely related to ethnicity if we define ethnicity on a biological basis. Race is a biological category that has visible physical features.[13] The existence of visible physical differences, naturally, functions as a separating factor among people. And when a nation is formed on the basis of visible physical features, membership in such a nation will be attainable only through birth.

A shared history or a common past is another important element of a nation. A community's belief that they collectively shared the challenges, sorrows, victories and hopes provides a powerful emotional bond that ties them together. A shared history also enriches societies with numerous symbols, images, legends, myths, etc., which are invaluable resources in the development of a community feeling. The significance of the shared past is that along with it, there exists, always, a vision of a shared future. In other words, communities not only remember past generations but also imagine many future generations which provide the strength to face present challenges.

Miller explains how shared history makes a national community different from other communities. To him a national community is a community of obligation and current members of the national community are obliged to continue the work of their forebears which they accomplish partly for their contemporaries and partly for their descendants (Miller 2000:1681). Thus, a historical community, which stretches both in the past and in the future across generations, comes to our mind when we speak of a nation as an ethical community. And Miller observes that here we see the "depth of national communities" that may not be the characteristic feature of many other associations.

The importance of the past in the construction of the nation was well perceived by the leaders of anti-colonial movements and many of them claimed a glorious, valiant past. Nkrumah persistently referred to the 'Golden Age' of the Ghanian Empire. In Indonesia, Sukarno's slogan was "Glorious past, dark today, promising future."

One question that always appears along with the claim of a shared history is its authenticity. It is immensely difficult to disentangle the element of genuine

shared memory from that of exaggeration. Successive generations and different groups may differ on their views on history. One important matter is that it cannot be remembered, but must be narrated (Anderson 1991: 204). And who will narrate the past becomes the crucial question.[14] Whoever narrates history may be selective in collecting facts, and in the process, forgets or neglects certain parts. Every people have many past events which can mar its present communion. Considering this, Renan commented that "to forget and – I will venture to say – to get one's history wrong, are essential factors in the making of a nation; and thus advance of historical studies are often a danger to nationality" (Renan 1990: 145). However, what matters is not the antiquity of the contents of tradition, but the efficiency of the process by which tradition constitutes certain beliefs and understandings as unquestioned, immediate knowledge, that becomes the basis for disputing or questioning other claims.

Another factor that has been central to the formation of the nation is an historic territory or homeland. A moral and exclusive claim over a specific territory may be the most important element that distinguishes a nation from other human communities. The significance of the homeland in a community's life is enormous. It is in that land their ancestors lived, their society developed and their future generations will breathe. The various aspects of a nation's life – its economy, culture and social life – have evolved through intimate interaction with the territory. A community's values, art, language and myths, rituals, ceremony, etc., grow out of its inhabitation in a particular land for generations. In certain cases the territory becomes religiously important and becomes a sacred land. Thus, in multiple ways, territory is closely associated with people and is an inalienable part of their history, memory and identity.[15] The crucial goal of all national assertions is to build their own state in that territory.

This close relationship between a people and their history with a territory has a crucial role in the modern scheme of thinking. According to Miller, a nation's association to a territory has a crucial role in making it a political community and this relationship is in contrast with most other group identities to which people belong. According to him it is the territorial element that makes nations uniquely suited to serve as the basis of state, since states by definition must exercise their authority over a geographical area (Miller 2000:1682).

Subjective Definitions

We have discussed a set of factors like language, ethnicity, religion, race, shared history, territory, etc., which have played a crucial role in the formation of nations. And, undoubtedly, there are enough cases in history where these factors have played both core and contributing roles. A vital point to be remembered, however,

is that the mere existence of these factors may not create a nation. Rather a nation is the outcome of the specific socio-economic and political situations of a particular time. For example, Tamils have been living in Sri Lanka for hundreds of years. However, they developed into a nation only in the unique political and economic conditions of post-independent Sri Lanka. This shows that in the context of new socio-political and economic conflicts new identities often emerge undermining old solidarities. The Pakistani experience would explain it more clearly. After the creation of Pakistan as a home for the sub-continent's Muslims, in 1947, new conflicts resulted in the emergence of new national identities or sharpening of old ones like Bangla, Sindhi, Mojahir. Apart from such socio-political and economic factors the role and conscious efforts of intellectuals, the political leadership, and in some cases the state, is vital in bringing some factors as core and developing a national identity around it. Thus, as commented by Horowitz, what counts, is not whether objective differences are present, but whether they are used to mark one group off from another (Horowitz 1985:50).

What we understand from this discussion is that the mere knowledge of objective factors is not sufficient to give a clear idea about the nation. And complicating the picture are the large number of cases that do not allow us to pinpoint one criterion or one or two combinations as a universal model.

It may be this limitation of objective definitions that has prompted scholars to look for subjective ones. Scholars like Hobsbawm, Renan and Seton-Watson frame their definition on the lines of subjective criteria. According to Seton-Watson, "a nation exists when a significant number of people in a community consider themselves to form, or behave as if they formed one" (Seton-Watson 1977: 5). Renan, who considers that "the existence of nation is a daily plebiscite" (Renan 1990: 154) provides another, but much more radical, subjective definition. Here the conscious choice of the people becomes the criteria of the nation and all other objective elements are secondary.

However a few questions arise with subjective definitions. If choice or belief is the basic criteria for defining a nation, it can be a criterion for many other human associations also. Miller, who considers such shared beliefs as one criterion of nationality, also suggests that this shared belief itself does not distinguish nationality from other kind of human relationships (Miller 1990:1681). In this context, the question of the basic criteria that distinguish nation from other groups arises.

This issue draws our attention to what is arguably the most important aspect of a nation. It seems that the political element of the nation is the crucial factor for its identity. The nation is not just a community; it is a community that believes that it is politically self-determinant. It is a community that has the moral right

and the will to decide its destiny through political action. The crucial difference between the nation and other human associations is this political content which is integral to its persona. Here the idea of a nation as a human community is radically different from other communities. A nation's right to decide its political will and the realization of this ideal in the form of an independent state is unique to it. No other community, ethnic, religious, or linguistic, normally considers itself as a basis for a state.[16]

Intellectual Influences

Another aspect worth looking is the role of nationalist doctrine. The influence or diffusion of nationalism plays a crucial role in transforming communities into a national unit. Wherever communities were under alien rule the activities of the intellectuals and the national movement that follows them create diffusion. In such contexts a national movement becomes the crucial historical agency that transforms the traditional, often highly fragmented, communities into a politically conscious nation. When people are ruled by indigenous nobility, the doctrine inspires the people to see themselves as the source of political authority and mobilizes for more political rights. The growing recognition of nationalist doctrine also impels the states to engage in activities that help to build a uniform nation in an attempt to ensure legitimacy. The increased activities of governments and the growth of industrial capitalism also played a crucial role in the formation of nations in such cases.

However, the rise of nationalist doctrine was not an isolated development. It was closely connected with modern developments in the socio-economic realm and political ideas. It is the expression of a radically changed form of consciousness (Anderson 1991: xiv). And whenever we use the term nation it implies a community which encompasses modern notions of political life. In other words, nation invokes the idea of a people who are the legitimate holders of a state. Here we see the idea of the popular sovereignty as embedded in nation.

Popular sovereignty, though taken for granted now, was a novelty in the late eighteenth and nineteenth centuries. In the past rulers acquired their right not from the people but from other sources like divine sanction, religious approval, belonging to a dynasty, etc. In such political orders, people were just subjects of the ruler. However in the context of major socio-economic changes in the eighteenth century, older notions of legitimacy began to lose their hold over the society and were replaced by the idea of popular sovereignty. In fact, what originally distinguishes the idea of nation is not a claim to territorial sovereignty but to the sovereignty of a specific people who happen to occupy a particular geographical area. Thus, whenever we use the term nation, it pre-supposes a population that

embodies the right to decide their political destiny. One of the early affirmations of the idea is the *Declaration of the Rights of Man* of 1789: "The principle of sovereignty resides essentially in the nation; no body of men, no individual, can exercise authority that does not emanate expressly from it."

The nation also presupposes one more meaning which radically distinguishes it from the earlier societies; the equality of individuals as citizens. Like popular sovereignty, the fundamental equality of citizens is also novel in political history. In earlier societies people were regarded as subjects who were hierarchically placed on the basis of various socio-economic considerations. However, in a nation all individuals have equal rights and status as citizens. All other identities and associations become insignificant or irrelevant in the relation between a nation and its members. Taylor regards this as one of the two important features of modern imaginary, i.e. "the shift from hierarchical, mediated-access societies to horizontal direct access societies" (Taylor 1998:196). In earlier societies, which were hierarchical, an individual belonged to a society via belonging to some component of it. In contrast, the modern notion of citizenship is direct i.e. one's fundamental way of belonging to the state is not dependent on, or mediated by any other memberships. One stands alongside one's fellow citizens, in direct relationship to the state which is the object of their common allegiance.

All these features point towards a community that is fundamentally a novelty, whose constituting principles are incompatible with the communities of the previous period. A nation internalises principles like popular sovereignty and the fundamental equality of citizens that were non-existent in earlier political societies. Such characteristics of a nation also help us to clarify an earlier debate; whether a nation is a modern phenomenon or whether it is much older.

Nationalism and Formation of Nations

The doctrinal character of nationalism and the important role it played in the formation of nations can be ascertained from history. This part will survey three different models of nation formation in Europe – from national movements, within established states and official nationalism. By referring to these cases, we can argue that the diffusion of nationalist doctrine was a major factor in the development of nations.

Europe has witnessed two major models of nation formation.[17] In one model, the national aspirations of fragmented people or national movements from those under alien rule resulted in the development of nation. In the second, a nation was formed within established states. Smith describes the first case as "ethnic-genealogical" and the second as "civic territorial" (Smith 1991:123). The influence of the nationalist doctrine is evident in both these types.

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National Movements to Nation

Germany, Italy and Poland are examples of this type of nation formation. During the first half of the nineteenth century they were under alien rule or divided into many principalities. However, division of communities (language/religious/ethnic, etc.) into different political units as well as the differences between the rulers and ruled was not an exception in earlier period. But the nationalist doctrine unveiled during the French Revolution introduced a radical vision of political life and made a lasting impact all over Europe in the nineteenth century. People who were dominated and divided began to imagine themselves as nations. They aspired to overthrow their alien rulers, unite with their kin and to carve a state of their own. Nationalism, as mentioned by Berlin, provided a new vision of life with which a wounded society could identify themselves around which they could gather and attempt to restore their collective life (Berlin 1981:349). Thus what we can see in German, Polish or Italian uprisings were a people inspired by a new idea – nationalism.

The three-phase division of the national movement introduced by Hroch is applicable to these cases.[18] The early proponents of the nationalist idea were intellectuals who were concerned with the cultural and historic aspects of their society. They were followed by a politically oriented group which desired to alter the unhappy condition of their society. However, as mentioned by Nairn, even though the elite and the intelligentsia at the periphery wanted to counter this adverse situation, they were not resourceful enough to do it by themselves. Their only resource was people and the elite and intelligentsia were left with no option but to mobilise them. Thus, they were forced to invoke whatever similarities they shared and speak in a language that would give them access to the lower classes and touch their sentiments. And those compulsions led to the "political baptism" of the lower classes (Nairn 1977:340).[19] In other words, with the emergence of the national movement the hitherto neglected masses were not only "invited into history" but also become the centre of political discourse.

To mobilise the masses, national movements and their leaders utilised whatever sources that were available to them. Natural features like rivers, mountains, meadows, historical events, myths and legends–all become effective weapons in the process of building community feeling. The moral values, unique qualities and ancient glories of the community were invoked and the nation was usually referred to as a big family. Through such a process, a political community with a unique identity and moral purpose was envisioned and slowly evolved over time.

The diffusion of nationalist doctrine was immensely helped with the progress in the fields of production, transportation and communication. According to

Anderson an "imagined political community" was made possible only with the revolution in the area of "print-capitalism". The post reformation period saw the large scale printing of vernacular material. With the advent of capitalist production, which seeks a larger market, vernacular publishing increased tremendously.[20] In the same period vernaculars also became official languages in many kingdoms which elevated them to the "language of power". These processes pioneered the creation of specific linguistic communities associated with eventual national identities. For Anderson, the nation became imaginable only in the context of print-capitalism (Anderson 1991: 42-43).[21]

As nationalist doctrine was closely connected with the ideals of democracy, freedom and equality, national movements also addressed many pertinent issues of the period. Questions like relations between the monarchy and republic, church and state, landowners and bourgeoisie, town and country, employers and workers, also emerged as serious issues in the movement. National movements also tried to portray their goals in a universal sense. The Italian movement proclaimed that their fight was against all oppressors – foreign and domestic. (Seton Watson 1977: 103) Polish nationalists described themselves as, "a nation martyred in the cause of liberty, fighters for the freedom of mankind… For our liberty and yours" (ibid).

The historic outcome of these national movements was the mobilization of formerly passive communities into active political units, that is, nation. In other words an overarching national identity, undermining many local or particular loyalties, emerged. In the process, former subjects were brought into the political community of citizens and a new state, the collective political institution of the people, realised.

Nation Formation within Existing States

In the modern era, Europe witnessed another model of nation formation. In this model a linguistically and culturally diverse population within an established state was incorporated into a single national unit through the diffusion of nationalist doctrine along with the increased activities of the government and rapid capitalist development. These processes resulted in the gradual integration of diverse groups and outlaying regions into the culture of the dominant ethnic group. Britain and France are examples of this model.

We have seen that the notion of the state as the collective political institution of the people grew among the intelligentsia and the middle class after the French Revolution. This idea inspired more and more popular mobilizations for democratic and political rights across the Europe. The voice of the masses was increasingly recognised as the consent of the people gained respect. All these processes paved way for the formation of a modern political community.

Although monarchies were predominant in nineteenth century Europe, changing political circumstances in which traditional guarantors of loyalty were losing their validity forced rulers to build an organic relationship with the people. As observed by Hobsbawm, "even when the states as yet faced no serious challenge to its legitimacy or cohesion, the mere decline of older socio-political bonds would have made imperative to formulate and inculcate new forms of civic loyalty… "(Hobsbawm 1990:85). And wherever the state succeeded in developing a single national identity and consciousness that became an invaluable emotional asset.

The growth of the bureaucracy was one factor that played a crucial role in the development of civic loyalty.[22] Along with growing activities of the centralized states, the strength of the civil service, the army and the unified legal system and judiciary also increased. Through the adoption of a national language and state wide education, the cultural identity of the dominant ethnic group was disseminated within its borders. Scholars like Tilly (1975), Giddens and Smith regard the establishment of the modern state and its various activities as the major factor in building a uniform civic identity. According to Giddens the various characteristics of the modern state – territoriality, monopoly over the legitimate use of violence, bureaucracy, administrative surveillance, taxation, law and a modern army–played a crucial role in the development of nationalist feeling. And the distinguishable nascent form of nationalist sentiment was associated with the states that developed early with fixed capital. He cites France and England as examples (Giddens 1985). Inter-state war was another factor that played a crucial role in the formation and consolidation of a national identity in such cases.

Another development that played an important role in the formation of nations was the emergence of industrial capitalism. Rapid industrial growth had a lasting impact on various spheres of human life. Many urban centres developed, commerce multiplied, communication and transport facilities were revolutionized and the interaction of people within a country intensified. These activities facilitated the mobilization and incorporation of diverse groups into a single national culture. Two scholars who emphasize the role of modernization in the formation of nations are Deutsch (1966) and Gellner. Gellner understands nationalism as a structural necessity of industrialism (Gellner 1983: 46). It is an essential component of modernisation, of transition from an agrarian society to an industrial one.

Marxists also view the formation of a nation in relation with the capitalist mode of development. Marx and Engels see the emergence of the modern nation in relation to the processes in which the feudal mode of production is replaced by the capitalist mode. As the result of these developments, the fragmented feudal society of petty principalities unites into the nation-state – in other words a culturally diverse feudal society is transformed into a standardised population.

One of the fundamental requirements of capitalist production, a large domestic market, also develops in the process.[23]

The nation, which emerges in the context of large scale economic and political changes and social dislocation, provides a sense of belonging and thus an emotional security to the masses who faces the destruction of their old social systems, values and beliefs. According to Anderson, the period, that saw the dusk of the religious mode of thought under the impact of Enlightenment, brought its own "modern darkness". This situation necessitated a "secular transformation of fatality into continuity, continuity into meaning" and "few things were (are) better suited to this end than an idea of nation" (Anderson 1991: 13).[24] Giddens also observes that the belonging to a national community provides "ontological security" (Giddens 1987: 178).

Official Nationalism

There is a third model of nation formation in Europe, known as official nationalism, in which the attempt to build a national community came from the imperial rulers themselves. Seton-Watson and Anderson refer to Tsarist Russia as an example. This model clearly demonstrates the impact of nationalist doctrine. With the emergence of nationalist doctrine the link between a state and nation became highly desirable and the legitimating factor and, at the same time, the presence of non-nationals was considered as undesirable or a threat. The Russian Empire during the nineteenth century included a large number of non-Russians and capitalist development in Russia was not extensive enough to assimilate the foreigners. This situation made necessary direct action from the state for the incorporation of non-Russians into Russian culture.

Tsarist Russia conducted a massive effort to Russify its diverse population in the second half of the nineteenth century. Although Count Uvarov recommended that Russia should be based on three principles: autocracy, orthodoxy, and nationality, in 1832, the massive Russification policy was started only in the 1880s by Tsar Alexander III (1881-94). The policy emphasized that all subjects of the Tsar should consider themselves Russians and owe allegiance not only to the monarch but also to the Russian nation. The Russian language and culture, to which less than half of Empire's population belonged, was to be imposed over time on all subjects, ensuring that they put Russia first, and preferred Russian culture to their own original culture. Consequently Russian was made a compulsory language in all schools, especially in minority areas (Seton-Watson 1977: 58-59). Thus the growing recognition of the nationalist doctrine forced even the imperial state to stretch the "short, tight skin of the nation over gigantic body of empire" (Anderson 1991: 86) [25]

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All these cases show that the influence of nationalist doctrine was a major factor in formation of nations in Europe. Even the nations that were formed as a result of national movements or where nation was developed within established states the impact of the doctrine was obvious.

Conclusion

This paper was an attempt to understand nationalism and the various issues related to it. To develop a lucid idea of nation and nationalism we examined theoretical concepts, economic and social conditions of its emergence and different phases of its manifestation. In the process an idea of a political principle that has been alive throughout the last two centuries emerged. It seems that nationalism is, fundamentally, a political principle that recognises the right of a human community, that is, the nation, to decide its political destiny. Or, to put it in another way, nationalism is a political principle that acknowledges the right of a nation to have a political set-up of its own. This principle, which was explicitly stated during the French Revolution, received universal acceptance due to its moral power and such moral power and universal acceptance gave birth to many political movements, nation-states, and psychological attachments. And it still inspires millions.

Notes

1. Isaiah Berlin writes, "no significant thinkers known to me predicted it [nationalism] a future in which it would play an even more dominant role. Yet it would, perhaps, be no overstatement to say that it is one of the most powerful, in some regions the most powerful, single movement at works in the world today;…" Berlin (1981: 337).
2. There are some internal and external implications to this position. It implies that loyalty to the national community should transcend loyalty to more particular identifications, personal, cultural, economic or political, and members of ones' nation have higher moral claims than members of other nations.
3. One implication of this approach is that there is an implicit assumption of the prior existence of a nation and nationalism emerges later.
4. Connor considers loyalty to one's ethnic group as nationalism and self-determining ethnic groups as nations. Connor (1972: 334).
5. In Smith's opinion, "nationalism is an ideological movement for attaining and maintaining the autonomy, unity and identity of an existing or potential nation". Smith (1983: 343).
6. John Armstrong does not differentiate between ethnic and national groups and considers the modern nations as the continuation of ethnic or religious identities. John Armstrong (1982).

7. This should be seen in the light of the reluctance that Marxists generally have in acknowledging the role of religion in the formation of nations. Stalin did not include religion among the constituting elements of a nation. Moreover, one of the major purposes of Stalin's thesis was to refute the claims of Jewish Bunds that they were a nation.
8. Anthony D. Smith lists six main criteria of ethnic community as (a) a collective proper name, (b) a myth of common ancestry, (c) shared historical memories, (d) one or more differentiating elements of common cultures, (e) an association with a specific home land and (f) a sense of solidarity for significant sectors of the population. Smith (1991: 21).
9. There are different strands within this view. Van Den Berghe, a socio-biologist, focuses on individual genetic reproductive drives which, extended through the 'nepotism instinct', develops greater physical differences between peoples that produce group formation. However, this view is not widely supported as a biological bond or an extended family is too small a unit and politically insignificant in the formation of big ethnic groups. Geertz and Shils see ethnic identity as cultural 'givens' that emanate from kinship, race, language, territory and religion which take centuries to crystallize and are quite stable. Another important view on ethnicity is based on the belief or perception of common descent or ancestry. Weber, Smith and Connor are some scholars who hold this position. According to Weber, an ethnic group is that where its members "entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization and migration." Weber, Quoted in Calhoun (2000: 408), Van der Berghe (1978) Geertz, (1973), Shils (1957).
10. According to Kymlicka the difference between the two approaches can be inferred from their relations to outsiders. Ethnic nationalism, which is based on a shared ancestry and race, normally does not permit outsiders to join as members. Cultural nationalism, on the other hand, which is based on language, religion and culture, is open to outsiders. Kymlicka (2001: 16)
11. Scholars like Eric Hobsbawm, Etienne Balibar and Immanuel Wallerstein hold this position.
12. He holds that ethnicity is based not on the basis of fixed character or essence of the group, but on the perception of its members which differentiate them from others. And the cultural content of the group can change if the boundary mechanism is intact. Barth (1969).
13. However, there are some scholars who argue that what we call 'racial difference' is not just biological, but a socio-political construction. Balibar (1991).
14. Romila Thapar observes that a society has many pasts out of which it chooses some over the others and it creates history. The choice is determined by those who are dominant, although occasionally, the vo ice of the others may also heard. Thapar (1994: 37).
15. There are many examples to show how political leaders, sensing this intimacy, evoke popular emotions by mentioning the significance of the homeland in their life. In his outgoing speech Israeli Prime Minister Yitzhaq Shamir said, "Eretz Yisra'el is not only

another piece of land, it is not just a place to live. Above all, Eretz Yisra'el is a value; it is holy. Any conscientious Jew aware of his roots will never be able to treat Eretz Yisra'el as a commodity… And just as there is a single Eretz Yisra'el, there is only one nation of Israel." In one of his speeches to Kosovo Serbians Slobodan Milosevic said, "This is your land. These are your houses. Your meadows and gardens. Your memories. You shouldn't abandon your land just because it is difficult to live, because you are pressured by injustice and degradation. It was never part of Serbian… character to give up in the face of obstacles, to demobilize when it its time to fight…. You should stay here for the sake of your ancestors and descendants, otherwise your ancestors would be defiled and your descendents disappointed." Quoted in Connor (2002: 386 & 382).

16. The political content of the nation and its expression, generally as the aspiration for a state, is the central feature of many explanations. For Anderson, nation is an imagined political community. Anderson (1991: 6) (Emphasis Added). Miller considers nation as "a community of people with an aspiration to be politically self-determining" (Miller 1995: 19).
17. Various scholars who have studied European nationalism have categorised it in precisely this way. Pioneer among them is Kohn (1967). Later Plamenatz (1976), Hroch, Smith, etc., also made such a division. According to Hroch, in Western Europe–England, France, Spain, Portugal, Sweden and the Netherlands–the early modern state developed under the domination of one ethnic culture either in an absolutist form or in representative estates systems. In most of these cases the late feudal regime was subsequently transformed by reforms or revolution into modern civil society in parallel with the construction of a nation-state as a community of equal citizens. In most of the Central and Eastern Europe an alien ruling class dominated the ethnic groups who lacked indigenous nobility, a political-unit or a long literary tradition, though they occupied a compact territory. Here nation building can be dated to the moment when selected groups within a non-dominant ethnic community started to discuss their own ethnicity and to conceive of it as a potential nation to be (Hroch 1996: 80).
18. Hroch states that a nationalist movement passes through three structural phases which are distinguished on the basis of the character and role of the actors and the extent of the national consciousness in the ethnic group at large. These phases are (a) when the activists of a group are involved in scholarly inquiry and the dissemination of an awareness of the linguistic, cultural, social and historical attributes of the non-dominant group. (b) The ethnic group tries to project itself as a future nation among its population, with significant signs of success. (c) The majority of the people are aware of their national identity and a mass movement arises, and this is a stage that also witnesses various strands in the national movement (Hroch 1996: 81).
19. Nairn states: "This is why a romantic culture quite remote from enlightenment rationalism always went hand-in-hand with the spread of nationalism. The new middle-class intelligentsia of nationalism had to invite the masses into history; and the invitation card to be written in a language they understood" (Nairn 1977: 340).
20. In Anderson's thesis print-languages are crucial and he claims that print-languages laid the basis for national consciousness in three different ways. They created unified

fields of exchange and communication below the Latin and above the spoken vernaculars. Secondly, print-capitalism provided fixity to language which in the long run helped to build that image of antiquity which is so central to the subjective idea of the nation. Thirdly print-capitalism created languages-of-power of a kind different from the older administrative vernaculars (Anderson 1991: 44-45).

21. Anderson writes, "what,… made the new communities imaginable was a half-fortuitous, but explosive, interaction between a system of production and productive relations (capitalism), a technology of communication (print), and fatality of human linguistic diversity" (ibid.: 42-43).
22. Public expenditure per capita increased between 1830 and 1850 by 25 per cent in Spain, by 40 per cent in France, by 44 per cent in Russia, by 50 per cent in Belgium, by 70 percent in Austria, over 90 per cent in the Netherlands (Hobsbawm 1964: 229).
23. A good discussion of the Marxist approach can be seen in, Lowy (1993), Nimni (1985), Connor (1984), and Ahmad (2000).
24. Anderson also comments that "nationalism has to be understood by aligning it, not with self consciously held political ideologies, but with the large cultural systems that preceded it, out of which–as well as against which–it came into being" (Anderson 1991:13).

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The Political Economy of the Enabling State

Jayati Ghosh

This year's *Economic Survey* contains a new and unusual chapter, entitled "Micro-foundations of Inclusive Growth." It is unusual because it is largely theoretical, thereby providing an addition to the generally descriptive review of the Indian economy over the past year according to the government's own perception. It also contains, possibly for the first time in an *Economic Survey*, an explicit statement of what might be described as the present Government's economic philosophy and its approach to certain crucial questions of economic policy. That this is, indeed, the case was confirmed by the statements found in the Finance Minister's Budget Speech.

It is certainly welcome that the basic goal of economic policy is identified as inclusive growth, recognising that "growth must not be treated as an end in itself but as an instrument for spreading prosperity to all" (22). Inclusive growth, in turn, is given a more precise definition than is usual, as growth that improves the incomes and other measures of conditions of life of the bottom 20 per cent of the population. This inclusive growth is to be delivered by a change in focus to an enabling government, which is seen as "a Government that does not try to directly deliver to its citizens everything that they need. Instead, it (1) creates an enabling ethos for the market so that individual enterprise can flourish and citizens can, for the most part, provide for the needs of one another, and (2) steps in to help those who do not manage to do well for themselves,'' for example by "directly helping the poor by ensuring that they get basic education and health services and receive adequate nutrition and food'' (23).

It is immediately clear that this is a vision of the economy in which it is taken for granted that the market mechanism generally delivers the economically-desired outcomes for most citizens, and the role of government is therefore mainly to ensure that such markets function smoothly and to take care of the stragglers " for there will always be individuals, no matter what the system, who need support and help.'' This vision excludes the possibility of the process of market-driven economic growth itself generating greater material insecurity and impoverishment for a significant section. Trickle-down is seen to operate for most of the

population; for the bottom fifth, the government has to step in. Obviously, in such a framework, public delivery of essential goods and services will necessarily be targeted to those that are defined as poor. The chapter contains an eloquent argument in favour of redefining the nature of public delivery to minimise direct involvement of the state in favour of market-based mechanisms such as coupons and vouchers targeted to the poor. This is what allows for the claim that more can be achieved with less fiscal resources, by eliminating the administrative costs of running large public schemes.

This would be a major departure from current practice, with potentially far-reaching implications in a very wide range of goods and services that are seen to constitute essential socio-economic rights. It is impossible to discuss all the different implications here, so I will briefly consider only the interventions proposed for the food economy. The arguments have wide applicability with reference to other sectors as well.

Managing the food economy

There is an extended discussion on how to manage the food economy, which is only to be expected given that food price inflation is clearly the most significant economic problem in the country at present. Yet the discussion presents several different arguments which turn out to be mutually inconsistent. In keeping with the overall approach of an `enabling' state rather than an actively interventionist one, it is proposed to do away with the existing system of government food procurement and distribution. It is argued that this is prone to corruption, adulteration and similar flaws, and that it is necessary to craft policy that takes into account that people are the way they are (not always ethically sound) and craft incentive-compatible policies accordingly. So this is to be replaced with a system of food coupons (of a certain value of money) given directly to targeted households, that can be exchanged for wheat or rice at market prices, giving the freedom of choice to households about the shop from which to purchase.

This proposal betrays some ignorance about the background of the current food subsidy and the purposes of the public system of food procurement and distribution in India. These were (and fundamentally remain) to provide farmers with a minimum price that covers their costs, to ensure that basic food grain is transported from surplus to deficit areas of the country, and to build up a system of buffer stocks that protects the country from international price volatility and external dependence. It is because the market mechanism was found wanting in achieving any of these goals that such measures were deemed necessary – and the persistence of such measures not only in India but in many countries across the world (including most developed ones) suggests that this is still the case.

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Food security within a nation as large as India is not possible without ensuring the viability of food production by domestic farmers and the existence of a national distribution system that tries to reach deficit areas quickly. There is no way that replacing this with a system of food coupons to selected households could achieve these basic aims.

There is, of course, the further question of how to ensure that the public at large - and the poor in particular - get access to affordable food. This too is a current function of the Public Distribution System, but it has been less than successful in meeting it for a variety of reasons. *The Economic Survey* correctly recognises the many problems in the existing system, but tends to treat the entire system as homogeneous across the country. There are states in the country (such as Kerala and Tamil Nadu, and to a lesser extent Andhra Pradesh) where the PDS is a strong, functioning and largely non-corrupt system, and there are other states where the opposite is true. Surely, policy makers need to study and understand these differences if they actually want to make the system work.

What is clear is that targeting tends to add to the problems, not only because of the significant administrative costs associated with identifying the poor and monitoring them, but because of well-known errors of unfair exclusion from and unjustified inclusion in the list of poor households. That is why the states with more successful PDS are those that have such a large number of declared below-poverty-line (BPL) households that they are close to universal in nature. *The Survey* argues that the Unique Identification System (UID) will solve that problem, but that is to believe that there can be a technological fix to what is essentially a socio-economic problem. The UID card only identifies a person; the description of that person as belonging to a poor or non-poor household remains as cumbersome, problematic, politically charged and administratively challenging as ever.

The Survey does provide some useful and interesting proposals with respect to managing the foodgrain stocks, and correctly argues for a more flexible approach in releasing stocks that is not only responsive to market pressures but also anticipates them. Indeed, the need to prevent foodgrain allocation from becoming a political tool in the hands of the Centre vis-à-vis the state governments is all the more pressing in the light of recent experience. However, it should be obvious that such a proactive role of the state in preventing food price increases would not be possible at all if the entire system is replaced with a system of food coupons!

There is another comment with direct relevance to the food economy that deserves to be noted. In keeping with the overall perspective that markets generally know best, the *Survey* argues for erring on the side of less control whenever there is some doubt on the matter. This is, then, used to suggest that a ban on

futures trading in essential commodities is unwarranted. "An enabling Government takes the view that if we cannot establish a connection between the existence of futures trading and inflation in spot prices, we should allow futures trade." (24) Yet there are least two flaws with this argument.

First, as any econometrician would know, it is generally possible to question any link between two economic phenomena, and so the argument about whether future trading has been associated with significant spot price changes will definitely continue well after all the cows have come home. Yet globally, the existence of contango in commodity markets (when prices in the futures markets are higher than the spot prices) associated with substantial holding of long positions by index traders, has been seen as indicative of speculation driving changes in spot prices. It is next to impossible to provide a clear and explicit link that will satisfy those determined not to see it. Second, and perhaps more significantly, there are important conceptual reasons to be wary of allowing futures trading in any commodity in which there is significant public intervention in the form of minimum support prices etc., because these provide an easy floor for speculators. So, this is not a case of allowing something because we do not have enough information on either side of the argument, but preventing speculative activity that can cause great harm even as its possible benefits are minimal.

Enabling markets and empowering the citizenry

There are several other issues that are discussed, for which similar arguments could be made. But it is the broader perspective underlying this chapter which deserves more careful consideration. The goal is clearly benevolent: improving the economic conditions of the bottom quintile of the population. Yet the means that have been proposed suggest a lack of awareness of the political economy of both markets and government in India, and the social and economic context within which policies are implemented. This is somewhat surprising, because within the chapter there is a discussion of the need to recognise extant social realities, even though it is more concerned with culture and social norms.

The point is essentially this: both markets and government policies do not function in a socio-political vacuum but within complex social realities in which power relations are deeply entrenched. So, it is not that there are individuals all operating on level playing fields, with some having a few disadvantages such as lower income and assets and less education. Rather, the processes of striving for power, and keeping it, unfold through the medium of markets. The impact of government policies depends upon the extent to which they enable different sets of actors with different power positions to fight for their rights or advance their own positions.

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That is why `free' market functioning tends to accentuate existing inequalities, both social and economic. To the extent that government policies are aware of this and are designed to reduce this effect, they are more successful. All economic policies therefore have distributive implications, whether or not these are officially recognised. A government that is genuinely enabling for the citizenry as a whole, and for the poorest citizens, has to act decisively in their favour, and also has to provide good quality public services that the poor are not excluded from.

In such a context, it is worth stepping back and examining how much of the declared goal of inclusive growth in the *Economic Survey* actually informs the most recent policy statement of the government, the Union Budget. Surprisingly, the most important initiatives constitute direct attacks on the incomes of the bottom quintile of the population: the hike in fuel prices and indirect taxes, which will definitely increase the price of necessities; the reduction in food subsidy; the embarrassingly small increases in funds for agricultural schemes, especially in the most devastated regions; the paltry amounts allocated to education and health, which cannot possibly ensure good quality public provision that reaches the poorest. Conversely, the enabling aspect of government is very clearly evident with respect to big business, in the form of tax breaks, subsidies for agribusiness and the like.

The problem is that enabling market does not always translate into empowering people: often the reverse is the case. Clearly, whatever be the more sensitive statements made in the *Economic Survey*, the basic philosophy of the government has not changed from an obsessive focus on growth at any cost.

Foreign Aid or Aiding the Foreign?

C.P. Chandrasekhar

The cabinet has reportedly passed a version of the Foreign Educational Institutions (Regulation of Entry and Operations) Bill, and this modified version of a draft bill is to be soon tabled in Parliament. The debate has, however, already begun, with protagonists and opponents expressing a range of views on the subject. One view is that it favours foreign players against domestic ones, both public and private, which seems unfounded when the draft bill is read as it is. While debate is normally a process of bringing clarity to an issue, there is a real danger that this would not be true of the ongoing debate on the subject of expanding higher education, improving it and rendering it inclusive.

The case for permitting freer entry for private domestic institutions and foreign private and public institutions is that higher educational facilities are woefully short in India. For example, the proportion of the population in the 18-24 age group accessing higher education is about half the 15 per cent average elsewhere in Asia. Part of this is because of a shortage of higher educational facilities. Moreover, it is argued, even where such facilities are available, quality is uneven. An important reason is the low level of resource allocation for higher education. Public spending-central and state-on higher education has indeed been low, amounting to less than half a per cent of GDP over the last two decades, even though the government itself targets a spending rate of 1.5 per cent of GDP. If, besides private sector participation, public spending and enrolment are low, the emphasis must clearly be on increasing these with more allocations to education. This is likely to be extremely effective since India has the requisite institutional framework. But there is no reason to believe, especially given past experience, that just allowing private entry, whether domestic or foreign, and the resources associated with it would indeed ensure quality.

It is true that if foreign institutions are to be allowed at all, to provide education of any kind in the country, it is better that they operate within an appropriate framework of regulation. If not, unscrupulous operators can use the `foreign' tag to exploit poorly informed students who do not have the scores to enter a good

national educational institution or the finances to travel abroad to acquire a good education. In an environment where good higher educational facilities are in short supply, such operators could get away with charging high fees for courses backed by inadequately qualified faculty, inferior infrastructure and substandard equipment.

This has, in recent years, been a reality in India because of a mismatch between the law on foreign investment in educational provision and the law with regard to the functioning of `recognised' educational institutions. The foreign investment law in this country does allow foreign educational providers to enter India under the automatic route in the educational services area. It therefore allows for commercial provision of educational services by foreigners and the repatriation of surpluses or `profits' earned through such activity.

However, if an educational service provider chooses to establish an institution that is termed a university and is recognised as such by the University Grants Commission (UGC), or if it awards a degree or diploma that is recognised by a range of institutions such as the All India Council on Technical Education (AICTE) or the Medical Council of India, then it would be subject to regulation just as any other Indian institution engaging in similar practices. It also cannot operate on a `for-profit' basis. Surpluses can be generated based on fees charged, but those surpluses have to be ploughed back into the institution.

This distinction in the regulatory framework applying to institutions seeking recognition of their degrees and those that do not, did result in the proliferation of courses that are not recognised by government, and in institutions that were, therefore, not subject to regulation under laws governing the higher education system. Most of these institutions were in the private sector, with a majority being domestic private institutions and a few foreign. Some were good, many extremely bad. These institutions were not all avowedly `for-profit' entities, but there were many that made large surpluses legally and otherwise, and distributed them in various ways to their promoters.

In some ways, what the Foreign Educational Institutions Bill does is that it seeks to bring certain of those foreign institutions within a separate, clearly defined regulatory framework, requiring institutions providing diplomas and degrees to register under a designated authority, making them subject to regulation and seeking, under such regulation, to ensure that the promoting institution has a proper pedigree, brings in adequate resources, employs quality faculty, offers adequate facilities, and reinvests all surpluses in the institution, which cannot function for profit. However, even though these are not considered for-profit institutions, the government is not seeking to regulate the fees they charge the students they take in, set parameters for compensation for faculty, or impose de-

mands such as reservation of seats for disadvantaged sections as it does in its own institutions.

There are three questions which arise in this context. One is whether the implementation of the Bill amounts to skewing further the inequality in access to higher education and tilting the playing field against public institutions. Clearly, the Bill does not allow for the application of laws with regard to affirmative action in the form of reservation of admissions to private institutions, domestic or foreign. But if the infrastructure for higher education is inadequate, this is true not just for those who fall in what is termed the "general category", but for those in the reserved categories as well, who need adequate numbers of seats to be reserved for them. So if private, including foreign institutions, are seen as entities that would help close the demand-supply gap in higher education, they would need to service students in the categories eligible for affirmative action as well.

Since the aim of promoting private education, including that offered by foreign providers, is to make up for the shortfall in public education, the demand that reserved category students be admitted to these institutions with support from the state is bound to rise. That is, while the state is not going to regulate fees, it may be forced to demand some reservation by covering the fees charged by these institutions for those it wants to assure the access they are deprived of because of the social discrimination they face. The obvious question that would then arise is whether it may not be better to use these funds to expand quality public education at lower cost per student. Hence, clarity on the government's use of these institutions for closing the demand-supply gap would be useful. If the direction of policy in other areas is indicative, the public-private partnership mantra would be used to justify supporting private provision by funding access to the disadvantaged with no regulation of costs or prices. In fact, the likelihood is that the implicit control would be on the `subsidy' offered to needy students, who then may have to make do with entry into poorer quality institutions.

A second question that arises is whether the better among foreign educational providers are likely to choose not to come into the country if stringent regulations are imposed on them. With budgetary cuts for education in developed countries and with demographic changes affecting the size of the domestic college-going population in these countries, universities may like to go abroad if they can earn surpluses to support domestic operations. But if regulation includes the "not-for-profit" condition, which prevents them from extracting surpluses and transferring them abroad, they may see no reason to be in India. Perhaps for this reason, the Act has clauses which subvert its very intent. For example, it provides for the constitution of an Advisory Board that can exempt any foreign provider of all requirements imposed by the Act except the require-

ment of being a "not-for-profit" body. It also exempts institutions conducting any "certificate course" and awarding any qualification other than a degree or diploma from most of the provisions of the Act, making them subject only to certain reporting requirements. This amounts to saying that if a foreign provider enters the country, reports its presence, and advertises and runs only such "certificate courses" (as opposed to courses offering degrees and recognised diplomas), it would have all the rights that many of the so-called "fly-by-night" operators exploit today. Once that possibility is recognised the only conclusion that can be drawn, based on the experience hitherto, is that this Act in itself is unlikely to either bring high quality education into the country, or keep poor quality education out. What motivates it is, therefore, unclear.

This raises the third question as to whether this bill is just the thin end of the wedge. If foreign providers do not come in requisite measure would the government use that "failure" to dilute the law even further and provide for profit and its repatriation by foreign operators in this sector? Some time back, the Commerce Ministry had put out a consultation paper clearly aimed at building support for an Indian offer on education in the negotiations under the General Agreement on Trade in Services (GATS). The paper, while inviting opinions on a host of issues, was clearly inclined to offering foreign educational providers significant concessions that would facilitate their participation in Indian education. In its view: "Given that India's public spending, GER (gross enrolment ratio) levels and private sector participation are low, even when compared to developing countries, there appears to be a case for improving the effectiveness of public spending and increasing the participation of private players, both domestic and foreign." GATS is a trading agreement and therefore applies to those engaged in trade in services for profit. Providing such concession would force a fundamental transformation of the face of higher education in the country.

Put all of this together and both the motivation and the likely outcome of this bill remain unclear. If the intent is to attract new, more and better foreign investment in higher education to close the demand-supply gap, then the specific framework being chosen is likely to subvert its intent. If the idea is to regulate only those who have been coming and would come, then a separate law just for foreign operators as opposed to all non-state players is inexplicable. This suggests that the process underway is one of creating a window for foreign players and then changing the rules of the game in ways that persuade them to exploit the opportunity. This may explain the fear that the field would be skewed against domestic private players.

Census of Castes

Rajesh Komath and Roshni Padmanabhan

The decadal Census is the major source of information for enumerating the social and economic conditions of India. It explores the details of the country's population. For colonial regime, it was necessary to understand people's anthropological characteristics in order to facilitate the administration of their government, for which they had used several methods in taking the Census of India consisting of different castes, religions and creeds along with their social and political relations in a manner most suitable to the alien governing class. This has resulted in the creation of a body of ethnographic account of various castes that came to be known as the Colonial Anthropology, a foreign legacy of information. These ethnographic descriptions were utilised by the colonial powers for the purpose of tax collection and recruitment of soldiers from the native people. But the notion that it is the British who started using the concept of caste for purposes of governance is not true. We find a long list of caste and *varnas* in *Manusmriti*, the laws based on castes and the *varnasrama* system, cementing unjust caste discrimination. But quite different from all these data, the present system of making Census has many advantages such as, taking stock of Indian situation with detailed data regarding the wide diversity of our people and the finding of conditions of life have been conducive to evolve more efficient ways of conducting public administration at different levels of government. Such detailed Census of a people helps a modern governmental machinery to understand the people better and to adopt proper policies in the distribution of the county's resources equitably and to mete out social justice to the people.

Caste was a key variable in Census from 1871 to 1931. The last Census based on the details of caste in India was done in 1931, which provided tables of the distribution of population based on caste. In 1941, though the Census could generate data on castes in India, owing to economic depression associated with Second World War, they were not tabulated. The 1951 census could gather data regarding the Backward Classes besides, over and above, those about the SC/ST sections of Indian population. But the results were not published (Burman 1998). In 1948 a Census Act was passed in India deciding that the account of castes in

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Census need not be included. The colonial rulers had reckoned India as a nation consisting of many different castes, religions and languages but an independent India need not visualise the country as they had done with a divisive outlook. The colonial legacy should be discontinued. The Census of the population of India taking into account of the different castes would only be supporting the argument of the colonial powers that such a caste divided people have no capacity to stand in unity. The very essence of the Census Act was that the Indians themselves need not furnish any justification for the policy of a foreign rule and the way they conducted justice to the people. Later the Government of India had adopted a policy of showing on record only the number of people considered broadly in categories like Scheduled Castes and Scheduled Tribes, without disclosing the detailed state of different castes and sub-castes in all the successive Census accounts. This was on the pretence of assessing how far the various development programmes for the welfare of the people reach the lower strata of society.

When the 2001 Census was due, it brought on a new debate, whether a person's caste should be recorded in the Census? One view was that there must be caste-wise details to assess the social and economic standard of the people belonging to each caste as it would enable to assess how far the benefits of development have reached the rank and file of each community. But the other view was that it would be difficult to identify castes and such enumeration will lead to the growth of 'casteism'. Eventually, it was decided to exclude caste in the Census.

Debates on Inclusion of Caste in Census

Inclusion of caste in Census is seen as both advantageous and disadvantageous to different groups of people. Opponents of caste enumeration point out the past experience of caste mobilisation and the current state of caste antagonisms, to claim that the attempt to enumerate caste would lead to fresh mobilisation and a further strengthening of caste identities (Srinivas 1998; Beteille 1998). It is also argued that counting caste in the context of changes that have been taken place due to migration, modern employment practices, and inter-caste marriages would be complex and problematic. It may spoil the quality of data too. Upendra (2010) says that caste census is a more complex and contradictory affair than that is imagined by its proponents and opponents. Drawing mainly from Mehta (2010) Upendra tries to make a point that proponents of caste census valorise it in terms of a realistic Utopia remoulding sovereign power towards an `ethical' state-formation. Mehta maintains that "a caste census condemns us to the tyranny of compulsory identities. The premise of enumeration is that we can never escape caste. Our identities are not something we can choose; they are given as non-negotiable facts which we can never escape. The state has legitimised the

principle that we will always be our caste." Supporters of caste enumeration argue that the refusal to count caste is a classic case of highborn interests masquerading the national or majority interest. Backward castes wish to come out of the caste's worst veneration in their day to day life and the prejudiced attitude of the upper castes. Whether it has been legitimised by state or upper caste councils in the villages, is not the matter here. What matters is the fact that caste permeates everywhere. How an untouchable who experiences the tyranny of caste could just forget the caste? It is now as if a fashion that some scholars claim that they are not thinking about the caste, mostly the highborn that could say it publicly and do all necessary rituals of caste in their private life. As Deshmukh (as quoted in Maheshwari 1986: 142) argued, "These very people now wish to continue their exploitation in the name of no caste. Census operations are very important and for all people they serve as an excellent index to ascertain the progress they have made from time to time." We have large amount of studies on caste and its inequalities which has conducted by both the opponents of caste census and the supporters which clearly ascertain the fact of caste inequalities in many dimensions of wellbeing. Satish Deshpande and Mary John (2010), assert that "not counting caste has been one of independent India's biggest mistakes." As Desai (2010) rightly pointed out, if those studies and its concluding remarks are not simply imagined, then it has to be addressed openly and deserve public policy attention.

But the decision of the United Progressive Alliance (UPA) government to enumerate caste in 2011 Census has made the already contested controversy more alive now. Politicising caste is a monster that has been let loose by Ambedkar and which passed through V.P. Singh's Mandal Commission. One view of politics tries to tie down it somewhere and others want to make caste as a political category to democratise Indian society. This is the context in which we discuss the Census of 2011.

If we examine the debates surrounding the enumeration of caste in Census, what we gather is the argument implying that a Census taking into account of the castes of people, will pose great danger to the country. One should not believe that it is only because of the enumeration of caste in Census that India has to encounter danger, which poses threat to the democratic process in India. Whereas, it is a social fact that Indian society is stratified and divided on the basis of caste and religion for centuries, on which one shouldn't be able to close their eyes. Hierarchies of caste have been a tool for the high born to oppress the lowest strata in India. Hence the emergence of a new Indian society should not be at the risk of hiding the realities about castes in India, but on the basis of openly revealing the aspects of castes and caste discriminations in a multi-cultural social setting of our society. It will be mincing of matters if we do not take facts into con-

sideration at a time when we are trying to guarantee political and economic equality to vast sections of the Indian society. Census based on caste will also be a useful tool in understanding the socio-economic nature of India. Thus, those who argue that the oncoming Census in India will open the eyes of political parties and compel them to plan welfare projects as to achieve proper balance in social and economic structure, where we now find great disparity among different sections of our people even after seven decades of Independence.

Major arguments against caste enumeration

1. The Census process necessitates a huge financial commitment to the country's exchequer. And the benefit that yields from it is not satisfactory in proportion to the efforts put forward. Why should there be any special Census at all as long as there are items in the questionnaire about SC/ST/OBC to which only additional information may be furnished and thereby the problem of caste enumeration be solved.
2. There is the danger of each community giving wrong details regarding its numbers to show that it is larger in strength. Because of this possibility for exaggerated account, the Census report could never be accurate at all. In one word, there is no warranty that the people will tell the truth regarding their caste, religion etc.
3. Such a Census that takes caste factors also into account will only lead to communalisation of Indian society.
4. Another consequence will be fresh agitations and campaigns of people like that of the Gujjar community in North India, to include them in the category of Scheduled Caste and there will be accompanying social restlessness.
5 The Census on caste may threaten smaller and minor castes which will ultimately throw fraternity ascender.

Counting Caste: A Journey towards Progress

It is always very expensive to conduct the Census of a vast and huge country like India, and the hazards adjoining it are also likely to be manifold and tremendous. Hence expenditure involved in gathering any sorts of data is essential. The huge population of India in fact demands such huge infrastructural efforts. To prepare an objective Census report is not as simple as making some alterations and additions here and there in the old list of SC, ST, and OBCs. On the other hand, what the 2011 Census is going to bring to the limelight are, indeed, umpteen hitherto unreckoned facts regarding castes and sub-castes, also their interconnectedness in relation to their socio-material conditions and its working on the larger political structure of the country. Though it may lead to conflicts here and there, it is

an opportunity for a Government to enumerate the facts of castes and analyse the generated data meaningfully to adopt better policies to ensure social justice. It is not sensible to begin any sort of enumeration with the premises that all data gathered are true. What is intelligent is to allow a proper margin for the lapses and to proceed carefully on the broad faith in the data that have been collected. The history of Census has witnessed some communities being exaggerate in their numbers to become numerically dominant and to make democratic process and socio-economic relations in their favour. Here religion is also to be looked into more cautiously.

The *savarna* groups were able to threaten with arms and to coerce the Adivasis and Dalits and the Backward Castes to join their group and were also able to prevent them from revealing their true caste identity when the officers of Census enumerators approach them. The communal bias and prejudices of the officers of enumeration are also factors to be reckoned with. If the officers are caste Hindus they will try to include Adivasis and Dalits to the Hindu folder. The other religious leaders will also try to use this opportunity to expand their vested interests. So it is necessary to prevent such unlawful practices at least in the present socio-political context where politics of marginalisation and backwardness has been problematised. Hence it is mandatory for a society like ours to prepare the Census report objectively and accomplish the enumeration, for what lies ahead before us is the task of building a strong democratic, socialist and secular India. We have to build strong fortress to resist all kind of communalism. At the same time we have to understand the pluralistic variety in the texture of Indian society and appreciate that it is this colourful and rich variety that ultimately results in the splendid confluence of Indian identity that is so unique. The present venture to collect data regarding the vast population of India should be a veritable document, vivid in details, and very fact finding. Such a Census report should be subjected to scientific analytical studies, for which the most suitable methodology should be adopted, because such a Census survey at the present context will assume great historical relevance and it will serve the nation in its journey towards progress.

Besides, Indians are not so foolish to believe that the communalism that is prevailing in India will be increasing simply on account of a Census report based on caste factors. We need not now examine how ferocious had been the communal and caste faces of India in the past. But the very fact remains that it is natural for a people belonging to a particular religion to gather together and form an organisation to identify their own strength and raise their legitimate demand and try to gain their legitimate rights in the social and economic context. It may have communal colour. When any particular religion claims that it alone has the right to exist and it should see that all other religions should not be allowed to flourish

there is the rub and seed for danger. This is fundamentalism and it has to be resisted and defeated.

Caste census may provide an opportunity to recognise the number and the status of various caste groups, which may lead to certain caste's collectiveness and in putting up agitation for justice and for gaining socio-economic progress. This has to be seen as an engine of democratisation of Indian society. Certain caste groups smaller in number have always been enjoying the lion's share of the country's wealth, power and some other minority castes by virtue of their inferior caste positions suffer from untouchability, and are subjected to exploitation on the basis of labour assigned to their caste. Hence the most subtle differences between and among the various castes have to be identified. If the census campaign as now envisaged is taking into account the state of castes in India along with other data, it will certainly bring the nation face to face with many glaring aspects of Indian life and supply it with a radical perspective and it is hoped that an adequate methodology for social transformation will also emerge through the Census at 2011.

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Caste and Religion in the Public Sphere:
Political Articulation of Community Identities in Colonial Kerala

Salah Punathil

The public sphere is the reflection of the social relationships, culture, politics and other aspects of a society. Public sphere is an appropriate descriptive tool to understand the formation and transformation of community identities in the modern socio-political conditions. The nature and mode of the engagement of collective forces in the public sphere varies when significant changes take place in society. The engagement of religious communities in the public sphere became a critical question in the postcolonial discourse, especially in South Asian societies (Van Der Veer 2001). This essay deals with the political articulation of the collective identities that emerged in the public sphere of Kerala during the colonial period.

The term public sphere was first introduced in the work of Jurgen Habermas (1989) titled *The Structural Transformation of Public Sphere: An Inquiry into the category of Bourgeoisie Society*. Habermas considers the public sphere as a domain of 'common concern,' a space for critical debate, inclusive in nature (Habermas 1989). To put his ideas simply, the public sphere meant a social space of communication where citizens deliberate upon their common affairs, an institutionalised arena of discursive interaction. For him, it contains formative elements of a common space where free and equal individuals meet to discuss and debate issues of common concern, arriving there by at a normatively binding public opinion (Bhargava 2005). The origin of the public sphere, he explained, had a context, which is the separation of state and church in Europe.

Habermas's view of the public sphere is contested in many ways. Habermas's notion of public sphere based on consensus is questioned by the advocates of Foucault's notion of power and conflict. For example Bent Flyvbjerg (2002) says conflict and inequality are inherent in the public sphere, so we need to look at the problem of exclusion, difference and the politics of identity. There are 'declared standards' and 'manifest self-understanding' in the public sphere that exclude certain groups, which Habermas did not realise (Ibid). In the public sphere,

even if declared standards do not exist, some groups may not be able to participate, then they may assert through non-discursive means to gain access in the public (Fraser 1990). It may lead to the formation of counter publics. So, the public sphere is not a single overarching sphere as explained by Habermas. There were competing counter publics contemporaneous with the bourgeois public sphere in the form of nationalist publics, popular peasant publics, elite women's publics and working class publics (Ibid). Fraser says: "Virtually from the beginning, counter publics contested the exclusionary norms of the bourgeois public, elaborating alternative styles of political behaviour and alternative norms of public speech" (Fraser 1990: 61).

What Fraser argues is particularly significant in stratified societies, because, inequality reflected in the discursive arena may lead to the advantage of dominant groups and the disadvantage of subordinates. The tendency of absorbing the less powerful and marginalised in the public sphere is also a historical reality. In such a public sphere, the consensus that purports to represent the common good should be regarded with suspicion because the consensus may be constructed by the effects of dominance and subordination (Ibid). Fraser talks about the possibility of different publics. Subaltern groups make counter publics through parallel discursive arenas where members of subordinate social groups invent and circulate counter discourses; assert their identities, interests and needs. The engagement of such collective identities based on caste, religion, gender etc are common in the public spheres.

Before coming to the context of Kerala, it will be worth mentioning about the public sphere of colonial India. The particular public formed in colonial India got attention in many studies. By referring to the community configuration in colonial public sphere, Bhattacharya asks, "was the public sphere as it emerged in India such a consensual space?, was it a space for rational debate defined by the use of critical reason?" (Bhattacharya 2005: 132). He argues that public sphere in colonial India was not just a space where private individuals appeared as public; it is also a space where communities are forced to come together (Ibid).The emergence of the public sphere in colonial period allowed communities to transform community matters into public issues and inner community matters into public battles (Bhttacharya 2005; Chatterjee 1998; Bhargava 2005). The nationalist movement and related political processes determined the nature of colonial public sphere. For Chatterjee (1998), it was a space of the conflict between two domain of colonial India, the 'material domain' and the `spiritual domain.'

To complicate the issue further, Pandian (2002) argues that the inner domain that used as weapon of cultural resistance to western imperialism in the form of national community excluded the subaltern voice, the 'traditions' of lower castes.

When the 'national community' and 'national culture' are depicted as a cultural resistance against colonial domination, what is missing is the history of subordination of subaltern groups within this 'national culture.' There was exclusion of some sections like lower caste groups, women and other communities within the dominant public sphere.

Questions on Public Sphere in Kerala

Generally, scholars considered the public sphere of Kerala as 'vibrant, rational and critical' (Biju 2007). The non-interference of 'primordial' forces such as religion and caste—mainly due to left political interventions in Kerala—is considered as the primary factor in the formation of such a public sphere. There are two assumptions that underlie this view. First, it assumes that a critical, rational public sphere can be made possible only by eliminating the presence of religion and caste from the public sphere. Secondly, it also assumes that the public sphere of Kerala is developed as a result of critical and rational debates where religion and caste were absent in all sense. Moreover, this is accounted as one of the major factors for the social development. As a continuity of such a discourse there are worries among scholars about 'recent communal' interference in the public sphere of Kerala (Panikkar 2003; Ganesh 2004). Differing from this conventional view, this essay would highlight that public sphere of Kerala was never free from either the involvement of religion or the influence of caste weather it is in colonial period or later. Whether related to social development, education, politics, economy or culture, religious and caste groups are involved in debates and are highly influential in the public sphere. They manipulate public opinion and influence governmental decisions. Broadly, the involvement of communities in the public sphere is a social reality and this history goes back to the colonial period. There is a history of caste and religious assertions in colonial period inspired by the enlightenment modernity and it was one of the foundations of social development in Kerala. Colonial period was a significant phase where communities acquired a new meaning in the public sphere. The colonial processes had/have larger implications in the later movements in the public sphere.

Region and the Imagination of Communities

We need to contextualise communities in a particular socio-political terrain of the region which constitutes a public sphere. Bernad Cohn says: "There are regional differences in South Asia, just as there is a reality to think about South Asia as a geographic and historical entity or Indian Civilization as a cultural unity"(Cohn 1996: 36). Any attempt to study communities in a given region necessitates an insight about the specific social history of that region. In other words, the territo-

riality of a given region becomes meaningful only when it is claimed by some community/communities (Jodhka 2006). In that sense, colonial Kerala must be seen as a historical, cultural, linguistic and structural entity that constitutes the confluence of communities.

First, the question of differences within the region in colonial time needs to be examined here. The notion of colonial Kerala as a homogeneous entity is contested by the argument that Kerala was divided by three princely states called Travancore, Cochin and Malabar. The studies show that there are variations in terms of cultural practices, social relationship and in the wave of social reforms in colonial period in these three regions (Aloysius 2005). The caste system was not so rigid in Malabar compared to other regions. Likewise, reform movements first emerged in southern region (Travancore), while the community assertions occurred mainly in the form of caste in south, in Malabar, the northern region, it was more religious based (Ibid). But, there are evidences to suggest that colonialism helped to integrate the region despite these differences. For example the integration of the region was made possible with expansion of community boundaries (Arunima 2006). This was the phase of the transformation of traditional social categories like caste, religion etc into 'political communities' together with the imagination of region. Arunima points out that the standardisation of Malayalam language in colonial period resulted in the imagination of region among people of Kerala as a single community (Ibid). The standardisation of Malayalam language created a regional public sphere, but then, that was not a regional public sphere alone, instead it also helped to the imagination of communities of ethnic, religious and caste groups. Standardised Malayalam language acted as a medium through which each community constructed a past of their own. The process of expansion of territorial affinity of Malayalam-speaking people in colonial period as a single region simultaneously created the ground for community imagination within the region. This enables us to read that the internal demarcation in the region in terms of territorial, political and cultural factors challenged to an extent in the case of emergence of community identity.

The peculiarity of the region and community assertions is taken as an explanation for social development at least in few studies. For example, Aloysius (2005) highlights the importance to trace the historicity of the region and community formations in Kerala to understand contemporary social development fully. In colonial period, it was a small region untouched by major imperialist, anti-imperialist interventions compared to other states (Ibid). The roughly divided population of Hindus, Muslims and Christians made this region unique. He points out that though there were significant variations in different regions of Travancore, Cochin and Malabar, by and large, there was an ethno-linguistic

unity in culture specific form of socio-religious hierarchy. In his view, though Malayali society was fragmented in terms of territorial politics, the people from Travancore to Malabar developed a common Malayali ethnicity even before British rule. The practice of Hinduism, the caste hierarchy and the presence of Christians and Muslims made this region unique from other regions. The emergence of the region is not fully associated with colonial changes, rather the 'malayaliness' expressed itself across the region even in the time of non standardised language. The other factor that made this region different from the rest of the country is that, it was not politically monopolised, but political power was ambiguously distributed among several groups- the British, local rajas and dominant communities (Ibid). There was a common enemy identified by all subordinated communities, which is caste feudalism. And the struggle against such a common enemy played a role in the modern political identity of ethnic communities in Kerala.

Interpenetration of Caste and Religion

The transformations of fuzzy, fluid social groups in relation to the structural changes in the region have been understood mainly with reference to the mobilisation of castes (See Menon 2002; Ganesh 2004). But religious groups are equally important in understanding the community dynamics of the region. The participation of communities in the public sphere has something to do with the 'discourse' of caste as well as religious groups (Dirks 2001; Menon 2002). Moreover, the literature about the social history of Kerala provides the inference that there was interpenetration between caste and religion in the public sphere (Aloysius 1998; Menon 2002). It can be seen at two levels. First, the nature of the caste movements emerged in that period was intrinsically tied up with religious beliefs and practices of the people. Such religiously expressed social protests of lower castes and other marginalised communities found expression in a variety of ways like construction of new religions, appropriation of new religions, re-fashioning of Hindu tradition etc (Aloysius 1998).Secondly, the participation and fate of religious communities like Christians and Muslims in the public sphere in Kerala are well associated with the interference of caste groups in the public sphere, especially in the political sphere. This interpenetration between caste and religion in different forms was crucial factor in the transformation of communities in the socio-political sphere. All the factors that consolidated community identities under colonial modernity, like colonial administrative practices, introduction of various laws regarding communities, print culture, emergence of reformist leaders, caste associations, Christian Missionary activities etc, helped these groups to

form as a political community in more or less similar fashion, and they influenced each other in a complex manner.

Modernity, Communities and Public Sphere

Modernity was the central theme in most of the studies dealing with community formations. The establishment of modern print culture facilitated the incorporation of a variety of events, places and people to create a genealogy of belief for every religious community. So, the replacement of older liturgical languages like Syrian, Arabic or Sanskrit by Malayalam lead to the formation of both Malayali ethnic as well as communitarian identity(Arunima 2006).Once the missionary enterprise inaugurated this, the contestation for space was observed between religious communities and caste. Community identities whether it is based on caste or religion would endure despite modernisation.

Dilip Menon (2002) sees colonial modernity as a context in which collective groups are engaging in the public with religious imaginaries. The project of modernity inspired by colonial ambitions had a different impact in Kerala which actually worked against the predicted outcome, like development of individualism, reason and rationality. He says that, in practice, the individual is subordinated to social groups and political order. Moreover, individual is located in a traditional private sphere within which colonialism feared to tread. His view also goes in the track of Anderson's imagined community. It shows us that the imagined community is not simply a story of national community emerged in the wake of modernity; but it gives insight about the creation of a new kind of believing community also, against the possibility of disintegration of religion. Talal Asad (1993) argues that any notion considering religion as something operating at private level, and has nothing to do with public life and politics, would be a wrong assumption. It was the colonial assumption that, state's institutions could accommodate all political issues and the issues relating to religion, caste and so on were 'apolitical' (Menon 2002). But the public sphere of Kerala witnessed the constant engagement, encounter and negotiation of religion and caste with modernity in contrast to the prediction of the development of reason, rationality and individualism.

K.N Ganesh (2004) criticises the existing scholarships on modernity which are pre-occupied with the notion that social transformation is a process of moving from tradition to modern where all primordial ties fade away. He looks at modernity in Kerala in terms of revival of community consciousness and formation of identities on the basis of caste, community and religion. The essence of these formations in Kerala lies in the critique of modernity as an alien process, which was simply brought into Kerala by educated middle class (ibid). He says,

the middle class project had a transitory and illusory existence, and is now turned into fragments by the very same forces (caste and religion) that emerge as a result of modernising processes. The argument is that the formation of community identity was a middle class project associated with the emergence of modernity in Kerala. Osella and Osella (2004) look at how members of a backward community, the Ezhavas in Kerala, engaged with modernity and capitalised on it for their social mobility. Their study depicts how Ezhavas experienced social mobility by taking impetus from their caste reform movements and from sporadic militant actions in relation to social change. Under the leadership of Sree Narayana Guru, the illiterate labourers, blue collar workers, unskilled migrants, untouchable devotees and all sections of the community experienced modernity in all its ambivalences and contradictions. By taking these examples, Osella and Osella point that modern practices are neither western imported, nor traditional; but arise instead through engagements between local and external universal ideals. Their attempt was to break the dualistic categories generated by modernity that the 'other' cannot be treated as external to modernity, and also that modernity cannot be seen as discrete western project. The impact of colonial modernity on collective groups rather than individual self is explained in different ways here. There is a consensus among scholars that colonialism opened a stipulation to all social groups of caste and religion to engage in public sphere either forcefully or freely.

Factors which Consolidated Community Formation

There are many empirical facts that give more insights into the political articulation of community identities in Kerala.

Socio-economic changes

The formation of communities in colonial Kerala must be seen as part of the new political and economic changes. The processes of community formation did not simply emerge from the objective conditions of modernity. Instead, it was a political weapon for both individuals and groups to achieve social mobility. The unrest of the communities began to reveal towards the end of the nineteenth century. The socio-economic organisations, new social and institutional values etc helped strengthen community identity. It is, therefore, argued that the subtle, divided and fragmented categories became Ezhavas, Nairs, Christian and Muslims etc for practical purposes (Ayer 1968). The opportunities opened up in colonial period accentuated to competitions among communities. It is specifically noted that, in Malabar, it was religion-based. Representation in the civil service and other administrative posts was the main source of contention among the dif-

ferent caste and communities in Kerala. There was a competition for both power and status. The scarcity of employment opportunities increased competition. The selection of candidates for appointments admits the claims and counter claims of various communities in the public sphere.

Caste Associations and Religious Organizations

The political identity of communities got crystallised in the colonial period through organisations and associations based on caste and religion. The emergence of organisations and associations was a response to political processes. This helped for a new imagination of community in Kerala. We can call it as 'paracommunity', the idea introduced by Rudolph and Rudolph (1984). This was the medium through which each social group made its claims in the public sphere. There was hardly any community or caste in the state without an association of its own for self-development. They tried to create pressure groups by emphasising caste identity in order to secure concession or rights from the governments. Newspapers and periodicals established by them helped in the dissemination of their ideologies. It was through the press, public meetings and debates that each group asserted their interests in the public sphere. Caste associations worked to reform the community by raising voice against all injustices and evil customs in their community like dowry, child marriage and so on. The internal reform was a preparation for every community to cope with the new public sphere; it demanded communities to internalise new values and institutionalise mechanisms for social mobility. The rapid spread of education, the growth of literacy among the backward castes and the consequent unemployment of the educated and the increased activities of caste associations intensified rivalry between communities. There were lots of large as well as small organisations, most of which were caste based and later became very powerful pressure group in politics. It includes SNDP (Sree Narayana Guru Dharma Paripalana Sagham) of Ezhavas, NSS (Nair Service Society) of Nairs, Nampoodiri Yoga Kshema Sabaha etc. Besides these, there were organisations like Malayali Sabha, Travancore Nayar Samajam, Kerala Nair Samajam etc.

Law and Community

In many of the postcolonial studies, communities are considered to be a colonial invention. One of the major political reasons for this, they point out, is the enactment of law along with census enumeration as part of colonial 'governmentality' (Kaviraj 1997; Mamdani 2001). British government introduced laws concerning each community regarding the property rights, inheritance etc. It strengthened

the community consciousness. The Christian Succession Act of 1916 based on the recommendations of the Christian Commission was designed to consolidate and amend the rules applicable to succession among the Christians. The Travancore Act X1 of 1932 amended the law relating to inheritance and succession among the Indian Christians in Travancore (Ayer 1968). The social legislation helped the communities to integrate themselves with the law regarding marriage, maintenance, succession and inheritance. In the Muslim community, the Mappila Marumakkathayam Act allowed the individual partition of *Tharawad*. The Cochin Nair Act of 1937 -38 allowed individual partition of the *Tharawad* property. These all are evidences to suggest that laws played a major role in reaffirming community consciousness.

Religious and Caste Groups in Administrative Processes

The administrative mechanism of British authority was never free from the interference of religion and caste. Appointments in land revenues, palace and military departments were exclusively reserved for upper caste Hindus. Christians and Muslims felt that they were excluded on religious grounds. Christians were interested in revenue department because of its importance concerning their investments in land. The gradual introduction of electoral politics strengthened competitive politics. Members were elected to assembly and council more or less on the basis of property and educational qualifications. Each group looked at the activities of other group to decide their agenda. The preferences shown by heads of department to members of their own communities lead to clash between communities. The government rejected community-based representation by saying that it would affect efficiency and create communal tension. But, in 1939 government decided to recognise all communities whose population was 2 per cent of the total population of the state or about a lakh or more as separate communities for the purpose of recruitment to the public service (Ibid). Brahmans were exception there; they constituted only 1.3 per cent of the total population. The entire population was divided into fifteen groups. Hindus were classified as Brahmins, Nairs, Kmmalas, Nadars, Ezhavas, Cherumar and other caste Hindus. Christians comprised Jacobites, Marthomites, Syrian Catholics, and other Christians. So, the recruitment processes were based on community considerations. This classification and enumeration crystallised the groups. Therefore, there was a competitive politics among communities for power and position. The self-presentation of one community in the public sphere was replicated in other groups and each group began to assert their identity.

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Upper Caste Dominance in Government Jobs

The dominance of upper castes continued in the new socio-political situation. Subordinated communities realised that government services became the exclusive preserve of upper caste Hindus who appropriated for themselves all the positions of power in the government. Conflict over appointments and other movements against the dominance of services and legislatures sprang up in the second decade of the century. The Marthoma Christians and the non Malayali Brahmins and Nairs held a good number of posts in administration. Latin Christians, Ezhavas and Muslims had no sufficient representation in the government service. There was strong sentiment among all these groups against the upper caste groups, which encouraged them to mobilise politically.

Electoral Politics and Communities

During the late colonial phase, the caste and religious organisations demanded the nomination of their representatives in the Assembly. They also demanded more representation to their respective communities. When other communities raised more demands, government realised that not many Christian, Muslim, and Ezhava candidates were likely to get elected; and thus it was decided to increase their representations by nomination in 1931. Six Ezhavas, six Christians and four Muslims were nominated to the assembly every year. The government held a view that the formation of communal electorate tended to create and multiply communal cleavages in the country. The reforms introduced by government in 1932 increased community consciousness. The poorly and inadequately represented communities decided to organize and work along strictly constitutional lines to get their grievances redressed. But some communities that were underrepresented came together and formed the 'abstentionist' movement against the governmental machinery. That was a major land mark in the history of community assertion in Kerala. The 'abstentionists' believed that the position of the different castes and communities in society could improve only when they obtained representation commensurate with their numerical strength. Those who stood for community interest through such movements tried to detach from the nationalist movement.

Christian Missionaries

There are different opinions about the Christian interventions in Kerala. For example, many of the scholars suggest that Christianity brought about the principle of equality and justice in Kerala. The introduction of English education is considered as one of the major achievements. Many of the lower caste people embraced

Christianity or Islam to escape from the oppression of caste system. It is a fact that the interference of Christianity in the public sphere of Kerala in a sense helped the lower caste to experience the benefit of modernity which allowed them to engage in the public sphere (Menon 2002). But, if we follow Dirks (2001) and others who criticised the secular policies of colonisers, one can argue that there was an agenda of imposing western values, essentially rooted in Christianity. It generated conflict between caste groups and other religious communities, thereby strengthened community identities.

Intellectual Leaders and Social Reform

In all parts of the country, colonial period witnessed the rise of intellectual leaders and social reformers who fought against injustice, oppression and discrimination. So, the role of such leadership must be conceived as the quintessential part of community formation. Sree Narayana Guru is the pioneering champion of the social reform in Kerala. He was born in the Ezhava community. The famous message of "one god, one religion and one caste" indicted the vision he had in mind. He used the enlightened and egalitarian principles for 'de-Brahmanising' religion, universalisation of education, diversification of occupation and a rational approach towards life, society, history and culture. Many other reformers followed him, like Dr Palpu, Kumaran Asan, Sahodharan Aiappan, Chattanbi swamikal et al. Ayyankali is the other prominent figure who worked for the 'untouchable castes' like Cherumas, Pulayas and Parayas. Among the Mulsim community, leaders like Makthi Thangal, Vakkom Abdul Khader Moulavi, Moidu Moulavi et al. led the community. Simultaneously upper caste groups like Nairs and Namboodiris were also mobilised under the leadership of prominent reformists within the community to reform and to protect their interest. There are contesting views on the activities of Sree Narayana Guru. Houtart and Lemercinier (1978) pointed out that the reform of Sree Narayana Guru was not at all secular because he mobilised Ezhavas in such a way that religion and caste did not vanish from social life. But, the role of religion in mobilisation should not be looked through the prism of western secularism because it is very much linked to the social aspect, the material life. Religion was always part of the social life of the people and it is irreducible from the public life.

Religion and Caste Mobilisation

Anyhow religious factor was important in the movement like Ezhava emancipation movement. The lower caste movements were inspired by religious spirit. The activities like replacement of Ezhava Shiva instead of Brahmin Shiva and the

further kind of mobilisation by using religious symbols clearly indicate that religion played a major role in the public sphere of Kerala in the social mobility of lower castes. The mobilisation of communities that took place in the political sphere was based on religious faith and sentiments (Mathew 1989). Similarly, religious conversion is an important event in the history of social emancipation of lower castes. The Ezhavas, Pulayas and the fishing groups like Mukhuvans were more eager for such radical acts. There was even conversion to Buddhism and Jainism. Here, the socially alienated community sought to overcome their deprivation by becoming members of a new religion (ibid).

Elitism and Middle Class Phenomenon

It was the elites and the educated middle class section who initiated much of the movement and they represented the community in the public sphere. There developed a middle class among lower caste groups in colonial period. Though they constituted a minority, they led the movement from the front. The abolition of the discriminatory practices was the result of such initiatives; they tried to reform their community and inspired the fellowmen to gain education. But in practice it benefited those who were in better positions within the group (Houtart and Lemercinier 1978).The benefits of the movements were restricted to a minor section in every community especially when the opportunities emerged under colonialism. But, it is important to note that public sphere was not always bounded by elite interests; the voices of the subordinated mass were always registered through such movements

Print, Public Sphere and Communities

The proliferation of newspapers and journals in this period was the result of the development of public sphere in Kerala. Each group had their own newspapers, through which they articulated their interests. For Christians, Nazraani and Malayala Manorama etc were the newspapers through which they fought for their interests. Every community had their own publications to articulate their interests. Literary sphere was also very active in the colonial period. Unlike the literary public sphere in many other parts of the country, in Kerala it was not a domain of the upper castes alone. For example, there were novels written by lower caste people which represented the caste issues prevalent at that time. Dilip Menon (2002) pointed out that if *Indulekha* was a novel written by an upper caste author dealing with the Nair self in the colonial period, there were novels like *Saraswativijaym* written by a lower caste author who advocated conversion to Christianity as a cure for the social evils besetting Hinduism. So, the literary sphere was a domain of representing the collective self.

Conclusion

It is found that the public sphere of colonial Kerala was the realm of communities of castes and religions. There were competitions between collective groups to utilise the social, economic and political opportunities. It was the time that the territorially bounded and scattered groups acquired a new meaning in the newly emerged public sphere. At political level they all claimed the status of a homogeneous community. This process is well associated with the development of the region called Kerala. The public sphere appeared as a realm of conflict between communities, because when the hegemonic caste groups continued their positions in the new situation, subordinated sections asserted in the socio-political sphere with their own means. There were counter publics and counter discourses initiated by such groups to question the hegemony of upper caste groups. The role of colonisers in this process was very ambiguous. The interaction between caste groups and religious groups showed some commonality in the public sphere in Kerala. Contrast to the general perception about caste groups and religious groups as two completely different organised forms, it is found that there was an interpenetration between caste groups and religious groups in Kerala. Each caste group asserted with its own particular religious symbols and looked at its neighbour groups, whether religious or caste, as a particular community. Similarly, religious groups also identified themselves with caste groups in the public sphere.

Notes

1. Partha Chatterjee(1998) says, one domain was the material domain dominated by the modern science and technology, to which colonized people were not acquainted with. So, it was an alien thing for them. The other domain was the spiritual, the inner domain influenced by Indian tradition, which marked the cultural identity of nation.
2. Brahmins in Kerala are generally known as Nampudiris
3. Muslims in Malabar are known as Mappilas
4. It means descent through sister's children to determine the system of inheritance and family organisation. This system mainly prevailed among Nairs, but this system was also practiced among Mappilas in some parts of Kerala.
5. It is a Marumakkathayam joint family consisting of all the descents of a common ancestor in the female line
6. Shiva is a God of those who follow Hindu religious belief.

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The Indian Ocean: Whose Lake?

K.R. Singh

Unlike other large water bodies where littoral states had claimed sovereignty over adjacent sea space, no regional maritime power in the Indian Ocean region had claimed sovereignty over these waters. Even the Cholas, who had launched large overseas expeditions against Sri Lanka and Sri Vijay Kingdoms in the tenth and eleventh centuries, had not claimed sovereignty over the sea. Thus, the Indian Ocean acquired the unique status of an ocean that enjoyed unimpeded freedom of navigation and associated overseas trade and commerce unhampered by political considerations. That status underwent a strategic reorientation after the Portuguese, in AD 1498, under the leadership of Vasco da Gama, opened a direct sea route connecting Europe and the Indian Ocean: since then, sea power projection became a major factor in determining the ethos of the Indian Ocean. That ethos has remained unchanged till now.

The Portuguese claimed sovereignty over the waters of the Indian Ocean on the basis of the Papal Bull of AD 1493 in which the Pope had divided the world between two Catholic kingdoms; Portugal and Spain. That Papal Bull would not have been worth the paper on which it was written but for the fact that the Portuguese had warships armed with heavy guns with which to enforce their claims of sovereignty (Padfield 1979: 46). The Dutch, who followed the Portuguese, put forward the doctrine of mare liberum as propounded by Hugo Grotius. It carried less legal but greater weight of Dutch warships. Thus, sea power based on a strong navy was introduced as a major variable determining the geo-strategic environment in the Indian Ocean. By the mid-eighteenth century, the Indian Ocean had become the British lake. Even though the concept of freedom of navigation was paid lip service under international law, that concept was used more to justify force projection by non-regional powers even after World War II. The Indian Ocean became an arena of super power rivalry. Finally, after the end of the Cold War, USA emerged as the sole super power. The Indian Ocean had become an American lake.

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Enter the USA

Increasing American naval presence in the Indian Ocean since the sixties can be analysed under two different heads. One was related to the second-strike in nuclear deterrence. The other was the gradually increasing interventionist and force projection capability in the context of USA's regional strategy. While the strategic-nuclear presence was short-lived the interventionist capability continued to grow over the years. USA's nuclear presence in the Indian Ocean was the outcome of its search for a credible second strike capability. While manned bombers armed with nuclear bombs and silo-based intercontinental ballistic missiles (ICBM) were also part of the second strike capability, submarine-launched ballistic missile (SLBM) was considered the most effective part of that triad. The first nuclear-powered submarine, the Nautilus, was operational by 1955. It was armed with torpedo only. The first ballistic missile that could be launched from a submerged submarine, Polaris A-1, was operational by 1961-62. It had a short range of 1,200 n. miles. Polaris A-2, with a range of 1,725 n. miles was operational by 1962. Polaris A-3, with a range of 2,500 n. miles, became operational by 1963-64. The nuclear-propelled Lafayette-class submarine could carry 16 A-3 SLBMs. While A-2-armed submarines could well operate from the Mediterranean, submarines armed with Polaris A-3 could be deployed more effectively in the northern half of the Indian Ocean from where these missiles could reach strategic targets in Soviet Central Asia; an area that could not be reached from other oceans. Thus, theoretically at least, the Indian Ocean had become an arena of strategic importance for USA in the context of nuclear standoff in the super power rivalry.

While USA neither acknowledged nor denied that it had deployed the Polaris A-3 and subsequently its updated version, the Poseidon, SLBMs in the Indian Ocean, the possibility of their deployment was strengthened because of two parallel moves. The one was the construction of a very low frequency (VLF) communication station in North-West Cape of Australia. It was very useful for establishing communication with submerged submarines. It was completed by 1966. The other was the Anglo-American agreement of 1965 on Diego Garcia which allowed USA to establish a base there. These developments were independent of the British withdrawal from the Indian Ocean region whose first step was initiated in 1964 with the formation of the British Indian Ocean Territories (BIOT) of which Diego Garcia was a part. These developments also predated the entry of Soviet taskforce in the Indian Ocean in 1968.

The possible deployment of Polaris A-3 and Poseidon SLBMs in the Indian Ocean could have been for a short period only because by the end of 1970s USA had perfected the intercontinental range SLBM, the Trident. Because of long

range, submarines armed with these SLBMs could be deployed in waters closer to the mainland. They could not only be better protected against hostile anti-submarine warfare efforts but also time wasted in transit to far-off locations could be better utilized nearer home. That development would have diminished the strategic-nuclear importance of the Indian Ocean for USA.

However, as will be examined, US naval presence in this ocean continued to grow for reasons other than strategic-nuclear or Cold War rivalry. USA had maintained a small naval base in Bahrain since World War II which had two destroyers and a command ship. The US Navy had kept a low posture vis-à-vis the British Navy. US naval presence in the Indian Ocean began to increase after 1963-64. USA had conducted a flag-showing exercise at the global level to demonstrate its nuclear propulsion capability. Operation Sea Orbit of 1964 involved three nuclear-powered surface vessels comprising of aircraft carrier *USS Enterprise*, cruiser *Long Beach* and Frigate *Bainbridge*. It is not known if nuclear-powered submarine (SSN) was also a part of that taskforce because it could cruise underwater for long period and thus remain undetected. The taskforce started from the Mediterranean, rounded the Cape of Good Hope, touched Karachi, crossed the Indian Ocean to Australia and rounded Cape Horn to reach Norfolk in USA in fifty seven days.

Decision to create a separate Indian Ocean command was reportedly taken as early as October-November 1963. General Maxwell Taylor, Chairman of the US Joint Chiefs of Staff, told the press at the Palam Airport, New Delhi, on December 19, 1963 that the US taskforce likely to visit the Indian Ocean might comprise of one aircraft carrier, two or three destroyers and one oil tanker. The taskforce would operate independently and would not need any port facility (Singh 1974: 61). The US taskforce, named the Concord Squadron, spent five weeks in the Indian Ocean before returning to its main base.

USA had also conducted naval exercises with two members of the CENTO. Operation Midlink was conducted off Karachi in November 1963. The object was to defend ship convoy against submarine and air attacks. US submarine (the *Ghazi*) was loaned to Pakistan in 1964. USA also conducted a joint exercise with Iran in April 1964. Operation Dilawar included amphibious attack on Iranian oil terminal in Kharg Island by US warships stationed in Bahrain as well as the landing of 2,300 US troops of the 101st Air-borne Division. They were flown in US aircraft direct from USA to Dezful in south-west Iran

Soviet interlude

The Indian Ocean region also witnessed the presence of the Soviet Navy which made its formal entry with a taskforce in 1968. It coincided with the formal dec-

laration in 1968 by Britain that it would withdraw from the Indian Ocean by 1971. Thus, it was suggested that USSR was seeking to fill the vacuum that would be created by the exit of Britain. Though USSR had developed close relations with some littoral states like South Yemen, Somalia, Iraq, India and Vietnam, there was no reason to believe that it desired to compete in naval field with USA which had already started filling the vacuum that was likely to be created by the British withdrawal. It was not easy for USSR to deploy its naval force in the Indian Ocean. Unlike USA, which was already a global naval power during World War II and had acquired strong force projection capability across the oceans, Soviet Navy till 1950s was at best a coastal force. Its expansion was gradual and geared more to neutralize the likely US sea-borne threat to its homeland whether strategic-nuclear or conventional. It was only under the leadership of Admiral Gorshkov that the Soviet Navy could develop a limited blue water capability after it realized that it lacked a credible naval capability to escort its ships carrying nuclear missiles to Cuba in 1962. Thus, while USA was already making its presence felt in the Indian Ocean, Soviet Navy was still to develop a credible long-range blue water deployment capability. The Soviet taskforce that was sent to the Indian Ocean in March 1968 comprised of one Sverdlov-class cruiser armed only with guns, one guided missile destroyer, one nuclear-powered submarine and one oiler. The Soviet taskforce entered the Indian Ocean in March 1968. It called at Madras and Bombay, Colombo, Karachi, Bandar Abbas, Basra, Umm al-Qasr, Aden and Mogadishu before returning (Cottrell and Barrell 1974: 111).

It will not be wrong to say that the Soviet naval presence in the Indian Ocean was largely demonstrative. Since the primary or strategic threat from US Navy's presence in the Indian Ocean, at least in the sixties and seventies, to Soviet Union was strategic-nuclear, based upon its nuclear-powered submarines armed with Polaris A-3 and Poseidon SLBMs, Soviet naval presence should have concentrated on anti-submarine warfare (ASW). But one fails to draw that inference from the type of ships and aircraft deployed in the region. Soviet Navy also had limited base facilities in Somalia and had to depend upon anchorages near Socotra and the Seychelles. Despite close political and military ties between India and USSR, even after the signing of the so-called Friendship Treaty in 1971, India had not offered base facilities to the Soviet Navy.

While the presence of the Soviet Navy in the Indian Ocean was used by the Pentagon to further strengthen its military capability in the region, the threat was grossly inflated. William Colby, the then Director of CIA, in his statement before the Senate sub-committee said that the Soviet Union kept a minimal force in the Indian Ocean. He added that even the reopening of the Suez Canal would not necessarily lead to an increased Soviet presence in the area. He also maintained

that the Soviet Navy operated under serious constraints in the absence of reliable base facilities in the area (Johnson 1975: 10).

Soviet Union was isolated in the Indian Ocean region following the Soviet military intervention in Afghanistan after 1978-79. Almost the entire Arab-Islamic world had turned hostile. It also lost its bases in Somalia and had to depend largely upon anchorages and long line of supply ships to maintain its limited naval presence in the Indian Ocean. USSR continued to retain its presence in the Indian Ocean till its disintegration. Destabilisation in the Soviet Union led to the disintegration of the Soviet Navy as well. Russia, the successor state, showed no interest in retaining its naval presence in the Indian Ocean. Thus the Soviet naval presence in the Indian Ocean was short lived and was at a far lower level as compared to its naval presence in the Pacific, the Baltic Sea, the North Sea and the Mediterranean. Even today, the Russian Navy has not shown any interest in the Indian Ocean expect for the recent deployment of one or two surface vessels for anti-piracy operations around the Horn of Africa.

Super power presence and local response

Apprehension about growing US naval presence after 1963-64, which in turn was expected to bring in the presence of Soviet Navy and thus make the Indian Ocean an arena of super power rivalry, was reflected in the debate at the non-aligned summit in Cairo in 1964, long before the entry of the Soviet taskforce in 1968. The question was also seen as introducing nuclear weapons in a region that was free from deployment of nuclear weapons till then. Sirimavo Bandarnaike, Sri Lanka's Prime Minister, in her speech on 8 October 1964 at the Non-Aligned Summit in Cairo, argued for the concept of nuclear free zone in Indian Ocean. She said that ships carrying nuclear weapons on board should be denied access by littoral states. These suggestions were incorporated in the Cairo Declaration of Second NAM Summit. The Anglo-American deal on the leasing of Diego Garcia also came under attack by many regional powers including India. The NAM summit in Lusaka in 1970 suggested the creation of a peace zone in the Indian Ocean. The matter was taken to the General Assembly which passed Resolution A/2832 (XXVI) on 16 December 1971 advocating what came to be known as the concept of peace zone in the Indian Ocean.

While many Afro-Asian states had voted for it the NATO and the Warsaw Pact members by and large either voted against it or abstained. The so-called victory of the non-aligned resolution was an empty gesture for two main reasons. General Assembly had no power to enforce it. And, super powers had every intention of maintaining and even enlarging their presence for various reasons. The debate on the Ad Hoc Committee Report in 1974 led to acrimony without

any result. India, reportedly a reluctant participant, was cornered, as will be examined subsequently, on the question of creating a nuclear-weapon free zone in South Asia after 1974. The debate on peace zone petered out after 1978-79 following the Afghan crisis and the Iranian Revolution and died a natural death following the end of the Cold War. As will be examined, almost all littoral states supported the military intervention by USA, Britain and France during the Kuwaiti crisis. India did not join the US-led crusade against Iraq largely due to domestic pressure related to the evacuation of large number of Indian expatriates from the region which was to be arranged by land via Iraq and Jordan. The peace zone concept, which was more emotional than strategic in content, was buried by the states that had first propounded it.

Energy security and US policy

Though the Cold War confrontation was the excuse given for enhancing US military presence in the Indian Ocean region, the real reason was energy security; to acquire and retain the capability to ensure continued access to oil fields as well as to ensure security of pro-Western regimes that dominated most of the oil fields in the Gulf region. Access to the Gulf from the Mediterranean, the Atlantic and the Pacific was only via the Indian Ocean. Hence, dominating the Indian Ocean became essential if the energy resources of the Gulf had to be assured for the benefit of the OECD countries. But for the energy resources of the Gulf, Indian Ocean would have remained for them a transit route between the Atlantic and the Pacific.

By the beginning of 1970s, it was clear that USA would have to increasingly depend upon imported oil to meet its growing energy requirements. The Gulf, even then, was a major source of oil export at the global level. Also, US oil companies had large investment in energy-related sector in the Gulf. US policy was fully demonstrated in 1973-74 when members of the Organization of Arab Oil Exporting Countries (OAPEC) decided in their meeting in Kuwait on October 17, 1973 to use oil as a strategic weapon so as to put pressure on the supporters of Israel during and after the Arab-Israeli War of October 1973. The OAPEC had suggested a total ban on supply of oil to USA, Netherlands and South Africa as well as a five percent reduction per month in its oil production so as to create an artificial scarcity in the global oil market. The immediate response was the first global oil shock and the sharp escalation in the price of crude oil from about $3 to $ 10-12 per barrel.

USA reacted sharply to the use of oil weapon by the Arabs. Beside the use of diplomacy in facilitating the Arab-Israeli peace process in 1974, that led to the ceasefire and first disengagement of forces between Egypt and Israel as also Syr-

ia and Israel in 1974, USA not only proclaimed its determination to occupy Arab oil fields in the Gulf but also sent several taskforces to the region to conduct massive naval exercises and to demonstrate its force projection capability. The Congressional Research Service of the Library of Congress published on 27 August 1975 the book, *Oil Fields As Military Targets*. The book gave details of how US forces could occupy oil fields of the present-day GCC states. It was ironic that regimes that were so threatened were strong supporters of USA. It was a classical example of national interest overriding so-called friendship. The situation has not altered even now.

The US response to the oil shock of 1973-74 and its Indian Ocean policy has to be analysed under two broad heads: the immediate demonstration of interventionist capability and the long-term policy of enhancing it through what came to be known as rapid deployment force (RDF) strategy. Soon after OAPEC's decision to use oil as a weapon, USA sent in November 1973 a taskforce led by aircraft carrier *USS Hancock* to the Indian Ocean. It was replaced in December by one led by *USS Oriskany*. *USS Kitty Hawk* led the third taskforce in March 1974. It was followed by the one led by *USS Constellation*. It paid a visit to the Gulf states in March 1974. That was the first time that a US carrier taskforce had visited the Gulf per se since World War II. USS Constellation and the associated escort vessels also participated in the CENTO naval exercise Midlink that was conducted in the Arabian Sea off Karachi in November 1974. Some fifty warships and 25,000 personnel reportedly participated in it. These exercises were significant in the context of threat of occupying oil field even in 1974.

The long-term US strategy of RDF got a boost after the oil crisis of October 1973. Seymour Weiss, Director, Bureau of Political-Military Affairs, in his statement on 6 March 1974 before the Sub-Committee on the Near East and South Asia in the House Committee on Foreign Affairs, said that the vital necessity of having a demonstrable US capability in the Indian Ocean-Persian Gulf area was sharply brought home after the oil shock of October 1973. (Weiss 1974: 37). Henry Kissinger, in an interview to *Business Week* on January 13, 1975 had hinted at the use of force if there was strangulation of industrialized world (*Department of State Bulletin*, 1975: 110).

It will be wrong to assume that the oil crisis of October 1973 was the primary cause for US policy of force projection. In fact, there was already a move to upgrade the base facilities at Diego Garcia and to strengthen US capability of force projection to control the oil resources of the Gulf. Senator J.W. Fulbright, Chairman of the Senate Foreign Relations Committee, among other things had said in early 1973, "our present policy makers may come to the conclusion that military

action is required to secure the oil resources of the Middle East to secure our exposed jugular" (Beazley 1983: 107-29).

US policy of RDF aimed to upgrade facilities at Diego Garcia to support intervention in Indian Ocean region, acquire access rights via air and naval bases enroute to the Gulf, preposition war material and encourage GCC members to create facilities on their soil that would ensure interoperability with NATO forces as also help in rapid induction of forces by air and sea in the region. Though these moves had commenced after 1973-74, they were accelerated following the Iranian Revolution of 1979, which also coincided with Soviet military intervention in Afghanistan, and the decade-long Iraq-Iran war in the eighties. The overthrow of the Shah of Iran and the establishment of a radical Shii regime in Iran probably brought home to the conservative pro-West regimes in the Gulf the possibility of similar development in their own states. Saudi Arabia was already witnessing the upsurge of radical Islamic movement as was demonstrated by the occupation, by a group of these militants, of the most sacred mosque in Mecca in November 1979 (Ayubi 1991: 62). These events explain the emergence of close politico-military nexus between these Gulf states and the West, especially USA, UK and France, which further strengthened USA's RDF strategy.

After the overthrow of the Shah of Iran, Saudi Arabia emerged as the lynchpin of US strategy in the Gulf. The Saudi regime was also willing to join in the game especially when it felt that the Islamic Revolution in Iran would not only destabilize Shii population along the Arab littoral but may also pose a military threat by defeating Iraq. Hence, GCC states not only offered economic aid to Iraq but also spent large amount in building modern bases and acquiring modern arms and electronic equipment largely from USA, UK and France. Saudi Arabia alone reportedly had spent about $100 bn on that count. All these facilities came handy following the Kuwaiti crisis of August 1990. There is no evidence that Saudi Arabia used these facilities on its own against Iraq. It is also important to note that despite the Iraq-Iran War and the resulting threat to tankers in the Gulf due to air attacks and mining of the Straits of Hormuz, there was no coordinated effort by NATO to evolve security mechanism in the region. Each state acted independently. The Kuwaiti crisis of August 1990 changed it drastically.

The Indian Ocean in the post-Cold War period

The end of the Cold War and the exit of Soviet/Russian Navy from the Indian Ocean also coincided with the Kuwaiti crisis after Iraqi troops occupied Kuwait on 1 August 1990. This is no place to discuss the details of the Kuwaiti crisis of 1990-91 as also the abortive attempts at pacific settlement of dispute at the level of the Arab League and the Security Council, or the rapid deployment of US and

allied forces like those from Britain and France as well as regional powers like Pakistan, Egypt, Syria etc between August 1990 and February 1991 when Operation Desert Storm commenced (for details see Singh 2006: 79-146).

The Kuwaiti crisis of 1990-91 or Iraq War I was the operational part of the long planned RDF strategy. It began with the surge of US air power to preplanned air bases in Saudi Arabia, to be followed by induction of the army and the navy not only of USA but also of Britain and France. When Operation Desert Storm began in January 1991 there were about 2,005 frontline aircraft in the region. Of them, 1,821 were American. There were 190,000 US troops as well as 45,000 troops from Britain and France, 12,000 tanks and other armoured vehicles, 95,000 trucks, 1,498 pieces of artillery and 420 attack helicopters. There were also six aircraft carriers, about 58 large surface fighting ships and six nuclear-powered attack submarines capable of launching Tomahawk cruise missiles (*Military Balance 1991-92*: 238-41).

Operation Desert Storm, the air and missile attack on Iraq, that began on January 17, 1991, lasted for more than one month. It devasted Iraqi infrastructure. The ground offensive lasted for about 100 hours before an interim ceasefire was announced on 27 February 1991. The final ceasefire, Security Council Resolution 687 of 3 April 1991, not only imposed lot more sanctions on Iraq but also provided pretexts for periodic air attacks on Iraqi targets by airforces of USA, Britain and France from GCC airbases. That also provided the pretext for stationing large number of combat troops and aircraft in bases in the GCC states. These bases later on came handy when USA and Britain launched Iraq War II.

Military preparation for Iraq War II began by the end of December 2002. Military operation began during the night of 19-20 March 2003. Anglo-American troops were able to overrun the already weakened Iraqi armed forces and Baghdad was brought under control on 9 April 2003. President Bush formally announced the end of armed hostilities on 1 May 2003. How misplaced was the euphoria. UN Security Council passed series of resolutions in 2003 after the war was over. They legitimized subsequent US policy in Iraq. US-led coalition not only placed a puppet regime in power but also sought to divide the Iraqi population on ethnic and sectarian lines; Kurds vs Arabs and Shii vs Sunni. Despite the fact that Iraq continued to be occupied by large number of foreign troops, armed with ultra-modern weapons, surveillance and communication systems, Iraq continues to be rocked by sporadic sectarian clashes and explosions caused by detonation of improvised devices that have claimed thousands of lives. No Arab-Islamic state has done anything, except shed crocodile tears at the plight of Iraqis, that would have effectively led to deoccupation of Iraq by the occupying forces. Military occupation of Iraq, in turn, also led to stationing of even larger number

of foreign troops, mostly from NATO members, in GCC states like Bahrain, Kuwait and Qatar.

While Iraq War I was fought to safeguard oil fields of GCC states, Iraq War II and the preceding Operation Enduring Freedom that was launched in Afghanistan on 9 October 2001 against Al-Qaida and the Taliban, ostensibly had a new focus; terrorism. Al-Qaida and the Taliban were targeted for their involvement in international terrorism, with the events of 9/11 (11 September 2001) providing the legitimacy for UN and NATO-backed military action. The Baathi regime of President Saddam Hussein was also accused of sponsoring terrorism as well as of developing weapons of mass destruction (WMD). It is another matter that no evidence was found after the end of the war that could prove that the Baathi regime was developing WMD. But, by than, the regime had been destroyed and violence unleased in Iraq against foreign occupation and the associated policy of dividing Iraq on ethnic and sectarian lines was being designated as terrorism. Whatever be the excuse for military interventions in the Gulf there is no denying the fact that energy resources, both oil and natural gas, were the prime reason not only for military interventions but also for the subsequent continued occupation of the Gulf. After the First Iraq War, large number of foreign troops were withdrawn from the region. However, after 2001 one witnesses an escalation in military presence under US-led coalition not only in the Arab littoral of the Gulf but also in Afghanistan and even in parts of Central Asia. This is now designated as the zone of interest of the Central Command (CENTCOM).

In 2005-2006 there were 19,000 troops under US-led Operation Enduring Freedom and about 10,000 NATO-led troops under International Security Assistance Force (ISAF) in Afghanistan. (*Military Balance* 2006: 233). Their actions were coordinated with thousands of Pakistani forces deployed along sensitive areas along the Afghan frontier. Yet, activities of Al-Qaida and the Taliban were not curbed. There are proposals to induct more troops, under the new initiative of the Obama administration. The total number of US troops in Afghanistan is expected to reach 96,000 by October 2010. There are expected to be about 40,000 troops from other coalition partners. The strategy is to sanitize the Kandahar region which is allegedly the heartland of the Taliban so as to enable the government in Kabul to consolidate its hold over the troubled Pushtoon area of Afghanistan. A process of political reconciliation is also supposed to be worked out simultaneously so as to prepare the ground for the reduction and finally withdrawal of foreign forces from Afghanistan beginning 2011.

It is easy to induct troops in an area of low intensity conflict. But it is very difficult to deinduct them without making important political and even military concessions. It remains to be seen what concessions would be made by USA and

its allies in return for disengagement of troops from Afghanistan and how successful would be the final objective. A deal even with so-called good Taliban will most likely alienate the non-Pushtun ethnic groups like the Uzbek, Tajik and Hazara who had been the target of Taliban attacks before 2001 and who had fought alongside US troops to defeat the Taliban and to capture Kabul and Kunduz. Such a deal will most probably push Afghanistan back to pre-2001 status and could lead to regional destabilization on a bigger scale.

USA and its allies are also caught in a similar situation in Iraq. Iraq continued to be occupied by foreign troops even after the defeat and destruction of the Baathi regime. In 2005-06, there were about 138,000 foreign troops in Iraq. In 2008, the US administration had proposed to induct about 30,000 more troops so as to finally curb internal violence and thus facilitate the withdrawal of foreign troops from Iraq. British troops, that had been stationed in southern Iraq, began their withdrawal from 2009. USA is still caught in its strategy of pacification.

USA announced that it had withdrawn all its 'combat' troops from Iraq by August 2010. However, about 50,000 US troops continue to be stationed in Iraq. It remains to be seen if they remain militarily inactive while Iraqi regime continues to be targeted by anti-regime groups. If so, what will be the purpose of their stay, only training? Simultaneously, international initiative has been launched under UN umbrella. This so-called International Compact with Iraq involves the Government of Iraq, representatives of UN, IMF, World Bank etc. It is an Iraqi initiative designed to create in five years a democratic, unified, federal state and to give a boost to economic development with a major role for the private sector.

USA and its allies also maintain large forces in other littoral states. In 2005-06, there were about 156,800 foreign troops in the Gulf region, apart from the naval units deployed there. Beside 130,000 troops in Iraq, there were about 25,000 troops in Kuwait, 3,000 in Bahrain, 6,540 in Qatar, 1,500 in UAE and 270 in Oman. The number of foreign troops in Saudi Arabia had been reduced to 300, largely due to mounting domestic protest. (Military Balance 2006: 121, 125-39). USA maintains the headquarters of the Fifth Fleet in Bahrain.

Military attacks and subsequent military occupation of Afghanistan, Iraq and the military presence in GCC states has been a costly affair for USA. As per data provided by the SIPRI, US military expenditure rose sharply after 2001. Between 2001-07, it increased by 85 per cent in nominal terms and by 59 percent in real terms. US military expenditure rose from $ 312.7 bn in 2001 to $ 464.7 bn in 2004 and to $547 bn in 2007. In 2008, military expenditure of USA and UK was approximately $547.0 bn and $59.7 bn respectively. That was about 50 percent of world's total military expenditure of $1,214 bn (SIPRI Yearbook 2008: 178-79, 183). The US President had to seek Congressional approval for more funds. The

US Congress, after months of haggling with the President, passed the bill authorizing new $120 bn for funding the war in Afghanistan and Iraq. That would bring the total to $ 566 bn since 2001 (Rajaghatta, *Times of India* 2007).

Caught in the shackles of energy insecurity

Why has USA been spending such large amount of money and efforts so as to politically and militarily dominate the Gulf region and therefore the Indian Ocean? During the preceding five centuries, reason for foreign dominance was primarily trade. Resources of the Indian Ocean region like spices and other commercial items, though important, were not crucial in the context of national socio-economic survival of these states. Today, energy resources of the Gulf are being linked to the very socio-economic and even political survival of energy-based life-style of these developed countries. This explains the difference between the policies of European states like Portugal, the Netherlands and Britain in the past and of USA today.

Energy resources of the Gulf region are projected as being vital for the very survival of USA as a developed modern state. This is equally true of most of the countries of the Western Europe and Japan as is clear from the data given in Table 1 dealing with OECD and the world crude oil supply and demand. Also, unlike the previous centuries, when European powers had fought among themselves for the resources of the Indian Ocean region, today fear of energy insecurity among the OECD countries has brought them together as is reflected in their policy towards the region at least since 1990. Table 1 shows the ever increasing consumption of crude oil as also its declining production in the OECD countries. While oil production in OECD countries vis-à-vis global oil production declined from 48.7 per cent in 1990 to 32.2 percent in 2009, percentage of their consumption rose sharply from 19.2 percent in 1990 to 54.6 percent in 2009; from 11.6 mbd in 1990 to 45.6 mbd in 2009. By contrast, their contribution to global oil production declined by 48 percent during the same period. That partly explains why NATO countries as also non-NATO countries like Japan are more than willing to offer their support to US policies in the Gulf. While there have been public protests in those states, there has been no official constraint on the part of the OECD governments as also UN vis-à-vis US policies. This support is likely to continue in future since, as per Table 2 dealing with anticipated demands for oil till 2025, OECD's dependence on oil will continue to grow. Increasing dependence of USA on imported oil is obvious from Table 3 dealing with production, consumption and import of crude oil since 1970. USA's import dependence increased from 12.5 percent in 1970 to 43.7 percent in 1990, which coincided with the Ku-

waiti crisis of August 1990 and Iraq War I of 1990-91. It rose to 65.1 percent in 2003 which also coincided with Iraq War II.

The Gulf region has acquired an increasing importance in the context of OECD's dependence upon imported oil. Export of oil and oil products from the Gulf is an important factor in influencing global oil price. In 2006, total oil production at global level was 81.6 mbd. Of that, the Gulf contributed 24.7 mbd or about 30.3 percent of world total (*The Middle East and North Africa* 2008: 151-3). In 2003, the Gulf countries had produced 972.3 mn tons of oil. Of that, it exported 609.0 mn tons of oil and 96.5 mn tons of oil products. (*Energy Statistical Yearbook 2003* Tables 14, 28). Thus, in 2003 the Gulf countries contributed a total of 704.5 mn tons of oil and oil products to the global energy market. The Gulf region has large reserves of both oil and natural gas. In 2007, global oil reserves amounted to 1,208.7 billion barrels (bn bls). Of that, the Gulf had reserves of about 740 bn bls which were about 61 percent of world's total oil reserves. These reserves are broadly concentrated in Iran (137.3 bn bls), Iraq (115.0 bn bls), Kuwait (101.5 bn bls), Saudi Arabia (264.3 bn bls) and UAE (97.8 BN BLS). By contrast, oil reserves of North America amounted to only 59.4 bn bls, and of the North Sea about 14 bn bls (*The Middle East and North Africa* 2008: 152). One metric ton equals 7.2 barrels of oil. Not only does the Gulf region possess large oil reserves, some of the individual oil fields are also large. In 2006, Ghawar oil field in Saudi Arabia alone had oil reserves of 83 bn bls or more than the total reserves of North America and the North Sea. Burgan oil field in Kuwait had reserves of 72 bn bls which were more than the total oil reserves of North America. Rumaila and Kirkuk oil fields in Iraq had reserves of 30 bn bls and 16 bn bls respectively that were more than the reserves of the North Sea.

Rapid decline in oil production in USA combined with peaking and gradual but steady decline in oil production in North Sea as also in South East Asia, limited oil reserves in other oil producing areas that are also declining due to overexploitation, and the fact that the world will continue to depend upon oil for decades to come has made the Gulf region the focus of future energy security not only of the OECD countries but also of the world as a whole. Contrary to popular perception, the Gulf region is also very rich in natural gas. In 2007, world reserves of natural gas were estimated at 181.5 tcm (trillion cubic meters). Of that, North America and North Sea had only 8.0 tcm and 4.8 tcm reserves respectively. By contrast, the Gulf had reserves of about 71.2 tcm or 39.6 percent of global reserves. These reserves are concentrated in Iran (28.1 tcm) and Qatar (25.4 tcm). Only Russian Federation had reserves of 47.7 tcm (*The Middle East and North Africa* 2008: 154-8). Like the OPEC that seeks to regulate production of crude oil, producers of natural gas are also seeking to coordinate their policies in a struc-

tured way. The Gas Exporting Countries Forum (GECF) was established in 2001. Its headquarters are in Qatar. Beside Qatar and Iran, Algeria, Egypt, Libya, Russian Federation and Venezuela are among its members. Thus, the Gulf region has emerged as the heartland of global energy resources of crude oil as well as natural gas.

Another factor related to energy insecurity is the possibility that energy resources may be used as strategic weapon by the regimes. One doubts if the OAPEC members would repeat their strategy of October 1973 primarily for two reasons. Unlike 1973, when USA and its allies had very limited on-station interventionist capability, today, as analysed earlier, the Arab littoral of the Gulf is overwhelmed with a powerful on-the-spot military presence of Western powers. About 100,000 foreign forces are stationed in the Gulf region today.

The second reason that would act as an inhibiting factor is that these states, which can be called rentier states, depend heavily upon their oil revenue for socio-economic and hence political stability. None of the regimes, not even the Iranian, would willingly pursue a policy that would diminish their oil revenue and thereby face domestic instability. They too have a stake in maintaining energy security. It will not be wrong to suggest that global energy security is also linked to regime security in these states. That is also one major reason for the close politico-military collaboration between the Arab littoral states in the Gulf and the West. Not only have they purchased more equipment from the West but their defence expenditures has also risen sharply over the years. As seen from Table 4 dealing with defence budget of the Arab states of the Gulf littoral their total defence expenditure rose from $28,312 mn in 1998 to $50,265 mn in 2007. The Saudi defence expenditure showed the sharpest rise from $20,513 mn in 1998 to $36,793 mn in 2007. By contrast, India's defence expenditure for 2007 was $24.2bn, far below that of Saudi Arabia. India's per capita defence expenditure was also $21 in contrast to $1,310 of Saudi Arabia.

Two other factors are also highlighted as likely to destabilise the region and thus pose a threat to energy security. The one is the possible threat of a strong Iran, possibly armed with nuclear warheads and ballistic missiles, as also increasingly being driven by radical and conservative Shii clerics who have made confrontation with the West a means of retaining popular support and legitimacy for their continuing dominance over Iran. The radical image of Iranian Shii ruling elite is also linked to its alleged support to radical Islamic groups in the Arab world like the Hamas and the Hizbullah. This is projected as a threat to peace and stability in the region. This image of Iran, in turn, helps to legitimise the policy of Arab regimes in the Gulf to lean more upon USA and its allies for their own security. The WMD controversy and Iran's refusal to fully comply

with UN-established guidelines has further complicated the issue and often raises the spectre of possible American or Israeli air strikes against Iranian nuclear sites. Such an action, especially by Israel, is likely to further inflame public opinion among Arab-Islamic countries.

The other source of threat to free flow of oil from the Gulf is allegedly posed by radical Islamic protest movements in Arab-Islamic world which have already developed strong roots in the Gulf and are posing threat to regimes there. It is ironic that these regimes are reaping what they had been sowing in their own soil and were also exporting to other countries for decades. Thus, the war on terrorism (jehad is no longer accepted as politically correct term) is another factor that binds the West and local regimes in the Arab littoral of the Gulf. This will further help the West, especially USA, retain the interventionist presence in the Gulf in future as well, despite the avowed policy of downgrading military presence from Afghanistan and Iraq after 2011-12.

A likely framework of US strategy in future was spelled out in the National Security Strategy of September 2002. It has replaced the earlier RDF strategy. It hinted at the creation of flexible forces able to project power rapidly across the world in a bid to preempt, respond to and deter terrorist attacks. A series of hubs and forward bases were envisaged so as to cover the so-called arc of instability stretching from the Andean ranges to South-East Asia (Military Balance 2003: 13). General James Jones, Commander of the US European Command, had recommended, as early as 2001, the setting up of a set of 'lily pads', small and lightly staffed facilities for use as jumping points in a crisis. These 'warm bases' were to be outfitted with supplies and equipment to rapidly accommodate a far larger force, and were also to be linked like spokes to a few large heavy infrastructure bases. At the margin, 'virtual bases' would be established by negotiating series of access rights with a wide range of states. Much more equipment would also be prepositioned on land and sea, with a measured focus on specialized units for rapid base construction (Campbell and Ward 2001: 97).

Indian Ocean: whose lake?

Though Indian Ocean was surrounded by strong regional maritime states since the ancient period it was never claimed as an exclusive preserve of any single state. The concept of extending sovereignty over the ocean did not exist till the Portuguese applied it after 1498 A.D. That concept of European origin became the basis for dominating the sea and also sea-borne trade and commerce. Few regional powers could contest claims of European powers primarily because they lacked a navy capable of challenging European warships even near the coast. At best, they could launch hit and run attacks. They could not regain con-

trol over the sea. Thus, Indian Ocean became a European lake between 1500 and 1971 when Britain formally began its withdrawal from the Indian Ocean. USA, that was already enlarging its naval presence in the region, filled the so-called vacuum. It will not be wrong to say that the Indian Ocean had turned into an American lake.

The often lauded concept of freedom of navigation on the high seas, i.e. the sea space beyond 3 n. miles (now increased to 12 n. miles) from the coast, legally reinforced the legitimacy of strong maritime power to project its force across the seas in far off places. That right to intervene across the seas is still the basic framework of naval strategy of great powers in the Indian Ocean region. The challenge to US naval presence came from its super power rival, USSR rather than from the Indian Ocean littoral. Regional protest between 1964 and 1974 was articulated in the context of possible threat to peace and security in the region due to super power rivalry and the possible dangers posed by nuclear weapons that could be deployed on board ships operating in the Indian Ocean. Thus, the so-called peace zone concept had a two-fold implication; threat to peace due to fallout of super power rivalry in the Indian Ocean and associated with that was the fallout of possible nuclear confrontation between them. Hence, the peace zone concept got linked to super power rivalry and associated nuclear threat. Resolutions of the Non-Aligned summits of Cairo of 1964 and of Lusaka of 1970 as also the General Assembly Resolution A/2832 of January 1971 have to be seen in that context.

Even in the seventies, regional response to super power presence in Indian Ocean was sharply divided depending upon their closeness to either of the super powers. Thus, there could never be a unified response that could have united the littoral and hinterland states of Indian Ocean region. Strong reservations made by the Western and the Eastern bloc states to General Assembly Resolution of 1971 had already taken the wind off its sails. The heated debate on the Report presented by the Ad hoc Committee on Indian Ocean in 1974 confirmed the utter disregard of super powers vis-à-vis the wishes of many of the regional powers. That was accompanied by the deployment of series of taskforces by USA following the use of oil weapon by the OAPEC in October 1973 as also escalation in Soviet naval presence in the region.

Attempts were made by many littoral states to link creation of a nuclear-weapon free zone in Indian Ocean, that was conceived in the context of super power rivalry, to the creation of a nuclear-weapon free zone in South Asia, especially after India exploded its first nuclear device in Pokhran in May 1974. Attempts were made after 1974 to corner India under the concept of Nuclear Weapon Free Zone in South Asia. Resolutions were passed in the General Assembly

with the result that India was diplomatically isolated. Thus, India got targeted. The slogan of Indian Ocean as a peace zone lost its appeal after the Soviet military intervention in Afghanistan, the Islamic Revolution in Iran and the beginning of the long-drawn and bitter Iraq-Iran conflict and the associated tanker war. Not only was USSR isolated but USA got full support from most of the Arab-Islamic states.

The end of the Cold War, removal of the Russian Navy from the Indian Ocean, followed by the Kuwaiti crisis of August 1990 and the full support offered by regional powers to USA and its allies in their efforts towards liberation of Kuwait and associated destruction of Iraq's infrastructure confirmed that Indian Ocean had indeed become an American lake. Operation Enduring Freedom of 2001 and Iraq War II of 2003, and the subsequent enhanced on-the-spot military presence of USA and its allies in the region with tacit approval and in many cases support of important regional powers has reaffirmed that role. As noted, the anticipated energy crisis, war on terrorism and WMD-related targeting of Iran, that reminds one of similar excuses before Iraq War II, will provide ample rationale for USA not only to retain its military presence but also to obtain full backing of some regional powers for its role.

How long will Indian Ocean remain an American lake? It is difficult to determine the period but like all foreign powers in the past, USA too will one day downgrade its role if not withdraw totally from the region. The reasons are heavy cost of large-scale military deployment especially when threatened by local 'terrorism', increasing public antagonism in some states of the Gulf like in Saudi Arabia, and even Pakistan, against continuing strong military presence of foreign powers that target local population in the name of war on terrorism, and may be a viable alternative to fossil fuel (like hydrogen) that could provide an alternative to oil and gas and thus reduce the role of Gulf in global energy security. All these may take anywhere between 10-15 years if not more.

If USA does reduce its presence in the Indian Ocean, who will fill the so-called vacuum? Will China as the aspiring super power like to do so? Will it succeed in getting the support of majority of regional powers as also tacit approval of OECD which alone will allow it to play that role successfully. Or, can regional powers come together to device a system of regional cooperation that would enable them to shoulder their maritime obligations so that there is no need for the presence of foreign powers to ensure peace and security in this ocean space. Can India, an emerging regional maritime power, play the role of a facilitator in that context? During the Cold War era, India was not seen as a credible maritime power by others. It was also unable to acquire the needed acceptance as a benign maritime neighbour, largely due to Cold War perceptions at global

and even regional level. Today, the situation has altered for better. Not only is India accepted as a regional maritime power capable of exploiting living and non-living resources in its adjacent sea space but is also gaining acceptance as a credible regional maritime partner both in the context of economic cooperation like AOR-ARC as well as in cooperation in the field of maritime security. The Indian Coast Guard and Indian Navy are developing close cooperation with several littoral states of Africa, Gulf and South-East Asia. India, given the goodwill and support of regional powers, has the capability to help lay the foundation of multi-faceted regional cooperation in Indian Ocean region that can include areas like trade and shipping, fisheries, exploration and exploitation of off-shore oil and gas, health care, education, tourism etc beside meeting threats posed by non-state actors like pirates as well as terrorists.

In the sixties some critics of India had objected even to the use of the term Indian Ocean. A few had suggested alternate terms like Indonesian Ocean and Afro-Asian Ocean. Instead of quibbling over the name let us work towards converting Indian Ocean as a zone of regional cooperation and prosperity. May be, together we can succeed in reversing the tide after more than five hundred years and make it a peace zone in reality as it was before the entry of Vasco da Gama in 1498.

Table 1. Crude Oil: OECD and the World, Supply and Demand (in mbd)

	1970	1980	1990	2000	2005	2009
World demand	59.6	60.0	66.9	84.0	84.4	-
That of OECD*	11.2	11.6	18.6	49.8	45.6	-
% of world	23.1	18.8	19.2	27.8	59.3	54.0
World Supply	45.6	60.0	60.2	67.7	84.2	84.1
OECD share*	27.6	32.4	27.2	37.3	20.3	19.5
% of world	60.7	53.9	48.7	55.1	24.1	23.2

Based upon data from Table 14, *UN 1984; UN 1993, and UN 2006 and OPEC Bulletin*, 12(3), April 2010: 85.
*Between 1970-2000, only USA, West Europe and Japan are included among OECD countries.

(One mbd = 50 mn tons per year)

Table 2: Anticipated Demand for Crude Oil (in mbd).

	2010	2015	2020	2025
World Total	89.9	96.8	104.0	113.3
That of OECD	50.7	52.0	53.0	53.9
That of developing countries	33.3	39.2	45.1	51.3
That of transition countries	5.3	5.8	5.9	6.1

Source: *OPEC (2005).*

Table 3: USA, Production, Consumption and Import of Crude Oil (in mn tons, 50 mn tons = 1 mbd).

	1970	1980	1990	2000	2003
Production	474.3	422.3	371.0	287.9	280.2
Consumption	539.9	666.7	662.4	772.8	791.0
Import	65.5	247.1	289.6	481.6	515.0
As percentage of Total crude oil Consumption	12.5	37.1	43.6	62.3	65.1

Table based upon data provided in Table 14 of *UN 1984, UN 1993, and UN 2006.*

Table 4: Defence Expenditure of Arab States of the Gulf (in $ mn).

Arab State of the Gulf`	1998	2000	2004	2007 (Est.)
Bahrain	304	337	491	543
Iraq	na	na	na	3,313
Kuwait	2,735	3,082	3,679	4,400
Oman	1,774	2,139	3,030	3,813
Qatar	na	na	na	na
Saudi Arabia	20,513	20,125	21,074	36,793
UAE	2,986	2,876	2,585	5,702
Total (Est.)	28,312	28,559	30,859	50,265
Iran	2,290	4,731	5,816	6,592

Source: *SIPRI Yearbook (2008): 178, 225, 231-32*

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State and Health under Capitalism

K. M. Seethi and Reghunathan M.

Leo Panitch and Colin Leys (eds.) (2009): **Morbid Symptoms: Health Under Capitalism: Socialist Register 2010**, New Delhi: Leftword Books.

The role of state in the realm of public services such as health is being debated in the contemporary development debates, particularly in the backdrop of neoliberal globalisation. The ascendancy of the neoliberal state has wider ramifications in the context of the retreat of the Welfare State and the end of social security paradigm. Neoliberalism is not a mere a resurrection of the orthodox 'laissez faire' economic ideology that prevailed in the nineteenth and early twentieth century. It has come to dominate public discourse and the modalities of the state, virtually in every part of the world.

The neoliberal regime promotes the basic idea that the state should be limited in its role in modern society apart from securing private property rights and contracts. A Darwinian world is apparently emerging - the struggle of all against all, at all levels of the hierarchy, which finds support through everyone clinging to their job and organisation under conditions of insecurity, suffering, and stress. The ultimate foundation of this entire economic order placed under the sign of freedom is, in effect, the structural violence of unemployment, of the insecurity of job tenure and the menace of layoff that it implies. It preaches the subordination of nation-state to the requirements of economic freedom for the masters of the economy, with the suppression of any regulation of any market, the prohibition of deficits and inflation, the general privatisation of public services, and the reduction of public and social expenses. The neoliberal state promotes the belief that the market should be the organising principle for all political, social, and economic decisions. It wages an attack on public goods, the welfare state, and all non-commodified values. Neoliberalism dominates the discourse of politics and uses the rhetoric of the global victory of free-market rationality to cut public expenditures, and undermine those non-commodified public spheres. Supported by the mass media, right-wing intellectuals, religious fanatics, and politicians, neoliberal ideology has found its material expression in an all-out attack on democratic values and on the very notion of the public sphere. Within the discourse

of neoliberalism, the notion of the public good is devalued and, where possible, eliminated. Public services such as health care, child care, public assistance, education, communication and transportation are now subject to the rules of the market.

The state, no doubt, plays an important role in the realm of health. The profound changes the world has witnessed during the last four decades have greatly affected and led to a repositioning of the state's role in health as well as other social sectors. As market forces fail to address properly the health needs of populations, the state has an obligation to intervene in order to improve both equity and efficiency, to carry out public health functions and to produce vital public goods which have bearing on health development. Governments, through ministries of health and other related ministries and agencies, play an important role in the realm of health through strengthening health systems and generation of human, financial and other resources. This allows health systems to achieve their goals of improving health, reducing health inequalities, securing equity in health care financing and responding to population needs. Improved health outcomes are not attributable to health systems alone, as evidence has shown, but to social, economic, cultural and environmental determinants also, as reflected in the WHO conceptual framework of 'Health for All'.

The role of the state in health development is well documented worldwide and is illustrated by the impressive growth of health systems, initiated and supported by governments and pursued through partnership with the private sector, nongovernmental organisations (NGOs) and charitable institutions. Governments, which impose taxes and benefit from natural resources, have social obligations to provide health and human security and to facilitate socio-economic development. The changes and challenges which took place during the past several decades have greatly affected, and led to a repositioning of the role of governments in health as well as other social sectors. Attempts towards democracy, decentralisation and a more active role for civil society in governance, and the growing importance of the private sector in socioeconomic development, have been accompanied by policy changes reflecting more privatisation, a more restricted role of government in policy development, strategic planning and management, and greater reliance on market forces..

However, governments play a crucial advocacy role in promoting the central role of health in overall social and economic development. Several studies, including the report of the Commission on Macroeconomics and Health, have shown the interplay between health and economic development and have concluded that inter sectoral collaboration should be developed in order to harness the important synergies between health and development. The focus on the social determinants of health gained momentum following the Declaration of Alma-Ata

which targeted the achievement of health for all through primary health care, and this focus was further affirmed in the UN strategies for comprehensive socio-economic development following the World Summits for Social Development in 1995 and 2000. Several initiatives were taken by ministries of health and other related ministries of the region to improve health outcomes through promoting the social and economic determinants of health, such as a sustainable environment, literacy, female education and empowerment, and poverty reduction.

The changes and challenges which evolved globally, regionally and nationally during the last half of the twentieth century have had significant impact on health systems, on the pace of their development and on health outcomes. In the political field, democratisation with more participation of civil society in governance and focus on local and decentralised government has affected the configuration of health systems worldwide and in the region. Policy development is becoming more participatory, and organisation and management of health services delivery is being further decentralised to provinces and even to communities. This trend was strengthened following the Alma-Ata Declaration. The main challenge since the early 1980s is represented by the move towards market economies and the reduction in interest in central planning in social and economic development. In many developing economies, macroeconomic reforms including structural adjustment and stabilisation programmes, were implemented under pressure from the International Monetary Fund and the World Bank and were often accompanied by cuts in public spending on social sectors including health and education.

Active privatisation policies were also adopted in most health systems through incentives provided to private investors in the form of subsidised loans and tax credits, particularly in poor and deprived regions. Incentives were also developed in many health systems of the region allowing government health workers to practise privately inside and outside the public facilities. In the social field, the main challenges are represented by growing poverty, widening disparities within and between countries and increasing social exclusion. Almost 3 billion people are living on less than US$ 2 per day, despite rising per capita income in many developing countries. The average income ratio at global level of the richest 20 per cent of the population to the poorest 20 per cent is 82 to 1, compared to 30 to 1 in 1960. The increase in social, economic and environmental vulnerability is associated with a deterioration of health status among deprived communities and calls for a more proactive role from governments.

Globalisation has also had an impact on health systems, and particularly on access to health care. The conflict over acquisition of affordable antiretroviral treatment for poor AIDS patients in South Africa and other developing countries illustrates some of the threats posed by the implementation of TRIPS agreements. The migration of scarce human resources from countries of the South will further

weaken health systems as a result of GATS (General Agreement on Trade in Services), as is being witnessed in some regions including Africa.

The World Health Report 2008 noted that across the world, expenditure on health has been growing: between 1995 and 2005, it almost doubled. The rate of growth was accelerating: between 2000 and 2005, the total amount spent on health in the world increased by $ 330 billion on average each year, against an average of $ 197 billion in each of the five previous years. Health expenditure was growing faster than GDP and faster than population growth. The net result is that, with some exceptions, health spending per capita grew at a rate of more than 5 per cent per year throughout the world. This common trend in the growth in health expenditure masked a greater than 300-fold variation across countries in per capita expenditure, which ranges from less than $ 20 per capita to well over $ 6 000. These disparities stratified countries into three categories: high-expenditure health economies, rapid-growth health economies, and low-expenditure, low-growth health economies.

The high-expenditure health economies, not surprisingly, are those of the nearly 1 billion people living in high-income countries. In 2005, these countries spent on an average $ 3752 per capita on health, $ 1563 per capita more than in 1995: a growth rate of 5.5 per cent per year. At the other extreme is a group of low-expenditure, low-growth health economies: low-income countries in Africa and South and Southeast Asia, as well as fragile states. They total 2.6 billion inhabitants who spent a mere $ 103 per capita on health in 2005, against $ 58 in 1995. In relative terms, these countries have seen their health expenditure per capita grow at roughly the same rate as high-expenditure countries: 5.8 per cent each year since 1995, but, in absolute terms, the growth has been disappointingly low. With 2.6 billion people and less than 5 per cent of the world's health expenditure, countries in this group suffer from an absolute under-funding of their health sector, along with a disproportionally high disease burden. The persistence of high levels of maternal mortality in these countries− they claim close to 90 per cent of all maternal deaths − is perhaps the clearest indication of the consequences of the under-funding of health on the performance of their health systems. Worryingly, growth in health expenditure in these countries is low and highly vulnerable to their political and economic contexts. In fragile states, particularly in those located in Africa, health expenditure is not only low but barely growing at all, and 28 per cent of this little amount of growth in recent years is accounted for by external aid. Health expenditure in the other countries of this group is growing at a stronger average rate of 6 per cent to 7 per cent per year. On current trends, by 2015, per capita health expenditure would have more than doubled in India compared to 2005, and increased by half elsewhere, except in fragile states. In many countries, this represents significant leverage to engage

primary health care (PHC) reforms, particularly where the growth is through increased government expenditure or, as in Southern Africa, through other forms of prepayment. In India, however, more than 80 per cent of the growth will, on current trends, be in out-of pocket expenditure, offering much less leverage.

Countries in these regions accumulate a set of problems that in all their diversity share many characteristics. Whole population groups are excluded from access to quality care: because no services are available; because they are too expensive, or under-funded, under-staffed and under-equipped; or because they are fragmented and limited to a few priority programmes. Efforts to establish sound public policies that promote health and deal with determinants of ill-health are limited at best. Unregulated commercialisation of both private- and public-health care is quickly becoming the norm for urban and, increasingly, for rural populations − a much bigger and more underestimated challenge to PHC's values than the verticalism that so worries the international health community. In most of these countries, the state has had, in the past, the ambition to run the health sector on an authoritarian basis. In today's pluralistic context, with a multitude of different providers, formal and informal, public and private, only few have succeeded in switching to more appropriate steer-and-negotiate approaches. Instead, as public resources stagnated and bureaucratic mechanisms failed, laissez-faire has become the default approach to management of the health sector.

The Report says that across all of the diverse national contexts in which PHC reforms must find their specific expression, globalisation plays a major role. It is altering the balance between international organisations, national governments, non-state actors, local and regional authorities and individual citizens. The global health landscape is not immune to these wider changes. Over the last 30 years, the traditional nation state and multilateral architecture have been transformed. Civil society organisations have mushroomed, along with the emergence of public-private partnerships and global advocacy communities identified with specific health problems. Governmental agencies work with research consortia and consulting firms as well as with non-state transnational institutions, foundations and NGOs that operate on a global scale. National diasporas have appeared that command substantial resources and influence with remittances – about US$ 150 billion in 2005 – that dwarf overseas development aid. Illicit global networks make a business out of counterfeit drugs or toxic waste disposal, and now have the resources that allow them to capture and subvert the capacity of public agencies. Power is gravitating from national governments to international organisations and, at the same time, to sub-national entities, including a range of local and regional governments and non-governmental institutions. This new and often chaotic complexity is challenging, particularly to health authorities that hesitate between ineffective and often counterproductive command and control and

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deleterious laissez-faire approaches to governance. However, it also offers new, common opportunities for investing in the capacity to lead and mediate the politics of reform, by mobilising knowledge, the workforce and people.

The World Health Report 2008 also revisited the ambitious vision of primary health care as a set of values and principles for guiding the development of health systems. The Report represents an important opportunity to draw on the lessons of the past, consider the challenges that lie ahead, and identify major avenues for health systems to narrow the intolerable gaps between aspiration and implementation. These avenues are defined in the Report as four sets of reforms that reflect a convergence between the values of primary health care, the expectations of citizens and the common health performance challenges that cut across all contexts. They include: universal coverage reforms that ensure that health systems contribute to health equity, social justice and the end of exclusion, primarily by moving towards universal access and social health protection; service delivery reforms that re-organise health services around people's needs and expectations, so as to make them more socially relevant and more responsive to the changing world, while producing better outcomes; public policy reforms that secure healthier communities, by integrating public health actions with primary care, by pursuing healthy public policies across sectors and by strengthening national and transnational public health interventions; leadership reforms that replace disproportionate reliance on command and control on one hand, and laissez-faire disengagement of the state on the other, by the inclusive, participatory, negotiation-based leadership indicated by the complexity of contemporary health systems.

The World Health Report 2010 says that WHO's Member States have set themselves the target of developing their health financing systems to ensure that all people can use health services, while being protected against financial hardship associated with paying for them. In this report, the WHO maps out what countries can do to modify their financing systems so they can move more quickly towards this goal - universal coverage - and sustain the gains that have been achieved. The report builds on new research and lessons learnt from country experience. It provides an action agenda for countries at all stages of development and proposes ways that the international community can better support efforts in low income countries to achieve universal coverage and improve health.

Health under Capitalism

The book under review offers a critical assessment of health under capitalism, providing insights into the antagonistic relationship between capitalism and human bodies, of how modern healthcare has been deeply penetrated by neoliberal

capitalism and the ways in which healthcare workers, activists and socialists are struggling and pursuing alternative paths of solidarity in human health.

There are two fundamental issues addressed by the editors of the volume. One is the need to focus on the militant campaign that is now being waged by capital – the health insurance industry, the pharmaceutical and biotechnology industry, and big healthcare provider companies – to break up state-funded and provided healthcare systems in every country that has them, and turn them into fields of accumulation. The power of the corporations moving in on public health services is huge, and growing. In advanced capitalist countries such as Canada and Britain, they are major actors in the restructuring of states on neoliberal lines that has been pushed through to a greater or lesser extent in all countries over the past 30 years. They are increasingly installed at the heart of government policy-making. Health ministries and departments have been downsized and policy development has been handed over to private sector personnel as consultants, or appointed to government posts, while ministers and career civil servants leave to take lucrative jobs in the private health sector. The boundary between public and private interests is increasingly blurred, especially in relation to health. This is not nearly as well understood as it needs to be. The other issue is the fact that healthcare, important as it is, is not the most important thing: the crucial determinants of health, wherever you live – India, Canada, South Africa, the USA, it makes no difference – are good food, good shelter, safety at work and protection against infections, so whether you and your family are healthy or not is above all a matter of equality. The poorest countries have the worst health, and so do the poorest people in all countries, including rich ones. Unless public policy is geared toward equality, even in rich countries most people's health will remain a lot worse than it should be. But the more neoliberal a government is, the less policy is concerned with equality. In the U.S. and the U.K., where inequality has been dramatically increased, it is condemning growing numbers of people to pain, disability and early death. The same is true internationally. According to Meri Koivusalo, effective control over international health policy has been steadily transferred from the World Health Organisation to commercially-oriented and unaccountable organisations such as the Gates Foundation and the Global Fund to fight AIDS, tuberculosis and malaria. Even the WHO depends on 'voluntary' contributions from a range of sources for over four-fifths of its budget, as opposed to its core funding through UN member states. The bulk of health aid is thus increasingly controlled by agencies with links to corporate interests, especially those of big pharma. The WHO's 1978 commitment to promoting 'health for all' via comprehensive primary care has given way to aid targeted at specific diseases largely chosen by these other agencies. The aim of improving people's health is compromised by the aim of making money.

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Colin Leys says that neoliberalism has showed clearly how capitalism fosters/ perpetuates ill-health in today's medical environment by increasing inequality, both between and within nations. In spite of the abundant evidence on all these points, the myth that 'capitalism promotes health' is consciously or unconsciously accepted by most people in the world. Yet, "the most important common factor in the success of capital's drive to convert state-funded health care into a profit-making commodity has undoubtedly been the wider hegemony of neoliberalism, both as a system of social practices and as a system of ideas." According to Hans-Ulrich Deppe, the healthcare systems of most countries are "hard-pressed for resources." This is mainly a question of distribution, and we have to recognise – even in medical science – that this is a question of social choice and political power. Almost all health systems are said to be 'too expensive.' Deppe says that "the myth of a 'cost explosion' has been energetically promoted and the costs are seen solely as a burden on economic development – an issue affecting where, in global economic competition, capital will locate." This might mean a "radical change in the concept of health care, from the traditional idea of collectively dealing with a social risk, to health care as a support for private capital accumulation. Solidarity in health care is displaced by individual and private interests, in a process of re-individualisation and commercialisation." Deppe asserts that "health is not a commodity."

David Coburn argues that despite its recent ascendency, neoliberalism "has lost its credibility." However, much before the current crisis, "the 'trickle-down' theory of the benefits of capitalist growth had been decisively disproven, although powerful business interests have managed to keep it alive." The vast inequalities neoliberalism has created has led to increasing attention being paid to health and health inequalities as measures of human well-being, and "a questioning of the economistic view which equates increases in GNP/capita with human betterment." The "change in the balance of class forces lies behind both national differences in health status, and the inequality in health within nations. Class mobilisation and politics are critical for health and health inequalities, because progressive social and class movements and parties are the dynamic forces pushing for improvements in the human condition, rather than simply more of everything for the rich," he says.

Kalman Applebaum takes a critical look at "medicalisation" and 'pharmaceuticalisation" of the health care delivery system. Pharmaceutical sales, of late, have increased at a compounded annual rate of 10 per cent. This trend is due to the vigorous promotional campaign and sales drive the pharmaceutical companies launched to push their products. He shows an instance where the money spent by a reputed company on promoting the sales of a certain drug in 2002 was 100 times that of the health budget of Haiti in that year.

Mohan Rao discusses the Indian scenario and argues against the 'new political economy' which is threatening the marginalised and the poorer sections of the people. Instead of an expansion of the state's commitment to public health as promised in the early 1980s, over the two decades since India embarked upon structural adjustment there has been a decline from already low levels. The 2002 National Health Policy admitted that India's public expenditure on health was the fifth lowest in the world as a percentage of GDP. In 2006 general government spending on health was less than 20 per cent of all health expenditure. The decline in public investment in health was matched by growing subsidies to the private healthcare sector, the largest and one of the least regulated in the world. Evidence from across the country indicates that access to health care has declined sharply over this period. The policy of levying user fees has had a negative impact on access to public health facilities, especially for poor and marginalised communities, and for women more generally. As the 2002 National Health Policy also acknowledged, medical expenditure had by then already emerged as one of the leading causes of personal indebtedness. Equally significant have been other changes. Inter-regional, rural-urban, gender and economic class differentials in access to health care in India were already well-documented before the 1990s.

State support for private health care grew with the initiation of various kinds of private-public partnerships. A range of incentives has also been offered to the private health sector. These include the provision of land at throw-away prices, customs duty exemptions for importing sophisticated medical technology, and loans from financial institutions at low interest rates. The period thus witnessed the emergence of a corporate health sector, increasingly influential in policymaking. The institutions involved have not always provided free services to the poor as they were expected to under the terms of their contracts. The incentives given to the private sector have led to India's emergence as a major destination for health tourists, including as a centre for reproductive health. Thus while India produces more than enough doctors – but not enough nurses – for her public health system, it is facing an acute crisis in human health resources for the public health system.

India has also emerged as a major exporter of human health resources. The emigration of skilled workers does bring some benefits to the migrants and their families, with further benefits to the state in terms of foreign exchange flows, but it comes at a heavy price for the country. Meanwhile far-reaching changes came in India's drug policy. India was known for its relatively low costs of drugs and pharmaceuticals and for its significant indigenous production of drugs. With its accession to the WTO, India witnessed a greater concentration of drug production, a larger role for multinationals, a higher proportion of imported drugs and a dramatic increase in the cost of drugs. This too has contributed to the steep rise of medical care costs. Amendments to India's Patent Act, came about by 2005,

further vitiated the situation. All this led to marked shifts in healthcare utilisation. It was already the case in the mid-1990s that among people who sought out-patient services more than 80 per cent did so in the private sector, and this was visible even in the poorer states of the country. The same was true of in-patient care: in 1995-96, 55 per cent of patients in rural areas and 57 per cent urban areas were treated in private hospitals, compared to 40 per cent in both rural and urban areas in 1986-87. By the mid-point of the current decade things had worsened. A further 4 per cent in rural areas and 5 per cent in urban areas had shifted to private services by 2004. In short, more people were turning away from the collapsing public system, a collapse that was an outcome of public policy. An increasing proportion of people borrowed or sold assets in order to access medical care in the private sector.

Mohan Rao stated that class inequality in the use of health facilities has increased over years. In rural areas class differences in the in-patient use of public hospitals, insignificant in the mid-1980s, turned statistically significant in the mid-1990s. In urban areas, inequality in the use of public facilities did not worsen significantly, but inequality in use of private facilities did. The steep fall in rural hospitalisation rates, along with increasing use of hospitals by the better-off, indicates that the poor are now being squeezed out. User fees are one important reason for this. In other words, the type of market-oriented policies on health famously advanced by the World Bank in its 1993 *World Development Report* succeeded in doing exactly the opposite of what was ostensibly their raison d'être: to reduce the utilisation of public services by the better-off in order to increase access for the poor. What people need to pay for both out-patient and in-patient care increased sharply in both rural and urban areas of India after the mid-1980s. In rural areas, private out-patient costs increased by 142 per cent as against 77 per cent in the public sector. In urban areas, private out-patient costs increased by 150 per cent compared to 124 per cent in the public sector. The increase in what people had to pay for in-patient care is even more striking: average charges rose by 436 per cent in rural areas and 320 per cent in urban areas. The counterpart to poor public financing is that India has one of the highest levels of private medical expenditures in the world: out-of-pocket personal expenditure accounts for 83 per cent of the total health expenditure. At the same time, the proportion of people not getting any type of medical care due to financial reasons had already increased between 1986-87 and 1995-96: from 10 to 21 per cent in urban areas, and from 15 to 24 per cent in rural areas. Since then, even the middle classes are finding it increasingly difficult to meet medical care costs.

The message of the volume is that unfettered privatisation of the health care delivery system in various countries, which is the result of neoliberal globalisation, is counter-productive to achieving a reasonable level of health. The contributors

of the volume underline this by critically examining the reforms in countries such as the US, Western Europe, and Canada. They also point to the specific diseases like HIV and malaria to prove their theses. The volume also discusses how, in spite of continued trade embargo by the US, Cuba has been able to achieve admirable improvement in health indices. The reforms that are put in place in China are also analysed in detail. What emerges from the *Socialist Register 2010* is that there is hardly any alternative to state-sponsored health care globally, if the goal of health-for-all is to be achieved, even if that should take some decades. *Morbid Symptoms* should be read by all, and it is a compulsory reference work to medical practitioners, students, and health professionals.

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Solidarity or Sabotage?

Michael Barker

Kim Scipes (2010): **AFL-CIO's Secret War against Developing Country Workers: Solidarity or Sabotage**?, Lanham, MD: Lexington Books.

Late last year, long-time rank-and-file union activist and Assistant Professor of Sociology at Purdue University, Kim Scipes, published an important book that provided many answers as to why a global democratic labour movement has yet to truly blossom. Much to my dismay, however, the price-tag on this must-read book was a princely $65 (for the hard-back edition), which in a time of revolution-inducing austerity had the potential of rendering it a largely unread must-read title. But thankfully, this need no longer be the case, and as a result of Scipes' hard work and good name, his book has sold so well that his publisher has just brought out a paperback edition, at a more accessible cost of $35: still a lot of money, but well worth the financial investment all the same.

So given the plethora of books that have already scrutinised the democratic deficit of the US labour movement, why should you buy this book? Well, for one, it is immensely readable, which is a rare treat in the jargon-laden world of academic publishing. Secondly, it lays bare the root causes of the labour movement's existing maladies, and proposes workable solutions. And finally, in a world that is rapidly moving towards the ideas of revolutionary socialism, it draws much needed attention to the regressive impact that US labour has had, and is continuing to have, on radical activism the world over: an important issue that to date has been overlooked, with tragic consequences, by most progressive labour commentators. On the latter point, a rare exception is Paul Street, who concludes in his review of Scipes' book that it is a "welcome, overdue, and highly informed exposé of U.S. labour imperialism and its nefarious effects both in the 'third' or 'developing' world (the periphery and semi-peripheries of the world capitalist system) and in the eye of the imperial hurricane -- the American 'homeland.'"

For most people, it is obvious that international solidarity should be the bounding principle of any labour movement, but in practice this has not always been the case. Much of this has to do with the capitalist-aided rise of (unaccount-

able) labour leaders who speak of solidarity while practising sabotage: sabotage which has cost the lives of countless workers struggling against the oppressive machinery of global capital. The fact that labour leaders (not rank-and-file activists) have so regularly sold-out workers to capitalists is despicable, but nevertheless in a world awash in capital it is quite understandable -- which is why reading Scipes' detailed exposition on the history of this misleadership is so important, especially for workers seeking to rectify this situation.

Scipes writes that for the almost one hundred years that the US labour movement has had a foreign policy programme, "Labor's foreign policy leaders -- including the top elected officials in the labor movement -- have never given an honest report to their members of what they have been doing around the world and why they have been doing it." In fact, he adds, these leaders have "actively resisted efforts" to expose the largely unknown history of their imperial interventions in foreign labour movements. Scipes seeks to address this critical issue, and he notes that, his... book makes three major claims: (1) the foreign policy programme of the AFL-CIO (and the AFL before it) tries to dominate foreign labour movements, especially in developing countries and, therefore, is an imperialist foreign policy; since it comes from within the labour movement, it should be understood as being labour imperialism; (2) that this labour imperialism began before the Bolshevik Revolution in Russia in 1917, so it was not a reaction to the Bolsheviks, but rather preceded their efforts; and (3) while being designed to advance the interests of the U.S. Empire, it comes at the expense of developing country workers and, increasingly, at the expense of American working people -- ultimately, U.S. labour imperialism also hurts American workers.

In brief, his argument is that a "small group" of the AFL-CIO's foreign policy leaders "have subverted the larger, desired purpose of any labor movement" which aims "to advance the social, political and economic well-being of its members and, by implication, the well-being of workers everywhere." To explain this toxic legacy, Scipes traces the origins of this foreign policy to the political choices made by Samuel Gompers, the first President of the American Federation of Labor (AFL), scrutinising the role of the AFL in the Mexican revolution, World War I, and in the rise of the Soviet Union. Scipes then critically reviews the trajectory of the US labour movement's foreign policy to the present day, demonstrating how their leaders, acting behind the backs of the US workers, have collaborated to help overthrow democratically-elected governments; and actively supported labour movements set up by dictatorships "to ensure that the workers, along with the rest of civil society, would never be able to coalesce and restore popular democracy in these particular countries."

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In the third chapter of his book, Scipes details the ongoing resistance -- from within the labor movement -- to the AFL-CIO's ongoing commitment to labor imperialism. Although he acknowledges that there has always been grassroots resistance to the anti-democratic activities of the US labor movement's leaders, Scipes pays particular attention to events occurring in the post-1995 period.

The choice of 1995 is significant because it marked the rise to power of John Sweeney, who in that year became the president of the AFL-CIO in what was the first democratic presidential election held by the labour center since it was founded in 1955. Sweeney was thus elected in part because of the union membership's "repulsion against the AFL-CIO's foreign policy program," and although in many ways his initial political moves "suggested a radically new approach to international labor movement," Scipes demonstrates how Sweeney ultimately "betrayed" his supporters who sought to bring an end to labour imperialism. This betrayal is illustrated by the fact that under Sweeney, the AFL-CIO has continued to work closely with the U.S. government's leading imperial "democracy promoting" agency, the National Endowment for Democracy; and so it is appropriate that the fourth chapter of Scipes book focuses on "the U.S. Government's efforts to incorporate AFL-CIO leadership into its foreign policy efforts..."

The fifth and final chapter of the book not only summarises the findings of Scipes study, but highlights existing problems with current sociological theory, and makes the case for the adoption of a new theoretical approach to help understand the often over-looked problems covered by his study. Scipes, however, points out that while all manner of non-governmental organisations contribute to the promotion of imperialism, labour organisations are the only such bodies that have the power to be able to bring imperialist governments' to their knees through the collective withholding of their labour power. It is for this reason that he argues that workers based in the United States should still fight to democratise even the most troublesome unions. With all of their weaknesses -- and there are many -- unions still are the one institution in U.S. society that are of the workers, by the workers, and for the workers: there simply is nothing else in our society that even remotely serves the interests of working people, especially in the workplace. In my opinion, they must be defended.

Yet, saying that, working people should not put their energy into repeating mistakes: the only reason to fight for business unions is to transform them. Labour activists have to transform the unions we are now in, and we have to create new unions; we must transform our existing unions and create new unions to fight for the interests and well-being of all working people, here and around the world. We can no longer accept inward-focused, selfish, business unionism (120).

Instead, Scipes calls for activists to intensify the struggle within the AFL-CIO and work on the urgent task of transforming the crippling American version of trade unionism "at least into social justice union forms of economic trade unionism, and preferably into social movement unionism." This will be no easy task. However, armed with the historical insights developed in his invaluable book, rank-and-file trade unionists will now at least be in a more favourable position to organise their fight to reclaim the labour movement: working to collectively transform the sordid history of labour imperialism into a democratic member-driven alternative that will assert the demands of popular democracy in the face of capitalism; thereby working to produce democracy, not Empire.

Notes

1. Paul Street, "A Betrayal of the Highest Order: Reflections on Kim Scipes' Important New Book on U.S. Labor Imperialism," Znet, April 23, 2011; on-line at www.zcommunications.org/contents/177776/print.
2. Scipes 2010: xi.
3. Scipes 2010: xxiv, As a endnote to this point, Scipes observes: "Let us be clear: the damage to American workers, while increasing over time, nonetheless is nowhere near comparable to that which has affected workers in developing countries, as is shown herein."
4. With regard the support of imperial labor movement's, Scipes provides in-depth accounts of the AFL-CIO's activities in Chile in the early 1970s, in the Philippines in the mid- to late-1980s, and in Venezuela in early 2000s (Scipes 2010:xii).
5. For details of the early movement to democratise the AFL, see David Nack, "The American Federation of Labor Confronts Revolution in Russia and Early Soviet Government, 1905 to 1928: Origins of Labor's Cold War," Unpublished Ph.D. Dissertation, State University of New Jersey, 1999.
6. Scipes writes that "other than efforts largely around building labor support for the Soviet Union during the 1930s and '40s -- a controversial project within Labor to say the least -- efforts to build international labor solidarity did not seriously re-emerge until the middle 1960s. A number of analysts began challenging AFL-CIO foreign policy. The most important of these efforts was by Ronald Radosh (1969), who did one of the earliest in-depth studies of AFL foreign policy under Gompers, albeit seeing the source of this foreign policy as being outside of the labor movement." (69-70) See Ronald Radosh, *American Labor and United States Foreign Policy*.
7. In October 2003, U.S. Labor Against the War (USLAW) was founded. According to Scipes: "A key development in USLAW's short but powerful existence has been to get the AFL-CIO's 2005 National Convention to pass a resolution demanding that U.S. troops be 'rapidly removed' from Iraq. The significance of this cannot be overestimated: not only did this, in effect, overturn an AFL-CIO Executive Committee resolution -- impressive in and of itself -- but this was the first time in its history that the

U.S. labor movement has challenged U.S. foreign policy while at war, and demanded that the troops be brought home rapidly." (78)

8. "What the AFL-CIO does is add to the weapons in the arsenal of the U.S. Empire. It adds to the non-military efforts of the CIA, the National Endowment for Democracy (NED), USAID and related organizations, reducing the need for U.S. military intervention, which the U.S. elites try to avoid unless deemed absolutely necessary. And should U.S. military intervention be deemed "necessary," the AFL-CIO's efforts add to the chances of success, while ensuring the resumption of production when desired, and all the time helping to legitimize these attacks on sovereign countries. It is a substantial contribution to the on-going power of the U.S. Empire. (Scipes 2010: xxxii).

   "Yet there is one more 'service' the AFL-CIO provides to the Empire that is perhaps even more important: it undercuts opposition to the imperial project from within the United States, and especially limits the power of the most organized section of American society, organized workers. In other words, by active collaboration with the Empire, the AFL-CIO keeps the most organized and experienced leaders that have emerged from among working people chained, unable to act against Empire or foreclosed from being won to that position by others in the society. To put it another way, the AFL-CIO's foreign policy program neutralizes arguably the key leadership in our society that has the ability to mobilize American workers against the imperial project. This makes its contribution to the imperial project all that more important." (119)

8. This is not the place to attempt to summarize Scipes' theoretical work, but this is a topic that I will take up in a forthcoming article. For further details of Scipes' scholarly interventions, see Kim Scipes, "Why Labor Imperialism? AFL-CIO's Foreign Policy Leaders and the Developing World," WorkingUSA: *The Journal of Labor and Society*, 13, December 2010, pp.465-79. And Kim Scipes, ""Globalization from below: Labor Activists Challenging the AFL-CIO Foreign Policy Program," *Critical Sociology*, forthcoming, 2011. For a list of his publications, go to http::/faculty.pnc.edu/kscipes/publications.htm .

9. For more on social justice unionism, see Bill Fletcher, Jr. and Fernando Gapasin, *Solidarity Divided: The Crisis in Organized Labor and a New Path Toward Social Justice* (University of California Press, 2008); and for details on social movement unionism, see Kim Scipes, "Social Movement Unionism and the Kilusang Mayo Uno," *Kasarinlan* [Third World Studies Center, University of the Philippines], 7 (2-3), 4th Qtr. 1991-1st Qtr. 1992) and available on-line at http://journals.upd.edu.ph/index.php/kasarinlan/article/view/1393/pdf_38); and Kim Scipes, "Understanding the New Labor Movements in the 'Third World': The Emergence of Social Movement Unionism," *Critical Sociology*, 19 (2), 1992. Posted on-line in English by LabourNet Germany at www.labournet.de/diskussion/gewerkschaft/smu/The_New_Unions_Crit_Soc.htm

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Writing on a hypothetical possibility of India threatening to proliferate, Perkovich (2005) writes, "…..China proliferated to Pakistan and Pakistan proliferated to Libya, Iran, and North Korea. Nor does proliferation that occurred before the NPT was negotiated justify promiscuous proliferation behaviour today."

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Journal Article: where the page numbering continues from issue to issue

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