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THE SUB-COMMISSION'S INITIATIVE ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY

DAVID WEISSBRODT* AND KELL SCHOFF**

Abstract

In 2000 the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution raising concerns about the consistency of international intellectual property protections and human rights norms. This article summarises human rights norms relevant to intellectual property and the pertinent aspects of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which overlap or potentially conflict. The article provides several examples of potential conflict and how they might be resolved. The article demonstrates that the Sub-Commission resolution helped to initiate a major international discussion and some action on the relationship between human rights and intellectual property.

1. INTRODUCTION

On 17 August 2000, the United Nations Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) adopted Resolution 2000/7, entitled 'Intellectual Property Rights and Human Rights'.¹ This resolution indicated the Sub-Commission's belief that international intellectual property regimes were not adequately taking into account human rights norms.² Resolution 2000/7 called on UN Member States, intergovernmental bodies, and various UN entities to reaffirm their commitments towards the achievement of international human rights norms, adopt a human rights approach to the development of international intellectual property regimes, and to further study the interaction between intellectual property protection and human rights.³ Resolution 2000/7 has

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¹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property Rights and Human Rights*, 52nd Sess., 25th mtg., UN Doc. E/CN.4/Sub.2/Res/2000/7 (2000) [hereinafter Resolution 2000/7].

² *Ibidem*, at para. 2.

³ *Ibidem*, at paras 4-15.

helped to initiate a UN effort to modify global trade and finance in light of human rights concerns.

This article will first examine how the seemingly disparate interests of trade and globalisation, intellectual property protection, and human rights norms converged ultimately in the adoption of Resolution 2000/7. It will then review what steps have been taken by the UN and other international norm-setting institutions in response to the Sub-Commission's call for increased awareness and integration of human rights norms into intellectual property protection regimes. Finally, it will summarise what the Sub-Commission hopes will be its next steps in promoting a human rights approach to international intellectual property protection and trade liberalisation.

2. ELEMENTS LEADING TO THE ADOPTION OF RESOLUTION 2000/7

2.1. *International Agreements*

A brief review of a few key international agreements may help to frame the rationale behind Resolution 2000/7's call for the integration of human rights norms into intellectual property protection schemes.

(1) Human Rights Treaties

In Article 15 of the International Covenant on Economic, Social and Cultural Rights⁴ the States Parties 'recognize the right of everyone (...) to [both] enjoy the benefits of scientific progress and its applications', on the one hand, and to 'benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author', on the other. Hence, international human rights law recognised the rights of inventors and authors as well as simultaneously focusing on the public right to benefit from their inventions and works of art. Article 15 does not, however, indicate how a balance might be struck between the creators, the economic interests that acquire their intellectual property, and the beneficiaries of creativity.

The Economic, Social and Cultural Covenant does, however, contain several other provisions bearing upon access to the fruits of inventions. In Article 11 States Parties 'recognize the rights of everyone to an adequate standard of living (...), including adequate food, clothing and housing, and to the continuous improvement of living conditions'. Further, States Parties recognise in Article 11 'the fundamental right of everyone to be free from hunger (...) [and accordingly agree to] improve methods of production,

⁴ *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 49, UN Doc. A/6316 (1966), entered into force 3 January 1976.

conservation and distribution of food by making full use of technical and scientific knowledge...' In Article 12 the States Parties to the Economic, Social and Cultural Covenant also 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' which shall be achieved by the 'prevention, treatment and control (...) of diseases' as well as the 'creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

Just as the Economic, Social and Cultural Covenant does not specify how to balance between the rights of inventors, owners, and users of intellectual property in Article 15, there is another balancing process between the rights of inventors or owners of inventions under Article 15 and the rights of the hungry, ill-housed, or the sick who are protected under Articles 11 and 12. Article 2 of the Covenant provides some guidance as to how governments should achieve these rights. Under Article 2 States Parties only undertake to 'take steps (...) to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in' Articles 11, 12, and 15 of the Covenant.

The Covenant is subject to authoritative interpretation by the Committee on Economic, Social and Cultural Rights and the Committee has provided more specific guidance on how to implement the general and potentially conflicting responsibilities of States Parties. The Committee has declared that States Parties have a 'minimum core obligation to ensure the satisfaction of each of, at the very least, minimum essential levels of each of the rights'.⁵ In particular, the Committee 'emphasize[d] that any intellectual property regime that makes it more difficult to comply with its core obligations in relation to health, food, [or] education (...) is inconsistent with the legally binding obligations of the State party'.⁶ The Committee's statement reminded States Parties of the 'importance of integrating international human rights norms into the enactment and interpretation of intellectual property law' in a balanced manner that protects public and private interests in knowledge without infringing on fundamental human rights.⁷

A second major human rights treaty relevant to understanding the nexus between human rights and intellectual property – particularly with respect to copyright – is the International Covenant on Civil and Political Rights.⁸

⁵ Commission on Economic, Social and Cultural Rights, General Comment 3, *The Nature of States Parties Obligations* (Article 2(1) of the Covenant), 5th Session, 1990, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 1, at 45 (1994).

⁶ Commission on Economic, Social and Cultural Rights, *Human Rights and Intellectual Property: Statement of the Committee on Economic, Social and Cultural Rights*, 27th Session, Agenda item 3, UN Doc. E/C.12/2001/15 (2001), at para. 12.

⁷ *Ibidem*, at para. 18.

⁸ *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), entered into force 23 March 1976. The Covenant on Civil and Political Rights has been ratified by 149 nations.

Article 19(2) of the Civil and Political Covenant provides that '[e]veryone shall have the right to freedom of expression (...) includ[ing] freedom to seek, receive and impart information and ideas (...) either orally, in writing or in print'. Article 19(3), however, allows governments to place substantial restrictions on the broad rights in Article 19(2) insofar as those limitations are 'provided by law and are necessary' for 'the protection of national security or of public order (*ordre public*), or of public health or morals'. Unlike the robust and primary freedom of speech guaranteed by the First Amendment to the US Constitution, the heavily restricted freedom of expression granted by Article 19 of the Civil and Political Covenant affords somewhat less basis for arguing that freedom of expression should trump or narrow copyright. Nonetheless, it has been suggested that Article 19 could support an international right to fair use, just as the First Amendment does in the United States.⁹

Based on language similar to the Covenant's Article 19, the European Convention on Human Rights¹⁰ informs a human rights approach to intellectual property protection. Article 10(1) of the European Convention on Human Rights recognises that '[e]veryone has the right to freedom of

⁹ It is unclear, however, whether a prohibition on fair use might arguably fit within the need to protect 'national security or of public order (*ordre public*), or of public health or morals'. While the concepts of 'national security and public order' have been expansively interpreted in the past couple of years, it is uncertain whether they could be used as a basis for establishing an appropriate balance between copyright and freedom of expression. See also paragraph 2.1 (2), *infra* (discussing the *ordre public* clause in the TRIPS Agreement). There is also a danger in relying too heavily on US precedent pertaining to fair use and the First Amendment. Two recent copyright cases signal a narrowing of the scope of protection for expression available under the fair use doctrine. In *Universal City Studios, Inc. vs. Corley*, 273 F.3d 429 (2d Cir. 2001), the Second Circuit hinted at the potential vulnerability of the fair use defense when it noted that 'the Supreme Court has never held that fair use is constitutionally required...' *Universal City Studios*, 273 F.3d at 458. Although the *Universal City Studios* court conceded that 'some isolated statements in [the Supreme Court's] opinions might arguably be enlisted for [a fair use] requirement', the Second Circuit's emphatic assertion that 'the DMCA [Digital Millennium Copyright Act] does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies' indicates that US judges are not particularly receptive to fair use arguments that attempt to invalidate current copyright protection laws. *Ibidem*, at 459. In *Eldred vs Ashcroft*, 123 S. Ct. 769 (2003), the Supreme Court recently confirmed the difficulty of using fair use as a tool to challenge the constitutionality of federal copyright legislation. In upholding the constitutionality of the Copyright Term Extension Act, the Supreme Court declined to impose the 'uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards', reasoning that, because the Copyright Clause and the First Amendment to the Constitution were 'adopted close in time, (...) copyright's limited monopolies are compatible with free speech principles'. *Eldred*, 123 S.Ct. at 788. The Supreme Court went on to state that '[t]he First Amendment securely protects the freedom to make – or decline to make – one's own speech; it bears less heavily when speakers assert the right to make other people's speeches'. *Ibidem*, at 789. In light of the narrow scope of fair use seen in *Universal City Studios* and *Eldred*, advocates of a human rights approach to intellectual property rights should be wary of relying too heavily on US precedent to buttress an argument for a *right* to fair use under Article 19 of the Civil and Political Covenant.

¹⁰ Council of Europe, *European Convention on Human Rights*, ETS No. 5 (1950).

expression', which includes 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. The freedom of expression, however, is circumscribed by Article 10(2), which states that '[t]he exercise of these freedoms (...) may be subject to such formalities, conditions, restrictions and penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, [and] for the protection of the reputation or rights of others...'

The Article 10 freedom of expression argument was recently raised in an unsuccessful challenge to English copyright law. In *Ashdown vs Telegraph Group, Ltd.*,¹¹ a newspaper publisher that had printed *verbatim* excerpts from an MP's personal diaries attempted to avoid liability for copyright infringement by arguing that the Article 10 freedom of expression trumped the copyright protection provided by the English Copyright, Patents and Designs Act (CPDA). The English Court of Appeal rejected that contention, reasoning that, because '[t]he needs of a democratic society include the recognition and protection of private property (...) [which] includes copyright', there was 'no reason why the provisions of the [CPDA] should not be sufficient to give effect to the Convention [Article 10] right subject only to such restrictions as are permitted by Article 10(2)'.¹² Although Article 10 protection for freedom of expression did not control in this particular case, the Court of Appeal nonetheless acknowledged that

'rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the [CPDA], notwithstanding the express exceptions to be found in the [CPDA]. In these circumstances, we consider that the Court is bound (...) to apply the [CPDA] in a manner that accommodates the right of freedom of expression.'¹³

This dictum indicates that courts may in some contexts take human rights norms into account when ruling on intellectual property litigation.¹⁴

(2) *International Intellectual Property Protection: The TRIPS Agreement*

In adopting Resolution 2000/7, the Sub-Commission expressed a fundamental concern that the Agreement on Trade-Related Aspects of

¹¹ *The Right Honourable Paddy Ashdown MP PC vs Telegraph Group Ltd.*, [2002] E.C.C. 19 (Eng. C.A.).

¹² *Ibidem*, at para. 367.

¹³ *Ibidem*, at para. 369.

¹⁴ For more extensive discussion of the *Ashdown* Case and its implications, see generally, Joseph, Louis, 'Human Rights Versus Copyright: The Paddy Ashdown Case', *Entertainment Law Review*, Vol. 13, No. 3, 2002, p. 72; Merris, Amos, 'Can We Speak Freely Now? Freedom of Expression under the Human Rights Act', *European Human Rights Law Review*, Vol. 6, 2002, p. 750.

Intellectual Property (TRIPS) does not adequately recognise human rights norms. Resolution 2000/7 reads in part:

Noting (...) that actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, *inter alia*, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food, or plant variety rights and the patenting of genetically modified organisms, 'bio-piracy' and the reduction of communities' (especially indigenous communities) control over their own genetic and natural resources and cultural values, and restrictions on access to patented pharmaceuticals and the implications for the enjoyment of the right to health...

Declares (...) that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights (...) there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other; (...) ¹⁵

Since TRIPS is such a central focus of the Sub-Commission's concern, it is appropriate to present a brief overview of the TRIPS Agreement.

The Agreement on Trade-Related Aspects of Intellectual Property Rights was a product of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) held in 1994.¹⁶ Broadly speaking, TRIPS extended intellectual property rights by creating a new World Trade Organization (WTO) enforcement mechanism with the availability of reciprocal trade sanctions.¹⁷ TRIPS requires that WTO States protect intellectual property by enacting national legislation and regulatory procedures.¹⁸

¹⁵ Resolution 2000/7, *op.cit.* (note 1), at preface and para. 2.

¹⁶ Merges, Robert P., Menell, Peter S. and Lemley, Mark A., *Intellectual Property in the New Technological Age*, Aspen Publishers, Inc., New York, 2nd ed. 2000, pp. 319-320.

¹⁷ The preface of TRIPS outlines a desire to 'reduce distortions and impediments to international trade (...) [by] taking into account the need to promote effective and adequate protection of intellectual property rights, and ensur[ing] that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade'. It also recognises the need for 'new rules and disciplines concerning (...) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights...' Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS Agreement], 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, 'Legal Instruments-Results of the Uruguay Round', Vol. 31, 33 *International Law Magazine*, 81, 1994, available at www.wto.org/english/docs_e/legal_e/27-trips.pdf.

¹⁸ 'Members shall give effect to 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.' *Ibidem*, at Article 1(1).

TRIPS recognises that nations at different levels of development will have differing policy goals with respect to the scope of intellectual property protection.¹⁹ Article 7 notes that 'protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation', yet should do so 'in a manner conducive to social and economic welfare'.²⁰ Article 8 explicitly mentions that WTO States may take into account the 'protect[ion] of public health and nutrition, and promot[ion of] the public interest in sectors of vital importance to their socio-economic and technological development' when tailoring their intellectual property regimes to the norms mandated by TRIPS.²¹ These provisions reveal a fundamental tension in TRIPS between the economic interests of intellectual property rights holders, on the one hand,²² and State and public interests in promoting public health and economic development, on the other.

This tension is reiterated in the specific context of patent protection in TRIPS Articles 27, 28, 30, and 31. Article 28 provides the general rule extending exclusive protection to patent holders.²³ Article 27, however, permits governments to 'exclude from patentability' any inventions as to 'protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment'.²⁴ Furthermore, Article 30 describes broad parameters within which it is acceptable for member States to intrude on the exclusivity of patent rights:

'Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.'²⁵

¹⁹ TRIPS prefaces its substantive articles with a recognition of 'the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable economic base.' *Ibidem*, at preface.

²⁰ *Ibidem*, at Article 7.

²¹ 'Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect 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.' *Ibidem*, Article 8.

²² The patent protection system in most developed countries typically encourages innovation by providing an economic incentive, in the form of a limited term monopoly on the production and sale of the patentable subject matter. In the United States, this policy is rooted in the text of the Constitution, which authorises Congress 'To promote the Progress of (...) useful Arts, by securing for limited Times to (...) Inventors the exclusive right to their (...) Discoveries'. US Constitution, Article I, para. 8, cl. 8.

²³ TRIPS Agreement, *supra* note 17, at Article 28(1)(a).

²⁴ *Ibidem*, at Article 27(2).

²⁵ *Ibidem*, at Article 30.

Article 31 specifies the threshold conditions and limitations that must be satisfied if a State wishes to derogate from the exclusivity of the patent protection afforded by Article 28. Before allowing the use of the subject matter of a patent without the authorisation of the patent holder, a government must first attempt to 'obtain authorization from the right holder on reasonable commercial terms'.²⁶ That requirement, however, can be waived 'in the case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use'.²⁷ Even if such exigent circumstances exist, the government must limit 'the scope and duration of such use (...) to the purpose for which it was authorized',²⁸ and such use is to be 'terminated if and when the circumstances which led to [the unauthorized use] cease to exist and are unlikely to recur'.²⁹ Hence, Articles 30 and 31 frame the balance of interests between intellectual property rights of patent holders, States, and the public at large.

TRIPS' copyright protection primarily guards the copyright interests of literary and artistic creators from developed nations. Gaps exist in the copyright protection provided for artistic and literary manifestations of traditional knowledge and indigenous culture. TRIPS incorporates Articles 1-21 of the Berne Convention for the Protection of Literary and Artistic Works³⁰ as the basis for TRIPS copyright protection.³¹ The language of the Berne Convention does provide some protection for works that encompass traditional knowledge and indigenous culture.³² Significantly though, TRIPS does not include the rights and obligations under Berne Convention Article 6^{bis}, which confers moral rights upon copyright holders.³³ The refusal to recognise moral rights of authors partially explains why some indigenous artists have difficulty in protecting their creations from

²⁶ *Ibidem*, at Article 31(b).

²⁷ *Idem*.

²⁸ *Ibidem*, at Article 31(c).

²⁹ *Ibidem*, at Article 31(g).

³⁰ *Berne Convention for the Protection of Literary and Artistic Works* [hereinafter Berne Convention], Paris Act of 24 July 1971, as amended on 28 September 1979, available at www.wipo.int/treaties/ip/index.html.

³¹ TRIPS Agreement, *supra* note 17, at Article 9(1).

³² The Berne Convention provides copyright protection for 'literary and artistic works', which include 'every production in the literary, scientific and artistic domain, whatever may be form of its expression, such as (...) works of drawing, painting, architecture, sculpture, engraving and lithography...' Berne Convention, *supra* note 30, at Article 2(1).

³³ Berne Convention Article 6^{bis} reads in part: 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.' *Ibidem*, at Article 6bis(1).

undesirable modifications or uses.³⁴ Furthermore, the remaining TRIPS copyright provisions focus on rights involving computer programmes, cinematographic works, sound recordings, and broadcasting.³⁵ These TRIPS provisions are more valuable to copyright holders in developed nations than to literary and artistic creators seeking to protect traditional knowledge and indigenous cultural rights.

Intellectual property protections under TRIPS benefit from the enforcement mechanism of the WTO. Under this system, when disputes are raised under WTO law by a government seeking examination of the legality of a national measure, the result is a binding decision addressing the validity of the national regulation.³⁶ If the complaining nation prevails, it may then place retaliatory tariffs on goods from the defending country.³⁷

(3) Dealing with Differences and Overlaps Between Human Rights Law and TRIPS

As compared with the robust sanctions-based enforcement mechanism of TRIPS within the WTO, human rights treaties have modest implementation procedures. Both the Human Rights Covenants require that States Parties report periodically on their progress in achieving the rights in the respective treaties. Those reports are reviewed by 18-member treaty bodies elected by the States Parties. The treaty bodies conclude their reviews of state reports by issuing concluding comments in which issues are raised and recommendations are made. When the government needs to make a further report – usually after a couple of years – those concerns should be the subject of attention. The Human Rights Committee also has the capacity to adjudicate complaints from the individual residents of the 104 nations that have ratified the Optional Protocol to the International Covenant on Civil and Political Rights. Committee decisions are, however, not considered to be

³⁴ Upon reading a working draft of this article, one scholar noted that 'while it's true that indigenous authors sometimes have difficulty protecting their works under established intellectual property doctrines, this relates to broader issues than moral rights. In particular, differing conceptions of ownership and differing understandings of the desirability of claiming exclusive rights often underlie the inadequacy of protection. Thus, even if TRIPS were amended to protect moral rights, many indigenous authors would still face these same difficulties'. Comments of Professor Laurence R. Helfer, Loyola Law School, Los Angeles, January 2003. For a further discussion of problems involving intellectual property protection of indigenous rights, see generally, paragraph 2.2, *infra*.

³⁵ See TRIPS Agreement, *supra* note 17, at Articles 10-14.

³⁶ See WTO, *Guide to the Uruguay Round Agreements*, WTO Secretariat, Washington, 1999, pp. 18-27 (discussing dispute settlement through the WTO).

³⁷ See *ibidem*, at pp. 23-24 ('For a government found at fault in a dispute, the possibility of [tariffs as the] ultimate sanction of retaliation is undoubtedly a strong inducement to settle the matter by withdrawing the offending measure or by giving compensation.'). See also Shell, G. Richard, 'Trade Legalism and International Relations Theory', *Duke Law Journal*, Vol. 44, 1995, p. 829, at p. 832 (discussing the WTO dispute resolution system). While it can be argued that sovereign States can still ignore a WTO ruling, the cost associated with retaliatory tariffs, and the threat that such a decision poses to the viability of the entire WTO system and the world export economy militate against such a response. See WTO, *op.cit.* (note 36), at p. 24 (discussing retaliation measures).

binding. Indeed, human rights norms are principally implemented at the international level by persuasion and embarrassment rather than sanctions. Hence, there is an imbalance in the way international obligations are effectuated under TRIPS and human rights treaties.

A related problem posed by the creation of the WTO with its incorporation of TRIPS is its failure to address any conflicts that arise under international law when a country has ratified treaties, such as the International Covenants on Human Rights, that may differ with its obligations under the WTO. A nation cannot generally absolve itself of its obligations under one treaty by ratifying a second treaty later.³⁸ In a situation in which there is a potential conflict, the Vienna Convention on the Law of Treaties calls for the interpretation of the two treaties so as to give effect to both.³⁹ It might be argued that WTO law, including TRIPS, qualifies as *lex specialis*, but that argument would not exempt nations from their human rights obligations and would not prevent human rights treaty bodies from assessing the human rights implications of intellectual property measures.⁴⁰ Hence, despite the stronger implementation procedures of the WTO, governments are obligated to seek interpretations of both TRIPS and the human rights treaties which would avoid violating either treaty regime.

The WTO has given short shrift to human rights norms when deciding conflicts in the dispute resolution system. The WTO Dispute Settlement Panels and Appellate Body are primarily focused on scrutinising the legality of national measures under GATT/WTO law.⁴¹ They are not required to

³⁸ In the unlikely situation in which all the parties to both treaties are the same, however, and the two treaties relate to the same subject matter, the first treaty may be considered amended by the second treaty. Under the Vienna Convention on the Law of Treaties, 'when all the parties to [an] earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation (...) the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. Vienna Convention on the Law of Treaties, 1155 UNTS 331, 27 January 1980, at Article 30(3). Hence, the later treaty is controlling where there is a conflict, and so is treated as an amendment to the earlier treaty.

³⁹ 'When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail', *ibidem*, at Article 30(2). To the extent that the treaties are compatible, then, each is given effect. At least one WTO Panel Report acknowledges that States Parties must seek interpretations that avoid violating both treaties. See Report of the Panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DR59/R, WT/DS64/R, 23 July 1998 (stating that 'in public international law there is a presumption against conflict').

⁴⁰ Although the WTO is a specialised agency established under Article 57 of the UN Charter, that provision does not give the WTO superior legal powers. The UN Charter protects human rights in Articles 1, 55, and 56. Further, under Article 103, the UN Charter should be considered controlling. The authority for establishment of specialised agencies under Article 57 of the Charter does not diminish the impact of Articles 1, 55, 56 and 103.

⁴¹ The Dispute Settlement Panels handle disputes under 'covered agreements', which include only GATT/WTO law: the agreement establishing the WTO, multilateral trade agreements, and plurilateral trade agreements. Understanding on Rules and Procedures Governing Settlement of Disputes, App. 1. The WTO's Dispute Settlement Body cannot 'add to or diminish the rights and obligation provided' in the covered WTO agreements and human rights instruments are not among the WTO agreements.

balance various sectors of national or international law with trade law.⁴² Further, the WTO dispute resolution system has been criticised for its lack of transparency and openness to input from *amici curiae* and other procedures for knowledgeable input from outside the trade field.⁴³

The imbalance in the way international obligations are realised under TRIPS and the human rights treaties was a significant motivating factor in the Sub-Commission's decision to adopt Resolution 2000/7.

2.2. Gaps in Protecting Traditional Knowledge, Indigenous Culture, and Human Rights

Alleged violations of indigenous cultural property rights attained visibility during the 1990s, before the immediate impetus for the adoption of Resolution 2000/7 arose. Three examples of indigenous cultures clashing with intellectual property regimes indicate why the Sub-Commission felt compelled to advocate human rights protection of traditional knowledge as part of its resolution.

⁴² *Ibidem*, Article I (stating that the agreement covers the documents listed in Appendix I, but not mentioning any balancing of national concerns). One could argue that some aspects of human rights law, such as the prohibition of genocide and slavery, constitute *jus cogens* and would thus prevail over contrary provision of WTO law. But there is very little agreement as to which principles qualify as *jus cogens*, so that argument would probably not broaden the jurisdiction of the WTO Dispute Settlement Body or the qualifications of its members. One scholar has noted, however, that 'there is some indication from the *Shrimp/Turtle* case, Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998) that WTO jurists are willing to consider not only non-trade treaties but also non-trade soft law when interpreting WTO agreements'. In *Shrimp/Turtle*, the Appellate Body concluded that the phrase 'exhaustible natural resources' was an 'evolutionary' concept to 'be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'. Those concerns, in turn, were reflected not only in treaties regulating natural resources but also in nonbinding 'declarations' addressing that topic. A similar approach might be applied to 'evolutionary' terms in TRIPS (especially the open-ended phrases in Articles 7 and 8), giving them a meaning that 'takes into account human rights norms endorsed by the international community'. Comments of Professor Helfer, *supra* note 34. Helfer also noted that imbalances between TRIPS and human rights treaties seen in the context of enforcement and implementation procedures extend to substantive norms as well: 'Particularly in the case of economic, social and cultural rights (...) [the human rights] treaties articulate norms at relatively high levels of generality as compared to the precise and detailed rules that TRIPS imposes.' Compare, *e.g.*, ICESCR, Article 12 'right to (...) the highest attainable standard of physical and mental health' to Article 30 of TRIPS dealing with patents. It is hard to see a conflict between these treaty provisions because Article 12 is quite general in scope, *idem*. Helfer goes on to note, however, that conflicts do emerge upon consideration of the Economic and Social Committee's General Comments. For discussion of the Economic and Social Committee's General Comments, see paragraph 4.4, *infra*.

⁴³ See Marceau, Gabrielle, 'WTO Dispute Settlement and Human Rights', *European Journal of International Law*, Vol. 17 (noting the effort of the Appellate Body to call for *amici curiae* briefs in the *E.C. – Asbestos* Case, the criticism of that request by WTO Members, and the response of the Appellate Body in the *US – Certain E.C. Products* decision).

The first two examples illustrate the insufficiency of copyright schemes to protect Aboriginal Australian cultural interests adequately. In the first case, an Aboriginal artist named Terry Yumbulul created an artifact called a Dreaming Star Pole, which represents where one's soul goes after death.⁴⁴ The artifact is sacred to the Aborigines, and Mr. Yumbulul had to undergo initiation rights in order to be allowed to create the artifact.⁴⁵ Mr. Yumbulul assigned the copyright on the artifact to an agent,⁴⁶ who then passed reproductions of the artifact to the Reserve Bank of Australia, which used the image on an Australian bank note. Mr. Yumbulul brought suit⁴⁷ against the Reserve Bank in an attempt to prevent distribution of the notes, which the clan considered a blasphemous use of their sacred image.

The High Court of Australia court ruled in favour of the Bank, on grounds that the copyright had been validly assigned. The court, however, noted that Australia's copyright law might not 'provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin', but declined to provide relief, because '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'.⁴⁸

The second Australian copyright case concerned the use of an Aboriginal painting as a template for a design woven into Vietnamese-manufactured carpets. The painting, displayed in the National Gallery of Australia, depicts a story of the Dreamtime.⁴⁹ The use of a sacred image as a decoration on which to walk was considered to be highly offensive by the artists and their clan. The artists, on behalf of the clan,⁵⁰ brought suit⁵¹ to enjoin the use of

⁴⁴ Symposium, 'Global Intellectual Property Rights: Boundaries of Access and Enforcement, Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources', *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 12, 2002, p. 753, at p. 760.

⁴⁵ *Ibidem*, at p. 761.

⁴⁶ Probably for use in promoting societal knowledge of Aboriginal culture in educational settings. See Blakeney, Michael, 'Millpurrurru and Ors v. Indofurn Pty. and Ors-Protecting Expressions of Aboriginal Folklore Under Copyright Law', *E Law – Murdoch University Electronic Journal of Law*, Vol. 2, No. 1, 1995, available at www.murdoch.edu.au/elaw/issues/v2n1/1.html.

⁴⁷ *Yumbulul vs Reserve Bank of Australia*, (1991) 21 IPR, p. 481 (Australia).

⁴⁸ Blakeney, *loc.cit.* (note 46), citing *Yumbulul vs Reserve Bank of Australia*, *supra* note 47, at pp. 490-492.

⁴⁹ The Dreamtime is the Aboriginal collection of folklore concerning the creation of the world; virtually all Aboriginal artwork depicting stories of the Dreamtime are semi-sacred. Symposium, 'Global Intellectual Property Rights', *supra* note 44 (citing Blakeney, *loc.cit.* (note 46)).

⁵⁰ Aboriginal custom holds that the Dreamtime stories are passed down through tribal custodians; the right to create depictions of the Dreamtime are similarly passed down from artist to artist. These custodians act as the keepers of the clan's knowledge on behalf of their people. See Blakeney, *loc.cit.* (note 46).

⁵¹ *Milpurrurru & Ors vs Indofurn Pty. & Ors*, (1994) 54 FCR 240 (Australia).

the image, alleging cultural harm suffered by the clan as a whole. The High Court of Australia tried to compensate the Aborigines for the cultural harm they suffered, awarding damages to each of the living artists⁵² for 'flagrant'⁵³ copyright infringement. Nonetheless, the Court refused to award damages to the clan as a whole, on the grounds that Australian copyright law did not provide a remedy for the alleged infringement of a collective ownership right.⁵⁴

The *Yumbulul* and *Milpururru* cases highlight gaps in the protection of indigenous rights under existing copyright law regimes. Both cases turn in part on the problem of establishing authorship. Many indigenous peoples claim a collective right of ownership, or alternatively assert that styles of art have been passed down from generation to generation. Such assertions raise issues of standing to bring suit, and duration of protection to be conferred.⁵⁵ Furthermore, even in cases like *Milpururru* where courts do provide a remedy, it usually takes the form of monetary compensation. In many cases, pecuniary gain could never fully compensate for the cultural harm suffered in these situations, and does little to deter future offenses.

The cultural harms suffered in the *Milpururru* and *Yumbulul* cases implicate rights guaranteed under the International Covenant on Economic, Social and Political Rights. Article 15(1)(a) of the Covenant recognises the right of everyone 'to take part in cultural life', and Article 15(1)(c) recognises the right of everyone 'to benefit from the protection of the moral

⁵² Each artist was awarded Australian Dollar 16,500 to 'reflect harm (...) suffered in their cultural environment'. See Blakeney, *loc.cit.* (note 46).

⁵³ Australian law allows for increased compensatory damages for copyright infringement in cases where the infringement was executed with 'total disregard not only for the legal rights of the plaintiff regarding copyright but for his feelings and his sense of family dignity and pride'. See *Williams vs Settle*, (1960) 1 WLR, p. 1072, at p. 1082. In the *Milpururru* Case, it was established that the Aboriginal depictions had been designated for educational display only, and that the artists had indicated that use of the images on carpets would be considered highly offensive to themselves and their clan. See Blakeney, *loc.cit.* (note 46).

⁵⁴ The *Milpururru* court stated that 'the statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as that used in the artworks of the present applicants...', *idem*. See also Blakeney, *loc.cit.* (note 46), noting that Australian copyright law provides remedies for infringement in proportion to the economic damage caused by the infringement, and further noting that it was untenable to think that the court could quantify the extent of economic damage to the Aboriginal cultural right.

⁵⁵ Many copyright regimes require a specific, identifiable author, or at least some identifiable entity that created the subject matter, in order to confer copyright protection. Since an entire indigenous clan or regional population generally does not participate in the creation of a particular artifact, there is a question of who exactly has suffered a legal harm for which they can pursue a legal remedy. Furthermore, in cases where indigenous peoples claim that the original depictions were created by ancestors thousands of years ago, most copyright systems provide scant protection, since the original author's life and limited term of protection has long since expired.

and material interests resulting from any scientific, literary or artistic production of which he is the author'.⁵⁶

The third traditional knowledge case, which received much greater publicity, related to the validity of a patent on an extract from the oil of an Asian tree. The neem tree is indigenous to the Indian subcontinent. Neem bark has been used for centuries as a traditional medicine, insecticide and fungicide.⁵⁷ The pharmaceutical manufacturer W.R. Grace Co. initially obtained a patent⁵⁸ from the European Patent Office (EPO) on the fungicidal properties of a neem oil extract, and then (cheekily) tried to sell the patented product on the Indian market.⁵⁹ Upon appeal by the Green Party of the European Parliament and an Indian nongovernmental organisation (NGO), the EPO revoked the patent on grounds that it did not qualify as a novel invention, in light of the traditional use of neem bark in Indian society.⁶⁰ The EPO's revocation of a patent on neem tree oil extract was a rare victory for traditional scientific knowledge over modern patent schemes.⁶¹

Responding to concerns arising from cases like the neem tree, *Milpurrurru*, and *Yulumbul*, Sub-Commission member Dr. Erica-Irene A. Daes advocated the protection of indigenous cultural and property rights since the mid-1990s. As Chairperson and Rapporteur of the Sub-Commission's Working Group on Indigenous Populations, Dr. Daes was the principal

⁵⁶ *International Covenant on Economic, Social and Cultural Rights*, *supra* note 4, at Article 15. For a more extensive discussion of rights guaranteed under the International Covenant on Economic, Social and Cultural Rights, see paragraph 2.1 (1), *supra*.

⁵⁷ Hoggan, Karen, 'Neem Tree Patent Revoked', *BBC News Online*, 11 May 2000, available at news.bbc.co.uk/1/hi/sci/tech/745028.stm.

⁵⁸ Patent No. EPO0436257 (issued 10 July 1991).

⁵⁹ Symposium, *loc.cit.* (note 44), at p. 765.

⁶⁰ *Idem*.

⁶¹ Besides increasing public awareness of the grave risks that corporations would unjustly exploit indigenous and traditional knowledge, the *Neem Tree Case* raised three additional points of interest. First, the US Department of Agriculture was a co-applicant with W.R. Grace for the neem oil patent, see *supra* note 58. Hence, the US Government contributed to and encouraged exploitation of traditional knowledge under current intellectual property regimes. Second, the plaintiffs in the revocation action argued that, in addition to non-novelty, Grace's patent should be revoked as 'against public morality' (European Patent Convention, January 2000). Article 53 reads in part: '[P]atents shall not be granted in respect of invention the publication or exploitation of which would be contrary to the public order or morality'. Although the EPO declined to rule on that question, the fact that the argument was brought at all signals a move towards using human rights arguments as a means of combating unfair intellectual property determinations. Similar arguments could be advanced in future patent disputes in the context of TRIPS, which contains a 'public morality' article similar to the one in the European Patent Convention (TRIPS Article 27(2), see *supra* note 17, says that 'Members may exclude from patentability inventions, the prevention of which within their territory (...) is necessary to protect *ordre public* or morality...'). Third, the EPO revoked the neem oil patent in part because the European Parliament's Green Party advocated the patent appeal. In the absence of influential and knowledgeable allies like the Greens, indigenous peoples may lack the resources to raise successful objections to the appropriation of their traditional knowledge by wealthy corporations.

author of the Draft Declaration on the Rights of Indigenous Peoples.⁶² This draft Declaration⁶³ called for the broad recognition and respect for indigenous peoples' rights, including cultural and intellectual property rights.⁶⁴ Dr. Daes continued to campaign for indigenous peoples' interests,⁶⁵ emphasising that UN Member nations must not only recognise the existence of indigenous peoples' rights, but also enact national legislation providing stringent substantive and jurisdictional protection of those rights.⁶⁶

Dr. Daes' *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* indicates how indigenous rights can be more effectively protected. Collective ownership and custodial ownership created through initiation procedures should be recognised and incorporated into national legal systems.⁶⁷ Patent and copyright protection for indigenous knowledge should be available only after the traditional owners' free and informed consent has been secured.⁶⁸ States should create prompt and effective judicial measures to allow traditional owners to 'prevent, punish and obtain full restitution and just compensation' for unlawful acquisition or use of their cultural heritage.⁶⁹ In addition, 'business and industry should ensure they have free and informed consent of indigenous peoples when entering into agreements for the rights (...) to use undescribed species or cultivated varieties of plants, animals or micro-organisms, or naturally occurring pharmaceuticals', and 'any agreement should ensure that the indigenous

⁶² Daes, Erica-Irene A., 'Equality of Indigenous Peoples Under the Auspices of the United Nations-Draft Declaration on the Rights of Indigenous Peoples', *St. Thomas Law Review*, Vol. 7, 1995, p. 493, at p. 494.

⁶³ UN Commission on Human Rights, *United Nations Declaration on the Rights of Indigenous Peoples*, 11th Session, Annex I, UN Doc. E/CN.4/Sub.2 (1993). The UN Commission on Human Rights has referred the draft Declaration to its Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples, where it has been under consideration for eight years.

⁶⁴ Article 29 reads: 'Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts', *idem*.

⁶⁵ After preparing the *Draft Declaration*, see *supra* note 63, Dr. Daes wrote *Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples* in 1995 (UN Doc. E/CN.4/Sub.2/1995/26/annex (1995)) and chaired a revision of those Principles and Guidelines in 2000 (see *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/2000/26 (2000)).

⁶⁶ Daes, Erica-Irene, 'Intellectual Property and Indigenous Peoples', *American Society of International Law Proceedings*, Vol. 95, 2001, p. 143, at p. 150 (calling for 'strengthening [of] transboundary jurisdictions of national courts to enforce private international law, and ensuring international respect for the customary intellectual property laws of indigenous people as a matter of choice of law').

⁶⁷ *Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples*, *supra* note 65, at paras 14, 15, and 24.

⁶⁸ *Ibidem*, at para. 23(c).

⁶⁹ *Ibidem*, at para. 23(b).

peoples continue to be primary beneficiaries of commercial application'.⁷⁰ Further, 'indigenous peoples and their representative organizations should (...) participate in all intergovernmental discussions and negotiations in the field of intellectual property rights, to share their views on the measures needed to protect their heritage through international law.'⁷¹ These guidelines address many of the inadequacies of intellectual property protection for traditional heritage highlighted in the *Yulumbul, Milpurrurru*, and *Neem Tree* cases.

Because current legal regimes often provide inadequate protection for indigenous peoples' knowledge, culture, and human rights, the Sub-Commission explicitly referred to those concerns as a motivating factor for the adoption of Resolution 2000/7.

2.3. The (Negative) Impact of Globalisation on the Realisation of Human Rights

The Sub-Commission indicated that the negative effect of globalisation on human rights was another motivating factor for the adoption of Resolution 2000/7.⁷² Specifically, the Sub-Commission relied on reports from two Special Rapporteurs, as well as from its working group on transnational corporations, to support a request for 'governments and national, regional and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation'.⁷³ Because the Sub-Commission explicitly referenced these globalisation reports as supporting their decision to adopt Resolution 2000/7, it is appropriate to examine those reports briefly.

(1) The Special Rapporteurs' Preliminary Report

J. Oloka-Onyango and Deepika Udagama, Sub-Commission Special Rapporteurs on globalisation and its impact on the full enjoyment of human rights, submitted a preliminary report to the Sub-Commission two months before the adoption of Resolution 2000/7. The Special Rapporteurs' report began by reminding the Sub-Commission that globalisation is not a purely economic

⁷⁰ *Ibidem*, at para. 36. By explicitly referencing indigenous rights to plants, animals, and micro-organisms, the *Principles and Guidelines* echo a major theme of the Convention on Biological Diversity (5 June 1992). A product of the 1992 Earth Summit, the Convention on Biological Diversity seeks to encourage sustainable use of the components of biodiversity, and to share the benefits of such use in a fair and equitable way. The *Neem Tree* Case and the debate over the use of terminator technology in agriculture (see paragraph 2.3 (2), *infra*) are examples of biodiversity exploitation that the Convention on Biological Diversity addresses. Sub-Commission Resolution 2000/7 indicated that the Convention on Biological Diversity was a motivating factor in the Sub-Commission's decision to adopt Resolution 2000/7. Further information about the Convention on Biological Diversity, as well as the text of the Convention, are available at www.fao.org/biodiversity/ (last visited 14 February 2003).

⁷¹ *Ibidem*, at para. 51.

⁷² Resolution 2000/7, *supra* note 1, at preface.

⁷³ *Ibidem*, at para. 4.

phenomenon that is divorced from human values and policy decisions. Instead, the report contended that 'the boundaries within which the market operates are defined *politically*, in direct negotiations between governments in multilateral forums, such as the World Trade Organization'.⁷⁴ By asserting that political decisions shape the path of globalisation, the Special Rapporteurs indicated that some human rights problems can be ameliorated at their source, by modifying the political decisions that enable globalisation.

The report critiqued the World Trade Organization (WTO) for its contributions to increasing global inequality and discrimination. The report characterised the WTO structure and its assumptions about global trade as being heavily biased in favour of transnational corporations and developed nations.⁷⁵ While the WTO can be fairly characterised as democratic in form (since it allows one vote per member and purports to use consensus decision-making),⁷⁶ in practice it is unfair to less-developed nations, which are often denied participation in policy-making decisions.⁷⁷ Therefore, the report called for the WTO's deliberative and policy-setting procedures to be made more transparent, and more receptive to developing nations.

The Special Rapporteurs' report also disapproved of the WTO's intellectual property protection system, characterising TRIPS' guarantee of the patentability of plant varieties and life forms as a 'legal act of economic hijack'.⁷⁸ Furthermore, the Special Rapporteurs recommended that if the WTO really wanted to commit to a balanced trade liberalisation scheme, it 'must not only include intellectual property protections of interest to the developed countries, but also address issues of current or potential concern for developing countries, such as property rights for knowledge embedded in traditional medicines, or the pricing of pharmaceuticals in developing country markets'.⁷⁹

⁷⁴ Oloka-Onyango, J. and Udagama, Deepika, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, UN Sub-Commission on the Promotion and Protection of Human Rights [hereinafter the Special Rapporteurs' report], 52nd Session, Item 4, UN Doc. E/CN.4/Sub.2/2000/13 (2000) (citing Cardoso, Fernando Enrique, *Globalization and International Relations: Public Address to the South African Institute of International Affairs*, Johannesburg, 26 November 1996, at pp. 5-6).

⁷⁵ 'Indeed, the assumptions on which the rules of WTO are based are grossly unfair and even prejudiced. Those rules also reflect an agenda that serves only to promote dominant corporatist interests that already monopolize the arena of international trade', *ibidem*, at para. 14.

⁷⁶ *Ibidem*, at para. 16.

⁷⁷ 'Whether one considers the dispute settlement procedures, the mechanisms for implementing agreements or the areas selected for negotiations, one comes to realize that the WTO structure is heavily tilted in favour of developed countries, such that developing countries are, de facto, kept away from decision-making mechanisms and from policy-making; similarly, their own specific problems are not sufficiently taken into account', *ibidem*, at para. 16 (citing Habbard, Anne-Christine and Guirand, Marie, *The WTO and Human Rights*, International Federation of Human Rights, Position Paper, November 1999).

⁷⁸ *Ibidem*, at para. 18.

⁷⁹ *Ibidem*, at para. 19 (citing Stiglitz, Joseph F., 'Trade and the Developing World: A New Agenda', *Current History*, November 1999, p. 387).

(2) *The Working Group on the Working Methods and Activities of Transnational Corporations*

One further precursor of Sub-Commission Resolution 2000/7 arose in the context of the Sub-Commission's study and drafting in regard to the human rights obligations of transnational corporations and other business enterprises. In its Resolution 1998/8 of 20 August 1998 the Sub-Commission decided 'to establish for a three-year period a sessional working group of the Sub-Commission, composed of five of its members, taking into account the principle of equitable geographic distribution, to examine the working methods and activities of transnational corporations'.⁸⁰ The first meeting of the Working Group in 1999 requested preparation of a draft code of conduct for transnational corporations.⁸¹ While the first draft code of conduct did not contain a provision on intellectual property and human rights, more recent documents⁸² produced by members of the Working Group track Article 7 of the TRIPS Agreement.⁸³

The development of genetically modified 'terminator' seeds in the late 1990s was a highly visible example of questionable corporate behaviour that motivated the adoption of Sub-Commission Resolution 2000/7. Terminator technology enables seed suppliers to create strains of crop seeds that are incapable of reproducing. Agribusiness companies 'stood to make huge profits from the technique, since it meant that farmers could not continue holding over seeds produced in one growing season for use in the next – a widespread practice in developing countries'.⁸⁴ Although many agricultural companies were developing genetically modified seeds, the Monsanto Corporation became the target of widespread public concern over the anticipated sales of sterile seeds in the markets of developing nations.⁸⁵ The international furor eventually led Monsanto to pledge that it would not commercialise the terminator technology that created sterile seeds.⁸⁶

⁸⁰ UN Sub-Commission on the Promotion and Protection of Human Rights, *The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations*, 49th Session, Res. 1998/8, UN Doc. E/CN.4/1999/4, E/CN.4/Sub.2/1998/45 (1998).

⁸¹ See UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the sessional working group on the working methods and activities of transnational corporations on its first session*, 50th Session, UN Doc. E/CN.4/Sub.2/1999/9 (1999).

⁸² *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises with Commentary on the Principles*, UN Doc. E/CN.4/Sub.2/2002/WG.2.WP.1/Add.2, at 5 (2002).

⁸³ TRIPS Agreement, *supra* note 17, at Article 7.

⁸⁴ Knight, Danielle, 'Cheers for Monsanto's Reversal on "Terminator"', *Inter Press Service*, 5 October 1999, available at www.oneworld.org (last visited 25 January 2003).

⁸⁵ In fact, at the time Monsanto promised not to market sterile seed technology, it did not yet possess the rights to that specific technique. The technology was jointly developed by the USDA and Delta and Pine Land Company, a smaller business that Monsanto was attempting to take over. 'Terminator gene halt a "major U-Turn"', *BBC News Online*, 5 October 1999, available at www.news.bbc.co.uk/1/hi/sci/tech/465222.stm (last visited 31 January 2003).

⁸⁶ Knight, *loc.cit.* (note 84).

Although Monsanto's declaration was heralded as a 'significant victory for developing countries', critics of terminator technology were quick to note that the dangers of genetic manipulation of seeds had by no means vanished.⁸⁷ At the time of its announcement not to market sterile seeds, Monsanto was believed to have 87 other terminator patents pending in developing countries,⁸⁸ including one for a genetic modification that would 'make a seed not germinate unless exposed to a certain chemical'.⁸⁹ Other major agribusinesses were pursuing similar patents for technology that could be used to control various 'developmental processes in plants, including germination, sprouting, flowering and fruit ripening'.⁹⁰ The potentially devastating effects that such technology could have on developing nations' agricultural sectors typified the concerns that motivated the Sub-Commission to create the Working Group on the methods and practices of transnational corporations, and was a significant factor in the Sub-Commission's decision to adopt Resolution 2000/7.

3. THE GENESIS AND ADOPTION OF SUB-COMMISSION RESOLUTION 2000/7

As the previous section of this article shows, human rights concerns had been expressed with regard to intellectual property protection and global trade, in the years before the Sub-Commission adopted Resolution 2000/7. The Sub-Commission, however, had a more immediate catalyst for Resolution 2000/7 and its call for a human rights approach to devising international intellectual property protection and global trade regimes.

In late July 2000, a Lutheran World Fund representative⁹¹ named Peter Prove submitted to the Sub-Commission a joint statement by three NGOs.⁹² This statement urged the Sub-Commission to 'take concrete action on TRIPS (...) [by] reassert[ing] the primacy of human rights obligations over the commercial and profit-driven motives upon which agreements such as

⁸⁷ *Idem*.

⁸⁸ Vidal, John, 'World braced for terminator 2', *The Guardian Unlimited*, 6 October 1999, available at www.guardian.co.uk (last visited 31 January 2003).

⁸⁹ Knight, *loc.cit.* (note 84).

⁹⁰ *Idem*.

⁹¹ The Lutheran World Federation (LWF) is an international organisation of Lutheran churches that provides humanitarian assistance in troubled areas of the world, and advocates for greater awareness of human rights. Peter Prove is an LWF representative and is a well-respected NGO advocate at the Sub-Commission.

⁹² The statement was submitted to the Sub-Commission by Habitat International Coalition, the International NGO Committee on Human Rights in Trade and Investment [hereinafter INCHRTI], and the Lutheran World Federation. UN Sub-Commission on the Promotion and Protection of Human Rights, *The Realization of Economic, Social and Cultural Rights*, 52nd Session, UN Doc. E/CN.4/Sub.2/2000/NGO/14 (2000).

TRIPS are based'.⁹³ The statement specifically called attention to human rights implications of economic globalisation, TRIPS' acceptance of biopiracy, and TRIPS' stringent protection of TNC interests with respect to technology transfers.⁹⁴

Issues of globalisation, indigenous rights protection, and TNC behaviour had been separately mentioned for years before Prove submitted the joint statement. Nonetheless, the Sub-Commission had not taken any action in regard to TRIPS and international intellectual property protection. Prove found an ally in Asbjørn Eide, a Norwegian member of the Sub-Commission. Eide proposed a resolution criticising existing international intellectual property regimes. Because no one anticipated the proposal, there was little opposition to Eide's resolution expressing human rights concerns about TRIPS. That lack of opposition, combined with the Sub-Commission's awareness of the related problems presented by globalisation and indigenous rights, allowed Eide to push international intellectual property protection onto the Sub-Commission's agenda.

Although the Sub-Commission softened its tone somewhat in comparison to the forceful language of the NGO statement, the actions urged by Resolution 2000/7 were nonetheless a significant set of propositions. Referencing Daes' work on indigenous cultural rights, problems highlighted in the globalization report,⁹⁵ and 'actual or potential conflicts (...) between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights',⁹⁶ the resolution made the following requests: (1) that governments give primary consideration to human rights objectives when crafting national policy and legislation pertaining to intellectual property; (2) that intergovernmental organisations provide similar integration of human rights principles in their policies and practices; (3) that the WTO in particular take human rights obligations into account when reviewing the TRIPS Agreement; and (4) that various UN bodies (including the High Commissioner for Human Rights (HCHR), the Committee on Economic, Social and Cultural Rights, and the Secretary-General) take further measures to analyse the human rights impacts of the TRIPS Agreement.⁹⁷

4. REACTIONS TO RESOLUTION 2000/7

If the relationships between international intellectual property protection, globalisation, and human rights had not been particularly visible before the

⁹³ *Ibidem*, at para. 6.

⁹⁴ *Idem*.

⁹⁵ See *supra* note 74 and accompanying text.

⁹⁶ Resolution 2000/7, see *supra* note 1, at preface. See also *supra* paragraph 2.1(2).

⁹⁷ Resolution 2000/7, *supra* note 1, at paras 3-15.

summer of 2000, they certainly were subjected to more detailed scrutiny after the Sub-Commission adopted Resolution 2000/7. The Sub-Commission's resolution generated responses from UN bodies, intergovernmental organisations, and governments.

4.1. *The High Commissioner's Report on TRIPS and Human Rights*

Pursuant to the Sub-Commission's request, the High Commissioner for Human Rights (HCHR) submitted a report on the impact of TRIPS on human rights. The HCHR's report undertook a two-step analysis. First, the report assessed the degree to which TRIPS was compatible with a human rights approach to intellectual property protection. Second, to the extent that TRIPS did not comport with human rights standards,⁹⁸ the report made recommendations for revisions of TRIPS' implementation that would foster a more human rights-oriented approach to international intellectual property protection.

The HCHR determined that as currently implemented, TRIPS was not fully compatible with human rights objectives. First, the HCHR noted that 'the overall thrust of TRIPS is the promotion of innovation through the provision of commercial incentives. The various links with the subject matter of human rights (...) are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves'.⁹⁹ Second, TRIPS explicitly details intellectual property *rights*, but refers only to general *responsibilities* of intellectual property holders. The HCHR indicated that, for States parties to both TRIPS and the International Covenant on Economic, Social and Cultural Rights, the balance of interests identified in TRIPS Article 7¹⁰⁰ might not be sufficient to meet its human rights obligations under the Covenant.¹⁰¹ Third, the HCHR noted that the TRIPS-imposed obligation 'to provide protection for all forms of technology limits States' ability to decide on development strategies'. These limitations are designed to encourage policies in industrialised countries. Those policies do not necessarily coincide with objectives of developing nations. In addition, some

⁹⁸ UN Sub-Commission on the Promotion and Protection of Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights: Report of the High Commissioner* [hereinafter the High Commissioner's TRIPS Report], 52nd Session, provisional agenda item 4, UN Doc. E/CN.4/Sub.2/2001/13 (2001), at para. 15.

⁹⁹ *Ibidem*, at para. 22.

¹⁰⁰ See *supra* note 20 and accompanying text.

¹⁰¹ International Covenant on Economic, Social and Cultural Rights, Article 15 delineates a need to balance protection of the interests of intellectual property holders and the public. In this respect, the Covenant is similar to TRIPS Article 7. However, the HCHR noted that Covenant Article 15 must be read in conjunction with Covenant Article 5, which holds that nothing in the Covenant can justify any act aimed at the destruction of any of its rights or freedoms or to limit a right beyond what is provided for in the Covenant. Hence, the Covenant may well require greater obligations to realise human rights than does TRIPS Article 7. The High Commissioner's TRIPS Report, see *supra* note 98, at para. 13.

developing nations lack the requisite infrastructure to implement the developed nation policies mandated by TRIPS.¹⁰² Further, the HCHR noted that TRIPS contained no provisions for the protection of cultural heritage and indigenous rights.¹⁰³

In light of these shortcomings the High Commissioner made a series of recommendations. First, States should monitor TRIPS implementation through national legislation to ensure that it meets the human rights standards detailed in the International Covenant on Economic, Social and Cultural Rights. Second, the HCHR encouraged States to modify their intellectual property regimes to provide protection for indigenous community interests. Third, States should pass legislation that ensured access to essential drugs, so as to protect the right to the highest available standard of health.¹⁰⁴ Fourth, the High Commissioner suggested that TRIPS Article 7 be amended to include an explicit reference to human rights. Further, the High Commissioner encouraged the Sub-Commission to continue examining the interaction of intellectual property rights and other human rights.¹⁰⁵

4.2. The WTO/WIPO Response

The WTO and the World Intellectual Property Organization (WIPO) were surprised by and did not agree with Resolution 2000/7's criticisms. Both organisations stated that the tension between rights of intellectual property holders and the public interest was 'complementary rather than mutually exclusive',¹⁰⁶ and that TRIPS Article 7 adequately reflected this complementary tension. With respect to drug access, the organisations contended that Article 8's recognition of States' interest in 'protecting health',¹⁰⁷ coupled with Article 31's provisions for limited exceptions to the exclusivity

¹⁰² *Ibidem*, at paras 24-25.

¹⁰³ *Ibidem*, at para. 26.

¹⁰⁴ A large portion of the High Commissioner's Report was devoted to an analysis of whether TRIPS left sufficient room for States to address public health issues; Brazil's approach to its national AIDS crisis was one focus of this discussion. For a more detailed discussion of the Brazil case, see *infra* notes 116-123 and accompanying text. The High Commissioner's report determined that TRIPS does allow for States to enact legislation allowing compulsory licensing and parallel importation of drugs in times of public health emergency. As a result, the High Commissioner recommended that States pass national legislation securing those privileges. The High Commissioner's TRIPS report, *supra* note 98, at para. 66.

¹⁰⁵ The High Commissioner's recommendations can be found in the High Commissioner's TRIPS Report, *supra* note 98, at paras 59-70.

¹⁰⁶ UN Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property and Human Rights: Report of the Secretary-General*, 52nd Session, Provisional Agenda Item 4, UN Doc. E/CN.4/Sub.2/2001/12 (2001), at Section B, para. 2 The Secretary-General's report consisted of reactions to Resolution 2000/7 from various nations, NGOs, and intergovernmental bodies that were delivered to the Secretary-General. Section B of this document contained the WTO's response. See also UN Doc. E/CN.4/Sub.2/2001/12/Add.1 (2001) (an addendum to the Secretary-General's report with additional replies, including one from WIPO).

¹⁰⁷ See *supra* note 21 and accompanying text.

of patent protection,¹⁰⁸ sufficiently enabled States to address their public health concerns.¹⁰⁹ The WTO acknowledged that many national intellectual property regimes did not provide comprehensive protection for traditional knowledge. Nonetheless, the WTO thought that TRIPS mandated complete protection of traditional knowledge, and that gaps in coverage might be better filled by national legislation rather than by a retooling of TRIPS itself.¹¹⁰ In short, the WTO and WIPO did not concur with the Sub-Commission's conclusion that TRIPS conflicted with human rights objections.

4.3. State Responses

Echoing the WTO/WIPO positions, the European Commission also asserted that TRIPS adequately provided for the realisation of human rights. Like the WTO and WIPO, the Commission thought that TRIPS Article 7 struck an appropriate balance of interests.¹¹¹ The Commission reiterated that TRIPS principles should not allow patenting of traditional knowledge. The Commission noted that TRIPS does not speak directly to the issue, but believed that this silence provided States with enough leeway to enact legislation specific to traditional knowledge if they so desired.¹¹² The Commission also encouraged the creation of traditional knowledge databases, as well as reference to the geographic origin of biological material seeking patent protection, in order to reduce conflicts in instances like the *Neem Tree Case*.¹¹³

The European Commission did not believe that TRIPS needed to be altered in order to enable States to address public health concerns. The Commission thought that developing nations and the international community should concentrate on preventing disease, fostering drug distribution mechanisms, and building health care infrastructures, rather than pressuring large pharmaceutical companies to provide cheap medicines.¹¹⁴ The Commission also voiced concerns about over-reliance

¹⁰⁸ See *supra* notes 25-29 and accompanying text.

¹⁰⁹ UN Doc. E/CN.4/Sub.2/2001/12 (2001), *op.cit.* (note 106), at para. 10, and the Addendum at paras 8-12.

¹¹⁰ *Ibidem*, at paras 11-13.

¹¹¹ European Commission, European Community Response to Resolution 2000/7, at para. 7 (undated document, 2000).

¹¹² *Ibidem*, at paras 22-23.

¹¹³ *Idem*.

¹¹⁴ *Ibidem*, at para. 12. The Commission also indicated a concern that providing cheap drugs could lead to problems with parallel importation. When a pharmaceutical company engages in differential pricing based on the purchasing power of a given market, it runs the risk of selling drugs cheaply to a poor nation that may turn around and re-sell the product to a nation with greater purchasing power. This problem would leave the poor nation with no drugs and reduce the pharmaceutical company's profits.

on the compulsory licensing exception provided in TRIPS Article 31, arguing that rigorous patent protection is necessary in order to provide pharmaceutical companies with an incentive to continue research and development programmes.¹¹⁵

Unlike the European Commission, some States believed that affordable medicine constituted a crucial step in promoting public health. The most visible test of TRIPS' mandates came from Brazil, whose 1997 decision to enact compulsory licensing legislation enabled generic production of internationally patented AIDS drugs.¹¹⁶ Although contentious at the time, Brazil's acts have generally been considered a stunning public health success. Within four years of initiating its compulsory licensing programme, Brazil reduced its AIDS death rate by 50 per cent, while simultaneously reducing per capita expenditures on pharmaceuticals.¹¹⁷ Indeed, the High Commissioner's TRIPS report, discussed above, praised the Brazilian Government for 'implementing the public health safeguards in the TRIPS Agreement' in a way that 'has successfully married implementation of the Agreement with its obligations under human rights law'.¹¹⁸

The United States contested Brazil's compulsory licensing programme. In January 2001, the United States requested the establishment of a WTO dispute resolution panel, alleging that Brazil's compulsory licensing law violated US patent holders' rights guaranteed by TRIPS.¹¹⁹ The US subsequently agreed to drop the WTO suit, provided that Brazil consult with the US Government if Brazil intended to implement compulsory licensing in the future.¹²⁰

The US decision to drop its complaint was influenced by the UN Commission on Human Rights adoption of a resolution supporting Brazil's compulsory licensing programme. Commission Resolution 2001/33 called upon States to 'pursue policies (...) which promote (...) [t]he availability in sufficient quantities of pharmaceuticals (...) used to treat pandemics such as

¹¹⁵ *Ibidem*, at para. 14.

¹¹⁶ The Brazilian Intellectual Property Law enacted in 1997 (Law No. 9279 of 14 May 1996; effective May 1997) authorised the government to provide for compulsory licensing where a patent holder exercises patent rights in an abusive manner, and in cases of national emergency or public interest. These provisions mimic the TRIPS' compulsory licensing provision outlined in Article 31. The High Commissioner's Report, see *supra* note 98, at para. 55.

¹¹⁷ Brazil also saw an 80 per cent decrease in hospitalisation due to opportunistic diseases that so often afflict AIDS patients. The Brazilian Ministry of Health reduced its drug expenditure from USD 336 million to USD 319 million between 1999 and 2000, yet also managed to deliver drugs to an additional 12,000 patients during that same 12-month span. Local production of generic drugs has cut production costs by an average of 70 per cent since the inception of the compulsory licensing program. *Ibidem*, at para. 70.

¹¹⁸ *Ibidem*, at para. 58.

¹¹⁹ *Brazil-Measures Affecting Patent Protection: Request for the Establishment of a Panel by the United States*, WT/DS199/3 (9 January 2001).

¹²⁰ *Brazil-Measures Affecting Patent Protection: Notification of Mutually Agreed Solution*, WT/DS199/4 (19 July 2001).

HIV/AIDS'.¹²¹ To that end, the Commission encouraged States to 'adopt legislation (...) to safeguard access to preventative, curative or palliative pharmaceuticals or medical technologies from any limitations by third parties'.¹²² Furthermore, the Commission called on States to 'refrain from taking measures which would deny or limit equal access for all persons to [such pharmaceuticals and medical technologies]'.¹²³ This resolution endorsed Brazil's compulsory licensing programme, and discouraged aggressive pharmaceutical patent protection such as the US complaint pending with the WTO at the time. The US abstention constituted the only opposition to the otherwise unanimous adoption of Commission Resolution 2001/33.

A scenario similar to the US-Brazil dispute took place when the Pharmaceutical Manufacturers Association of South Africa sued the South African Government in South Africa's Constitutional Court.¹²⁴ The pharmaceutical manufacturers' alleged that an amendment to South Africa's patent laws infringed on the manufacturers' property rights and conflicted with TRIPS-mandated patent protection.¹²⁵ The pharmaceutical manufacturers settled their suit in April 2001, in light of the South African Government's agreement to consult a pharmaceutical working group before

¹²¹ UN Commission on Human Rights, *Access to medication in the context of pandemics such as HIV/AIDS*, 57th Session, 71st Mtg., UN Doc. E/CN.4/RES/2001/33 (2001), at para. 2(a).

¹²² *Ibidem*, at para. 3(b).

¹²³ *Ibidem*, at para. 3(a).

¹²⁴ *Pharmaceutical Mfrs. Association of South Africa vs President of the Republic of South Africa*, Case No. 4183/98 (High Court of South Africa 1998).

¹²⁵ The Medicines and Related Substances Control Amendment Act, No. 90 of 1997, gave the South African Health Minister sole power to define 'prescribed conditions' for the supply of 'more affordable medicines' in 'certain circumstances'. See *Pharmaceutical Mfrs. Association of South Africa*, *supra* note 124, at para. 2.1. One practical effect of the Amendment Act was to give the Health Minister the power to enact parallel importation of patented drugs. See Joseph, Sarah, 'Pharmaceutical Corporations and Access to Drugs: The Fourth Wave of Corporate Human Rights Scrutiny', *Human Rights Quarterly*. The amendment also gave the Health Minister the sole power to prescribe conditions under which compulsory licenses could be granted. The South African Government already had the ability to grant compulsory licenses pursuant to the Patents Act of 1978. The Amendment Act, however, increased the discretion of the Government to determine the conditions under which compulsory licenses would be granted. See *Pharmaceutical Mfrs. Association of South Africa vs President of the Republic of South Africa*, *supra* note 124, at para. 2.2. The pharmaceutical manufacturers alleged that the Amendment Act authorised the Government to deprive pharmaceutical patent holders of their intellectual property, or to appropriate that property without providing compensation. See *ibidem*, at para. 2.3. Such a taking was alleged to violate Section 25 of the South African Constitution, which states that 'property may be expropriated only (...) for a public purpose or in the public interest, and subject to compensation...', *Constitution of the Republic of South Africa*, Act 108 of 1996, Section 25, available at www.polity.org.za/govdocs/constitution/saconst.html. Further, the pharmaceutical manufacturers alleged that the parallel importation authorisation violated TRIPS' Article 27 prohibition on discrimination with respect to importation or local production of patented products. See *Pharmaceutical Mfrs. Association of South Africa*, *supra* note 124, at para. 2.4.

implementing its new laws.¹²⁶ The pharmaceutical group's decision to drop their complaint was prompted in part by strong global protest to the suit. The Commission on Human Rights' impending adoption of Resolution 2001/33 (which endorsed Brazil's compulsory licensing programme) and Sub-Commission Resolution 2000/7 may also have contributed to the decision to drop the South African suit.¹²⁷

4.4. Response of the Committee on Economic, Social and Cultural Rights

Three months after the adoption of Sub-Commission Resolution 2000/7, the Committee on Economic, Social and Cultural Rights held a day of discussion in November 2000 to consider whether TRIPS potentially conflicts with human rights norms in the International Covenant on Economic, Social and Cultural Rights.¹²⁸ The day of discussion was intended to lay a foundation for the eventual adoption of a general comment on the relationship between intellectual property rights and human rights standards.¹²⁹

The discussion relied heavily on a discussion paper prepared by Audrey Chapman, a representative of the American Association for the Advancement of Science.¹³⁰ Peter Prove, the LWF lobbyist who had provided the initial impetus for the Sub-Commission to consider adopting Resolution 2000/7, also contributed to the discussion.¹³¹ Background papers and

¹²⁶ The Minister of Health agreed to invite a working party from the pharmaceutical industry to consult with the Government in formation of policies, legislation, and regulations that would be enacted to implement the Amendment Act. The Government, however, made explicit mention of TRIPS' allowance for the adoption of measures necessary to protect public health and broaden access to medicines. *Joint Statement of Understanding Between the Republic of South Africa and the Applicants, in the matter between: The Pharmaceutical Mfrs. Association of South Africa vs The President of the Republic of South Africa*, 19 April 2001, available at www.efpia.org/3_press/20010419.htm.

¹²⁷ The South African pharmaceutical manufacturers settled their suit on 19 April 2001. The Commission on Human Rights adopted Resolution 2001/33 on 23 April 2001. It seems plausible to think that the pharmaceutical manufacturers were tracking the buildup to Resolution 2001/33's adoption, and understood that a UN endorsement of compulsory licensing would reflect badly on the pharmaceutical manufacturers' suit.

¹²⁸ UN Commission on Economic, Social and Cultural Rights, *Report on the twenty-second, twenty-third and twenty-fourth sessions*, ECOSOC, Supp. 2, UN Docs E/2001/22 and E/C.12/2000/21 (2000), at para. 578.

¹²⁹ *Ibidem*, at para. 579.

¹³⁰ *Approaching intellectual property as a human right: obligations related to article 15, paragraph 1(c)*, submitted to the Committee on Economic, Social and Cultural Rights by Audrey Chapman, American Association for the Advancement of Science, UN Doc. E/C.12/2000/12 (2000).

¹³¹ UN Docs E/2001/22 and E/C.12/2000/21 (2000), *op.cit.* (note 128), at para. 629. Also present was Miloon Kothari, representing the International NGO Committee on Human Rights in International Trade and Investment. That NGO was one of groups that jointly presented the statement to the Sub-Commission that eventually resulted in the adoption of Resolution 2000/7. See *supra* note 92 and accompanying text.

commentary on cultural property and traditional knowledge rights also played a prominent part in the discussion.¹³²

Chapman's presentation to the Committee on Economic, Social and Cultural Rights stated that the creation of the WTO and TRIPS had strengthened the world intellectual property regime in a way that was inconsistent with human rights norms. She further stated that the international intellectual property regime had 'demonstrated detrimental effects to the rights enshrined in the [Covenant on Economic, Social and Cultural Rights]'.¹³³ She specifically noted that the current intellectual property regime did not apply to indigenous creations and knowledge, negatively affected the right to health by reducing the availability of pharmaceuticals, and threatened the right to food by extending broad plant patent protection to a few agricultural companies that hold patents on the genomes of important global crops.¹³⁴ The Economic and Social Committee's Chairperson concluded the discussion by reiterating the Committee's intent to draft a general comment on intellectual property and human rights.¹³⁵

The Committee on Economic, Social and Cultural Rights has not adopted a General Comment yet. Instead, the Committee drafted a less visible and less ambitious statement that outlines their concerns about the effect of intellectual property regimes on key human rights principles derived from the International Covenant on Economic, Social and Cultural Rights.¹³⁶ The Committee on Economic, Social and Cultural Rights stated that intellectual property has 'a social function (...) [of] serv[ing] the objective of human well-being, to which international human rights instruments give legal expression'.¹³⁷ In addition, '[h]uman rights are fundamental, inalienable and universal entitlements (...) whereas intellectual property rights (...) are instrumental (...) generally of a temporary nature, and can be revoked, licensed or assigned to someone else'.¹³⁸ The Committee also asserted that '[w]hile the State holds the primary duty to respect, protect and fulfil human rights, other actors, including non-State

¹³² Background papers were submitted by a Swiss scholar and by the Aboriginal and Torres Strait Islander Commission. See Meyer-Bisch, Patrice, *Protection of Cultural Property: an individual and collective right*, UN Doc. E/C.12/2000/16 (2000). See also Aboriginal and Torres Strait Islander Commission, *Protecting the rights of Aboriginal and Torres Strait Islander traditional knowledge*, UN Doc. E/C.12/2000/17 (2000).

¹³³ UN Docs E/2001/22 and E/C.12/2000/21 (2000), *op.cit.* (note 128), at para. 587.

¹³⁴ *Idem.*

¹³⁵ *Ibidem*, at para. 635.

¹³⁶ UN Commission on Economic, Social and Cultural Rights, *Human Rights and Intellectual Property: Statement of the Committee on Economic, Social and Cultural Rights*, 27th Session, Agenda item 3, UN Doc. E/C.12/2001/15 (2001), at para. 2.

¹³⁷ *Ibidem*, at para. 4.

¹³⁸ *Ibidem*, at para. 6 (citing *Report of the High Commissioner on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights*, UN Doc. E/CN.4/Sub.2/2001/13 (2001), at para. 14).

actors and international organizations, carry obligations, which must be subject to scrutiny'.¹³⁹

The Committee elaborated on the most important obligations imposed by the International Covenant on Economic, Social and Cultural Rights. While acknowledging that the Covenant allows for 'progressive realization' of some of the Covenant's objectives, the Committee reminded States Parties of 'various obligations which have immediate effect, including core obligations'.¹⁴⁰ Core obligations require States Parties to 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' enunciated in the Covenant.¹⁴¹ In particular, the Committee 'emphasize[d] that any intellectual property regime that makes it more difficult to comply with its core obligations in relation to health, food, [or] education (...) is inconsistent with the legally binding obligations of the State party'.¹⁴²

In addition to States' core obligations in relation to health, food, and education, the Committee noted that the International Covenant 'sets out a need to balance the protection of public and private interests in knowledge'.¹⁴³ On the one hand, Articles 15(1)(a) and (b) of the Covenant recognise 'the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications'. On the other hand, Article 15(1)(c) recognises 'the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author'.¹⁴⁴ The Committee urged States to 'strike a balance between those concurrent Covenant provisions' in developing intellectual property regimes.¹⁴⁵ The Committee referenced with approval the Doha Declaration on the TRIPS

¹³⁹ UN Doc. E/C.12/2001/15 (2001), *op.cit.* (note 136), at para. 10.

¹⁴⁰ *Ibidem*, at para. 11.

¹⁴¹ *Ibidem*, at para. 12 (citing *General Comment No. 3 – the nature of States parties' obligations*, Commission on Economic, Social and Cultural Rights, 5th Session (1990), at para. 10, available in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: note by the Secretariat*, UN Doc. HRI/GEN/1Rev.5 (2001)).

¹⁴² UN Doc. E/C.12/2001/15 (2001), *op.cit.* (note 136), at para. 12. Article 11 of the International Covenant recognises a right to food. See also discussion at para. 4.5 (1), *infra*. See also generally *General Comment No. 12 – the right to adequate food*, Commission on Economic, Social and Cultural Rights, 29th Session (1999) available in UN Doc. HRI/GEN/1Rev.5 (2001), *op.cit.* (note 141). Article 12 of the International Covenant recognises the right to the highest attainable standard of physical and mental health. See generally *General Comment No. 14 – the right to the highest attainable standard of health*, Commission on Economic, Social and Cultural Rights, 22nd Session (2000) available in UN Doc. HRI/GEN/1Rev.5 (2001), *op.cit.* (note 141). Article 13 of the International Covenant recognises the right to education, which shall strengthen the respect for human rights and fundamental freedoms. See generally *General Comment No. 13 – the right to education*, Commission on Economic, Social and Cultural Rights, 21st Session (1999), available in UN Doc. HRI/GEN/1Rev.5 (2001), *op.cit.* (note 141).

¹⁴³ UN Doc. E/C.12/2001/15 (2001), *op.cit.* (note 136), at para. 17.

¹⁴⁴ *Idem*.

¹⁴⁵ *Idem*.

Agreement and Public Health, which 'recognizes that intellectual property protection is important for the development of new medicines, but at the same time also recognizes the concerns about its effect on prices'.¹⁴⁶

In summary, the Committee's statement reminded States Parties of the 'importance of integrating international human rights norms into the enactment and interpretation of intellectual property law' in a balanced manner that protects public and private interests in knowledge without infringing on fundamental human rights.¹⁴⁷ When close questions arise about where the appropriate balance lies, States should draw the balance so as to maintain the integrity of human rights.

4.5. Continuing Efforts of the Office of the High Commissioner for Human Rights

(1) Report on Globalisation

The High Commissioner's Report on the impact of TRIPS on human rights, discussed at paragraph 4.1 above, was the first of a triad of reports, prompted by the Sub-Commission's resolution and proposed by the Office of the High Commissioner, concerning human rights and trade. The second report examined the impact of globalisation on the enjoyment of human rights by outlining issues that arise when liberalisation of agricultural trade is viewed from a human rights perspective.¹⁴⁸ Specifically, the report examined the implementation of the 1994 WTO Agreement on Agriculture to highlight some of the problems stemming from the liberalisation of agricultural trade. The High Commissioner's report reminded WTO States of their obligations under international human rights instruments. In particular, the report noted that all WTO States are subject to the Universal Declaration of Human Rights, and that 112 of the 144 WTO States have ratified the International Covenant on Economic, Social and Cultural Rights.¹⁴⁹ Both instruments recognise the right of everyone to have an adequate standard of living, which includes the right to food.¹⁵⁰ Article 2 of International Covenant on Economic, Social and Cultural Rights binds parties to 'take steps, individually and through international assistance and cooperation (...) with a view to achieving progressively the full realization of the rights recognized in the present Covenant...'¹⁵¹ Article 28 of the Universal Declaration states

¹⁴⁶ *Idem.* For further discussion of the Doha Declaration, see *infra* paragraph 5.

¹⁴⁷ UN Doc. E/C.12/2001/15 (2001), *op.cit.* (note 136), at para. 18.

¹⁴⁸ UN Commission on Human Rights, *Globalization and Its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights*, ESCOR, 58th Session, provisional agenda item 10, UN Doc. E/CN.4/2002/54 (2002), at para. 8.

¹⁴⁹ *Ibidem*, at para. 10.

¹⁵⁰ See Universal Declaration of Human Rights, GA Res. 217 A(III), UN Doc. A/810 (1948), at Article 25; see also International Covenant on Economic, Social and Cultural Rights, *supra* note 4, at Article 11.

¹⁵¹ International Covenant on Economic, Social and Cultural Rights, *supra* note 4, at Article 2.

that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.¹⁵² By reminding WTO States of their obligations under these instruments, the High Commissioner's report indicated that WTO States have a binding obligation to protect and promote the right to food, even as they seek to liberalise trade in agriculture.¹⁵³

The High Commissioner's report concluded that the WTO Agreement on Agriculture (AoA) generates both positive and negative human rights results. On the positive side, the AoA increases transparency and accountability in international agricultural trade, which the High Commissioner characterised as an 'important first step (...) towards a more fair international trading system'.¹⁵⁴

The High Commissioner's report also highlighted some of the potential human rights issues that might arise as a result of global trade liberalisation in agriculture. First, liberalisation has encouraged farm consolidation. Although this trend has increased productivity and competition, it has also marginalised small farmers and farm labourers, and exposed communities to increases in food prices.¹⁵⁵ Second, trade liberalisation has forced some developing countries into a chronic system of net food importation. The resultant payment imbalances could eventually hinder developing nations' ability to realise their right to development.¹⁵⁶ Third, agricultural price fluctuations created by trade liberalisation could negatively impact some nations' ability to finance development, or even affect a State's ability to guarantee availability of food.¹⁵⁷

(2) *Report on Liberalisation of Trade in Services*

In the summer of 2002, the Office of the High Commissioner submitted the final report in its tripartite examination of the interaction of trade and human rights. The report focused on the human rights effect of liberalisation of trade in services. In the same way that its report on globalisation used a specific agreement (the AoA) as a case study, the High Commissioner's report on trade in services examined the General Agreement on Trade in Services (GATS).

¹⁵² Universal Declaration of Human Rights, *supra* note 150, at Article 28.

¹⁵³ UN Doc. E/CN.4/2002/54 (2002), *op.cit.* (note 148), at para. 10.

¹⁵⁴ *Ibidem*, at para. 27.

¹⁵⁵ *Ibidem*, at para. 35. For example, the High Commissioner's report references a UN Food and Agriculture Organization (FAO) study that showed an adverse effect of agricultural trade liberalisation on 300,000 potato and onion farmers in Sri Lanka. The same study indicated that consolidation of Brazilian dairy farms were squeezing out traditional cooperatives. *Idem* (citing FAO, *Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*, Vol. II, Country Case Studies, FAO Commodities and Trade Division, Rome, 2000, at p. 25).

¹⁵⁶ UN Doc. E/CN.4/2002/54 (2002), *op.cit.* (note 148), at para. 37.

¹⁵⁷ *Ibidem*, at para. 38.

The report again reminded WTO States of their obligations under the Covenant on Economic, Social and Cultural Rights and the Universal Declaration to promote the right to food. The report also noted the right to development.¹⁵⁸ Since liberalisation of trade in services encompasses a wider range of activities than agricultural trade services, the report extended the scope of State obligations to include the rights to health, education, water, and labour.¹⁵⁹ The High Commissioner characterised States as the 'duty bearer[s] for human rights',¹⁶⁰ and therefore asserted that States have an affirmative obligation to (1) monitor the realisation of human rights; (2) develop domestic trade policies that promote human rights objectives; and (3) regulate extra-national third party activities that affect human rights in the State.¹⁶¹

The High Commissioner's report stressed that liberalisation of trade in services frequently has a positive effect on human rights. Therefore, 'the key question from a human rights perspective is not whether liberalization does or does not promote human rights; rather, it is how to determine the right form and pace of liberalization to ensure the protection of human rights and how to reverse policies that are unsuccessful'.¹⁶² The report indicated that effective State regulation and oversight, buttressed by international assistance to developing countries, is integral to controlling the pace and form of liberalization.¹⁶³

The High Commissioner noted with approval GATS' recognition of the principle of non-discrimination. In the context of trade law, non-discrimination means equal treatment for national and foreign service providers alike. The non-discrimination principle can be extended, however, to encompass the human rights view of non-discrimination in terms of race, colour, sex, *etc.*¹⁶⁴ The High Commissioner also endorsed

¹⁵⁸ See *supra* notes 149-153 and accompanying text.

¹⁵⁹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Liberalization of Trade in Services and Human Rights: Report of the High Commissioner*, 54th Session, provisional agenda item 4, UN Doc. E/CN.4/Sub.2/2002/9 (2002), at para. 7.

¹⁶⁰ *Ibidem*, at para. 10.

¹⁶¹ To this end, the High Commissioner encouraged State ministries and agencies to conduct human rights assessments that would promote popular participation and consultation with the people affected by trade liberalisation. The High Commissioner also advocated for increased transparency and accountability with respect to the methods of assessment and trade negotiations. *Ibidem*, at paras 10-13.

¹⁶² *Ibidem*, at para. 50.

¹⁶³ *Idem*. The High Commissioner specifically stressed the need for regulation that would implement effective competition policies and corporate transparency, as well as national policies reflecting a commitment to providing universal service. The High Commissioner stated that '[i]n human rights terms, the need to regulate (...) is in fact a *duty* to regulate; (...) to 'fulfil' human rights *requires* States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights' (emphasis added).

¹⁶⁴ *Ibidem*, at para. 59.

GATS' exceptions for the purposes of protecting public morals, as well as human, animal and plant life, and the protection of individual privacy.¹⁶⁵

5. PROGRESS

Sub-Commission Resolution 2000/7 encouraged a series of investigations into the human rights implications of international intellectual property protection and trade liberalisation. The heightened global awareness about the human rights implications of intellectual property and global trade has produced some positive results. Most significantly, the WTO Ministerial Conference at Doha in November 2001 responded to several of those human rights concerns.

The Ministerial Conference adopted a special declaration that explicitly addressed the issue of the interaction of TRIPS and public health concerns. The declaration stated that 'the [TRIPS] Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all'.¹⁶⁶ To that end, the declaration reminded WTO States that TRIPS recognises the right to grant compulsory licenses, as well as the ability to implement parallel importation mechanisms.¹⁶⁷ Furthermore, the declaration noted that 'public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency', which enable States to initiate compulsory licensing under TRIPS Article 31.¹⁶⁸

The Ministerial Conference's declaration instructed the Council for TRIPS (a TRIPS review body) to take into account the issues pertaining to traditional knowledge and folklore when reviewing TRIPS' exclusivity requirements.¹⁶⁹ Furthermore, the declaration stated that 'special and differential treatment for developing countries shall be an integral part of (...) enabl[ing] developing countries to effectively take account of their development needs, including food security and rural development'.¹⁷⁰ In addition, the declaration recognised the 'particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy', and committed the WTO to 'addressing the marginaliza-

¹⁶⁵ *Ibidem*, at para. 63. The High Commissioner noted that these protections are 'familiar themes to human rights law', and stated that although 'a human rights approach would place the promotion of human rights at the centre of the objectives of GATS rather than as permitted exceptions, these links nonetheless provide an entry point for a human rights approach to liberalization...' *Idem*.

¹⁶⁶ *Declaration on the TRIPS Agreement and public health*, Doha WTO Ministerial 2001, UN Doc. WT/MIN(01)/DEC/2 (2001), at para. 4.

¹⁶⁷ *Ibidem*, at para. 5(b) and (d).

¹⁶⁸ *Ibidem*, at para. 5(c).

¹⁶⁹ *Ibidem*, at para. 19.

¹⁷⁰ *Ibidem*, at para. 13.

tion of least-developed countries in international trade and to improving their effective participation in the multilateral trading system'.¹⁷¹ Further, the declaration noted that 'under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health (...) subject to the requirement that they (...) are otherwise in accordance with the provisions of the WTO Agreements'.¹⁷² The declaration also reaffirmed the right of WTO members to regulate the supply of services under GATS,¹⁷³ and confirmed the WTO's responsibility to make its operations transparent and democratic.¹⁷⁴

The United States' initial responses to the Doha Declaration's objectives have been mixed. With respect to trade liberalisation, the US submitted to the WTO a proposal suggesting the removal of international regulatory procedures for legal, financial, and insurance services, and also recommended lowering trade restrictions in the telecommunications, energy, and environmental services.¹⁷⁵ In addition, the Bush administration promised to contribute USD 1 million to the 'Doha Development Agenda Trust Fund, [which] aim[s] at building the capacity for developing countries to participate in the full range of WTO negotiations and activities agreed to in Doha'.¹⁷⁶ In the agricultural realm, the United States is leading a drive to eliminate export subsidies within five years.¹⁷⁷

The United States position on measures designed to provide affordable medication to treat AIDS and other epidemics has been more ambiguous. The Doha Declaration set a December 2002 deadline by which the Council for TRIPS was to have reached agreement on a policy under which least-developed WTO Members could import generically manufactured copies of patented pharmaceuticals.¹⁷⁸ The Council for TRIPS failed to meet that deadline amid reports of US objections to the number of diseases and eligible importing nations that some WTO Members wanted to include in the scheme for relaxing pharmaceutical patent protection.¹⁷⁹ In the wake of

¹⁷¹ *Ibidem*, at para. 3.

¹⁷² *Ibidem*, at para. 6.

¹⁷³ *Ibidem*, at para. 7.

¹⁷⁴ *Ibidem*, at para. 10.

¹⁷⁵ Office of the United States Trade Representative press release 2002-63, *United States Proposals for Liberalizing Trade in Services*, 1 July 2002, available at www.ustr.gov/releases/2002/07/02-63.pdf (last visited 23 January 2002).

¹⁷⁶ *Idem*.

¹⁷⁷ *Idem*.

¹⁷⁸ Copson, Raymond W., *AIDS in Africa: Issue Brief for Congress*, Foreign Affairs, Defense, and Trade Division, Congressional Research Service, Order Code IB10050, updated 7 January 2003, at CRS-1, available at www.usinfo.state.gov/topical/global/hiv/ib10050aidsaf.pdf (last visited 25 January 2003).

¹⁷⁹ *Idem*. The US State Department reported that some (unspecified) WTO Members sought to allow wealthier WTO Members onto the list of 'poor country epidemic' nations that were meant to be the focus of the Doha Declaration's emphasis on relaxations of patent protection allowable pursuant to TRIPS Article 31. In addition, the State Department reported that some

that failure, the United States proposed an exception to TRIPS Article 31 that would allow least-developed nations with health epidemics to import generically manufactured drugs from developing nations that currently provide patent protection for the pharmaceuticals in question.¹⁸⁰ While the US proposal indicated a willingness to ease patent protection in some cases, it did not give explicit guidance as to which specific drugs could be manufactured.¹⁸¹

On 30 August 2003, on the eve of the WTO Ministerial Meeting in Cancun, Mexico, the WTO General Council for TRIPS appeared to resolve the dispute about implementing the Doha Declaration by adopting a decision which essentially permitted a patent exception rule to allow countries to produce medicine for export in order to fulfill public health needs in countries that do not have production capacities.¹⁸² The decision

WTO Members sought to expand the classes of drugs available for generic manufacture and import to include drugs not designed for the treatment of epidemic diseases (*e.g.*, Viagra). US Department of State International Information Programs, *U.S. Announces Interim HIV/AIDS Plan for Poor Countries*, 23 December 2002, available at www.usinfo.state.gov/topical/global/hiv/02122301.htm (last visited 25 January 2003).

¹⁸⁰ TRIPS currently allows WTO Members to use a compulsory license to import a generically manufactured drug from another country provided that the exporting country has not granted a patent on that drug. The problem is that TRIPS Article 31(f) currently prohibits a WTO Member that has granted patent protection from generically producing a drug for export, even if the importing country has a health epidemic and lacks the domestic infrastructure to manufacture generic drugs. The US proposal envisions either a dispute resolution moratorium or a waiver of TRIPS Article 31(f) so that developing nations with the capacity to produce generic drugs could export those drugs to a least developed nation, even when the exporting nation has granted patent protection. The US proposal also takes pains to note that exporting nations would be expected to 'ensure that the medicines (...) are not diverted from the Member for which they were intended, either by being diverted to other markets or by leaking onto the domestic market of the exporting Member'. Furthermore, the US proposal indicates that an importing Member might still owe some discounted measure of compensation to the patent holder (although the licensing fees paid to the patent holder by the exporting nation would be used to offset the total amount of compensation owed by the importing Member). US Department of State, International Information Programs, *A Second Communication from the United States of America Relating to Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, available at www.usinfo.state.gov/topical/econ/wto/tripshealth020625.htm (last visited 25 January 2003).

¹⁸¹ The US proposal suggests that any WTO Member with least-developed nation status be presumed to have insufficient infrastructure to produce its own generic pharmaceuticals, and thus would be allowed to import generic drugs under the proposed exception to TRIPS Article 31(f). Developing Members not designated as 'high income countries' would also be eligible to import generic drugs (thus Barbados, Brunei, Cyprus, Hong Kong, Israel, Kuwait, Liechtenstein, Macao, Malta, Qatar, Singapore, Slovenia, Taiwan and the United Arab Emirates would not be allowed to import generic pharmaceuticals even in cases of health epidemics). The US proposal does provide a list of potential diseases that could qualify a Member for Article 31 exception (including ebola, trypanosomiasis, cholera, dengue, typhoid, and typhus fevers); it does not specify which pharmaceuticals could be generically produced. See US Department of State International Information Programs, *op.cit.* (note 179).

¹⁸² WTO Council for TRIPS, *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health*, www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (last visited 1 September 2003).

dealt with US concerns that the patent exception rule would lead to the distribution of generic medicines for non-infectious diseases and with concerns about the re-export of such medicines to other markets.

While it was hoped that the pre-Cancun agreement for implementing the Doha Declaration would help facilitate a successful Ministerial Meeting in Cancun, the meeting ended without tangible results on agricultural trade and the other issues that had been on the agenda. Similarly, the post-Cancun results for implementing the Doha Declaration have been disappointingly slow in coming. No pharmaceuticals have actually been produced under the Doha Declaration and the subsequent agreement. Very few developing countries will actually have the technical capacity to take advantage of the agreements. Even if they develop that technical capacity, pharmaceutical producers in the developing world are concerned that while governments are bound not to object to the production of the necessary medicines, the pharmaceutical companies can still initiate private legal actions on the basis of their patents. Also, once a producer or government in a developed country has spent substantial funds to retro-engineer critical medicines, the patent holders can then undermine all those efforts at the last moment by offering to sell their own products at a very low price so as to undercut the marketing of drugs produced in the developing country.¹⁸³ As with many struggles in the international domain, victories are hard won and require continual vigilance.

6. CONCLUSION

Sub-Commission Resolution 2000/7 expressed concern for the human rights implications of trends in world trade and globalisation. By adopting the resolution, the Sub-Commission thus played a role in initiating a broader effort to develop a human rights approach to intellectual property protection, world trade, and globalisation. Although Sub-Commission resolutions ordinarily have less impact than resolutions arising from the Commission on Human Rights, the Economic and Social Council, the General Assembly, or certainly the Security Council, Sub-Commission Resolution 2000/7 apparently caused a rethinking of the relationship between trade and human rights, in general, and intellectual property and human rights, in particular. One way of understanding the impact of Resolution 2000/7 is to repeat the adage: 'Nothing is more powerful than an idea whose time has come'.¹⁸⁴

¹⁸³ For an update of the situation, see Attaran, Amir, 'Assessing and Answering Paragraph 6 of the Doha Declaration on the TRIPs Agreement and Public Health: The case for Greater Flexibility and a Non-Justiciability Solution', *Emory International Law Review*, Vol. 17, 2003, p. 743.

¹⁸⁴ Hugo, Victor, *Oeuvres Complètes: Histoire*, 1877, p. 456: 'On résiste à l'invasion des armées, on ne résiste pas à l'invasion des idées.' [One can resist the invasion of armies, but not the invasion of ideas.]

