

mon heritage of humanity. Under current intellectual property law, patentability remains systematically biased against TK communities.³⁷

TK may have stimulated research leading to a patent. However, the TM may have little claim on the patent itself if a patent is obtained regarding the structure of a compound or the process of isolation. Where the use of the drug is the same as or similar to that of the source plant in TM, the connection between the TK and the invention is clear. The degree of the essential contribution of the TM depends upon the facts of every case. International agreements play a large role in establishing a base line of protection. The main question is how these agreements impact national legislation regarding protecting TM with patents.

III. TRIPS

The Trade Related Intellectual Property Agreement (TRIPS) is the international agreement that states the minimum level of protection that Global Agreement on Tariffs and Trade (GATT) member states must provide.³⁸ It allows developing nations to bring their legislation in line with the agreement over a period of time. The result, eventually, should be a nearly uniform standard in countries that could differ substantially in terms of economic development. Some have argued that this system drains wealth and resources from poor nations.³⁹

Article 8(j) of the CBD leaves it to national legislation to determine how to protect TK and biological resources. Article 27(3) of TRIPS allows governments to exclude from patentability plants and animals other than micro-organisms. The enactment of TRIPS resulted in violent protests in India, polarized by the US patent of chemicals isolated from the neem tree. India has proposed that TRIPS be amended to comply with the CBD (although some other nations see no inherent conflict). The Indian proposal calls for: 1. benefit sharing agreements, 2. the disclosure of origin for genetic resources, 3. patent applications open to public scrutiny, 4. the expansion of geographical indication protection and, 5. requiring companies that make environmentally sound technology to sell it at a fair price.⁴⁰ Issues 1 to 4 will receive special attention here, as they are central to the debate of patenting TM. Because the main impetus for amending TRIPS came from alleged US infringement of Indian rights, the US patent system will be considered next.

37 See Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 929-930 (1996).

38 General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (the Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Rights, 33 I.L.M. 81 (1994) [hereinafter TRIPs Agreement].

39 For an examination of India in particular, see Muria Kruger, *Harmonising TRIPS and the CBD: A Proposal from India* 10 MIN. J. GLOBAL TRADE 169 (2001). India was a particularly vocal opponent of TRIPS at the Uruguay Round.

40 *Id.* at 179.