INSTITUTION INTERACTION AND REGIME PURPOSE - CONSIDERATIONS
BASED ON TRIPS/CBD

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INSTITUTION INTERACTION AND REGIME PURPOSE - CONSIDERATIONS

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This thesis discusses interaction between international regimes, concentrating on regime overlap in light of the differentiation between purposes of international regimes. From this wide number of international agreements in the international system, this thesis argues that agreements can be created with different purposes: they can have a self-interest purpose or a moral purpose. These different purposes will be translated into the objectives of the agreements and will influence other characteristics of the agreements. Overlapping regimes gives a chance for countries to engage in forum shopping and choose the institution that best suits their interests. Powerful developed countries will take issues that are of their interest to self-interest purpose institutions and try to keep some issues in moral purpose agreements. These general considerations are going to be applied to a specific case of interaction: the relationship between the TRIPS and the CBD.

Approved: _____________________________________________________________

James S. Mosher

Assistant Professor, Political Science
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<td>Description</td>
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<td>---------</td>
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</tr>
<tr>
<td>ABS</td>
<td>Access and Benefit Sharing of Genetic Resources and Traditional Knowledge Associated</td>
<td></td>
</tr>
<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
<td></td>
</tr>
<tr>
<td>COP</td>
<td>Conference of the Parties</td>
<td></td>
</tr>
<tr>
<td>CTE</td>
<td>(WTO’s) Committee on Trade and Environment</td>
<td></td>
</tr>
<tr>
<td>DMD</td>
<td>Doha Ministerial Declaration</td>
<td></td>
</tr>
<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
<td></td>
</tr>
<tr>
<td>ENB</td>
<td>Earth Negotiations Bulletin</td>
<td></td>
</tr>
<tr>
<td>FAO</td>
<td>Food and Agriculture Organization</td>
<td></td>
</tr>
<tr>
<td>G-77</td>
<td>Group of Developing Countries</td>
<td></td>
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<tr>
<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
<td></td>
</tr>
<tr>
<td>ICTSD</td>
<td>International Centre for Trade and Sustainable Development</td>
<td></td>
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<tr>
<td>IPRs</td>
<td>Intellectual Property Rights</td>
<td></td>
</tr>
<tr>
<td>IUCN</td>
<td>World Conservation Union (also known as the International Union for the Conservation on Nature and Natural Resources)</td>
<td></td>
</tr>
<tr>
<td>LDCs</td>
<td>Least Developed Countries</td>
<td></td>
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<tr>
<td>NGOs</td>
<td>Non-Governmental Organizations</td>
<td></td>
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<tr>
<td>PIC</td>
<td>Prior Informed Consent</td>
<td></td>
</tr>
<tr>
<td>S&amp;D</td>
<td>Special and Differential Treatment (also SDT)</td>
<td></td>
</tr>
<tr>
<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
<td></td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference for Trade and Development</td>
<td></td>
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<tr>
<td>UNEP</td>
<td>United Nations Environmental Programme</td>
<td></td>
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<tr>
<td>UR</td>
<td>Uruguay Round</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WSSD</td>
<td>World Summit on Sustainable Development</td>
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<td>WTO</td>
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Chapter 1 – Institution Interaction and Regime Purpose

When we looking at the world today it can be seen an intricate network of international agreements and international organizations dealing with all sorts of issues that connect all countries in the world. Increasingly these agreements are moving beyond issues that traditionally required international coordination, for example security, and are becoming more involved in matters that were considered exclusively in the domestic domain. An example of the deepening of international regulations is the new trade rules under the World Trade Organization (WTO). Even though international trade is a fairly traditional theme of international agreements, the creation of the WTO expanded and deepened this regulation. The WTO has a direct influence (guiding, forcing change and even restricting) on domestic trade and industrial policy. Moreover, these international agreements have to co-exist and learn how to operate in a complex system of multilateral, bilateral and regional agreements.

This is happening at the same time that new themes are introduced in the international arena. One good example is the environment. Forty years ago environmental issues were hardly even a domestic concern for many countries and today there are over 200 international multilateral environmental agreements dealing with a wide array of environmental issues. Another important change taking place in the international sphere is the growing inclusion of non-state actors. Most discussed is the so-called global civil society that transcends national frontiers, including not only formal non-governmental organizations but also small indigenous groups.
These changes occurring during the past decade or so raise new questions, for instance, how do these proliferating international agreements interact with each other. Generally speaking, different international agreements strive to be implemented in a mutually supportive way. The Vienna Convention on the Law of Treaties (VCLT) provides that when successive agreements have the same subject matter and when “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” (Vienna Convention on the Law of Treaties, 1969, Article 30, paragraph 2). But increasingly there have been cases when agreements that do not have the same subject matter have overlapping issues, not falling under the scope of Article 30.2 of the Vienna Convention. This may not be intended or even anticipated. In other cases, different international organizations are brought together to cooperate with the expertise on broader issue areas, so interaction in this case is encouraged.

The objective of this thesis is to join the yet timid discussion on international institution interaction. The starting point will be the presentation of a way to differentiate international agreements according to their purpose. From this wide number of international agreements in the international system, this thesis argues that agreements can be created with different purposes: they can have a self-interest purpose or a moral purpose. These different purposes will be translated into the objectives of the agreements and will influence other characteristics of the agreements. Based on this typology and in the light of the distinctions they highlight, the thesis will discuss the implications when looking at interaction between international regimes. Although it is the intent to make
generic theoretical claims about international regime interaction, these considerations are going to be based on the analysis of the relationship between two specific international agreements: the Convention on Biological Diversity (CBD) and the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

In this first chapter the typology is presented, along with a literature review on the literature on institution interaction and other important concepts used on the general discussion on institution interaction that closes this first chapter. The next two chapters present the two case studies which are two international agreements, examining their creation and the specific area where they overlap, access and benefit sharing of genetic resources and traditional knowledge associated. The concluding chapter applies the theoretical framework suggested on this first chapter to the agreements presented before.

**Global Governance and Institutional Interaction**

One of the emerging concepts used to describe changes in the international organization is global governance. In the inaugural volume of the journal, *Global Governance*, James Rosenau defines global governance broadly as “systems of rule at all levels of human activity – from the family to the international organization – in which the pursuit of goals through the exercise of control has transnational repercussions” (1995:13). Finkelstein (1995) talks about the need to understand the concept of global governance in light of “the great changes that have been occurring both in the dynamics of relations in the world of states and in understandings of these dynamics” (p.367).
Oran Young (1997) for example, talks about the “developments that do not fit easily into our conventional view of international society as a decentralized system of sovereign states [and] as a result, we are much more conscious of the growing demand for governance in world affairs than of emergent innovative procedures to supply governance in this social context.” (p.1). About the concept of governance, the author, citing North says that “governance arises as a matter of public concern whenever the members of a social group find that they are interdependent: the actions of each individual member impinge on the welfare of the others” and that “at the most general level, governance involves the establishment and operation of social institutions – in other words, sets of rules, decision-making procedures, and programmatic activities that serve to define social practices and to guide the interactions of those participating in these practices” (North 1990 in Young 1997:4).

Hewson and Sinclair (1999) discuss the concept in the opening chapter of their book on Global Governance Theory, and identify different uses to the term global governance. The first idea presented is linking the importance of the concept of global governance with economic globalization and the move from states to market. They point out different perspectives, the first one being Rosenau’s theory of “shifting the location of authority” (p.5) and the emphasis on the “implications of a widespread reorientation of individuals political skills and horizons” (p.6). The other perspectives are the rise of a global civil society, the “key role played by the reorientation of key intellectual, business and political elites in the G-7 zone” (p.8) and finally the “salience of globally oriented epistemic elites and authorities” (p.10). Besides the emphasis on globalization, there are
two other elements that they point out as sources of theory on global governance, the debate inside the study of international regimes and the perception “that global change has transformed the environment of the world organizations” (p.13).

These changes and this new environment of world organizations is the context in which existing international regimes\(^1\) have to operate and cooperate today and in which new international regimes are created. Even though these regimes vary greatly on their objective, degree of formality, nature of obligations, specificity, membership, etc, it is increasingly noticeable that, although many times unexpectedly, the rules that arise from these agreements overlap in some way, requiring coordination among them. The interaction (or interplay, linkage and even overlap as some authors refer to it) between international regimes is a new theme in the study of international organization, and thus far the literature has been scarce, and most of the time restricted to specific cases, environmental regimes being the subject of many of these studies.

Kristen Rosendal (2003), for example, describes the relationship between the same two agreements used as basis for this thesis, the Convention on Biological Diversity and the Trade-Related Aspects of Intellectual Property Rights. After giving an introduction on both agreements, she goes on to talk about the issues that arise from the interaction between the agreements and institutional responses in both institutions, and concludes that “the interaction is rooted in different objectives and is arguably leading to disruptive effects with regard to conservation of, access to, and equitable sharing of benefits from genetic resources. The nature of influence is arguably unintentional, but

\(^1\) According to the already traditional definition by Krasner (1983), international regimes are “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.” (p.1).
clearly anticipated.” (Rosendal, 2003:18). As it can be seen from this passage, her conclusions are based on the future prospects for the interaction of these two specific international agreements, and the general regulation of access to genetic resources.

Also in the issue of genetic resources, but now restricted to agreements pertaining to the management of plant genetic resources for food and agriculture, Regine Andersen (2005) focuses on specific agreements and their interaction. Even though her main conclusions are again on relevant issues for the regimes she studies, she makes some more general recommendations concerning forum shopping and the time dimension, saying that “stakeholders may increase their chances to win through with interests or ideas, if they systematically analyze their strategic opportunities in regime interaction, as they arise out of the time dimension as well as out of the process of ‘forum shopping’.” (Andersen, 2005:24).

This idea of the importance of time dimension in international regime interaction had already been developed by Andersen in a prior article (2002), but again in the perspective of a specific issue are, the management of plant genetic resources. Andersen proposes four different development stages of regimes: agenda setting, regime formation, implementation and review/evaluation. Given those phases, her aim is to investigate how these different stages affect regime interaction and “how can we delineate the processes by which one regime could influence the other in such a context” (p.100). She shows that by examining the evolution of regimes in the area of plant genetic resources, she was able to see three possibilities of interplay. First, “an earlier agreement may influence a later one”. Secondly, “the way in which an earlier regime might hinder a later one” and
finally, “a regime under formation may develop potentials to modify the effects of a more established one.” (p.114-115).

There have been studies aimed at a broader understanding of the phenomenon of regime interaction outside a specific issue area. Young (1996) defines institutional linkage as “politically significant connections between or among institutional arrangements that are differentiable in the sense that they have distinct creation storied and ongoing lives of their own.”(p.2). The author distinguishes four different types of institutional linkages: embedded institutions, nested institutions, clustered institutions, and overlapping institutions. Embedded institutions are those that like most of the “issue-specific regimes in international society are deeply embedded in overarching institutional arrangements in the sense that they assume the operation of a whole suite of broader principles and practices that constitute the deep structure of international society as a whole” (p.3). Next, he describes nested institutions as those “in which specific arrangements restricted in terms of functional scope, geographical domain, or some other relevant criterion are folded into broader institutional frameworks that deal with the same general issue area but are less detailed in terms of their application to specific problems” (p.2). In the case of clustered regimes, “those engaged in the formation or operation of differentiable governance systems find it attractive to combine several of these arrangements into institutional packages, even when there is no compelling functional need to nest the individual components into a common and more generic framework” (p.5). And finally, the last category, overlapping institutions comprises “individual regimes that were formed for different purposes and largely without reference to one
another intersect on a de facto basis, producing substantial impacts on each other in the process” (p.6). Young then proceeds to explain how these different patterns of interaction emerge in international society.

Olav Stokke (2001) starts by defining regime interplay as “situations when the contents, operations or consequences of one institution (the recipient regime) are significantly affected by another (the tributary regime). He also proposes categorizing regime interaction, emphasizing regime effectiveness or a causal analysis (“concrete mechanisms around which institutions can alter the behavior of state actors” Keohane et al. 1993:19 in Stokke 2001:9). The author creates three types of interplay: utilitarian (one regime altering costs and benefits options for another regime); normative (when one regime confirms or contradicts norms or another); and ideational (by drawing attention to problems of another regime, or providing solutions that could be of use of another regime). Stokke stresses that the result of the interplay can be positive or negative on the effectiveness of the recipient regime.

Finally, Thomas Gehring and Sebastian Oberthür (2004) proposed a conceptual framework for the analysis of interaction between regimes. They start by pointing out that “the international system is populated by a steadily growing number of international institutions” (p.247) and that traditional studies in regime theory tend to view regimes in their isolated form, not taking into account this growing “regime density” and that interaction between international regimes can create either conflict or important synergies. They “concentrate on situations in which one or more international regimes exert influence on one or more other regimes or on issue areas related to other regimes”
For them, “interaction between regimes is based on a causal link between the source regime(s) and the target regime(s)” (p.248).

Gehring and Oberthür stress that this influence has to be taken into account not only when there are changes in norms and institutional arrangements, but also in all three levels of regime effectiveness, that is, output, outcome and impact. By output, they mean that regimes can change other regimes norms. When referring to outcome, they are talking about behavioral adaptations. And a regime can also have an impact on the subject matter of another regime.

The world environment discussed by all these authors, where institutional interaction is an important element to consider, is described by Joseph Jupille and Duncan Snidal as “anarchic but variably institutionalized international system [in which] actors confront multiple institutional options” (2005:2). Their focus is on the process in which these international institutions are chosen to deal with an issue. They “analyze institutional choice in terms of institutional strategies ranging the unproblematic ‘use’ of an existing focal institution, to ‘selection’ from a fixed but plural menu of institutional alternatives, to ‘change’ of an existing institution, to the ‘creation’ of a new arrangement.” (Jupille and Snidal, 2005:6). Therefore, when actors cannot agree on one institution that is viewed by all as the “focal” institution, which is adequate in terms of its characteristics, like membership, scope etc², institutional interplay becomes an important element to consider.

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² The authors define relevant institutions “depend[ing] on objective factors such as substantive issue coverage, but also on the norms, perceptions and strategic choices of actors” (Jupille and Snidal, 2005:10-11).
The multitude of international organizations on the international system currently can increasingly create situations in which there is no singular institution that is perceived by actors as adequate for dealing with an issue. The process of institutional choice can be summarized by this diagram (the selected part being the one when there is institution interaction):

Figure 1 - Choices within Institutionalized Cooperation (from Jupille and Snidal, 2005:15)

Jupille and Snidal argue that “when different actors prefer different institutional arrangements then the outcome will depend partly on the relative power and strategies of different actors and partly on the relative difficulty of achieving institutional outcomes” (2005:19). In this thesis, the focus will be on the power that those different actors have in different institutions. In order to discuss these differences in power, another factor is included, the different purposes of institutions in the international system.
Purpose of International regimes

Many authors have discussed the concept of international regimes, their formation, etc, and international regimes have been classified taking into account many aspects. Here it will be suggested another aspect to be examined, which differentiates regimes and could have implications when international regimes interact: the purpose of international regimes. The importance of the purpose of international regimes was discussed by John Ruggie, in his famous paper on embedded liberalism. Ruggie focuses on “how the regimes for money and trade have reflected and affected the evolution of the international economic order since World War II.” (1982:379). When studying the monetary and trade regime of the post-war period, he stresses that current interpretation only takes into account the power dimension which he says accounts for the “form” of the resulting regime, but not the content. To understand the content of the resulting regimes, he says that it is also necessary to look at “legitimate social purpose”. The following passage summarizes his theory:

In sum, to say anything sensible about the content of the international economic orders and about the regimes that serve them, it is necessary to look at how power and legitimate social purpose become fused to project political authority into the international system. Applied to the post-World War II context, this argument leads me to characterize the international economic order by the term “embedded liberalism”(...) (Ruggie 1982:382-383).

Taking Ruggie’s emphasis on the idea that international regimes have legitimate social purposes, and looking closely at how the purposes differ, that is to say the different motivations of countries when they create international agreements, we can observe

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3 See for example Haggard and Simmons (1987)
better power relations between developing and developed countries. This thesis defines two categories of international regime purpose: self-interest purpose and moral purpose. It is important to point out that these two types of regimes described here are not an exact description of concrete, real life examples. They are abstraction, in the weberian sense of “ideal types”, in which some characteristics that are analytically relevant are stressed and help understand phenomena, while many other characteristics are left aside. Also, any real regime may have aspects of both ideal types, but will better fit in one or other category. This being said, the two types are described below.

Agreements that have a self-interest purpose have as their main objective, or justification, individual gains. When countries enter agreements that have a self-interest purpose, they are acting as selfish rational actors, looking for the maximization of their own benefits. This egoistic motivation will be translated into the agreement’s objectives, and this will influence characteristics of the resulting regime. Because when entering these agreements countries act selfishly, different country’s obligations on the agreements are more equal. This is true even if weaker and poorer countries have a more difficult time meeting their obligations. This means that powerful countries are less incline to make unequal concessions, i.e., there is no substantial special and differential treatment (S&D) for developing and less developed countries. The decision making process on those agreement sometimes or often allow for a minority group of more powerful countries (for example developed countries) to have veto powers, whether be by having the majority of votes through a weighted voting system, or during the process of building consensus and even by a concrete veto powers. Another characteristic of these
types of agreements is that they are better enforced. Some even include an established intra-institutional dispute settlement mechanism. The kind of objectives pursued by such agreements could be seen as individualistic, or based on Inglehart’s “survival values”.

Ronald Inglehart (2006) talks about changes in people’s worldviews in two different times: first during the industrial revolution, going from “traditional to secular-rational values” and second in the post-industrial phase, where is taking place “a shift from survival values to self-expression values” (p.115). His main objective in this article, which is not the aim of this thesis, is to discuss how the “increasing emphasis on self-expression values makes the emergence of democracy increasingly likely where it does not yet exist, and makes democracy increasingly effective where it already exists” (p.115). But the distinction stressed here could be seen as being like the distinction Inglehart makes between survival and self-expression values. The author refers to survival values as “an emphasis on economic and physical security” and argues that there has been an “increasing emphasis on self-expression, subjective well-being, and quality of life concerns” (Inglehart 2006:116).

The argument presented here does not concern the transition discussed by Inglehart, but the existence of these two different values in our post-industrial society, and how they guide the purpose of the different international agreements. Therefore, using Inglehart’s categories, the first ideal type of international agreement presented had a self-interest purpose, its main objectives being what Inglehart describes as a survival values, but that here will be referred to as self-interest values, based on an individual state economic and physical security and well-being. On the other hand, Inglehart’s self-
expression values bring about agreements that have a moral purpose, agreements that are motivated by moral values of the societies, which make the main objective of the agreements a more altruistic one, more focused on general well-being and quality of life. Marilena Chaui (2000) defines moral as “values concerning good and evil, what is allowed and what is prohibited, and correct behavior”. Altruism, according to Monroe (1996) is the perception of a common humanity, in other words, what Weinstein (2007) describes as the “belief that all humans have common needs and interests” (p.13).

This idea of altruism as common interests of humanity goes along with Alexander Wendt’s (1994) notion of collective identity. He points out that collective identity “refers to positive identification with the welfare of another, such that the other is seen as a cognitive extension of the self, rather than independent” (p.386). Wendt goes on to argue that “this is the basis for feelings of solidarity, community, and loyalty and thus for collective definitions of interest. Having such interests does not mean that actors are irrational or no longer calculate costs and benefits, but rather, that they do so on a higher level of aggregation. This discourages free-riding by increasing diffuse reciprocity and the willingness to bear costs without selective incentives” (p.386).

Based on these concepts, agreements that have a moral purpose implicate a notion of what is good, a sense of what is a correct for the collective, an idealistic, selfless and altruistic behavior, also with an emphasis on the quality of life. These agreements are not aimed at obtaining immediate gains for a specific state but at addressing societies’ moral values. It could even be said that moral purpose regimes are not created with the objective of addressing traditional collective action problems in international cooperation.
These objectives, based on these values of what is good, of a common humanity and a collective identity and solidarity and an idealist, self-less behavior are going to determine certain characteristics of the regimes. Agreements that are motivated my moral values tend to be more inclined to recognize the differences between countries, accepting the principle of a common but differentiated responsibility, which reflects in more substantive special and differentiated provision on the agreements. Moreover, the decision making process on those agreements are more equalitarian, usually based on the “one country, one vote” system, and requiring a simple majority. Such system works in the advantage of developing countries since they are more numerous. But these agreements are also less strongly enforced, with many not determining the consequences of non-compliance with treaties’ obligations.

In sum, this typology suggests that international regimes are basically created with different purposes: self-interest or moral. This can be seen on table 1:

<table>
<thead>
<tr>
<th>Self Interest</th>
<th>Moral</th>
</tr>
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<tbody>
<tr>
<td>• Countries act egoistically</td>
<td>• Perception of right and good</td>
</tr>
<tr>
<td>• Maximize their own benefits</td>
<td>• Notion of common humanity,</td>
</tr>
<tr>
<td>• Self-interest values:</td>
<td>solidarity</td>
</tr>
<tr>
<td>Economic and physical</td>
<td>• Collective identity</td>
</tr>
<tr>
<td>security</td>
<td>• Idealist, and self-less</td>
</tr>
</tbody>
</table>

Table 1 – Purposes in International Regimes

These values and motivations are general and are going to be translated into the objectives of the different international agreements negotiated by countries. These
objectives will influence other characteristics of the resulting agreements. The aspects discussed in this thesis can be summarized by the following diagram:

![Diagram: Characteristics of Types of International Agreements]

These characteristics are going to be different depending on the purpose of the agreement. It is important to highlight again that this distinction is an abstraction. When examining real international regimes this typology and implications are not going to fit perfectly, but this distinction can help us understand important characteristics of agreements. This can be seen in table 2:
This table summarizes the characteristics of agreements that have different moral purposes. This typology will be applied to two cases on the last chapter, but as a first exercise some other examples can be presented. As a self-interest purpose regime, a good example is the International Monetary Fund, not only for its first objectives at the time of its creation, which were the stabilization of the international monetary system, by administering exchange rates (fixed in the post-war period) and aiding countries with balance-of-payments problems. The International Monetary Fund also presented characteristics of a self-interest institution when it was the main international agency to deal with the debt crisis of developing countries during the 1980s.

The objectives under which the organization was created lead to an institution that treated all countries equally concerning their obligations to the fund when problems with exchange rate and balance of payments arise. The response and policies implemented by the Fund, which require adjustment in the “problematic” country, have been consistent with liberal economics recipe of paying your creditors first and above other obligations, balancing domestic spending among others. This uniformity lead some authors to refer to...
those policies as the “Washington Consensus”\(^4\). Decision-making at the International Monetary Fund is based on a weighted voting system, with richer countries having more voting power than poorer countries. Enforcement is based on the not approving additional loans or parts of already approved loans.

One good example of a moral purpose agreement are agreements in human rights. A lot of the pressure at the international system to raise the level of protection to human rights in the world comes from developed countries and are to be applied mostly in developing countries. This is a case when the actors that are pressuring for the regime have nothing to directly benefit from them. On the other hand, most of the human rights agreements are poorly enforced, not having strong consequences for non-compliance.

**Purpose and Power in International Regime Interaction**

The last section described how international regimes can be created with different purposes, namely self-interest purpose and moral purpose, and the characteristics of such different regimes. Regimes that have a self-interest purpose are motivated by egoistic behavior and emphasize individual state economic and security values. These values are going to be translated in objectives that are also selfish, and into agreements that demand reciprocity from members, no matter developed or developing countries, agreements whose decision-making system is seen as not transparent or fair but are strongly enforced. On the other hand, regimes that are motivated by moral values take into account quality of life and principles of what is good and right. Actors behave in an altruistic way and

also identify with collective concerns. These idealistic values are included in the agreement's objectives, and open the possibility for countries to be treated differently in respect to their responsibilities and benefits arising from the agreement. However they are, most of the times, poorly enforced.

These differences in objectives, existence and extent of special and differential treatment clauses, decision-making system and enforcement, result in regimes that are perceived in different ways by actors. Provisions on self-interest purpose regimes are seen as more binding, since they can be better enforced and benefits withdrawn in case of non-compliance. On the other hand, regimes that have a moral purpose, although also binding, are perceived as “best-endeavor” or intentional agreements, which mean that countries commit to do their best to fulfill their obligations, but know that the consequences of non-compliance are not the same as on the other regimes. Regimes with different purposes also have distinct power relations between members, especially between developed and developing countries, where more equality on the decision-making process makes it possible for developing countries to benefit from their number majority.

In light of the importance of the concept of power, it is important to discuss this concept with greater detail. Barnett and Duvall (2005) when talking about global governance theory highlight the importance of including the concept of power in their analysis. They argue that theory in global governance has emerged in the post cold war period, and has focused on countries cooperating in order to create a more inclusive and egalitarian world. The authors credit this analysis of global governance as a mechanism
of coordination, having globalization as the reason why the world needs a regulatory mechanism, to the dominance of liberalism. That is the reason, according to Barnett and Duvall, that this view has excluded power as an important factor to take into consideration.

The concept of power that is used in their analysis is not the same as the one used by realists, that is, a “military” use of force power. They work with a broader concept that encompasses other forms and expressions of power, and includes “a consideration of the normative structures and discourses that generate differential social capabilities for actors to define and pursue their interests and ideals.” (p. 3). With this in mind, they work with the following definition of power: “power is the production, in and through social relations, of effects that shape the capabilities of actors to determine their own circumstances and fate” (p.8).

Barnett and Duvall observe four forms (or expressions) of power: compulsory, institutional, structural and productive. Compulsory power is exerted in situations where there is direct control in the relation between two actors. When there is Institutional power, as the name says, this power is indirect, through the design of institutions that will, even if in the long-term, work in the advantage of those actors holding the power. Structural power “concerns the constitution of social capacities and interests of actors in direct relation to one another, and finally productive power “is the socially diffuse production of subjectivity in systems of meaning and signification” (p.3).

The expression of power that we can in a more clear way in international regime interaction is institutional power, where powerful actors exercise their power most of the
times indirectly, by designing institutions that they will be able to control. By control, what is meant is the aforementioned idea “determining their own circumstances and fate”, and the idea behind the definition of institutional power, where powerful countries built institution that will work on their advantage. The analysis of international regime purpose shows that the control that developed countries hold over regimes can be different according to the purpose of the institution: control is higher in self-interest purpose institutions and lower (but still present) in moral purpose institutions. This distinction has implications when agreements with different purposes interact.

Basically there are three situations that can arise when agreements interact: first there can be two (or more) agreements with a self-interest purpose; second two (or more) agreements with a moral purpose, and the interacting agreements have different purposes. This last situation is the one that this analysis will focus.

One of the consequences of the existence of a multitude of international organizations that many times overlap with each other, in the international context of anarchy and thus no institutional hierarchy, is that countries use this overlap as part of their strategies. This is what many authors call “forum shopping”, that is, actors contemplate the use of different institutions and choose the one that benefits them the most, or where they can get the best outcome. Hafner-Burton (2006) for example, says that “nesting and overlap provide avenues for actors to compete to shape politics in their self-interest and to maximize their political advantages over others” (p.3). Alter and Meunier (2006) state that

the existence of nesting/overlapping institutions creates the opportunity for policy entrepreneurs and interest groups to choose the political forum that is both
willing to adopt their policy preference and is most authoritative. Policy entrepreneurs will frame their issue to build political consensus within their chosen decision-making institution and to fit the style of the decision-making forum, with the policy outcome being a mixture of the preferences of the policy entrepreneurs and existing repertoire of policy formula within the decision-making regime. Those actors wanting a different policy may respond, however, by appealing to a different forum that has overlapping authority, seeking an authoritative decision that contradicts or undermines the policy of the other institution. (p365)

Jupille and Snidal (2005) also discuss forum shopping in the passage: “with multiple institutions in the status quo, this may lead to inter-institutional competition on the supply-side, though there are also many examples of ‘peaceful coexistence’ among jurisdictionally overlapping institutions. On the demand side, individual actors may ‘forum shop’ to locate the issue in an institutional arrangement that favors them distributionally” (p.31). The important example given by the authors is the United State using its power to include intellectual property rights in the World Trade Organization, even though there existed an international institution that dealt with intellectual property rights issues (the World Intellectual Property Organization).5

What these authors are saying is that countries will use institution interaction, in the case of overlapping issues, to find the forum that will most suit their interest on that issue, as shown by figure 3.

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5 This will be discussed in chapter 2.
In the situation of forum shopping, powerful actors that exercise their power to control self-interest purpose institutions are going to bring issues that are of their interest to be dealt with in those organizations. Other issues will be justified under moral purpose institutions, and be dealt with in a more flexible way. But less powerful actors can also try to benefit from the greater power of self-interest institution and try to include issues on the agenda of self-interest purpose institutions. However, they are faced with a choice: if they succeed in changing the agenda to include an issue that they demand, the resulting decision will probably be weaker than first envisioned. On the other hand, at the moral purpose agreement, they would probably be able to achieve a result closer to what they demand, with the problem of weaker enforcement.
Chapter 2 – World Trade Organization and the TRIPS Agreement

The World Trade Organization is an international organization that deals with international trade. Currently with 150 members\(^6\), it is an organization where governments get together to negotiate further trade liberalization through international agreements and to resolve any conflict that arises when these agreements are implemented nationally.

The idea of an international organization that promotes international trade between nations was presented at the Bretton Woods Conference (1946) that negotiated the world economic order after the Second World War. The Conference created the International Monetary Fund\(^7\) and the World Bank\(^8\), but failed to reach consensus\(^9\) on the proposed International Trade Organization. Despite the failure to establish the International Trade Organization, one of its agreements, the General Agreement on Tariffs and Trade (GATT), actually entered into force in 1948\(^10\) with 23 member countries (or, as they are referred to in the text, contracting parties).

Although only an agreement, the GATT functioned like a provisional organization, promoting successive rounds of trade negotiations. The agreement was signed in Havana Round in 1947, and after that countries met in six more “rounds” of

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\(^6\) As of January 2007 with the accession of Vietnam.
\(^7\) See chapter 1 page 25-26 for objectives of the International Monetary Fund.
\(^8\) The World Bank was created as the International Bank for Reconstruction and Development, and its objective was to aid Europe’s post-war reconstruction. Today the World Bank Group comprises besides the International Bank for Reconstruction and Development, the International Finance Corporation, International Development Association, Multilateral Investment Guarantee Agency and International Centre for Settlement of Investment Disputes. The main focus of the World Bank Group in the last decades has been poverty reduction and development aid to developing countries.
\(^9\) The new organization was blocked by the US Senate
\(^10\) Because the text of the GATT was signed in 1947, that agreement is known as GATT 1947.
negotiations\textsuperscript{11}. On these meetings, countries basically discussed tariff reductions\textsuperscript{12}. However, at the Kennedy Round (1964-67) anti-dumping measures were put on the table and at the Tokyo Round (1973-79) non-tariff measures (or the so-called non-tariff barriers) were widely discussed, alongside with the inclusion of new themes resulting on nine special framework agreements and four “understandings”\textsuperscript{13}. John H. Jackson (1997) argues that “as a result of these seven rounds, and of other activity, many tariffs on non-primary goods imported into the industrialized contracting party nations have been so reduced that many economists and businessmen feel that they are no longer a meaningful barrier to imports.” (p.74).

The movement to broaden the scope of the themes dealt with by the multilateral trading system that started at the Tokyo Round and resulted on the framework agreements and understandings continued into what was to be the last GATT round, the Uruguay Round (UR). The agenda for the UR was negotiated during four years\textsuperscript{14} before the round was formally launched in September 1986 in Punta del Este (Uruguay). This agenda “covered virtually every outstanding trade policy issue. The talks were going to extend the trading system into several new areas, notably trade in services and intellectual property, and to reform trade in the sensitive sectors of agriculture and textiles. All the


\textsuperscript{12} \text{Jackson, J.H (1997:74) presents a table with number of countries participating on each round, value of trade covered, average tariff cut and average tariffs afterwards, for each of the GATT rounds.}

\textsuperscript{13} \text{The nine framework agreements were on: technical barriers to trade; government procurement; interpretation and application of Articles VI, XVI, and XXIII (subsidies); arrangements regarding bovine meat; arrangements regarding dairy products; implementation of Article VII (custom valuation); import licensing procedures; trade in civil aircraft; and implementation of Article VI (antidumping duties). The four understandings were on: Differential and more favorable treatment, reciprocity, and fuller participation of developing countries; Declaration on trade measures taken for balance-of-payments purposes; Safeguard action for development purposes; and Understanding regarding notification, consultation, dispute settlement, and surveillance. (Jackson 1997:76).}

\textsuperscript{14} \text{As noted by WTO 2007:17}
original GATT articles were up for review. It was the biggest negotiating mandate on trade ever agreed” (WTO 2007:18).

The Uruguay Round lasted for seven and a half years, ending in 1994, with 123 countries taking part in it. At the end of the UR, countries had created an umbrella organization, the World Trade Organization, which included not only an updated GATT (the GATT 1994) but also a number of other agreements in new areas of trade. The world trading system as regulated by the WTO now had three pillars: goods (through the reformed GATT and new sectoral agreements, the most important ones being the Agreement on Agriculture, and the Agreement on Textiles and Clothing\textsuperscript{15}), services (through the General Agreement on Trade in Services – GATS), intellectual property rights (through the Trade-Related Aspects of Intellectual Property Rights – TRIPS). In addition, there are agreements that deal with a wide array of issues related to trade: investment regulations (Trade-Related Investment Measures); antidumping and safeguard measures; subsidies; and two agreements dealing with Non-tariff barriers, one about health regulation (sanitary and phyto-sanitary measures) and product standards (technical barriers to trade). Overall, the Uruguay Round resulted on about 60 agreements, annexes, decisions and understandings\textsuperscript{16}.

The main principles of international trade that were the core of the GATT are still the guiding principles of the new organization. These basic principles of the international trading system spelled out in the GATT are that trade should not be discriminative:

\textsuperscript{15} The ATC took over from the Multifibre Arrangement (1974) and is no longer in effect. It contained a self-destruction clause, which determined that it would be phased out and terminated in January 2005, after 10 years of its entry into force.

\textsuperscript{16} The text of all WTO agreements are available at the organization’s website: \url{http://www.wto.org/english/docs_e/legal_e/legal_e.htm}
against trading partners (i.e., the most-favored nation principle)\textsuperscript{17} or against imported goods (imported products should receive national treatment)\textsuperscript{18}; international trade should also be freer; predictable; more competitive; and more beneficial for less developed countries\textsuperscript{19}. These are basic guidelines that all agreements, negotiations and disputes are built on and all member countries should respect.

Another important result of the Uruguay Round was establishment of a dispute resolution mechanism, the Dispute Settlement Body (DSB). The GATT already had a similar forum, but the new, reformed body, established at the WTO is more powerful. The system allows for countries to complain when they feel that other countries are not following the rules. After a period of consultations between the parties, if an amicable solution is not reached, a panel of experts examines the case and renders their report. The panel has to decide if the policy implemented by the country is consistent or not with WTO rules. If the policy is found to be not consistent, it is the country’s responsibility to bring it to compliance, if not the complainant is allowed to retaliate. The retaliation can be in the same sector, but the WTO also allows countries to cross-retaliate. The whole dispute settlement process lasts an average of one year (another three months if there is an appeal).

The WTO is a member-driven organization, which means that all decisions made by the organization are agreed-upon by all of its members. Negotiations still follow the

\textsuperscript{17} According to the most-favored nation principle countries cannot discriminate between trading partners - if a country grants preferential terms to another country, it has to extend those preferences to others as well (an important exception to the most-favored nation clause are free trade agreements).

\textsuperscript{18} The national treatment principle determines that countries cannot discriminate foreign products once they have entered the national market.

\textsuperscript{19} For a more comprehensive explanation of the principles of international trade, of the negotiations under GATT and other general themes regarding the WTO and its agreements, see “Understanding the WTO”, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm
format used by the organization’s predecessor, the GATT, that is, through rounds. Decisions taken at negotiating rounds are only effective once all member-countries have reached a positive consensus on all decisions. This method for decision-making is known as “single-undertaking”.

Day-to-day negotiations take place at its headquarters in Geneva, Switzerland. The WTO structure is made of committees on many different issues, and three Councils (Council for Trade in Goods, Council for Trade-Related Aspects of Intellectual Property Rights and Council for Trade in Services), they all report to the General Council, the organization’s permanent high-level decision-making body. The organization also has a permanent secretariat, which provides technical support to other bodies of the WTO (council, committees etc), to the legal staff during trade disputes, to developing countries and LDCs, and to countries during accession process\(^\text{20}\). The Secretariat also is responsible for elaborating the trade policy review, a periodical review of member country’s foreign trade policies. The secretariat is headed by a director-general, which is elected by member countries for a four-year term.

Above all this permanent structure and the General Council, as the highest-level decision-making body, member countries meet at least once in every two years on Ministerial Conferences, where they are allowed to make decisions pertaining any agreement under the WTO\(^\text{21}\). Since its creation on January 1\(^\text{st}\) 1995, delegates met in six

\(^{20}\) If a country did not sign the WTO agreements at the time of the organization’s creation and now wants to join, it has to go through the accession process, where the prospective member enters into bilateral negotiation with other members and a draft of membership terms is drawn. As the final step, the new member, under the conditions presented at the membership term, has to be accepted by more than two-thirds of the WTO members.

\(^{21}\) See Organization Chart at \text{http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm} and decision-making process at \text{http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm}
The first Ministerial Conference (Singapore, 1996) already started a trend that would characterize – and block – future Ministerial Conferences: a debate between developing countries wanting to discuss problems with implementation of the Uruguay Round agreements, and developed countries pressing for new issues to be added to the organization’s agenda. The new themes that developed countries were hoping to expand on were: investment, competitions policy, government procurement and trade facilitation. Exactly because there themes were largely discussed on this occasion, there became known inside that WTO as the “Singapore issues”. At the end of the meeting, the important results were the completion and adoption of the Information Technology Agreement and the adoption of the Comprehensive and Integrated Plan of Action “designed to lend further assistance to the least developed countries members in accessing and sharing the benefits of the rules-based multilateral trading system” (ICTSD summary report, 1996). The Committee on Trade and Environment (CTE) was also formally established as a permanent body of the WTO.

The second Ministerial Conference (Geneva, 1998) was also the commemoration of the GATT’s fifth anniversary. The agenda was not very ambitious, and the resulting Ministerial Declaration does not contain any important decision and limited to inviting

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22 WT/MIN(98)/DEC/ Ministerial Conference Geneva — Declaration
members to start preparing for the next round of trade negotiations to be launched at the following Ministerial Conference.

The third Ministerial Conference that took place on Seattle (USA) in 1999 was supposed to be the start of the Millennium Round, the first round of trade negotiation under the WTO. The meeting was suspended because member countries could not reach a consensus on a text for the Ministerial Declaration, and the launch of the new round postponed.

After the failure of the Millennium Round, delegates met again in 2001 at the isolated Doha (Qatar) for the fourth Ministerial Conference. During the meeting a new trade round was launched, which was supposed to have been concluded by January 2005, but has not ended to this date (the next unofficial target date by the end of 2006 was also missed). The Doha Ministerial Declaration (DMD) signed on the Ministerial Conference gives the WTO mandate to negotiate on a wide range of issues. Because of the strong emphasis put on themes of interest of developing countries the Doha Round was also named “the development round”. With a total of 52 paragraphs, the Doha Development Agenda deals with 20 different themes23.

The so-called implementation issues (paragraph 12 of the DMD), that were already a concern on the first Ministerial Conference, evolved from simply addressing problems that developing countries were having when implementing the WTO agreements, into a more complex discussion of imbalances that developing countries felt existed in the Uruguay Round agreements. These imbalances include the non-

23 See the text of the DMD (WT/MIN(01)/DEC/1) available at http://www.wto.org/english/tratop_e/minist_e/min01_e/mindecl_e.htm
implementation by developed of some of the obligations and were seen as an obstacle to developing countries being able to benefit from gains that the UR agreements was promised to bring them. Implementation issues cut across many of the themes dealt by the WTO. One example of an implementation issue that achieved quite a high-profile throughout the negotiations was TRIPS and public health. Countries agreed on a decision on the matter.

Negotiations on other two important themes at the Doha agenda were already mandated by the UR agreements: agriculture and services. Agriculture has been the most contentious issue, and the reason for the current deadlock on negotiations. Subsidies given by developed countries to their domestic producers are the core problem. The mandate negotiated at the DMD calls for:

- substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development. We take note of the non-trade concerns reflected in the negotiating proposals submitted by Members and confirm that non-trade concerns will be taken into account in the negotiations as provided for in the Agreement on Agriculture. (Paragraph 13 of the DMD).
This mandate touches upon all “three pillars” of the Agreement on Agriculture: market access\textsuperscript{24}, domestic support\textsuperscript{25} and export competition\textsuperscript{26}. The mandate is broad and has proved difficult to translate in decisions. Agriculture was pointed out as one of the reason, alongside with the Singapore issues, of the interruption of the Fifth Ministerial Meeting in Cancun in September 2003. A group of developing countries not satisfied with the proposed text for the Ministerial Declaration on agriculture, came together to form the group now known as G-20\textsuperscript{27} and tabled an alternative text. This division on the agriculture and the refusal of developing countries to launch negotiations on the Singapore issues resulted on the early closure of the Ministerial Conference, without the adoption of a Ministerial Declaration\textsuperscript{28}.

After the collapse in Cancun, negotiations have been headed by five countries that have a special interest in agriculture, this group – the Five Interested Parties – is formed by Australia, Brazil, United States, India and European Union. A step forward was made

\textsuperscript{24} Market access concentrated mainly on reducing tariffs (other forms of import restrictions were transformed in tariffs and then reduced).

\textsuperscript{25} Domestic Support concerned those subsidies given to domestic producers, with the aim of guaranteeing price or farmer’s income. These measures were divided into four groups – or boxes, as they were called - (according to their impact on trade): the green box, which contained measures they are not, or minimally, trade-distorting and so are not subjected to any cuts; in the amber box were measures that had a direct impact on production and trade (measured by the Aggregate Measure of Support), that is, they were trade-distorting and would have to be reduced; the blue box, that included direct subsidies to producers, but were linked to some sort of limitation on production and were not subjected to reduction; and finally those measures that were to be eliminated. Another instrument of domestic support was known as \textit{de minimis}, which was the permission to use some distorting measures, as long as they stayed below an agreed percentage of the value of production.

\textsuperscript{26} Export competition includes all measures aimed at artificially enhancing international competition of exports, mainly export subsidies (but also forms of food aid and instruments used by State-Trading Enterprises).

\textsuperscript{27} The G-20 has a wide and balanced geographical representation, being currently integrated by 21 members countries: 5 from Africa (Egypt, Nigeria, South Africa, Tanzania and Zimbabwe), 6 from Asia (China, India, Indonesia, Pakistan, Philippines and Thailand) and 10 from Latin America (Argentina, Bolivia, Brazil, Chile, Cuba, Guatemala, Mexico, Paraguay, Uruguay and Venezuela). See G-20’s official website at \url{http://www.g-20.mre.gov.br/history.asp}

\textsuperscript{28} For a more detailed description of the events on Cancun, see Bridges Daily Update, available at \url{http://www.ictsd.com/ministerial/cancun/wto_daily/index.htm}
with the agreement on a Framework for establishing modalities on agriculture in July 2004\textsuperscript{29}. Another step was taken in the Sixth Ministerial Conference in Hong Kong, in December 2005, where developed countries committed of to phase-out export subsidies by the year 2013, but its implementation is still pending on the final result of the Round. Since this small progress in Hong Kong, differences on agriculture were again the cause of the interruption on negotiation, resulting on the suspension of the Doha Round in July 2006 until February 2007.

Developed countries are expecting concessions on two sectors, services and non-agricultural market access, in exchange for agriculture. The discussion around non-agricultural market access focus on the formula to be used for further tariff cuts, with developed countries pressing for a formula that cuts higher tariffs more than lower tariffs, and developing countries insisting that the Doha mandate that guaranteed them “less than full reciprocity in reduction commitments” (paragraph 16 of the DMD). Due to the lack of progress in agriculture, no real concrete decision has been taken on non-agricultural market access.

The services sector is another key issue on the Doha round. The GATS has two main parts: the first are general rules and obligations that are to be applied to all sectors (horizontal commitments) and the second are rules for specific sectors and countries commitments in sectors (vertical commitments). The agreements divides trading in

\textsuperscript{29} This understanding presents broad parameters for further negotiations, and is part of the July Package, which can be seen at \url{http://www.wto.org/english/tratop_e/dda_e/dda_package_july04_e.htm}
services into four modes: mode 1 is cross-border supply, mode 2 is consumption abroad, mode 3 is commercial presence and mode 4 is presence of natural persons\textsuperscript{30}.

The Doha mandate acknowledged the negotiations that were already taking place since January 2000, and instructed members to carry on those negotiations on general and specific commitments. Negotiations on specific commitments on services are to take the request-offer approach\textsuperscript{31} (DMD, paragraph 15). Since then, developed countries do not feel that sufficient liberalization is being achieved through this method and are pressing for the complementation of the current bilateral approach with plurilateral and multilateral negotiations. “The multilateral approach is intended to widen the scope of liberalization commitments, and involves setting numerical targets for the services sectors and sub-sectors that Members must commit to liberalize, with the provision that the targets will be differentiated between developed, developing and least-developed countries. The plurilateral approach seeks to enhance the depth of commitments by proposing that countries that form the ‘critical mass’ of the market or total trade in a services sector or sub-sector abide by an ‘ideal’ or ‘model’ schedule of commitments developed for that sector or sub-sector. The main proponents of the benchmark approach

\textsuperscript{30} Explaining better each mode, we have -
cross-border supply (mode 1): services supplied from one country to another (e.g. international telephone calls);
consumption abroad (mode 2): consumers or firms making use of a service in another country (e.g. tourism);
commercial presence (mode 3): a foreign company setting up subsidiaries or branches to provide services in another country (e.g. foreign banks setting up operations in a country);
presence of natural persons (mode 4): individuals travelling from their own country to supply services in another (e.g. fashion models or consultants)
(WTO 2007:34)

\textsuperscript{31} Countries make offers to open some of its own sectors, while they receive requests from other countries to open sectors that are of their interest.
are keen to improve market access for their services supplied cross-border (Mode 1) and through commercial presence (Mode 3).” (ICTSD, 2005:10).

Developing countries prefer to maintain the bilateral request and offer approach, but developed countries succeeded in including the plurilateral and multilateral approach on the Hong Kong Ministerial Declaration. The other item on the agenda of developing countries is bigger liberalization on mode 4, that is, the presence of natural persons, but no decision on that effect has been taken yet.

One of earlier decisions taken under the Doha Mandate was in relation to the intellectual property rights agreements, the TRIPS, and public health. Developing countries’ concerns about the high costs of essential patented drugs was addressed since the begging of the round, as mandated by paragraph 17 of the DMD and a separate “Declaration on the TRIPS Agreement and Public Health32” also adopted at the Doha Ministerial Conference.

This declaration clarifies the possibility of compulsory license33, on grounds determined by the members themselves, not necessarily only in cases of a national emergency. The use of compulsory license is useful for countries that have a basic pharmaceutical industry that could produce the drugs once the license is rendered. But the problem persisted for poor countries that lack the capacity to produce the drugs locally. The authorization for these countries to import the cheaper drugs produce by countries

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32 WT/MIN(01)/DEC/2
33 Compulsory license is when a government allows someone else to produce the patented product or process without the consent of the patent owner (WTO, website)
acting under compulsory license came only in August 2003\textsuperscript{34} and was also included in the Hong Kong Ministerial Declaration.

The TRIPS agreement is one of the most controversial agreements at the WTO. The inclusion of IPRs in the Uruguay Round is seen as mainly a conquest of the United States, and its powerful industrial lobby, especially from the pharmaceutical companies. American and European pharmaceutical companies are said to invent about 20\% of their sales revenues in research and development of their future products (this is said to be the highest reinvestment rate of the entire industrial sector). In this industry IPRs are seen as essential to recoup this large investment and as a way to allow further research.

A report on “New Issues in the Uruguay Round of Multilateral Trade Negotiations” (1990) by the United Nations Centre of Transnational Corporations (UNCTC) gives a good explanation of the need to include IPRs in the new trade round:

“Major changes have occurred in the global trade and investment patterns over the past two decades, evidenced, in particular, by the competitive strength of Japanese transnational corporations, the increasing ascendancy of the newly industrialized countries in international trade, the growing importance of international transactions in services, and the emergence of the United States of America as both a leading host country and the leading home country for foreign direct investments. These changes have made it clearer than ever before that a country’s competitive position in the world market depends more on its capacity to develop and utilize technology in its production, trade and investments than on its natural resource endowments. The advent of full economic integration in the European Community at the end of 1992 has added new pressures to these changing competitive patterns. (…) Consequently, increasing attention and resources are being devoted by corporations and Governments, notably in the leading industrialized countries, to the creation of a competitive edge through

\textsuperscript{34} WT/L/540 and Corr.1
technological innovation. (...) The economies of scale required for the amortization of these research and development investments and the spectre of rapid obsolescence posed by the unrelenting pace of technology innovation add to the pressures for the globalization of markets. The removal or reduction of barriers to trade, investment and service is seen as necessary to facilitate the global commercialization of technology” (UNCTC, 1990:1-2)

Matthews (2002) shows the general movement to mobilize the international community to include minimum standards of IPRs worldwide. He describes the process as how “the consensus in favor of global action was achieved across a range of industry sectors. Moves towards achievement of that consensus, led by key individuals in the business community, were motivated first by a strategy of encouraging other countries to protect the intellectual property rights of multinational companies based in the United States. Once that strategy had proved successful, global corporate actors shifted the forum for their efforts from domestic law to global trade law” (Matthews 2002:7).

Along the same lines, Susan Sell (2003) shows that “private sector have played a major role in catapulting the previously arcane issues of IP [intellectual property] protection to the top tier of the US trade agenda, and have been able to enlarge the range of options for both themselves and the US policymakers by linking intellectual protection to international trade. This increasingly powerful lobby includes the following private sector groups: the International Intellectual Property Alliance; the Pharmaceutical Manufactures Association; the Chemical Manufacturers Association; National Agricultural Chemicals Association; Motor Equipment Manufacturers Association; Auto
Exports Council; Intellectual Property Owners, Inc.; the International Anti-counterfeiting Coalition; and the Semiconductor Industry Association” (p.76).

The first pressures to strength IPRs in the world date from the late 1970s. At the end of the Tokyo Round of the GATT (1973-1979), the US presented a proposal with the objective of to discouraging trade in counterfeit goods, with the creation in the GATT framework of an “Agreement on Measures to Discourage the Importation of Counterfeit Goods”. This proposal didn’t receive support from other parties and so was not widely discussed in the Tokyo Round. Developing countries, led by Brazil and India, opposed the very discussion of any sort of intellectual property rights in the trade talks at the GATT, arguing that a specific multilateral forum for that existed (the WIPO – World Intellectual Property Organization) and it was more appropriate than the GATT. Behind this strategy of the developing countries was the belief that they had more power to block an attempt to raise IPR protection in the WIPO for the reasons described in the last section, coupled with their numerical majority.

Underlining the opposing position of developed and developing countries were conflicting ways of looking at intellectual property rights. For developed countries the misappropriation of IPRs, through piracy or counterfeiting was regarded as theft – IPRs are ownership rights and right-holders should be allowed to be rewarded by their creative effort and their research and development investments. For developing countries, intellectual property should be seen as common heritage of society, especially when discussing access to life-saving medicines. Developing countries defend that “Recouping investment will in any case be achieved primarily from market in developed countries,
where consumers are more readily able to afford the higher costs of products protected by intellectual property rights” (Matthews 2002:8).

The division continues when discussing the necessity to strengthen IPRs. Developed countries advocate the necessity of a stronger and enforceable IPR system, to reverse the loss of revenues caused by increasing piracy and trade in counterfeiting goods. On the other hand, developing countries defend reforms that take into account the inequality presented in the UNCTAD report of 197535. The report acknowledges:

“the participation of developing countries in shaping as well as in the operation of the international patent system has remained minimal. Thus, for instance, of the 3.5 million patents currently in existence only about six percent (200,000) are granted by developing countries. Of these, some five sixths are held by foreigners and only one sixth – or one per cent of the world total – by nationals of the developing countries. These countries have plainly been on the periphery of the patent system. Of the patents granted by developing countries, about 84 per cent – or some 175,000 – are owned by foreigners. Most of them are held by large corporations of five developed market-economy countries (the United States of America, the Federal Republic of Germany, the United Kingdom, Switzerland and France). About 90 to 95 per cent of the patents granted by developing countries to foreigners are not used at all in production processes in these countries” (UNCTAD 1975:64).

In light of these considerations, the report recommends “a revision of the current patent laws and administrative practices of developing countries. The purpose of any such revision will have to be that of making patent laws and practices capable of effectively complementing other instruments of policy for national development” (UNCTAD 1975:64).

35 UNCTAD, The role of the patent system in the transfer of technology to developing countries, New York. 1975.
The conflicting views, dividing developed and developing countries in the multilateral arena caused a shift in strategy of developed countries to start pushing for higher IPR protection bilaterally, with the focus on the relationship between trade and IPRs still guiding the efforts. These bilateral measures pursued by mainly the United States in the 1980s are seeing as having an important significance to the emergence of the TRIPS Agreement.

The first established instrument used by the US to pressure its trading partners was the Section 301 of the Trade Act of 1984 which allowed the President to seek the elimination of “unjustifiable and unreasonable trade practices”. The possible sanctions included the suspension of the General System of Preferences \(^{36}\) tariff exemptions for the countries that did not allow for an adequate protection of intellectual property by US standards.

By 1986 the Uruguay Round of the GATT was launched and again the proposal for IPR treatment was tabled. Despite developing countries objection, a mandate to discuss the topic was approved. The Mandate of TRIPS negotiating Group reads:

“In order to reduce the distortion and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and discipline.” The negotiations aimed to “develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT and without prejudice to complementary initiatives

\(^{36}\) The General System of Preferences was a mechanism through which the US and other developed countries granted special access to its market for developing countries.
Matthews points out that “during the first three years of the Uruguay Round, the TRIPS negotiations continued to be stalled by a disagreement between the developed countries and developing countries over the competence of the GATT to negotiate substantive standards of intellectual property protection. (...) Together with agricultural reforms, the TRIPS Agreement had become the main stumbling block for the negotiating teams” (Matthews 2002:30). Developing countries again led by Brazil and India, continue to question the GATT as the appropriate forum for this discussion and also presented their concern of the impacts that such agreement could have, especially on transfer of technology and the cost of pharmaceuticals that could rise substantially with higher patent protection. “The contention was that a TRIPS Agreement would mean the surrender of sovereignty over national development objectives and the denial of access to technology” (Matthews 2002:31).

Concomitant with the Uruguay Round negotiations, the US continues with its policy of bilateral pressure on developing countries for higher IPR protection. In the middle of the negotiations, US enacts the Special 301 of the Omnibus Trade and Tariff Act 1988 which transferred powers of the President (under the prior act of 1984) to the USTR (with the aim of preventing the executive from making trade-offs due to foreign policy) and required the USTR to make annual reviews of IPRs of US trading partners. Depending on the result of the reviews, countries could be put on “watch lists” and the
USTR could impose unilateral sanctions, like increase tariff duties or impose import restrictions.

The opposition of developing countries started to change with the imposition of Special 301 sanctions on India in 1991, but “the Group of Ten did not waiver in their opposition until the USTR took the unprecedented step of initializing Special 301 action against the Republic of Korea and Brazil” (Matthews 2002:32). From the developing countries’ perspective, sacrificing the principles of common heritage, free flow of information and national sovereignty was to be offset within the TRIPS Agreement by the link it forged with the Dispute Settlement Understanding, which offered some respite from the threat of US trade sanctions under Special 301 as the United States kept up an aggressive bilateral trade diplomacy throughout the eight years of the Uruguay Round to keep the issue of intellectual property protection at the forefront of trade negotiations” (Ryan 1998, in Matthews 2002:33).

Matthews also points out that “towards the end of the UR, developing countries were also experiencing ‘negotiation fatigue’ or, at least, a problem of information deficiencies and lack of technical expertise in relation to intellectual property with only about ten countries actually sending intellectual property experts to the TRIPS negotiations. In the absence of necessary expertise within their national administrators, developing countries simply did not have the knowledge necessary to negotiate effectively on the content of the TRIPS Agreement” (Mathews 2002:44).

The final text of the TRIPS agreement followed the level of protection given to IPRs in the United States. It covers the different kinds of IPRs presented in the first part

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37 Group of developing countries, led by Brazil and India, that opposed the TRIPS agreement.
of this paper, that is: patents, copyrights, trademarks, industrial designs, trade secrets, geographical indications, layout-designs of integrated circuits and plant breeders’ rights (indirectly, through the obligation to protect plant varieties determined in article 27.3(b)).

The agreement incorporates the main principles of the other WTO agreements: national treatment and most-favoured nation and includes the principle of balanced protection. This last principle says that “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations” (TRIPS, article 7).

“The agreement covers five broad issues: how basic principles of the trading system and other international intellectual property agreements should be applied; how to give adequate protection to intellectual property rights; how countries should enforce those rights adequately in their own territories; how to settle disputes on intellectual property between members of the WTO; special transitional arrangements during the period when the new system is being introduced” (WTO, 2005).

When it comes to patent protection, the TRIPS determines that patent rights be given for a minimum of 20 years (article 33 – term of protection), for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application (article 27 – patentable subject matter – paragraph 1). Article 27 paragraphs 2 and 3 determine exceptions to patentability: protection of ordre public and morality (paragraph 2) and (a) diagnostic,
therapeutic and surgical methods and (b) plants and animals (other than microorganisms), and biological processes for the production of plants or animals (other than microbiological processes) (paragraph 3).

This last clause, article 27.3(b) was subjected to a review after four years of entry into force of the TRIPS agreement (the only one in the agreement). UNCTAD-ICTSD (2005) considers this one of the most controversial issues covered by the TRIPS. Negotiations during the Uruguay Round were extremely polarized on the issue, and reflected different interests from the north and south. Developed countries were trying to guarantee a broad patent coverage to their biotechnology inventions but were divided on what exactly was to be the scope of the protection. On the other side there were the developing countries, the “owners of the biodiversity”, concerned about the respect of their sovereign rights over these resources. The final drafting of the agreement was closer to the proposal of developed countries, and reads:

Article 27.3(b): Patentable Subject Matter

Members may also exclude from patentability:

Plants and animals other than micro-organisms, and essentially biological processes for production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any

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38 The United States was the first country to accept the patentability of a living organism. This was the result of a decision by the supreme court in 1980 (Diamond v. Chakrabarty). Other developed countries also accepted patents on living matter, but European Countries for example, were reluctant on extending patent rights to plant varieties and animal races).
39 See Anell Draft and Brussels Draft in UNCTAD-ICTSD (2005:391), which shows, in bracketed text, the tabled proposals.
combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

The review process of the article, as mandated, started in late 1998. Preliminary discussions at the TRIPS Council focused on whether the review mandate by the article was a comprehensive review of the article itself (including maybe changing its text) or if it was just a review of the implementation of the article. Developing countries argued for a substantive review of the article’s provisions while developed countries, in general, defended a limited review stressing implementation. Soon the discussion expanded to definition of terms, ethical questions, including patenting of life itself and ways to guarantee effective protection of plant varieties (and whether UPOV$^{40}$ is such a mechanism)$^{41}$.

Throughout the documents there can be seen the clear division of developed countries and developing countries. United States and Japan took the more radical side among the developed countries, and insisted on the importance of a broad patent system for technology development in the world. For them there was no reason to review anything on the TRIPS, especially if the result was going to be a more limited patent system that completely excluded living matter (and processes). They pointed out that if any reform of article 27.3(b) was to happen, it would be to end the exclusions. European countries agreed that the article should be left the way it was negotiated at the UR, where

$^{40}$ International Union for the Protection of New Varieties on Plants
$^{41}$ Some of the early submissions that show that discussion are: United States IP/C/W/162, IP/C/W/209 and IP/C/W/257; Japan IP/C/W/236; European Communities IP/C/W/254; Switzerland IP/C/W/284; Norway IP/C/W/293; Brazil IP/C/W/164 and IP/C/W/228; India IP/C/W/161, IP/C/W/195, IP/C/W/196 and IP/C/W/198; African Group IP/C/W/163 and IP/C/W/206. There is also a Summary of Issues Raised and Points Made elaborated by the WTO’s secretariat IP/C/W/369.
a balanced solution was reached. Also, for developed countries in general the existing criteria for patentability set out in article 27.1 are enough to guarantee that patents are not granted on wrongful terms (like being a discovery rather than an invention). Any other concerns that countries might have with the patented inventions are to be dealt through contracts, not at the multilateral IPR system.

Developing countries’ biggest concern in this negotiation is avoiding biopiracy. They define biopiracy as the misappropriation of genetic resources and associated traditional knowledge. Being the holders of most of the world’s biodiversity, they argue that the current patent system allows for the patentability of matter that was acquired illegally and without the adequate sharing of the benefits arising from their commercial use.

This is the context in which the relationship between the TRIPS agreement and the CBD first came up in the WTO, and was later incorporated in the Doha agenda. Paragraph 19 of the DMD reads:

We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.
In the course of negotiations members raised two general issues: the first one is whether there is any conflict between the two agreements, and second is if the TRIPS has to be amended so both agreements can be implemented in a mutually supportive way. In responding to those questions, countries have taken basically three positions.

The first group does not believe there is incompatibility between TRIPS and the CBD and they also can be both implemented in a mutually supportive way. This is the view expressed mainly by the United States and Japan. The reasons given are that both agreements are very different in regards to their objectives and deal with different subject matters. They also say that patentability criteria as spelled out in the TRIPS is enough to ensure valid patents on inventions based on genetic resources and that patenting itself does not go against the principles of the CBD, which should be pursued in contracts in a case-by-case basis between the parties, not through the patent system. Their view is that no conflict or misappropriation has ever been proved.

The second group, which comprises most of the developing countries, lead by Brazil and India, also believes there is no incompatibility in the agreements, but they can see that when both agreements are implemented, conflict could emerge. The third group, mainly the African group, believes that the agreements are incompatible. Both groups though, suggest that reforming the TRIPS agreement to include what has been called the “disclosure requirements”. The disclosure requirements, as proposed in a checklist of issues submitted by Brazil and many other developing countries, are three:

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42 In addition to those documents listed before, these positions are described in other submissions like:

43 Brazil et al. IP/C/W/420 and many other submissions to the TRIPS Council explain the proposal
- (i) the source and country of origin of the biological resource and of the traditional knowledge used in the invention;

- (ii) evidence of prior informed consent from the authorities under the relevant national regime; and

- (iii) evidence of fair and equitable benefit sharing under the relevant national regime.

The first requirement consists of some sort of declaration of origin, proving where the resource used in the invention comes from (origin) and where it was actually obtained (source). This requirement would aid patent offices examining prior art to be aware of any traditional knowledge associated with the invention in question. The second requirement, evidence of PIC, aims at making sure that the resource used in the invention was obtained legally, according to the national legislation on place on the country where it was accessed. The third requirement, evidence of fair and equitable benefit sharing would consist of some form of document attesting the way that benefit would be shared if and when the invention is commercialized.

All the three requirements are directly derived from CBD’s article 15 that establishes the terms of access to genetic resources. The specific way that the requirements would work would still be discussed, but the proponents stress that the requirements would have to be mandatory to all WTO members and that some sort of legal consequence of wrongful disclosure or non-compliance would have to be decided on.
The first group, mostly developed countries, objects to those disclosure requirements\textsuperscript{44}. They argue that there is no incompatibility between the TRIPS and the CBD and that both agreements have very different objectives and their provisions are flexible enough for them to be implemented in a mutually supportive way. According to them, biopiracy can be prevented through the negotiation of contracts between providers and users of genetic resources and traditional knowledge. Those contracts should be drawn consistently to CBD’s requirements and provide for prior informed consent, mutually agreed terms and fair and equitable benefit sharing.

The main argument is that the requirements would not bring about the alleged benefits, that is, would not prevent biopiracy. The inclusion of such mandatory requirements would be burdensome to patent offices, require them to make subject judgments (like what is fair and equitable benefit sharing), causing them to slow the patent granting process, which would not be beneficial to anyone. The requirements would also raise the perception of risk, adding more uncertainty to the patent system as a whole, which would have negative consequences to technology development.

Again the US stresses that a contract system would be more appropriate to address such concerns. This approach emphasizes that the most efficient way to achieve CBD’s principles is for countries to put in place (and strongly enforce) their own national legislations on ABS, guaranteeing prior-informed consent and fair and equitable sharing of benefits. In sum, this approach takes the responsibility off the international forum and off the patent system. Punishment for non-compliance should also be determined

\textsuperscript{44} see US, IP/C/W434, among others
domestically, and in case of wrongful patents are issued, there exists today in place possibilities for patent revocation.

Discussion at the WTO gained momentum during the year of 2006. After some deception in Hong Kong, where the issue was expected to be brought up but, in spite of India’s efforts, was not actually on the agenda, a new text-based proposal was tabled. The proposal Recalls the decision made in Hong Kong (Paragraph 39 of the Hong Kong Ministerial Declaration) instructing “the General Council [to] review progress and take any appropriate action no later than 31 July 2006” on outstanding implementation issues, which the relationship between the TRIPS Agreement and the CBD is part of (Paragraph 12.b of the Doha Ministerial Declaration).

The text was sponsored by Brazil, India, Pakistan, Peru, Thailand and Tanzania, subsequently joined by China and Cuba and supported by Ecuador and Colombia. This group of developing countries call themselves the “Disclosure Group”, because they defend the inclusion of the disclosure requirement on the TRIPS Agreement in order to deal with biopiracy, propose an amendment of the TRIPS Agreement, calling for the inclusion of an article 29bis, to complement the already established article 29 on “Conditions on patent applicants”. The purpose of the amendment is to establish “a mutually supportive relationship between this Agreement and the Convention on Biological Diversity” (Brazil and others IP/C/W/474).

The proposed article has a wide scope, covering subject matter “derived from or developed with biological resources and/or associated traditional knowledge” and requiring the disclosure of country providing the resource and/or traditional knowledge
associated and, “as known after reasonable inquiry, the country of origin.” The text also includes the need for members to require from patent applicants “evidence of compliance with the applicable requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or traditional knowledge.” (Brazil and others IP/C/W/474)

Another important aspect of the proposal is the instruction for members to elaborate enforcement measures to guarantee compliance with the new rules and the inclusion of strict consequences of non-compliance: patents should not be denied or revoked (or as an alternative rendered unenforceable) “when applicant has, knowingly or with reasonable grounds to know, failed to comply” with the requirements. (Brazil and others IP/C/W/474)

In further discussions the sponsors clarify some of the elements of the proposal. They say that the text said “biological resources” instead of “genetic resource” (as used in prior talks to far) because the term biological resources is broader and their intent is that this article covers all possible cases of biopiracy and to take into account new technological developments, to be more specific in biotechnology. Also, they justify the need for disclosure of both the country providing the resource and the country of origin as defined by the CBD, because they can be (and many times are) different and the disclosure of only the source country would not guarantee that misappropriation did not occur.
The explanation of the terms used in the text to trigger the requirement ("concerns", "derived from" and "developed with") is that they “encompass the relevant situations in which biological resources and/or traditional knowledge contributed to reaching an invention, while providing margin of flexibility for the national competent authorities of the country where the patent is sought to define whether the applicant has effectively complied with the rule or not.” The term “concerns” would account for inventions that incorporate substantial part of the genetic resource, inventions “developed with” genetic resources may not actually contain any of it, but the resource was crucial in its development, and finally “derived from” intends to extend the requirement to any derivative of biological resources.

A last aspect from the proposal to stress is the paragraph that deals with non-compliance. The proposal suggests which strict punishment (denial of revocation) for lack of or wrongful disclosure and extends the punishment, inside the patent system, for pre-grant and post-grant periods. So, even if after the patent was granted new information comes to the attention of countries that suggest the patent was wrongfully the patent can be revoked, or as an alternative, rendered unenforceable, which means that it can not be enforced in courts. The text calls for continuous disclosure, that is, whenever patentees have new information regarding the requirements, they are obliged to disclose that information, at the risk of the aforementioned consequences.

In spite of this first text-based proposal, basic negotiating positions remain the same. Many developing countries openly support the text. European countries generally support the concept of the disclosure requirement of country of origin, although not of
PIC and benefit-sharing, but not extending it to products and derivatives of genetic resources and/or traditional knowledge associated, and not strict enforcement and non-compliance measures. In general they also do not see the need for mandatory requirements. Also, Switzerland still stresses that WIPO is a more appropriate forum. US, Japan, Korea, Australia, New Zealand and Canada, still oppose the general concept of the disclosure requirement, and thus reject the amendment.

One new development though, is that Norway came forward with the support for disclosure requirements at WTO and WIPO, and has even submitted a proposal in that effect (IP/C/W/473), a little less broad than the Disclosure Group’s text. The proposal came in form of suggestions for key principles for a disclosure requirement. Norway supports a binding international obligation, includes supplier country and, when known and different, the country of origin. The disclosure of prior-informed consent would only be necessary “if the national law of the supplier country or country of origin requires consent for access to genetic resources of traditional knowledge”. On consequences of non-compliance they agree that if wrong or incomplete information is given, the patent application process should not proceed, but in cases that information is found incorrect of incomplete after the patent was already granted, they do not agree with penalties inside the patent system. One final aspect is that they extend the subject of the disclosure requirement not only to traditional knowledge associated with genetic resources (as was the case in former proposals), but to any invention that applies or relates to traditional knowledge.
Chapter 3 – Convention on Biological Diversity

The Convention on Biological Diversity is one of the most important multilateral environmental agreements. This importance is due not only to the issue it addresses but also because the CBD went beyond strictly conservationist objectives encompassing the concept of sustainable development. This means that the agreement ultimately touches upon themes outside the environmental scope, themes such as development issues, trade, and others. Moreover the CBD currently has almost universal membership: a total of 190 parties\(^{45}\), with the important exception of the United States which signed the Convention, but did not ratify it.

When initially the need for such a Convention was brought up, the idea was to create an international agreement that would integrate and supplement the various treaties that existed so far dealing directly or indirectly with biodiversity. These agreements focused either on certain species (like the 1979 Bonn Conference on Migratory Species); or places (like the 1972 Paris Convention on the Protection of Cultural and Natural Heritage); or habitats (like the 1971 Ramsar Convention on Wetlands); or even activities (like the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora – CITES). These four conventions were actually considered by the World Conservation Union (IUCN\(^{46}\)) the most important global agreements related to biodiversity prior to the CBD (see McGraw 2002:9).

\(^{45}\) Current number of parties, as of 03/06/2006.
\(^{46}\) IUCN: International Union for the Conservation of Nature and Natural Resources.
In the early 1980s, IUCN, an international non-governmental organization\(^{47}\), was the first organization to bring up the need for a global treaty focusing on biodiversity conservation. In 1981, at the 15\(^{th}\) IUCN General Assembly, the organization’s secretariat was mandated to prepare a first analysis for such an international agreement. This resolution started a process in the IUCN that culminated with the elaboration of a draft convention that was circulated among other NGOs and government members. McGraw (2002), based on interviews, says that this draft made several states and the United Nations Environmental Programme (UNEP) “increasingly interested in the idea of a global biodiversity convention” (p.10).

Actual formal negotiations started in the late 1980s, under the auspices of UNEP. The CBD was negotiated between November 1988 and May 1992 in ten intergovernmental meetings. Also in this period two other important environmental negotiations were on-going – the negotiation for CBD’s sister: the Convention on Climate Change and the preparatory meetings for the United Nations Conference on Environment and Development that was scheduled for June 1992 in Brazil. The United Nations Conference on Environment and Development was imposed as a deadline for the conclusion of both agreements, since the international community expected to see them open for signature at that event.

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\(^{47}\) Actually IUCN describes itself as an conservation network, bringing together States (83 countries and 110 government agencies) and NGOs (more than 800), and also scientist and experts for all over the world (number from the IUCN website, [http://www.iucn.org/en/about/](http://www.iucn.org/en/about/))
The concomitance of these three negotiations processes meant that decisions taken on one sphere certainly influenced the other two. For example McConnell\textsuperscript{48} (1996) mentions that financial provisions on the CBD were put on hold waiting to see how they were going to be dealt with by Convention on Climate Change. Other provisions were just transferred between the agreements. Some authors also point out that the hard negotiation positions of developing countries on the CBD were a consequence of their feeling that negotiations at the Convention on Climate Change were benefiting more developed countries. These developing countries saw in the CBD, where they had the advantage of being the holders of most of the world’s biodiversity, an opportunity to make up for some of these losses\textsuperscript{49}.

CBD’s negotiation process was put in motion after a decision taken at UNEP’s 14\textsuperscript{th} Governing Council that took place in Nairobi in June 1987. This meeting took place shortly after the World Commission on Environment and Development, commonly known as the Brundtland Commission, released its famous report “Our Common Future”. This report introduced sustainable development as a concept that combines environmental conservation and economic concerns. One of the suggestions of the Brundtland report was the possibility of the creation of a convention on species conservation.

\textsuperscript{48} Fiona McConnell was the head of the International Division in the United Kingdom’s Department of the Environment and was involved in the whole process of CBD’s negotiation.
\textsuperscript{49} See also McGraw (2002)
Along those lines, at UNEP’s meeting, the United States suggested the elaboration of a global convention on biological diversity. According to McConnell (1996), “some delegations liked the US idea: others preferred to give their support to efforts being made by IUCN (…)” (p.5). The final report of the meeting (decision 14/26) established an Ad Hoc Working Group of Experts on Biological Diversity with the mandate to investigate “the desirability and possible form of an umbrella convention”. The decision also mentions IUCN’s draft on a convention for the in situ preservation and conservation of biological diversity.

The first meeting of the Working Group of Experts (November 1988) officially begins the CBD negotiation process. According to Koester (1997), the result of the meeting was that “the need for a new convention was widely supported and a draft outline of the problems that might be addressed by such a convention, was presented” (p.5). Koester also highlights that on this meeting developing countries already made it clear that they would not accept genetic resources being treated in the convention as common heritage of mankind. Therefore, the principle of sovereignty was introduced in the CBD very early on the process. IUCN’s first draft and earlier treaties that dealt with aspects of biodiversity (like the International Undertaking on Plant Genetic Resources for Food and Agriculture, signed in 1983 under FAO – Food and Agriculture Organization), genetic resources were treated as such. Since most of the biodiversity is

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50 McGraw (2002) comments on two possible reasons for the US to sponsor this proposal: a frustration with the sectoral approach of the conservation agreements, or a more self-serving motive of trying to create a biodiversity convention on the same molds of the US Endangered Species Act (p.11).
51 Veit Koester (Denmark) was the Chairman of Working Group II (responsible for dealing with finance, technology transfer, biotechnology and royalties) during the negotiation for the CBD.
52 Later revised in order to be harmonized with the CBD in 2001, it is now the International Treaty on Plant Genetic Resources for Food and Agriculture.
located in developing countries, the sovereignty principle was their basic demand on any further biodiversity convention.

The *Ad Hoc* Working Group of Experts on Biological Diversity met again on two other occasions, in February 1990 and July 1990. Actual text negotiations started when the former working group was transformed by UNEP Governing Council into the *Ad Hoc* Group of Legal and Technical Experts, which met twice on November 1990 and February 1991. This Group was later renamed by UNEP Governing Council as the Intergovernmental Negotiating Committee for a Convention on Biological Convention (INC). The Intergovernmental Negotiating Committee met four times: the First (or Third)INC was held on June/July 1991, the Second (or Fourth) on September/October 1991, the Third (or Fifth) INC on November/December 1991, the Fourth (or Sixth) INC on February 1992 and almost running out of time to be opened for signature at United Nation Conference on Environment and Development on June 1992, the Fifth (or Seventh) INC was on May 1992, followed by only one day for the Conference for the Adoption of the Agreed Text of the CBD (22 May 1992).

Throughout these meetings, the initial idea of a strictly conservationist treaty turned into a more ambitious international treaty which went beyond conservationism and

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53 There was confusion on whether the first meeting of the INC was actually supposed to be the first or the third, due to the fact that INC originated from *Ad-Hoc* Group of Legal and Technical Experts, and UNEP Governing Council stressed that this decision did not create a new negotiating body. After some debate, the meetings received two numbers.

54 This whole process outlined here was divided into two or three phases by McGraw (2002) and Koester (1997), respectively. Also McConnell (1996) considers *Ad-Hoc* Group of Legal and Technical Experts as the first phase on the negotiations. For a more detailed outline, see Koester (1997) and for a detailed descriptions of main decisions and impasses on each of the meeting, see McConnell (1996).
included socio-economic values attributed to biodiversity. Sánchez\(^{55}\) (1994) identifies some of the central aspect of this process:

- the cost of taking measures to conserve biodiversity versus the cost of not taking such measures;
- access to genetic resources and the different possibilities of regulating it;
- whether the focus should be only on wild species or whether it should include both wild and domesticated species;
- access to and transfer of technology – including biotechnology – which must be considered for conservation and rational use of the components of biodiversity;
- eventual sources and methods of funding the costs of measures that would have to be agreed upon;
- the consequences and impact of biodiversity conservation on trade and development (p. 9).

During the negotiations the issues were divided into two working groups. Working Group 1 dealt basically with conservation themes, which were the demands of developed countries. McConnell (1996) lists some of those issues: “in situ conservation versus ex situ conservation; global lists of the most important species and/or habitats; wildlife corridors; etc.” The themes that were discussed by Working Group 2 were considered more controversial, mostly the demands of developing countries, and included: “technology transfer, biotechnology plant breeders’ rights and funding” (p.40).

The Convention on Biological Diversity was finally opened for signature at United Nations Conference on Environment and Development in June 1992. At the Earth Summit, CBD was signed by 156 countries (almost as much as the more advertised Convention on Climate Change). The United States, which refused to sign the CBD in Rio bringing widespread media attention, finally signed it on June 1993, but still has not

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\(^{55}\) Vincent Sánchez was Chile’s Ambassador to Kenya and Permanent Representative to UNEP. During CBD’s negotiation he was INC’s Chairman.
ratified the treaty. Soon after it was opened for signature, the Convention reached the required number of ratifications (Article 36 determines that the CBD will entry into force 90 days after the 30th country ratifies it) and entered into force on 29 December 1993.

The final text agreed by parties has a total of 42 articles and two annexes. Already in the preamble we can see some of the characteristic elements that are present throughout the whole text. It starts out by pointing out values of biological diversity other than its “intrinsic value”: ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic. The mentioning of these other values and of the need for sustainable use of resources, along with the recognition that “economic and social development and poverty eradication are the first and overriding priorities of developing countries” proves that the convention turned out taking a more broad approach to conservation.

Along the same lines, (of looking at biodiversity conservation from a more broad perspective) the preamble also affirms that “the conservation of biological diversity is a common concern of mankind” and that “States have sovereign rights over their own biological resources”. This, as pointed out previously, was the basic demand of developing countries at the beginning of the negotiations when they had complained about the approach taken before where all biological resources (and so genetic resources) were considered common heritage of mankind. This meant that the biodiversity, which is located mainly in the South, could be transferred to seed banks in the north and be used for free as the basis for the development of new biotechnologies (like new varieties of plants). What developing countries argued about was that, after their genetic resources
were transformed by companies, they could be then be protected by IPRs (patents, plant breeders’ rights whichever the case) and no longer be freely accessed.

The preamble also guides parties to follow, in regards to biodiversity threat, the precautionary principle. This principle, which is also present on the Rio Declaration\textsuperscript{56}, says that “lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat [of significant reduction or loss of biological diversity]”. Other important aspects that we can see in the preamble, and again permeate the operational clauses, are the need for special provisions for developing countries, which includes access and transfer to technology, and special attention to the needs of the least developed countries and Small Island Developing States.

The negotiated text starts with the three objectives of the Convention. Article 1 lists them: “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” Here, as noted previously, the broad scope of the CBD is clear, listing two other main objectives besides the conservation of biological diversity.

\textsuperscript{56} Principle 15 of the Rio Declaration on Environment and Development states that: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”
Article 2 defines important terms used throughout the text. Some of the important terms defined in this article that are relevant for the discussion here are: “country of origin of genetic resource, means the country which possesses those genetic resources in in-situ conditions”; “country providing genetic resources, means the country supplying genetic resources collected from in-situ sources, (both wild and domesticated species), or taken from ex-situ sources, which may or may not have originated on that country”; “genetic resource, means genetic material of actual or potential value”; “technology, includes biotechnology”.

Article 3 paraphrases the Rio Declaration, and declares as a principle of the CBD that: “States have the sovereign right to exploit their own resources, pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” Articles 6 (General Measures for Conservation and Sustainable Use) and 7 (Identification and Monitoring) instruct countries to “develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity” (art.6) and to identify components of biological diversity important for conservation (including processes and activities) and monitor these elements (art.7). Both these articles show the emphasis that the CBD has put on the idea that the conservation of biodiversity is a global effort, but individual countries should be respected. In this aspect, each country is supposed to establish its own priorities, legislation, etc.
In-situ and ex-situ conservation are addressed on articles 8 and 9, respectively. With regards to in-situ conservation, CBD determine that parties “establish a system of protected areas (…),” among other measures. The text also calls attention to (g) the regulation and management of the use and release of living modified organisms; and to (j) the preservation of traditional knowledge. Ex-situ conservation should complement in-situ conservation, for example “adopt(ing) measures for the ex-situ conservation of components of biological diversity, preferably in the country of origin of such components”. Also, developing countries should be supported financially in order to establish and maintain such ex-situ conservation facilities.

Article 15 regulates access to genetic resources. The first part again affirms countries’ sovereign rights over natural resources and says that “the authority to grant access to genetic resources rests with the national governments and is subject to national legislation.” The second paragraph states that holders of genetic resources should facilitate access to those resources and to “not impose restrictions that run counter to the objectives of this Convention.” Paragraph four establishes that “access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article” and paragraph five complements stating that such access is subject to the prior informed consent of the provider country. The next paragraph states that scientific research based on a country’s genetic resource should include the provider country and finally the last paragraph (seventh) calls for the fair and equitable sharing of the benefits of the commercial of other utilizations of genetic resources. In other words, article 15 establishes that access to genetic resources must be facilitated, but must be based on prior
informed consent of the country providing the resource, under mutually agreed terms and subject to fair and equitable sharing of the benefits arising of any utilization of the genetic resource.

Another important article of the Convention is article 16, which provides for access to and transfer of technology. In the first paragraph, the text already makes it clear that when the term technology is employed, it also includes biotechnology. In general, this paragraph determines that developing countries should have facilitated access (“under fair and most favourable terms, including on concessional and preferential terms”) to technology “that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment.” But the article, in paragraph two, points out that in the case of technology protected by IPRs, “such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights.” The last line of this paragraph says that “[t]he application of this paragraph shall be consistent with paragraphs 3, 4 and 5 below.” In these paragraphs, the right of countries that are providers of genetic resources to have access to technology developed with their resources is reaffirmed and the Convention recognizes that IPRs “may have influence on [its] implementation” and calls on countries to cooperate so that IPRs “are supportive and do not run counter of its objectives.”

This article, because of its broad statements in regards to IPR protection, and paragraphs 19 and 20, described below, are cited as the reasons why the United States has not yet ratified the CBD. Article 19 talks about the handling of biotechnology and the
distribution of its benefits. This article, besides calling on parties to consider the future need for a protocol on biosafety (ie transfer, handling and use of living-modified organisms), again stresses the need for participation of developing countries in research using their genetic resources, and facilitated access to biotechnology. Articles 20 and 21 deal with financial resources. On this matter countries agreed that “[t]he extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.” With this in mind, article 20 determines that developed countries will make available “new and additional financial resources” to aid developing countries on the implementation of the Convention. The chosen financial mechanism was the Global Environmental Facility, but only on an interim basis (as stated in Article 39) and “provided that it has been fully restructured in accordance with the requirements of Article 21”.

As can be noted in this brief description of CBD’s main provisions, during these negotiations, developing countries had an unusual bargaining position because they are the holders of most of the world’s biological diversity. The basic trade-off in the process was that the south would cooperate with the north’s conservation efforts and grant access to its genetic resources but the conditions were that the south’s sovereign rights over their genetic resource be acknowledged and that the north agreed to transfer technology and
make additional funds available for conservation. Koester (1997) states this general bargain, as articles 15 to 21 (basically ABS, IPRs, biotechnology and funds), was a concession by developed countries, in exchange for article 6 to 10 (conservation efforts) as concessions by developing countries.

Koester (1997) also presents a table with more specific and hard to negotiate trade-offs that allowed for the final outcome. A slightly modified version of his table follows:

<table>
<thead>
<tr>
<th>Northern Concessions</th>
<th>Southern Concessions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Art. 15 (6) + 19 (1-2)</strong> – provider country participate on research; priority access to biotech resulting</td>
<td><strong>Art. 15 (2)</strong> – facilitate access to genetic resources</td>
</tr>
<tr>
<td><strong>Art. 16 (3-5)</strong> – access to technology, including those protected</td>
<td><strong>Art. 16 (2)</strong> – respect for IPRs</td>
</tr>
<tr>
<td>No Global list</td>
<td><strong>Art. 25</strong> – Subsidiary Body on Scientific, Technical and Technological Advice</td>
</tr>
<tr>
<td>Global Environmental Facility only as interim</td>
<td>No multilateral fund explicitly mentioned</td>
</tr>
<tr>
<td><strong>Art. 39</strong> – provided Global Environmental Facility be fully structured</td>
<td><strong>Art. 39</strong> – Global Environmental Facility explicitly mentioned</td>
</tr>
<tr>
<td><strong>Art. 21</strong> – voluntary contributions may also be made by developed countries</td>
<td><strong>Art. 19 (3)</strong> – consider the need for a biosafety protocol</td>
</tr>
</tbody>
</table>

Table 3. Trade-offs on the final text of the Convention on Biological Diversity (Based on Koeste 1997 p. 27)

The first trade-off shown on this table relates to developing countries granting access to their genetic resources for developed countries, in exchange for their inclusion in the research and the access to the results of this research. The second trade-off deals with general IPR issues: recognition of IPRs in exchange for a vague clause determining facilitated access to protected technology. The third trade-off cited by Koester is the fact
that developing countries agreed to the establishment of a Subsidiary Body on Scientific, Technical and Technological Advice under the authority of the COP, which is designed to give general and technical advice when needed. In exchange, developed countries, which were pushing for the inclusion of a global list of endangered species on the CBD, agreed to its exclusion.

The next three trade-offs have to do with financial mechanisms and contributions. Developing countries during the whole negotiation were against the Global Environmental Facility as the mechanism to provide financial resources for the implementation of the Convention. After waiting for the issue to be resolved in the other on-going (Convention on Climate Change and the United Nations Conference on Environment and Development) negotiations and still not reaching an agreement, a deal was struck on the Global Environmental Facility as the interim financial mechanism (so, a concession by developed countries, which pushed for the Global Environmental Facility as the permanent financial mechanism) and not for the creation of a specific multilateral fund destined to provided financial resources for the Convention (as developing countries wanted). In another perspective, but again involving the Global Environmental Facility, developing countries ended up agreeing to specifically mention in the Convention’s text, the GEF as the interim financial mechanism, but insisted only if it be fully restructured according to their rules as state on article 21. Finally, the inclusion of new and additional funding was traded for the paragraph that instructed parties to consider the need for a biosafety protocol (which was a demand of the European countries, not backed by the USA).
Since the entry into force of the convention on December 1993 and as established by its article 23, countries have met in eight “Conferences of the Parties” (COPs) and one “Extraordinary Meeting of the COP”\textsuperscript{57}. The first COP took place between 28 November 1994 and 9 December 1994, in Nassau, the Bahamas and put together the necessary machinery to implement the CBD. COP 1\textsuperscript{58} determined the Permanent Secretariat (article 24), the establishment of the clearing-house mechanism\textsuperscript{59} and the Subsidiary Body on Scientific, Technical and Technological Advice (article 25)\textsuperscript{60}. Also, the Global Environmental Facility was decided to remain as the interim financial mechanism\textsuperscript{61}.

At COP 2\textsuperscript{62}, which was held between 6 and 11 November 1995 in Jakarta, Indonesia, CBD’s structure for implementation was discussed further: the permanent secretariat finally was appointed a home in Montreal – Canada, the operation of the Clearing-house Mechanism was also clarified, the Global Environmental Facility again remained as the interim financial mechanism. Besides those internal procedural matters, the COP initiated the negotiation of a Biosafety Protocol, which is to take place at the

\textsuperscript{57} For a detailed report on all COPs see Earth Negotiations Bulletin (ENB) (\url{www.iisd.org/biodiv}), which provides daily briefs and analysis of all COP, Subsidiary Body on Scientific, Technical and Technological Advice, Working Groups, etc, meetings. This section is based on those reports.

\textsuperscript{58} Decisions adopted by the First Meeting of the Conferences of the Parties (UNEP/CBD/COP/1/17).

\textsuperscript{59} According to CBD’s website (\url{http://www.biodiv.org/chm/default.aspx}), the Clearing-house Mechanism’s mission is to: “promote and facilitate technical and scientific cooperation, within and between countries; develop a global mechanism for exchanging and integrating information on biodiversity; develop the necessary human and technological network”.

\textsuperscript{60} The Subsidiary Body on Scientific, Technical and Technological Advice is a subsidiary body of the COP. Article 25 of the CBD determines its functions. So far, the body has met 12 times and produced 121 recommendations to the COP (\url{http://www.biodiv.org/convention/sbstta.shtml}).

\textsuperscript{61} The Global Environmental Facility was restructured since the CBD was signed, so the northern countries argued that the condition imposed on the text of article 39 (Financial Interim Arrangements) had been met and the Global Environmental Facility should become the permanent financial structure. The G-77 was reluctant, defending that the restructuring carried out did not meet fully their concerns (as further explained in ENB 1994, Vol. 9, No. 28).

\textsuperscript{62} Decisions adopted by the Second Meeting of the Conferences of the Parties (UNEP/CBD/COP/2/19).
newly-created Open-ended Ad Hoc Working Group on Biosafety and considered its first substantive issue, adopting a mandate on marine and coastal biodiversity.

COP 3\textsuperscript{63} took place between 4 and 15 November 1996 in Buenos Aires – Argentina. At this meeting parties adopted a Memorandum of Understanding between the COP and the Council of the Global Environmental Facility, formalizing the Global Environmental Facility as the financial mechanism until 1999. Members adopted a work programme on agricultural and forest biodiversity and scheduled a workshop to discuss article 8(j) (Traditional knowledge) and also requested countries develop national legislations on the subject. The work of the Working Group on Biosafety was reviewed and the 1998 deadline for the protocol reaffirmed. Another important decision was the request for the secretariat to apply for observer status at WTO’s CTE (Committee on Trade and Environment).

COP 4\textsuperscript{64} met in Bratislava, Slovakia, between 4 and 15 May, 1998. Delegates made some further progresses in substantive issues, adopting a work programme on marine and coastal biodiversity and decision in many other issues, including article 8(j) and cooperation with other agreements. An agenda for the next three COPs was also discussed.

In February 1999, in Cartagena, Colombia, CBD’s parties planned to finalize negotiations on the biosafety protocol at the first extraordinary meeting of the COP\textsuperscript{65}, but delegates could not reach a compromise and the Extraordinary COP was suspended. The

\textsuperscript{63} Decisions adopted by the Third Meeting of the Conferences of the Parties to the Convention on Biological Diversity at its First Meeting (UNEP/CBD/COP/3/38).
\textsuperscript{64} Decisions Adopted by the Conferences of the Parties to the Convention on Biological Diversity at its Fourth Meeting (UNEP/CBD/COP/4/10).
\textsuperscript{65} Decisions Adopted by the Conferences of the Parties to the Convention on Biological Diversity at its First Extraordinary Meeting (UNEP/CBD/ExCOP/1/3).
meeting reconvened in January 2000 in Montreal, Canada, and the protocol was finally adopted. Named “Cartagena Protocol on Biosafety”, the agreement deals with some the issue of the living modified organisms that was put aside during the actual CBD’s negotiations. According to the CBD’s website, “the Protocol seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology”. The protocol takes a more precautionary approach, and stresses the problems of transboundary movements.

At COP 5\textsuperscript{66}, meeting in Nairobi, Kenya, from 15 to 26 May 2000, delegates celebrated CBD’s relative “maturity”, which was seen by the shift from procedural matters to implementation of the Convention. ENB’s analysis points out ABS as the most contentious issue (ABS will be discussed in detail below). Other issues that received special attention were a review on the forest work programme, the discussion on how to deal with invasive alien species (whether a protocol like the biosafety protocol was the right approach), the participation of indigenous groups (under the article 8 j), among others.

Delegates met again from 7 to 19 April 2002 in The Hague, Netherlands, for COP\textsuperscript{67}. Parties took the opportunity to review CBD’s activities in light of the up coming World Summit on Sustainable Development the same year. The forest work programme and the Bonn Guidelines on Access and Benefit Sharing (discussed below) were also adopted. At the end of the conference, parties disagreed on a set of guiding principles on

\textsuperscript{66} Decisions Adopted by the Conferences of the Parties to the Convention on Biological Diversity at its Fifth Meeting (UNEP/CBD/COP/5/23).

\textsuperscript{67} Decisions Adopted by the Conferences of the Parties to the Convention on Biological Diversity at its Sixth Meeting (UNEP/CBD/COP/6/20).
invasive alien species and raised problems on decision-making at the CBD (decision VI/23). ENB described the conflict as “bending to the will of one country could allow for hijacking of other issues in the future, whereas the final decision to override the formal objections of a few, sets the precedent that consensus is not unanimity” (ENB, vol. 9 No. 239 2002:17).

COP 7\textsuperscript{68} convened from 9 to 20 February 2004 in Kuala Lumpur, Malaysia. There, parties assessed the outcomes of the World Summit on Sustainable Development to the CBD, including CBD’s responsibility in achieving the Summit’s target of significantly reducing biodiversity loss by 2010. Other themes related to biodiversity that were stressed at the World Summit on Sustainable Development, and thus were largely discussed at COP 7 were protected areas, with the creation of a Working Group on Protected Areas, and again access and benefit sharing (following the World Summit on Sustainable Development’s call for the negotiation of an International Regime in Access and Benefit Sharing). The controversy on the approval of the decision VI/23 on invasive alien species was still not resolved, with Australia contesting it.

The meeting COP 8\textsuperscript{69}, took place in Curitiba, Brazil, 20-31 March 2006. This COP was praised for record participation of different stakeholders, but lacked progress in substantive issues. Discussions on two topics dominated the agenda, namely access and benefit sharing and marine protected areas, focused on how to carry out further negotiations. Some of the substantive issues tackled by parties were the adoption of the

\textsuperscript{68} Decisions Adopted by the Conferences of the Parties to the Convention on Biological Diversity at its Seventh Meeting (UNEP/CBD/COP/7/21).

\textsuperscript{69} Decisions Adopted by the Conferences of the Parties to the Convention on Biological Diversity at its Eighth Meeting (UNEP/CBD/COP/8/31).
new island biodiversity work programme and the prorogation on the ban on the use of
genetic use restriction technologies (the ban was first established on COP 5).

This summary of the main developments after the entry into force of the CBD already shows that even though the issue of access and benefit sharing was constantly in the agenda, it is still not resolved in the CBD. As pointed out before, the text of the CBD gives general principles for access and benefit sharing and leaves to national legislations the elaboration of more detailed rules. The idea was that bilateral contracts, respecting those general principles and national legislation were the best way to guarantee access and benefit sharing. But soon some of the country holders of biodiversity started pushing for the elaboration of more precise rules, an internationally binding set of rules to help regulate that access and guarantee the sharing of benefits. These informal negotiations started at the 3rd COP (Conference of the Parties) in 1996.

In the next COP (COP 4, in 1998) decision IV/8 created a panel of experts on ABS and at COP 5 (2000) an Ad-Hoc Open-ended Working Group on Access and Benefit Sharing was created (decision V/26.11) with the mandate to

“develop guidelines and other approaches for submission to the Conference of the Parties and to assist Parties and stakeholders in addressing the following elements as relevant to access to genetic resources and benefit-sharing, inter alia: terms for prior informed consent and mutually agreed terms; roles, responsibilities and participation of stakeholders; relevant aspects relating to in situ and ex situ conservation and sustainable use; mechanisms for benefit-sharing, for example through technology transfer and joint research and development; and means to ensure the respect, preservation and maintenance of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use
of biological diversity, taking into account, inter alia, work by the World Intellectual Property Organization on intellectual property rights issues.”

As a result of the discussions on the Working Group on Access and Benefit Sharing, at COP 6 (2002) countries adopted the “Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization” (Decision VI/24). The Bonn Guidelines were considered a first step towards a deeper access and benefit sharing regulation under the CBD operationalizing some of its provisions. However, as the name suggests, they are just guidelines with the objective of aiding countries to develop their own national legislations on access and benefit sharing and negotiate bioprospection contracts.

The idea of the guidelines is to clarify some of the steps of the ABS process, stressing the need for prior-informed consent of providers and requirements for mutually agreed terms, as described in Part II and Part IV of the text (Roles and responsibilities in ABS and Steps in access and benefit sharing). Part III points out the importance of ensuring broad participation of all relevant stakeholders. The last section suggests some incentive measures for implementation of the guidelines, possible elements of national monitoring mechanism and provisions on enforcement (in accordance to contract arrangements, but with the possibility of sanctions).

It is important to mention that the Bonn Guidelines were adopted by the CBD members as a voluntary set of suggestions that are intended to be reviewed and improved as parties gain experience with access and benefit sharing arrangements. They are also
supposed to be applied in a coherent and mutually supportive way with other international agreements.

In the same year (2002), one of the results of the World Summit on Sustainable Development was a mandate to negotiate under the CBD an International Regime on access and benefit sharing. This mandate was included on the final decisions of COP 7 in 2004. Decision VII/19 D instructed the Working Group on Access and Benefit Sharing to “elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument\textit{\textit{s}} to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention.” The decision also contained agreed terms of reference for the negotiation on process, nature, scope and elements for consideration in the elaboration of the regime (Annex of decision VII/19)\textsuperscript{70}.

Between COPs, the Working Group on Access and Benefit Sharing, acting under the mandate from COP-7 to continue negotiations of the international regime, met twice. The working group’s third meeting was in February 2005 in Bangkok, Thailand. The group discussed possible designs for an international regime on access and benefit sharing, among other things. The main results of the meeting were recommendations for elements and objectives for the international regime.

The fourth meeting was held in Granada, Spain in February 2006. This last meeting started text-based negotiations, used as basis for negotiating a draft put together by the Chair Margarita Clemente (from Spain), and a revised version of this text, also

\textsuperscript{70} Hodges and Daniel (2005), Tully (2003), Diaz (2005) are some examples of authors that describe in greater detail and analyze aspects of this negotiation process.
presented by Chair Clemente. The Chair’s revised text was agreed to be forwarded to COP-8 as an annex to the working group recommendations to the COP.

The proposed draft text contains provisions covering: nature; objectives; scope; elements; traditional knowledge; fair and equitable benefit-sharing; legal provenance/origin; certificate of origin/legal provenance; implementation, monitoring and reporting; compliance and enforcement; access to justice; dispute settlement mechanism; financial mechanism; capacity building and technology transfer; institutional support; non parties. Within the draft very few sentences have been left out of brackets, and even many of these headlines were bracketed.

This confusing text reflects those deep divisions among countries. One of the most controversial issues is whether such a regime would be legally binding, not binding, or could contain a mix of binding and non-binding provisions. Another element that brings controversy among negotiators is whether to include derivatives and products of genetic resources. The mandate for inclusion of disclosure requirements in applications for IPRs also brings heated conflicts.

Developing countries, represented mainly by the African Group, Latin American and the Caribbean Group and the Like-Minded Megadiverse Countries, were ready to support the draft, but considered it “Eurocentric”. They defend a legally binding regime, with the widest scope possible, “focusing on channeling benefits to countries of origin, including those arising from the use of derivatives and products of genetic resources”. Among the developed countries, the European countries (EU, Switzerland and Norway) did not fully endorse it, complaining that it did not encompass some of their earlier
considerations and submissions. Finally, Australia, Japan, New Zealand and Canada did not even agree to negotiate such a regime to start with. In spite of these reactions, the draft text was, as mentioned before, sent to COP-8 (ENB, vol.9, No. 344, 6 February 2006: 9).

At COP-8 negotiations on the international regime on access and benefit sharing featured high on the agenda of many developing countries which, for the first time on access and benefit sharing negotiations, spoke as G77/China. Their objective was to speed up talks, taking advantage of the more or less structured draft text submitted by the working group. The group wished to set COP-9 (2008) as the final deadline for completion of the international regime. As divisions remained, their biggest progress was actually the recognition that the negotiations of the International Regime on Access and Benefit Sharing had in fact been officially initiated.

Concrete decisions at COP-8 were focused on the procedure to carry out future negotiations, with the appointment of permanent co-chairs (in order to guarantee some continuity to the negotiations, even in intermissions), and the mandate for the Working Group on Access and Benefit Sharing to meet twice before the next COP. The two co-chairs come from a developed country and a developing country: Mr. Fernando Casas of Colombia and Mr. Tim Hodges of Canada. An Ad Hoc technical expert group was created to discuss “an internationally recognized certificate” of origin/source/legal provenance. The group will be composed of 25 experts nominated by parties and seven observers, it should be geographically balanced, and it should meet before the next working group meeting. The COP-9 deadline was considered unrealistic, and a more
flexible COP-10 (2010) deadline was able to achieve consensus. The draft text resulted from the working group on access and benefit sharing meeting, after some debate, was agreed to be the basis for further negotiations (it was again annexed to the final report), along with the outcomes of Ad Hoc technical expert group on the certificate and other inputs provided by parties (decision VIII/4 A.5) (Bridges Trade BioRes, 22 March 2006, 28 March 2006, 3 April 2006 and Earth Negotiations Bulletin 20-31 March 2006).
As proposed in the first chapter, there are two types of international agreements: those with a self-interest purpose and those with a moral purpose. Agreements that have a self-interest purpose are those where countries act egoistic, to maximize their own benefits and they emphasize what has been called self-interest values (those being individual state economic and physical security). A self-interest purpose creates agreements where obligations of members are more equalitarian (with less or no special and differential treatment), there is better delimitation of benefits for members and they are better enforced. On the other hand, other values like a perception of what is correct, of a common humanity and of a collective identity give rise to agreements that have a moral purpose. Agreements that have a moral purpose are based on behavior that is idealistic, selfless and altruistic. The resulting agreements addressing society’s moral values therefore have more room to unequal rights and responsibilities, that is for special and differential treatment. The benefits coming from these agreements are harder to be limited exclusively to members, but they are also less strongly enforced.

After presenting case studies on the Convention on Biological Diversity and WTO’s Trade-Related Aspects of Intellectual Property Rights, this last chapter intends to apply the theoretical framework introduced in the first chapter to analyze the relationship between these two agreements. The analysis will focus on the five distinct characteristics of the two types of agreements, which are basic objective of the agreement, existence and extent of special and differential treatment clauses (reciprocity), decision-making system,
ability to limit benefits to members and enforcement. By looking at how such characteristics exist in the two agreements, the conclusion is that the TRIPS (and the WTO in general) is close to a self-interest purpose and the CDB was created with primarily a moral purpose. Again it is important to remember that these two types are to be considered ideal types, abstractions, and when applied on concrete cases, they do not fit exactly. Instead, the analysis will focus on what is the best category to put the institution, the one that best explains the design and processes inside the organizations.

The last part of the chapter will discuss some implications of that distinction on how international regimes interact. Issues of importance for the most powerful countries are included or kept separate from those self-interest purpose agreements, where those countries have more control. For developing countries, there is a trade-off. They can try to force an issue on a self-interest purpose agreement where it will face resistance, but if they succeed, the result will be more meaningful. On the other hand they can take the issue to an international institution that has a moral purpose, where they will most likely achieve a more comprehensive result, but weaker implementation.

World Trade Organization

As pointed out in chapter 2, the TRIPS agreement is an integral part of the WTO, and as such is built upon the organization’s core principles. Therefore it is the WTO which will be analyzed, with occasional comments on specific issues that are particular to IPRs. According to the typology the WTO is an organization (and thus, the TRIPS agreement) created with a self-interest purpose.
The first step on the analysis is to observe the objectives of the TRIPS/WTO. The basic objective of the WTO is complex to discuss, since there is no one specific article in the agreements that clearly determine what are the objectives of the organization. On its website, the WTO affirms that “its main function is to ensure that [international] trade flows as smoothly, predictably and freely as possible”. In another passage, the WTO explains that this is important because of the effect of trade on economic development and well-being, and “that partly means removing obstacles. It also means ensuring that individuals, companies and governments know what the trade rules are around the world, and giving them the confidence that there will be no sudden changes of policy. In other words, the rules have to be ‘transparent’ and predictable.” (WTO website, 2007).

By looking at another publication of the WTO that presents “10 benefits of the WTO trading system” (WTO, 2003), it could be said that most of the benefits are based on the economic theory that by making international trade more free and predictable, this would lead to an increase in international trade, and thus promote economic growth and development (and well-being). International trade theory says that when countries in the world reduce their trade barriers they can all specialize on whatever products they have comparative advantages on and the result is that everyone will benefit from economies of scale, diminished transaction costs and lower costs. Another idea that permeates the list of benefits brought by the WTO is a more peaceful world, where trade rules are more transparent and where trade conflicts are resolved by peaceful means inside the organization. These objectives are consistent with the idea of self-interest values that

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71 The theory on comparative advantages in international trade was first formulated by David Ricardo in the book “On the Principles of Political Economy and Taxation” from 1817.
emphasize economic and physical security of individual member states and are characteristic of self-interest agreements. In theory, all countries can benefit from trade, however, in the negotiations and implementation, countries focus on their own benefits.

After examining the objectives of TRIPS/WTO, it can be seen how the other three characteristics discussed appear on the WTO. So, the second element to be looked at, special and differential treatment (or Differential and More Favourable Treatment) at the WTO has been justified by developing and least developed countries based on structural imbalances between them and the now developed countries. Because of differences in their share of world trade, access to technology, and finance among other factors, these countries argue that trade liberalization does not result in the same gains to all countries. Special and differential treatment for trade has changed during the evolution of the multilateral trading system and “since the Uruguay Round, the S&D concept has evolved from being a development tool towards being an adjustment tool, mainly devised to ensure the implementation of the trade rules and the leveling of the playing field.” (Tortora, 2003:2).

According to the WTO, its agreements contain 145 S&D measures, which includes 22 provisions that apply only to those countries considered least developed countries\(^{72}\) (LDCs). Those provisions were divided into six categories: (i) provisions aimed at increasing the trade opportunities of developing country Members (total of 12); (ii) provisions under which WTO Members should safeguard the interests of developing country Members (most numerous in a total of 49); (iii) flexibility of commitments, of

\(^{72}\) According to an index created by the UN, and recognized by the 1979 GATT Enabling Clause, there are currently 50 countries that are considered least developed countries. For criteria, see http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm
action, and use of policy instruments (total of 30); (iv) transitional time periods (total of 18); (v) technical assistance (total of 14); (vi) provisions relating to least-developed country Members (as said before, total of 22)\textsuperscript{73}.

Unctad (2002) points out that the S&D measures under the WTO have two different natures: some are called negative measures, which are intended to support the adjustment of countries to the new rules – being binding, enforceable rules; and others are seen as positive measures, and are those with the objective of promoting the development of countries. It is particular significant that the second type are non-binding, non-enforceable rules. The negative measures are those that determine transition periods to comply with the rules, different criteria and/or thresholds in the implementation of the rules and exceptions to the rules. The positive measures are technical assistance and capacity building, greater market access (GSPs\textsuperscript{74}), “best endeavour” clauses, positive list approach (GATS\textsuperscript{75}). These so-called best endeavour clauses are all or most of the

\textsuperscript{73} Implementation of Special and Differential Treatment provisions in WTO Agreements and Decisions, WT/COMDT/W/77, 25 October 2000. Containing a list of all the S&D provisions.

\textsuperscript{74} GSP stands for Generalized System of Preferences. Under the GSP, developed countries offer non-reciprocal preferential treatment (such as zero or low duties on imports) to products originating in developing countries. Preference-giving countries unilaterally determine which countries and which products are included in their schemes.

\textsuperscript{75} GATS is the General Agreements for Trade in Services. The adoption of the “positive list” approach comparable to Article II of GATT rather than the “negative list” approach applied by the OECD instruments, subject to reservations. The “positive list” approach has been adopted as the mechanism of liberalization in the GATS structure (i.e. the separation of general obligations that would be accepted by all parties upon their signature of the framework in Part II from the market access and national treatment provisions in Part III that would be subject of specific negotiations. This means that each country can strategically select the individual service sector or transaction that it is willing to open up at a given time, subject to specific conditions and limitations. Market access would result from individual commitments negotiated in pursuance of long-term progressive liberalization, and national treatment would be negotiated and not automatically granted pursuant to market access. (Unctad 1994:152, box 14).
provisions under categories (i), (ii), (v) and (vi) of the WTO’s list, which comprises the majority of the S&D provisions (97 out of the 145).

The TRIPS agreement has six S&D provisions: transitional time periods (Article 65.2 and 65.4), technical assistance (Article 67) and provisions relating to LDCs (part of the Preamble to the Agreement; Article 66.1; and 66.2). An example of a “best endeavour” clause for the TRIPS agreement is Article 66:2, which reads “Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.”

Therefore, when it comes to the existence of special and differential treatment provisions, even though the TRIPS agreement and the WTO have S&D clauses, they are considered as said before, more an adjustment tool than a development tool. This means that, although this is not a perfect fit into the typology, because S&D measures exist. On close examination these S&D measures are weak compared to other obligations in the agreement. This is a key indication of a self-interest purpose agreement.

High-level decision-making at the WTO (and as an extension at the TRIPS), is the responsibility, as pointed out in chapter 3, of the Ministerial Meeting, where high member-country officials meet every two years. Decisions among countries of the WTO are made on the basis of consensus, where every member country has to agree, in order for the organization to adopt the decision. Some cases, the majority on the “one country, one vote” system can be used, like decisions on interpretation, for example76. Also, as

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76 The WTO Agreement envisages four specific situations involving voting:
said previously, the WTO works through rounds of negotiations, and decisions made during the rounds only take affect if all member countries agree to all decisions, known as single-undertaking.

It is also necessary to look at the way that countries build a consensus on the WTO. Important and controversial decisions and proposals are first negotiated and agreed-upon by a limited number of countries, in what is called informal meetings, or green room meetings\(^7\). In these meetings, a small number of interested countries (that are invited to the meeting usually by the chairperson of a negotiating group) try to reach a compromise that is afterwards presented to all the other countries. This system has been considered unfair (for not being representative of all countries on the organization) and not transparent enough (countries are only informed of the final negotiated text)\(^8\). Again, even though the consensus decision-making system at the WTO (and thus, TRIPS) is seemingly democratic (as compared for example to the weighted voting system of the IMF), the process through which the decision is taken and consensus is reached is considered biased in favor of powerful countries, as consistent with self-interest purpose agreements.

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\(^7\) The name green room meetings is in reference to informal name of the director-general’s conference at the WTO building in Geneva.

\(^8\) The WTO explains succinctly this process on the publication “Understanding the WTO” (WTO, 2007:101). Another view of how the process of consensus-building can be prejudicial to developing countries is presented by Bhagirath Lal Das, who was formerly India's Ambassador and Permanent Representative to the General Agreement on Tariffs and Trade (GATT), in the website on an NGO called Third World Network - TWN (http://www.twnside.org.sg/title/bgl3-cn.htm)
Finally, when it comes to enforcement, the WTO has an established Dispute Settlement Body (DSB), which is responsible for providing a place where member countries can sit down and resolve their conflicts inside the organization\textsuperscript{79}. The DSB is not a new concept in the multilateral trading system. WTO’s precursor, the GATT, already counted on an established mechanism to resolve trade disputes (GATT 1947 Articles XXII and XXIII). WTO’s body is based on the system used by the GATT, but has corrected and improved some of the problems of that system\textsuperscript{80}.

Dispute arises in the WTO when a member country feels that another member(s) is not following the agreed rules of the organizations. Other countries that are not directly involved in the dispute, but are interested parties, can ask for the right to be third parties and follow the process more closely. The first step into the process is to open consultations among the litigant parties. This initial phase is an attempt to resolve the conflict in an amicable way. Many of the problems brought by members were resolved this way without having to resort to the panel proceeding. Thus, if countries cannot find a

\textsuperscript{79} The rules and procedures of the DSB are described in the Understanding on Rules and Procedures Governing the Settlement of Disputes, commonly referred to as the Dispute Settlement Understanding or DSU, and it is attached to the WTO Agreement as Annex 2 and constitutes an integral part of that Agreement.

\textsuperscript{80} The most important shortcoming of the system was that the decision on the establishment of a panel, the decision on the adoption of the panel report and the decision to authorize the suspension of concessions were to be taken by the GATT Council by consensus. The responding party could thus delay or block any of these decisions and thus paralyze or frustrate the operation of the dispute settlement system. Furthermore, the Contracting Parties regarded the dispute settlement process as unable to handle many of the politically sensitive trade disputes since the assumption was that the respondent would refuse to agree to the establishment of a panel or the losing party would prevent the adoption of the panel report. As a result, some Contracting Parties, and, in particular, the United States, resorted increasingly to unilateral action against measures they considered in breach of GATT law. The most significant innovations to the GATT dispute settlement system concern: (1) the quasi-automatic adoption of requests for the establishment of a panel, of dispute settlement reports and of requests for the authorization to suspend concessions; (2) the strict timeframes for various stages of the dispute settlement process; and (3) the possibility of appellate review of panel reports. The latter innovation is closely linked to the quasi-automatic adoption of panel reports and reflects the concern of Members to ensure high-quality panel reports.

(Unctad, 2003:40-41)
solution during the time for consultations, the complainant can request a panel. The panel functions similarly to a court, with the important difference that panelists (3 to 5 experts in their individual capacities, from different countries) are chosen by the countries in dispute, and only appointed by WTO’s director-general if countries cannot come to an agreement. The panel is responsible for deciding whether the policy or action in question is consistent with WTO rules. All parties in question present their arguments, and expert review groups can be called to consult on technical matters.\(^8\)

The final report of the panel rules strictly on whether the policy or measure is or not consistent with WTO rules. It does not necessarily render opinion (but it may) on how, if considered inconsistent, it should be brought to compliance. After the final report, and its adoption by the DSB as a ruling (the report can only be rejected by consensus), parties involved can appeal the ruling. If there is an appeal, three members of the Appellate Body\(^8\) review the final report in terms of the law itself (for example legal interpretation). They cannot review evidence or accept new issues to the process.

After the Appellate Body renders its conclusion, and the DSB adopts the resolution (again the report can only be rejected by consensus). If the report considers the policy or measure inconsistent, the party has a period to notify the DSB of its intentions to change it and bring it to compliance. If there is no action by “a reasonable period of time”, the complaint can ask the DSB for permission to retaliate. The retaliation consists of limited trade sanctions (“suspend concessions or obligations”), and is

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\(^8\) This possibility of taking into consideration expert opinion has been considered by some NGOs as an opening for them to participate in the panel proceeding through Amicus Curiae Briefs. To date the acceptance of these document by the panels have been controversial.

\(^8\) The Appellate Body consists of seven permanent members, representing the WTO membership, and have 4-years terms. Here again they act on their personal capacity, they cannot be connected to any government.
preferably on the same sector of the dispute, but cross-retaliation can be permitted. The whole dispute resolution process should last an average of one year, with an additional three months when there is an appeal.

In general the dispute settlement system at the WTO is considered fairly efficient, even though it is too expensive and complicated to be used by many developing countries. From January 1995 through April 2007, 363 panels have been instituted. The main users of this system are developed countries. But increasingly developing countries are taking their trade disputes to the DSB, as Unctad (2003) illustrates with this passage:

Developing country Members, however, have also had frequent recourse to the WTO dispute settlement system, both to challenge trade measures of major trading powers and to settle trade disputes with other developing countries. During the first six years of the WTO dispute settlement system (1995-2000) in 26 per cent of all cases brought to the WTO system for resolution developing countries were complainants and in 40 per cent they were respondents. In 2000 and 2001, developing countries brought more disputes to the WTO system than did developed countries. The most active users of the dispute settlement system among developing country Members are Brazil, India, Mexico, Thailand and Chile. (Unctad 2003:55)

Another way that the WTO ensures that member countries are complying with its rules is through the Trade Policy Review Mechanism. Besides being obliged by the agreements to periodically inform the organization about specific measures, policies or national laws, all member countries go through regular reviews of their trade policies, the

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83 Cross-retaliation consists of sanction in different sector or even another agreement.
84 WTO 2007 presents a flow-chart (p.59) with an detailed demonstration of phases and time frames for each step. There is also a case study (p.61) showing the whole process of a case involving the United States and Venezuela concerning gasoline.
regularity depending on their world trade shares\textsuperscript{85}. This is a peer-review process taking place at the Trade Policy Review Board, which is actually comprised of the WTO General Council. The Trade Policy Review has two parts: a policy statement by the member under review and a report prepared by WTO’s secretariat. The secretariat has the cooperation of the member country, but has sole responsibility for the content of the report. According to the WTO (2007:53), the objectives of the Trade Policy Review are: to increase the transparency and understanding of countries’ trade policies and practices, through regular monitoring; to improve the quality of public and intergovernmental debate on the issues; and to enable a multilateral assessment of the effects of policies on the world trading system.

In sum, when examining the five proposed characteristics applied to the TRIPS (as part of the WTO,) it can be seen that the TRIPS/WTO has as its objective mainly individual country economic interests, it does not have extensive mandatory S&D measure (they focus mainly on adjustment measures), and its decision-making process, although apparently equalitarian, is said to be not fair and transparent and allows more powerful countries more influence; at the same time has strong enforcement mechanisms (through the trade policy reviews and the existence of their dispute settlement body).

\textit{Convention on Biological Diversity}

As an environmental agreement, with the overarching objective of preserving a global common, the world’s biodiversity, the CBD could be considered an organization.

\textsuperscript{85} The Quad, group of four major world traders – the United States, the European Union, Japan and Canada, are review every two years, the next 16 countries in terms of their share of world trade are reviewed once in every four years, and other countries in a period of six years (which could be longer for LDCs).
that has a moral purpose. However, as in the case of the TRIPS/WTO, the typology does not apply perfectly in every aspect.

The first aspect to be looked at is CBD’s objective. Article 1 clearly states the Convention’s objectives: “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” As stated in chapter 2, and can be seen by re-examining this article, CBD’s principles go beyond strictly conservationist objectives by including fair and equitable sharing of benefits. Even though this could be seen as a self-interest objective from the point of view of developing countries which own most of the biodiversity and would thus obtain economic benefits arising out of its use, this is also seen as not more than their own rights as sovereign owners of that resource, and also as a means to guarantee that these resources are conserved, which is also a moral issue for the rich countries. So, although it could be argued that CBD’s objectives are not exclusively consistent with a moral purpose agreement, the main key elements of a moral purpose agreement are present.

By listing the objectives of the Convention as the preservation of biological resources, their sustainable use and fair and equitable sharing of its benefits, countries are trying to operationalize values they described on the preamble, such as “the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its
components”, “the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere”, and that “the conservation of biological diversity is a common concern of humankind”. Moreover, the third objective, fair and equitable sharing, can be justified under other preamble paragraphs like, “recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components”. These paragraphs show an underlying concern with well being and quality of life, the perception of a common humanity and collective identity, characteristics of agreements that have a moral purpose.

Following the CBD’s objective, considered moral, the other characteristics follow. So, observing existence of S&D measures, overall the CBD is considered to be an agreement, as previously stated in chapter 3, where developing countries were able to secure gains that were denied to them even in other environmental agreements, like the Convention on Climate Change. These provisions are not only present in the Preamble of the CBD, as “Best Endeavour” clauses, but are also embodied in the operational articles of the agreement, although even the operational articles of the Convention are not concrete measure for countries to implement directly, but to measures to be embodied on country’s national legislations.

Examining the CBD’s text, nine articles could be identified that contained S&D clauses in one or more of their paragraphs. Those articles are 8, 9, 12, 16, 17, 18, 19, 20
and 21. Most of these clauses are designed to give special attention to developing countries and consist of the phrases like “particularly to developing countries” and “taking into account the special needs of developing countries”. There are also special mention of LDCs, small island developing states and developing countries that are “most environmentally vulnerable, such as those with arid and semi-arid zones, coastal and mountainous areas (articles 20.5, 20.6 and 20.7, respectively).

Four articles however, should be called into attention when discussing S&D measure on the CBD. These articles deal with Access to and Transfer of Technology (article 16.2), Financial Resources (articles 20.2 and 20.4) and Financial Mechanism (article 21.1). These are the passages that make the CBD an agreement that is considered especially beneficial for developing countries. Even though these articles were already presented on chapter 2, it is worthwhile to look at them again. Article 16.2 says that “access to and transfer of technology (...) to developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms”. Article 20.2 determines that “developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention”. Article 20.4 recognizes that “economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties” and that “the extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this
Convention related to financial resources and transfer of technology”. Finally, article 21.1 reads “there shall be a mechanism for the provision of financial resources to developing country Parties for purposes of this Convention on a grant or concessional basis”.

These articles, although do not establish concrete numbers or percentages, give very different treatment to developed and developing countries. To the latter, they recognize that economic and social development are priorities. To the former, they give an extra burden on the sharing (or even granting) of technology and financial resources to implement the Convention, saying even that successful implementation on the CBD by developing countries depends on the fulfillment of developed countries’ commitments. Therefore, it could be said that the CBD has strong and concrete special and differential treatment for developing countries.

Decision-making at the CBD is through the “one country, one vote” system. High-level decisions are made at the COPs, where high officials are to meet regularly (currently on a two-yearly basis). Article 23 that establishes the Conference of the Parties says that the COP “shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules governing the funding of the Secretariat” (Article 23.3). It is important to note here that the consensus is to be reached among the parties present to the COP, not necessarily among all parties to the Conventions. However, article 29, which determines the rules concerning the amendment of the Convention or protocols, admits that, in case a consensus in not reached, “the amendment shall as a last resort be adopted by a two-third majority vote of the Parties to the instrument in question present and voting at the meeting” (article 29.3).
Also, acceptance of observer status to other organizations can be denied if more than one third of parties objects (article 23.5). In sum, decision-making at the CBD, although preferably by consensus, there is some flexibility.

This flexibility of the decision-making system at the CBD can be perceived by some of the problems of legitimacy faced by polemic decision taken in COPs. The important example is the decision with invasive alien species at the end of COP 6. As mentioned in chapter 3, the controversy raised concerns over the decision-making procedures of the CBD.

Another important indication of how the decision-making process at the CBD is consistent with the characteristics of moral purpose agreements is an innovation in the negotiation of the Cartagena Protocol under the Convention. On the last stages of the negotiation, where countries had to convene in small groups to clear some of the hard bargain issues, a new procedure for the formulation of these small groups was adopted that guaranteed bigger participation for developing countries. This procedure was named “Vienna setting” and was considered by participants “a democratic alternative to the secretive negotiating processes that have characterized the WTO, and a healthy precedent for future global meetings” (Ling, 2000). So, in light of its flexibility of at COPs and the innovations in procedures for negotiations of protocols, decision-making at the CBD has the characteristics of a moral purpose institution.

Finally, concerning enforcement, the CDB in general does not have strong enforcement mechanisms. Article 27 of the Convention deals with the Settlement of Disputes and determines that a negotiated solution should be reached, and in case that
does not happen, parties could seek arbitration, and it provides the procedure to be adopted in these cases (Part 1 of Annex II). Parties could also resort to the International Court of Justice.

When it comes to making sure that parties are complying with their commitments under the CBD, again, the rules set out in the CBD are not strict. COP 1 established a Clearing-House Mechanism, but it’s main objective is to exchange information, it is not to monitor contracting parties implementation of the CBD. That’s also the case of the Subsidiary Body on Scientific, Technical and Technological Advice, which as its name already says, has the main function of giving advice on the implementation of the Convention (exact mandate on article 25).

However, parties are supposed, according to article 26, to submit regular reports to the COP on “measures which it has taken for the implementation of the provisions of [the] Convention and their effectiveness in meeting the objectives of this Convention”. To date there have been three reports: the first one was supposed to be submitted by January 1995 (a total of 143 parties did), the second by May 2001 (129 parties), and the third by May 2005 (127 parties submitted). Starting with the third national report, they are now to be in a four-yearly basis, and are to be examined at every other COP. The COP also requested parties to prepare thematic reports, on issues to be appointed at the meetings. It is important to notice that even though these reports are discussed at COPs and are available to all parties (and to the public on CBD’s website), they are prepared by the countries themselves, making them not necessarily an effective enforcement mechanism.
In sum, when examining the four proposed aspects of the CBD, it could be said that the Convention’s objectives are guided by moral and collective values, its text presents extensive S&D clauses, it has a more equal decision-making process, but faces difficulties when trying to limit benefits to members and to enforce its provisions.

**Relationship and Interaction between the CBD and TRIPS**

The last question discussed here is what is the dynamics of interaction when there are two international agreements or organizations that were created with different purposes. The TRIPS and the CBD, as argued in this chapter, have different purposes, the TRIPS agreement, as part of the WTO, having a self-interest purpose, and the CBD having a moral purpose.

Chapters 2 and 3 describe the issue of access and benefit sharing and how it has been dealt with in both forums. In general the issue of access and is of interest to developing countries, owners of the genetic resources and traditional knowledge associated. On the other side of the table, we have developed countries, which are the main users of developing countries’ genetic diversity as raw material for new products and technologies.

Developing countries have insisted on dealing with the issue at the WTO, including the relationship between both agreements under the mandate to review article 27.3(b), adding it to the Doha agenda and escalating the discussions to a text-based negotiation. As developing countries’ submission became more and more specific on their proposals, developed countries, even though consistently maintaining that there is
no conflict between the TRIPS and CBD and that both agreements should be implemented in a mutually supportive way, kept dialoging with the proposals.

Three different responses of developed countries can be identified. The first one is constant denial of the existence of conflict. This is mainly the US and Japanese argument, that either agreement needs to be changed since they are flexible enough to accommodate the different objectives. They also say that the current approach, through contracts between users and providers of genetic resources and traditional knowledge, is the most effective one. Second we have some European countries that see that there could be some room for conflict, but think that the issue would be best dealt with in other forums like the WIPO or just the CBD. Following this rationale, they even admit some of the disclosure requirements proposed by the developing countries, but suggest they be included on agreements administered by WIPO. In this view, any reform of the TRIPS would be prejudicial to the fragile balance that resulted on the current text of the TRIPS agreement. Finally, the third response has been to agree to the possibility of reform to the TRIPS to include access and benefit sharing concerns through disclosure requirements. The difference of this offer to the demands of developing countries is that they agree only with one of the three disclosure requirements, the disclosure of origin. Also, the “strength” of the requirement would be considerable less than the current proposal: the requirement would be voluntary and measures for non-compliance cannot include revocation of the patent rights. These changes on the original proposal are going to virtually eliminate the use of the available enforcement measures at the WTO.
A final analysis of the result of this negotiation is not possible since they have not yet been concluded, but by looking at the process so far, some evidence can be drawn. The relationship between TRIPS and CBD is now part of the Doha Round, the current round of negotiations at the WTO, which has been proving difficult to end in an agreement. Disagreements on fundamental issues for the round, like agriculture, have been blocking out any further significant development in other issues, and even freezing negotiations at all, like happened in July 2006. In light of this already complicated agenda that basically opposes developed countries and developing countries, it is not clear how far will developing countries press for ABS at the WTO. Evidence from Hong Kong is not encouraging. During preparations for the meeting, disclosure of origin was cited as one of the issues on the agenda, but as discussions polarized on agriculture, the proposal was barely mentioned. What happened in Hong Kong could be taken as a sign that confronted with trade-offs at the rounds closure, from the hard bargain issues, ABS is going to be dropped.

At the CBD the issue, although contentious, is not only on the table of negotiations, but has moved to text-based phase. An agreement on an International Regime on Access and Benefit Sharing under the CBD will likely be concluded, in spite of objections of some parties (and non-parties for that matter). However, the impact of such an international regime will no doubt be weaker than an amendment to the TRIPS agreement, since the CBD lacks the power the WTO has. Another point that cannot be ignored is the fact that the United States, major user of genetic resources, is not a party to the CBD.
A strong intellectual property system was always a concern for developed countries, specially the United States. This could be seen by the insistence of including the issue under the WTO, a strong organization that has a self-interest purpose, where developed countries have a greater power to control processes, decisions and concessions. The attempt of developing countries to restrict the use of IPRs in biotechnology, or to try to use the IPR system to their benefit by including additional disclosure requirements at the WTO, is consistently rejected. These measures could be acceptable in other forums, like CBD, which is considerably weaker and where such a decision would have less impact, but not at the WTO. For developing countries, a decision at the CBD would be easier to obtain, and probably negotiated more on their terms, but they recognize that would not have as extensive result as getting the disclosure requirements included in the TRIPS.

In sum, when examining the issue of access and benefit sharing of genetic resources and traditional knowledge associated, it can be seen that this issue arises mainly as an area of overlap between two international regimes that were created with different purposes: the TRIPS/WTO has a self-interest purpose and the CBD has a moral purpose. Further regulations on access and benefit sharing of genetic resources are being discussed on both forums, so countries are using the idea of “forum shopping” to find the institution that most suits their interests on this issue.

At the TRIPS/WTO, the self-interest purpose institution, that for its characteristics, the powerful developed countries are able to exercise a better control, the issue is sponsored by developing countries that want to secure their benefits arising out
the use of their resources. Developed countries have consistently blocked negotiations there and insist on moving it to other forums. CBD is frequently suggested as the most adequate forum to deal with this issue. These countries, that are more powerful at the WTO, are using this power to push the issue of access and benefit sharing away from the self-interest purpose regime.

At the CBD, there is definitely less resistance on negotiating stricter regulations for access and benefit sharing of genetic resources, even though some resistance remains (even coming from a non-party, the US). But developing countries see the result of including such regulations only at the CBD, a moral purpose agreements, as having less impact that it would have if included on the TRIPS/WTO.
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