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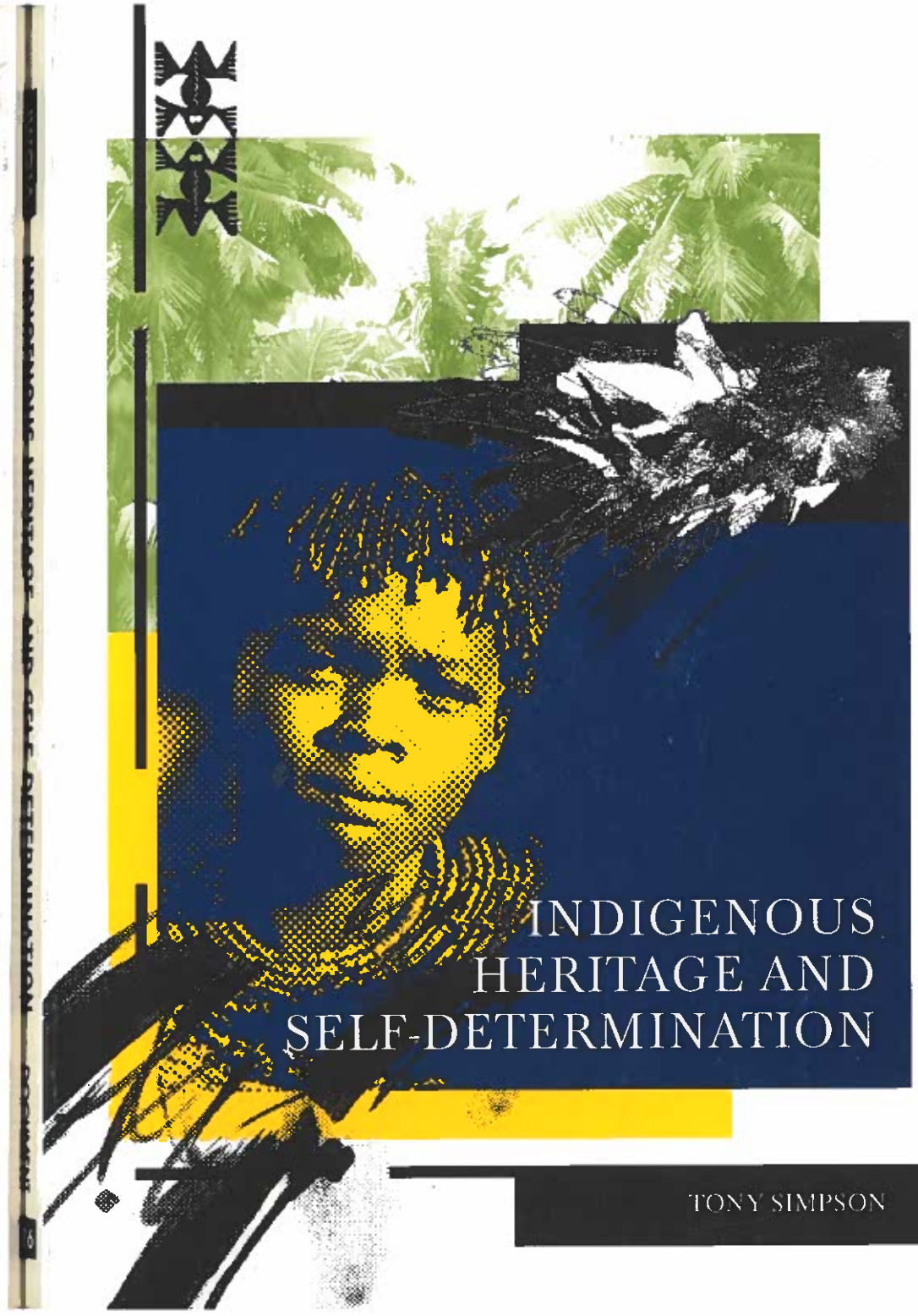
INDIGENOUS HERITAGE AND SELF-DETERMINATION



INDIGENOUS HERITAGE AND SELF-DETERMINATION

TONY SIMPSON

Howard Berman

in memoriam

INDIGENOUS HERITAGE AND SELF-DETERMINATION

The Cultural and Intellectual Property Rights of Indigenous Peoples

Tony Simpson

on behalf of the
Forest Peoples Programme

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Whilst I extend my thanks to all of those mentioned above, the opinions contained in this paper are those of the author and do not necessarily reflect their views or those of the editors.

Tony Simpson

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FOREWORD

Intellectual Property Rights have moved centre stage as a controversial human rights issue. International legislation, such as the Convention on Biological Diversity and the General Agreement on Tarriffs and Trade, seek to impose international norms on developing countries to promote trade in bio-technologies and human knowledge. The exact form of the national legislation to be adopted to secure these international obligations is the subject of heated debate between those representing the interests of transnational corporations, national governments and local communities. At the same time, some environmentalists have been promoting the commercialisation of forest products and indigenous pharamcopeias, as ways of saving forests and making them valuable.

After centuries of disparagement, indigenous peoples suddenly find their millenial wisdom coveted by outsiders and they are demanding that mechanisms be established to effectively protect their rights. The problem is, how? Western legal regimes have a poor record of accomodating indigenous rights, and in the past many laws adopted to protect indigenous peoples interests have done more harm than good.

This study was born from a concern that precipitate moves to define legal mechanisms for protecting indigenous peoples intellectual property rights mights repeat these mistakes. So often imposed laws defining indigenous rights to their lands have had the effect of opening up the communally-held ancestral territories of indigenous peoples and oftentimes parcelled them up into saleable titles.

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The study, carried out for the Forest Peoples Programme by the Australian lawyer, Tony Simpson, examines the legal avenues presently open to indigenous peoples to defend their cultural heritage, and seeks to elucidate the advantages and disadvantages of the various approaches so far advocated. It aims not to determine indigenous policy but to help them define their own local, national and international proposals to secure their futures, in accordance with their right to self-determination and to exercise their own customary law.

We are grateful to the IUCN-Netherlands for funding this research and to the International Work Group for Indigenous Affairs and the Greenland Home Rule Government for helping with the publication.

Marcus Colchester
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CHAPTER

1

1. INTRODUCTION

1.1 Indigenous Cultural and Intellectual Property Rights

This paper uses the term 'indigenous cultural and intellectual property rights' when referring to such things as indigenous art, songs, poetry, literature, biological and medical knowledge, ecological knowledge and environmental management practices, and other aspects and expressions of indigenous cultural heritage. This is the terminology that is used to encapsulate indigenous rights in these areas in the United Nations Draft Declaration on the Rights of Indigenous Peoples and various standard setting documents formulated by indigenous peoples.

For the sake of continuity, this paper also uses the term 'indigenous cultural and intellectual property' to refer to indigenous works, practices, innovations, knowledge, ideas, and other expressions of indigenous cultural heritage.

However, on closer examination of the origins and underlying principles of this terminology, it must also be noted that its very application to indigenous peoples may be offensive or abhorrent to many indigenous peoples. In fact, it may be said that the term 'indigenous cultural and intellectual property' is an oxymoron.

It is a term which implies that the cultural heritage of indigenous peoples can be protected by a reductionist Western legal philosophy that separates culture from knowledge and deals with them in different ways. It is also a term which suggests that Western property law can be adapted to confer on individuals (both indigenous and non-indigenous) exclusive ownership and monopoly rights to culture, while at the same time ensuring that the broader community has access to indigenous peoples' heritage.

Many aspects of the conceptual basis which underpins intellectual property law are fundamentally inconsistent with the beliefs and values of indigenous peoples, and therefore offer them very inadequate levels of protection. For example, in contrast to Western legal systems, indigenous cultural and intellectual property is generally not owned or monopolised on an

individual basis, but is a collective right that extends to the community as a whole. In saying this, it is important to note that each indigenous community determines the balance between individual and collective rights in its own community; it would be misleading to typify indigenous rights as *only* being of an individual or collective nature.

Although key individuals may bear particular responsibilities in relation to the use and management of certain elements of that 'property', their exercise of authority must be in accordance with the laws and customs of that people. They cannot for example, alienate that property from the community by transferring ownership to another person(s) because that knowledge or cultural expression is part of their collective identity and has meaning in the context of their community - not outside it.

In spite of these inadequacies and deficiencies of existing intellectual property law in relation to the protection of indigenous cultural and intellectual property, indigenous peoples are turning to intellectual property law to protect their knowledge, traditional lifestyles, cultural heritage and biological resources. Indigenous peoples' use of intellectual property law does not necessarily indicate indigenous support for these mechanisms. Rather it is largely a result of the fact that there is increasing international pressure on States to implement domestic legislation that will guarantee intellectual property rights, and little attempt on the part of governments to explore alternative legal mechanisms to adequately protect indigenous cultural and intellectual property.

In view of these criticisms of the term 'indigenous cultural and intellectual property', this paper believes it is important that indigenous peoples develop a terminology or language which encapsulates the 'knowledge, innovations and practices' (to use the terminology of the Convention on Biological Diversity (Article 8(j)) which they want to protect.

The development by indigenous peoples of appropriate terminology is important to ensure that they understand what issues and rights are actually being referred to in the debate about their 'cultural and intellectual property', without using legalistic, vague or culturally insensitive language. It is also a means by which indigenous peoples could be brought into the debate in a more meaningful way, thereby opening up the possibility that

indigenous peoples themselves can find a way through the complex issues which Western legal systems have failed to grapple with.

1.2 Indigenous Heritage

The United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, Dr Erica-Irene Daes, has suggested that the term 'indigenous heritage' is a more 'simple and appropriate' term than indigenous cultural and intellectual property.[1] She notes,

> 'Heritage' is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.

This terminology overcomes the distinction between 'cultural' and 'intellectual' which is indicative of reductionist Western knowledge systems, just as it avoids the use of the term 'property', which remains a foreign concept to many indigenous peoples. It leaves open to a particular people the determination of what is part of their heritage, and how that heritage should be protected.

Despite the Special Rapporteur's suggestion in relation to terminology, this paper has used the term 'indigenous cultural and intellectual property' to maintain consistency with the language of the Draft Declaration on the Rights of Indigenous Peoples, and to strengthen the argument that a 'rights- based' approach is the most appropriate in these matters.

1.3 Customary Heritage Rights

In accepting 'indigenous cultural and intellectual property' as the most frequently used terminology by the United Nations and

other experts writing on these matters, an alternative term considered by this paper is *customary heritage rights.* This term conveys the need to base any efforts to improve the protection and management of indigenous 'cultural and intellectual property' on the fundamental rights of indigenous peoples, such as their right of self-determination. It also conveys the dynamic and evolving nature of indigenous rights in relation to their cultural heritage, rather than suggesting that indigenous culture is frozen in time and required to rigidly adhere to ancient traditions. Furthermore, as noted above, Dr Erica-Irene Daes has suggested that the term 'indigenous heritage' is a more 'simple and appropriate' term than indigenous cultural and intellectual property.

The term 'customary rights', as opposed to 'traditional rights', is favoured in this paper. At first glance this distinction may appear predominantly semantic, but the subtle differences in meaning of these terms convey very different messages about indigenous cultural heritage. The term 'customary' for example, implies that indigenous heritage has its origins in traditional knowledge, practices and beliefs which have been transmitted to and reinterpreted by successive generations. Although customs are in harmony with the traditions that have given rise to them, they also embrace and reflect contemporary indigenous practices and beliefs. Acknowledgment of indigenous customary heritage rights therefore would be an acknowledgment of the right of indigenous peoples to practice and revitalise their cultural traditions, while at the same time embracing contemporary practices which they consider to be consistent with the overall continuity of their culture. In contrast, the term 'traditional rights' suggests that legal rights will only pertain to those culturally transmitted aspects of indigenous culture which remain faithful to ancient beliefs, practices and knowledge. The implication of this terminology is that indigenous cultures are static, frozen in time at some point prior to non-indigenous influences. In turn, this adherence to 'tradition' would require indigenous peoples to gather historical proof of the authenticity of their 'traditions' before the rights stemming from traditional beliefs, practices or knowledge could be lawfully exercised. Clearly this approach to indigenous cultural rights is more restricted and less empowering than an approach which recognises the evolving and dynamic nature of indigenous cultures.

Non-indigenous recognition of the 'customary heritage rights' of indigenous peoples is an important means of giving effect to indigenous peoples' right of self-determination, and vital if indigenous heritage is to survive. It is also an approach which is grounded in common law. The common law system, as it has evolved over the centuries, has actively recognised elements of the customary law of particular areas. The Statute of the International Court of Justice for example, recognises customary law as one of the sources of international law.[2]

1.4 A Definition of Indigenous?

The question of whether and how to define 'indigenous peoples' has repeatedly been posed within the United Nations. It is however, generally agreed among indigenous peoples and their organisations that the working definition of the concept of 'indigenous' provided by the Cobo Study (refer to Annexure C) provides sufficient guidance.

There are a number of potential disadvantages in seeking to formulate a comprehensive, universal definition of 'indigenous'. Firstly, the diversity of the world's indigenous peoples is such that no single definition is likely to capture the breadth of their experience and their existence, but may in fact exclude particular groups in its efforts to establish a defined category of 'indigenous peoples'. Secondly, efforts by the international community to develop a binding, inclusive definition are bound to absorb a considerable amount of time and energy, diverting it from other more fruitful activities.

Dr Erica-Irene Daes has made the following comments in relation to the discussion of the concept of 'indigenous' within the United Nations System:[3]

> Indigenous representatives on several occasions have expressed the view before the Working Group that a definition of the concept of 'indigenous people' is not necessary or desirable. They have stressed the importance of self-determination as an essential component of any definition which might be elaborated by the United Nations System. In addition, a number of other elements were noted by indigenous representatives in particular during the thirteenth session of the Working Group.
>
> For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr M. Dodson, stated: 'there must be a scope for self-identification as an individual and acceptance as such by the group. Above all and of crucial importance is the historical and ancient connection with lands and territories....' A number of other indigenous representatives referred to the working definition developed by the Special Rapporteur, Mr Martinez Cobo. The representatives of the Sami Council, for example, stated that 'Even without a definition it should be relatively easy to identify the beneficiaries [of the Draft Declaration on the Rights of Indigenous Peoples] by using the criteria of the Cobo Report which is adequate to determine whether a person or community is indigenous or not. Factors such as historical continuity, self-identification and group membership are cardinal criteria in this regard.'

Although Dr Daes does not advocate the formulation of a comprehensive, universal definition of 'indigenous', she does recognise a number of factors that are relevant to developing an understanding of the concept of 'indigenous'. These factors 'may be present, to a greater or lesser degree, in different regions and in different national contexts' and as such 'may provide some general guidance to reasonable decision-making in practice'.[4] These factors include:

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

1.5 The Concept of 'Peoples'

One of the purposes of the United Nations, as set out in Article 1 of the United Nations Charter, is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.' Both the International Covenant on the Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights provide specifically in Article 1 of each, that: 'All peoples have the right of self-determination. By virtue of that right [those peoples] freely determine their political status and freely pursue their economic, social and cultural development'. In addition, the Articles stipulate that 'The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'.

These international legal instruments reflect the recognition by the United Nations that self-determination is a prerequisite to the full enjoyment of all fundamental human rights. However, in order to fully understand the scope of the right of self-determination articulated in these instruments, it is important to read the United Nations Charter and the International Human Rights Covenants in the context of the post-war process of decolonisation.

1.5.1 The States' Formulation of the Right of Self-Determination

General Assembly Resolution 1514(XV) on the Granting of Independence to Colonial Countries and Peoples highlights the problems which have arisen as a result of the formulation of self-determination as a right of 'peoples', when in fact, international relations are dominated by States, not peoples. Although Article 1 of the Resolution 1514 affirms the right of all peoples to self-determination (para. 1), it goes on to qualify this right in a manner which essentially subordinates the rights of peoples to the sovereignty of the dominant State. The UN Resolution, which has guided the process of decolonisation, states that:

a. 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the United Nations Charter' (para. 6); and
b. 'All States shall observe faithfully and strictly the provisions of the Charter, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States and respect for the sovereign rights of all peoples and their territorial integrity.' (para. 7)

The effect of these provisions is to require distinct peoples within territorial States to exercise their right of self-determination only when in doing so, they pose no challenge to the integrity or unity of the dominant State. As Falk has commented:

> This obviously deals with the situation of peoples in a very artificial and contradictory way, because in many territorial units there are distinct, often antagonistic nationalities, even aside from the characteristic exclusion of indigenous peoples from government. .... One of the most severe sources of injustice and denial of human rights today is that the apparatus of State power has been captured by one of those fragments of a people, defined as the totality of persons within a given State, while the other elements are subjugated to varying degrees. .... This underscores the vulnerability of 'peoples', even if their status seems to be acknowledged in the basic instruments of the United Nations.[5]

This 'statist' interpretation of the right of all peoples to self-determination has enabled national governments to avoid confronting the situation of the world's indigenous peoples, and other 'captive nations' within dominant States, such as the Kurdish Peoples.

1.5.2 Indigenous Peoples and the Rights of Peoples

Indigenous peoples assert that as distinct peoples, they are entitled to the right of self-determination, as provided them under international law. Their unique cultures, histories and current

situations are such that indigenous peoples have a special set of demands and grievances that cannot be accommodated by existing international legal mechanisms and processes. In this sense, merely granting indigenous peoples the right to participate in the dominant society on the basis of equality and non-discrimination, is insufficient.[6]

International awareness about the inadequacies of the present international legal framework to deal with the systematic and intrenched discrimination that persists against the world's indigenous peoples has grown to the extent that the international community is now able to consider indigenous rights as a distinct category of human rights. The development of the draft Declaration on the Rights of Indigenous Peoples is evidence of this. However, in view of the fact that most national governments, at this stage, are unwilling to publicly acknowledge their own responsibility for and complicity in the discrimination and subordination of indigenous peoples within their jurisdiction, it is vital that indigenous peoples, their representative organisations, and supportive governments pursue the development of an international legal instrument which grants indigenous peoples rights as a distinct group.

As Falk has strongly argued, the need for and effectiveness of a tailored legal instrument to deal with the rights of distinct legal groups who are affected by discrimination, has been repeatedly demonstrated within the United Nations:

> If we look back at the circumstances surrounding the formulation of the Genocide Convention or of the Convention on the Rights of Women, the Prohibition of all Forms of Racial Discrimination or the Prohibition of the Crime of Apartheid, a pattern is evident. Each of these undertakings represented the crystallisation of particularly intense demands that took shape at a given time for an acknowledgment of rights, as a collective and formal expression of the urgency and seriousness of the claim and the grossness of the abuse. In each instance the prohibited behaviour could analytically have been subsumed in a broader group of pre-existing rights or demands. The insistence on a distinct category is matter of policy, not logic.[7]

1.6 The Scope and Focus of this Paper

It is not the intention of this paper to prescribe particular courses of action or present a 'solution' to indigenous peoples that will solve the range of problems associated with the protection and management of their cultural and intellectual property. Rather, this paper seeks to examine and critically analyse the potential legal mechanisms and processes that could be used by indigenous peoples to better protect and manage their cultural and intellectual property.

The analysis undertaken by this paper is predominantly drawn from and directed at the national and international levels, and it is therefore beyond the scope of this paper to suggest the detail of an appropriate response in any particular country or community. Appropriate responses will vary among countries and among indigenous peoples themselves. This focus on the national and international contexts should not however, be misinterpreted as a suggestion that responses at the local and community level are less important or potentially less rewarding; this is clearly not the case.

1.7 Structure of this Paper

To undertake a critical analysis of intellectual property law from the standpoint of indigenous peoples, it is important to firstly establish the principles which indigenous peoples believe constitute the basis for the protection and management of their cultural and intellectual property. The Draft Declaration on the Rights of Indigenous Peoples eloquently expresses the fundamental rights and freedoms of indigenous peoples, and in particular, those rights that are relevant to the cultural and intellectual property rights of indigenous peoples. Various declarations and documents issued by indigenous peoples in relation to the protection and management of intellectual property complement and expand on the Draft Declaration's elaboration of indigenous cultural rights. Together with the work on indigenous cultural and intellectual property rights and the protection of indigenous peoples' heritage which has been undertaken by Dr Erica-Irene Daes, this material forms the next section.

The following section examines the historical and legal context in which the debate about the rights of indigenous peoples to

the protection and enjoyment of their cultural and intellectual property has developed. It outlines the concerns of indigenous peoples, many of whom perceive the continuing erosion of their cultural rights as an extension of the colonialism which dispossessed them of their lands, and continues to deny the existence of their laws. Also briefly examined in this section are some of the developments in international trade and environmental law which at best provide very limited recognition of indigenous intellectual property rights, and at worst, look set to marginalise indigenous rights in this area further. These matters are also taken up in more detail in sections 5 and 6.

For the purpose of this paper, the rights of indigenous peoples will also be examined within the context of the international intellectual property perspective. This approach is taken for two reasons. Firstly, it has to be acknowledged that the protection of legitimate indigenous interests will draw some of its conceptual basis from existing models, in spite of the fact that each of them contains elements which are an anathema to the expressed interests of indigenous peoples. And secondly, this approach recognises that the international community, through mechanisms such as the Convention on Biological Diversity and the Trade Related Intellectual Property (TRIPS) Agreement, is committed to the development and enforcement of a legal framework which will strengthen intellectual property rights on an international scale. The linkage between intellectual property law, the Convention on Biological Diversity and the TRIPS Agreement is well recognised, and warrants closer investigation. It is therefore essential that indigenous peoples explore the relative benefits and limitations of contemporary intellectual property law.

Finally, the paper will conclude with an analysis of proposed alternative legal models, applying the principles articulated by indigenous peoples themselves as being relevant to the protection and management of their cultural and intellectual property. This analysis leads into a discussion of possible courses of action which indigenous peoples may wish to contemplate to improve the level of protection and management they have over their cultural and intellectual property.

INDIGENOUS HERITAGE AND SELF-DETERMINATION

CHAPTER

2

2. THE CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES

2.1 Introduction

The term 'indigenous cultural and intellectual property rights' is derived from Western property law and legal philosophy. It correctly implies that indigenous peoples possess inherent rights to their cultural heritage and their intellectual property, which can and should be legally recognised and enforced. To understand the nature of indigenous cultural and intellectual property rights, it is important to understand that these particular rights cannot be considered as somehow separate from other indigenous rights, such as those related to self-determination and land. Rather an appreciation of the interrelated and indivisible nature of indigenous rights is essential.

To this end, the Draft Declaration on the Rights of Indigenous Peoples is an important starting point as it conveys the notion of indigenous rights as being a 'seamless web' of rights that must be considered and upheld in an integrated way.[8] A number of the articles of the Draft Declaration relate specifically to the rights of indigenous peoples pertaining to their cultural and intellectual property.

2.2 The Draft Declaration on the Rights of Indigenous Peoples

The Draft Declaration is a most significant achievement for indigenous peoples. Although still in draft form, and (when adopted) a non-binding declaration, it is representative of international recognition of the rights and aspirations of the world's indigenous peoples as expressed and negotiated by them.

The Draft Declaration has been approved by the United Nations Sub-Commission on Human Rights, and is currently being negotiated by the Commission on Human Rights. If adopted by the UNCHR, it will proceed through the UN process to the General Assembly for adoption. The resistance to the strength of

the principles contained in the Draft Declaration from opposing States will increase as it progresses through the political processes of the United Nations. It can be expected that this resistance will reach its peak when the Draft Declaration is presented to the UN General Assembly.

The Draft Declaration eloquently expresses the spectrum of the rights of indigenous peoples. It gives particular attention to the importance of the right of indigenous peoples to self-determination, as well as the individual and collective rights of indigenous peoples in relation to the ownership, use and control of their lands, territories and other resources. In recognition of the property and territorial rights of indigenous peoples, the Declaration emphasises the requirements of consultation, participation and prior informed consent in regard to activities that are likely to have an impact on indigenous peoples, their property and their territories, as well as the requirement that just and fair compensation is required to address violations of the rights expressed in the Declaration.

The following articles from the Draft Declaration reflect the indivisible relationship between the right of indigenous peoples to protect and control their cultural and intellectual property, and identified, inherent, fundamental human rights as recognised in international human rights law.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right of all peoples to self-determination has been repeatedly recognised by the international community in legal instruments such as the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Although there is no authoritative definition of the term 'peoples' in international law, indigenous peoples satisfy the criteria that are commonly applied. As Berman notes, indigenous peoples 'consist of distinct populations, historically have inhabited territories, speak languages and maintain cultural

and spiritual traditions decidedly their own, and where suppressed, continue to maintain self-generated forms of social and political organisation.'[9]

The right of indigenous peoples to self-determination is a fundamental human right, upon which the subsequent rights of indigenous peoples depend. As Berman has commented, the rights of indigenous peoples as a whole form a 'seamless web with the right of self-determination at the centre'.[10] Self-determination in the context of indigenous peoples does not necessarily equate with statehood. Rather, it is generally interpreted as the right of indigenous peoples to determine their own political status within their territory free from external domination. These territorially-based rights are interwoven with indigenous culture and knowledge systems.

Article 12

> *Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.*

The fundamental human right to freely practice, develop and participate in one's culture, and to enjoy the benefits that arise from this, is recognised in the Universal Declaration of Human Rights.[11] The Universal Declaration also recognises that this is a right that extends to all peoples, regardless of whether they are an ethnic, linguistic or religious minority within a particular State.[12]

This Article from the Draft Declaration conveys the 'living' nature of indigenous cultures, and suggests that the right of indigenous peoples to practise their culture is an important means by which indigenous peoples reaffirm and develop a sense of their cultural identity. Recognition of the right of indigenous peoples to 'revitalise' their cultural traditions and customs is also

significant in view of the attempts on the part of many non-indigenous States to eradicate and denigrate indigenous cultures in their quest for 'assimilation' and domination.

This Article also reflects the evolving nature of indigenous cultures and the fact that the manner in which cultures are expressed or practised is not necessarily bound by the traditions that gave rise to them, but may be an adaptation which remains consistent with the initial cultural concepts or principles.

Recognition of the right of indigenous peoples to practice and revitalise their culture is also crucial to the ability of indigenous peoples to retain and develop their knowledge systems and their cultural heritage generally. The knowledge and understanding that indigenous peoples have developed in relation to the natural environment for example, is due largely to the spiritual and material relationship indigenous peoples share with their lands and territories; a relationship that has and continues to strongly influence indigenous cultures.

The protection of indigenous culture therefore needs to be undertaken in conjunction with the protection of other indigenous rights, most importantly the right of self-determination. When this integrated approach to the implementation of indigenous rights is pursued, it is clear that the promotion of indigenous cultural rights is an important means of giving effect to indigenous peoples' right of self-determination. Similarly, indigenous cultural rights cannot be fully enjoyed and developed if indigenous peoples are deprived of their territorial rights.

An associated right of indigenous peoples in relation to the practice and revitalisation of their cultural traditions and customs, which carries great spiritual importance, is the right of restitution of cultural, intellectual, religious and spiritual property that was taken without their free and informed consent. This right has particular relevance in relation to moveable cultural heritage in the form of human remains and sacred objects, which are dispersed in museum collections around the world and often on display in violation of indigenous laws.

It should be noted that this Article recognises the right of indigenous peoples to protect, control and manage their cultural, intellectual and spiritual property in accordance with their laws, traditions and customs. Where these laws have been violated,

indigenous peoples have the right to restitution. In view of the extent to which indigenous laws relating to the use of their cultural and intellectual property have already been violated, and the increasing pressures indigenous peoples currently face to adopt very limited non-indigenous intellectual property laws, this Article is of considerable significance.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

This Article builds on the right of indigenous peoples to the full ownership, control and protection of their intellectual property (Article 29), and the right of indigenous peoples to practice their cultural customs and traditions (Article 12). It suggests that indigenous peoples possess invaluable knowledge in relation to the conservation and management of biodiversity that is vital to humanity and the ecological sustainability of the environment generally. In particular, many indigenous peoples possess detailed knowledge of active ingredients in plants, animals and minerals which could be important in combating existing and emerging health problems which so-called 'modern' medicine is unable to treat.

Also implicit in this Article is the importance of the medicinal knowledge and health care practices of indigenous peoples for their survival. Indigenous peoples generally do not have equal access to national health care systems because of linguistic barriers, poverty, geographic isolation, and different indigenous conceptions of disease and cure. Traditional medicinal practices therefore can act as a valuable complement to national health care programs, and in so doing, help to preserve and revitalise this aspect of indigenous cultural heritage.

Increasingly the wisdom and effectiveness of indigenous medicinal knowledge and health care practices are being recognised by non-indigenous people, thereby increasing the pressure on indigenous communities to commercialise these aspects of their cultural and intellectual property. Article 24 provides that these

pressures of non-indigenous exploitation must be tempered by the recognition of the right of indigenous peoples to the protection of medicinal plants, animals and minerals.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measure by States to prevent any interference with, alienation of or encroachment upon these rights.

The right to own property is recognised in the Universal Declaration on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination as a fundamental human right that extends to everyone.[13] The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights provide that all peoples have the right to freely dispose of their natural wealth and resources.[14] An important and associated right to those mentioned above is the right to development which was recognised by the United Nations in 1986.

It is important to note that these international legal instruments are expressions of Western approaches to property which do not draw on the principles of indigenous customary law that relate to property. Rather, they are instruments which assume that the sovereignty of the Nation State and the concept of exclusive possession lie at the heart of property rights, thereby denying the existence of collective ownership and non-transferability of ownership, which are central to indigenous property systems.

Article 26 seeks to restore the rights of indigenous peoples in relation to the ownership, use and management of their territories. It recognises for example, that for thousands of years indig-

enous peoples have been living with the land and managing the 'total environment' by way of hunting, fishing, herding, trapping, gathering and other management activities. These land rights and this resource base remain essential for indigenous peoples for their subsistence and the ongoing development of indigenous societies and cultures.

These territorial rights in turn overlap with and strengthen the right of indigenous peoples to self-determination, as expressed through indigenous legal systems, land-tenure systems, and land use and management practices. The complex laws, practices and institutional structures which have been developed and maintained by indigenous peoples over successive generations are also integral to their physical, cultural and spiritual survival. For this reason, States bear a (moral) responsibility to respect and uphold indigenous approaches to property and expressions of sovereignty.

Article 29

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

This Article is consistent with Universal Declaration on Human Rights, which provides that 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' (Article 27(2)).

This Article is noteworthy in its recognition and promotion of a legal norm in relation to the rights of indigenous peoples to own, control and protect their cultural and intellectual heritage. The fact that it also states that indigenous peoples 'have the right to special measures to control, develop and protect' all aspects of their intellectual and cultural property strengthens the argument that existing intellectual property regimes are not able to effectively meet the needs and aspirations of indigenous peoples.

2.3 Common Principles Relating to the Protection and Management of Indigenous Cultural and Intellectual Property

The need to protect the right of indigenous peoples to own and control their cultural and intellectual property rights is taking on a growing urgency as the pressures from global commercial interests to exploit these forms of property heighten. The inadequacy of existing legal mechanisms to protect indigenous cultural and intellectual property rights is a major contributing factor to the continued erosion of indigenous cultural identity.

Following the establishment of the United Nations Working Group on Indigenous Populations in 1982, indigenous peoples have had access to an international forum where they can directly express their own views on matters which concern and affect them. The Working Group has repeatedly heard from indigenous representatives the world over about the importance and urgency they attach to the protection of their spiritual and cultural life, and scientific and medical knowledge. The message is clear: the survival of indigenous peoples depends on the promotion and protection of their right to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.

In response to this message, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Dr Erica-Irene Daes in 1990 to prepare a working paper on the question of the ownership and control of the cultural property of indigenous peoples, for submission to the Working Group on Indigenous Populations. After considering the findings of the working paper in 1991, the Sub-Commission entrusted Dr Daes with the further task of preparing a study of the measures which should be taken by the international community to strengthen respect for the cultural property of indigenous peoples. *The Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* was completed and submitted to the Sub-Commission in 1993.[15]

In her Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, Dr Daes noted that a number of similarities can be identified in the structure of indigenous peoples' legal systems in relation to the protection and

management of their heritage.[16] These similarities quite clearly distinguish indigenous cultural heritage from non-indigenous cultural heritage, and in so doing, indicate that existing forms of intellectual property law are inappropriate for the protection and management of indigenous peoples' cultural and intellectual property. The common elements include:

a. the heritage of indigenous peoples cannot be separated into its component parts, but should be regarded as a single, integrated, interdependent whole. Indigenous peoples do not award different values to those aspects of their cultural heritage that may be regarded as 'scientific' or 'spiritual'; all elements are equal and require equal respect, protection and management;
b. heritage is a communal or collective right that a family, clan, tribe or other kinship group holds in common, rather than on an individual basis. It is therefore not regarded as a form of property - something that is owned for the purpose of yielding some economic benefit in the future. In fact, this Western concept of property and the associated rights of ownership have no equivalent in indigenous customary laws and traditions. Rather, indigenous cultural heritage is viewed in terms of community and individual responsibility. The management, use and sharing of that heritage is something the group as a whole determines according to specific decision-making procedures and customary laws that have been passed down through generations. Generally these procedures vary according to whether an artwork, song, ceremony or some other aspect of heritage is in question;
c. although an indigenous community collectively acts as the custodian for their heritage, it is common that an individual or select group is appointed as the guardian or trustee of particular aspects of that culture, such as a story, sacred place, name or song. This position of status and privilege is also one to which great responsibility is attached. It is a position that only continues so long as the best interests of the community are protected by the decisions of the traditional trustee. In Australian Aboriginal culture for example, the right to depict a creation or dreaming story is strictly controlled by Aboriginal law. Usually these stories are unique to individual communities and are of such significance that within a particular community they may be known only to a few senior members who are chosen according to age, descent, sex, initiation, experience in the learning of the dreamings and ceremonies, and the attainment of skills that facilitate the faithful reproduction of the stories in accordance with customary law. This small group of traditional elders is collectively and individually responsible for protection of the secret and sacred nature of these stories in accordance with Aboriginal law. As Dr Daes notes, 'This continuing collective right to manage heritage is critical to the identity, survival and development of each indigenous community;'[17]
d. indigenous communities aspire to ensure permanent control over their heritage; it can never be alienated, surrendered or sold, except for conditional use. As Dr Daes notes, '[a] song for example, is not a "commodity", a "good", or a form of "property", but one of the manifestations of an ancient and continuing relationship between a people and their territory. Because it is an expression of a continuing relationship between the particular people and their territory, moreover, it is inconceivable that a song or any other element of the people's collective identity, could be alienated permanently or completely.'[18]

Consent to use, display, depict or exercise is therefore only temporary, and given only on trust that recipients respect and uphold the conditions and customary laws that are attached to particular aspects of indigenous heritage. Breaches of customary law will not only revoke what ever permission or authority was granted, but may attract some form of punishment or require compensation. These observations remain valid despite the increasing consent given by indigenous communities to the commercialisation of aspects of their cultural heritage. For example, in relation to Australian Aboriginal artists, the following extract explains some of the motivations for this consent to commercialisation in certain circumstances: 'the artists determine what they make and for whom, and hold power over what they choose to reveal or

decode in the iconography. Art is a means of empowerment for its makers, a political tool in the fight to regain sovereignty over land and to be allowed to remain themselves.'[19]

Nonetheless, alienation of indigenous cultural and intellectual property is occurring. This stems from the fact that in sharing and communicating their knowledge, indigenous peoples are taking that knowledge out of indigenous legal systems, and introducing it into a legal system that is founded on the principles of alienability and exclusive ownership. For example, if an indigenous song is published in a book, it becomes the intellectual property of the author, and is potentially accessible to anyone. The alienation of that song from its people cannot be undone. Therefore, where the 'sharing' of indigenous cultural or intellectual property is negotiated, it is essential that the full and informed consent of indigenous peoples is obtained prior to publication/communication, and that fair and adequate compensation for alienation is provided. Equally, the Draft Declaration recognises that as the custodians of their heritage, indigenous peoples have the right to refuse to share it with others.

Indigenous peoples have long held their own conceptions of indigenous cultural and intellectual property rights, regardless of the terminology they may have applied. These conceptions of intellectual property are contained in the principles of the Draft Declaration and other aspirational statements which are referred to below. Although the traditions and customary laws developed by indigenous peoples in relation to the use and benefit-sharing of their cultural heritage differ from people to people, common principles have been identified by indigenous peoples in various declarations.

2.4 Indigenous Peoples' Declarations Relating to the Protection and Management of Indigenous Cultural and Intellectual Property

It is important to note that the following declarations and agreements do not constitute a consensus position of indigenous peoples in relation to the protection and management of their cultural and intellectual property. Rather this review is designed to

provide an overview of some of the key principles which are emerging in this area.

Indigenous peoples have been developing their own standard-setting declarations to articulate their rights in relation to their cultural and intellectual property since the early 1990s. The preambles to many of these declarations reflect the conviction among indigenous peoples generally that their complex spiritual and material relationships with the natural environment has given rise to a range of indigenous philosophies about how to share land and to preserve the natural environment for future generations. Through these declarations, indigenous peoples express their willingness to share their beliefs and values with non-indigenous cultures in the hope that indigenous concepts of sustainable and environmentally sound management can be incorporated into non-indigenous philosophies.

One example is the *Conclusions and Recommendations on Indigenous Peoples and the Environment* developed by the United Nations Technical Conference on Practical Experience in the Realisation of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples in Santiago in 1992, which recognise that indigenous peoples' 'deep knowledge, understanding and management experience of the ecological systems on which they depend' have allowed them to live in an ecologically sustainable and harmonious relationship with their lands and territories over many generations. Furthermore:

> The ability of indigenous peoples to apply and develop this knowledge to their lands, and to share this knowledge with others, is vital for overcoming environmental degradation throughout the world. It is also an important factor in the achievement of equitable and sustainable living conditions for all the peoples of the world.[20]

As well as having a vital role in environmental management and conservation, indigenous peoples demand that their right of self-determination is imperative to the maintenance and application of their knowledge and understanding of biodiversity. The 1992

Charter of the Indigenous-Tribal Peoples of the Tropical Forests (CITP) states that:

> The best guarantee of the conservation of biodiversity is that those who promote it should uphold our rights to the use, administration, management and control of our territories. We assert that guardianship of the different ecosystems should be given to us, Indigenous Peoples, given that we have inhabited them for thousands of years and our very survival depends on them.

Indigenous peoples have repeatedly stated that they are the sole custodians of their cultural heritage; it is the very essence of their 'indigenousness'. As a consequence, indigenous peoples' knowledge and aspects of their culture cannot be appropriated, taken or denied them, nor can indigenous peoples themselves surrender the ownership of that knowledge and heritage by selling it. As the *COICA/UNDP Regional Meeting* (Coordinating Body of Indigenous Organisations of the Amazon Basin/ United Nations Development Program) held:

> For members of indigenous peoples, knowledge, and determination of the use of resources are collective and intergenerational. No indigenous population, whether of individuals or communities, nor the government, can sell or transfer ownership of resources which are the property of the people and which each generation has an obligation to safeguard for the next.

However, this is not to suggest that indigenous peoples seek to exclude non-indigenous peoples from the benefits of their knowledge and cultural heritage. Rather, indigenous peoples have expressed their willingness to share the benefits of their knowledge and cultural heritage with others, provided that their prior and informed consent is sought. As the CITP states:

> Indigenous peoples are willing to share our knowledge with humanity provided we determine when, where and how it is used. At present, the international system does not recognise or respect our past, present and potential contributions.

The willingness on the part of indigenous peoples to share their knowledge therefore rests on the requirement that they be recognised as the exclusive custodians of this knowledge, and as such the primary benefactors of its commercialisation. As the 1993 *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* states:

> Indigenous flora and fauna is inextricably bound to the territories of Indigenous communities and any property right claims must recognise their traditional guardianship. Commercialisation of any traditional plants and medicines of indigenous peoples must be managed by the indigenous peoples who have inherited such knowledge. A moratorium on any further commercialisation of indigenous medicinal plants and human genetic material must be declared until Indigenous communities have developed appropriate protection measures.

Existing protection measures in the form of intellectual property law are generally not accepted by indigenous peoples as adequate or appropriate mechanisms for the protection of their knowledge and cultural heritage. As the *COICA/UNDP Regional Meeting* noted:

> For indigenous peoples, the intellectual property system means legitimisation of the misappropriation of our peoples' knowledge and resources for commercial purposes. .... Prevailing intellectual property systems reflect a conception and practice that is:
> - Colonialist, in that the instruments of the developed countries are imposed in order to appropriate the resources of indigenous peoples;
> -Racist, in that it belittles and minimises the value of our knowledge systems; and
> - Usurpatory, in that it is essentially a practice of theft.

For this reason, indigenous peoples have repeatedly called for the development of effective legal mechanism to protect and realise their rights in relation to the use, transmission and protection of their knowledge and cultural heritage. Documents such as the *UNDP Consultation on the Protection and Conservation of Indigenous Knowledge*, held in Malaysia in 1995, and the *COICA/UNDP Regional Meeting* reflect the fact that such mechanisms cannot be developed and implemented in the short-term. Rather, indigenous peoples have developed short-term and medium-term strategies to achieve these objectives. In the immediate future, indigenous peoples at the UNDP Consultation on the Protection and Conservation of Indigenous Knowledge recognised that it is important to:

a. Strengthen the indigenous peoples' organisations and communities to be able to collectively address local concerns related to indigenous knowledge and intellectual property rights;
b. Continue the indigenous peoples' struggle for self-determination since this can be a strong counter force against the threats posed by intellectual property rights systems on indigenous knowledge and genetic resources; and
c. Raise the awareness of indigenous peoples' organisations and communities on the global trends and developments in intellectual property rights systems, especially as they apply to life forms and indigenous knowledge.

As the *Mataatua Declaration* notes, these strategies are designed to feed into the development of an additional cultural and intellectual property rights regime incorporating the following principles:

a. collective (as well as individual) ownership and origin-retroactive coverage of historical as well as contemporary works;
b. protection against debasement of culturally significant items;
c. cooperative rather than competitive framework;
d. first beneficiaries to be the direct descendants of the traditional guardians of the knowledge; and
e. multigenerational coverage span.

In the longer term, some of the suggestions recommended by the COICA/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity included that:

a. indigenous peoples hold seminars and workshops at the community, national and regional level to address biodiversity conservation and consider prevailing intellectual property systems and alternative systems;
b. establish a standing consultative mechanism to link community workers and indigenous leaders, and thereby develop information networks;
c. develop a Legal Protocol of Indigenous Law on the use and community knowledge of biological resources to be promoted at the national and international levels.

Some of these recommended strategies parallel efforts among indigenous non-government organisations in international fora, such as the United Nations, to put indigenous cultural and intellectual property rights on the agenda of those organisations dealing with human rights and environmental sustainability issues. In particular, these strategies are consistent with the request by indigenous peoples and some supportive Governments to the Working Group of the Sub-Commission on Indigenous Populations for the establishment of a Permanent Forum for Indigenous Peoples within the United Nations. The intention of this Forum is to ensure that all of the UN organisations adopt a much more coordinated and proactive role to involve indigenous peoples directly in the further negotiation, development and implementation of policies and programs which affect them. The relevance of such a Forum to the realisation of indigenous rights in relation to their cultural and intellectual property is discussed more fully in section 8.

INDIGENOUS HERITAGE AND SELF-DETERMINATION

CHAPTER

3

3. INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY

3.1 Introduction

The importance and the urgency of the need to protect indigenous cultural and intellectual property is increasingly being recognised by both indigenous and non-indigenous peoples around the world. The importance of this task stems from the fact that indigenous peoples' identity, and therefore their survival, is drawn from their cultural heritage, or their cultural and intellectual property. This so-called 'property' is what distinguishes indigenous peoples as distinct, separate and unique from other peoples. It consists of the traditions, knowledge and practices that have evolved over time and a result of the close spiritual and material relationship that a people shares with their territory.

The term indigenous cultural and intellectual property also refers to the detailed knowledge and understanding of the natural environment which has been developed and refined over centuries of indigenous natural resource use and management. This knowledge may relate to the medicinal properties of particular plants and animals, and how to extract and apply these medicines; or it may be knowledge about how to manage water resources or a particular animal species in a sustainable manner. Transmitted from generation to generation, this biological, medicinal and ecological knowledge is one of the most important types of information possessed by any culture.[21]

Proven by their very survival to be both socially and ecologically sustainable, indigenous cultural and intellectual property are of increasing economic value to non-indigenous peoples. They represent the key to the development of the vast and largely untapped resources of tropical rainforests and the germplasm of traditional farmers. Indigenous knowledge of biodiversity and sustainable environmental management practices could also provide important directions for natural resource

use and conservation that are urgently required to achieve ecological sustainability. Furthermore, indigenous cultural and intellectual property provides non-indigenous peoples with insights into different knowledge systems and lifestyles, and alternative approaches to spirituality, and cultural expression.

However, the survival of indigenous cultural and intellectual property clearly depends upon the commitment of non-indigenous peoples to respect the expressed wishes of indigenous peoples in relation to the 'ownership', protection and management of their cultural heritage.

It is therefore important to locate the discussion of the recognition and protection of indigenous peoples' cultural and intellectual property in the context of formulated, identified, inherent rights as expressed in the Draft Declaration of the Rights of Indigenous Peoples. This reflects the fact that the protection of the cultural and intellectual property of indigenous peoples is connected fundamentally with the realisation of their territorial rights and right of self-determination.

3.2 The Historical and Legal Context for the Appropriation of Indigenous Cultural and Intellectual Property

The appropriation of indigenous cultural and intellectual property stems from the fundamentally different conceptual approaches taken by indigenous and non-indigenous peoples to the questions of ownership, land, and culture. When coupled with the position of dominance which non-indigenous peoples have imposed on indigenous peoples, these different conceptual foundations have ensured that indigenous cultural and intellectual property has been poorly protected and open to exploitation and appropriation on an international scale.

The urgency of the need to protect indigenous cultural and intellectual property has assumed greater intensity in recent years as commercial interest in indigenous cultures continues to increase, and the demand for the universal application of existing intellectual property laws has been incorporated into international trade agreements. These and other related developments pose a significant threat to the ability of indigenous peoples to protect their cultural and intellectual property, and therefore

present a very real threat to the very survival of indigenous peoples. Although some of the developments referred to below have been occurring for centuries, their legacy continues to be acutely felt by indigenous peoples. These developments include:

a. colonial domination of indigenous peoples, which has included dispossession, unjust appropriation of indigenous knowledge, denial and loss of indigenous cultural heritage, social marginalisation and genocide;
b. the loss of global biodiversity and cultural diversity as a result of industrialisation; growth in the world's population; over-consumption; agricultural intensification; unsustainable exploitation and mismanagement of natural resources; inequitable control over natural resources, and the associated inequitable distribution of economic power and wealth;
c. developments in science-based technologies, especially biotechnology and genetic engineering, have broadened the economic utility of natural resources and increased the economic value of biodiversity, placing already scarce natural resources under greater pressure. Many indigenous communities live in areas rich in biodiversity, and have developed a complex and broad understanding of a range of ecosystems over generations. As a consequence, these indigenous communities are coming under increasing pressure from biodiversity prospectors and corporations interested in privatising and commercialising aspects of their biological knowledge. With the lure of economic benefits, indigenous peoples are increasingly being drawn into the operation of the market, in many cases for relatively small financial gain. Often this is a function of the poor access indigenous communities have to economic and legal resources, and their comparatively weaker bargaining position;
d. prior to the development of the Convention on Biodiversity in 1992, biological knowledge and genetic materials were considered part of the 'common heritage of humankind'. Consequently, they could be used and shared by humankind, but not owned or subject to intellectual property law. The 'common heritage' concept also implied that all users should actively share in the benefits of its use, be they financial, technological or other benefits. As a result, these vast and abundant resources, predominantly located in the South, remained largely unregulated by legal or administrative systems, and available for all of human kind to 'share'.[22] In the absence of regulatory mechanisms, it is indigenous peoples (as well as) 'local communities' who have made their biological knowledge and genetic materials available to (or had them appropriated by) the North. These Northern countries have developed the legal mechanisms to privatise the 'goods', and the technology to commercially develop and market them;
e. in recent decades, developed countries, and in particular the United States, have expanded intellectual property rights to include biological material and 'new' life forms, such as new plant varieties, transgenic animals, and human genetic diversity, thereby raising serious ethical questions about 'ownership' and the environmental impacts of these 'new' life forms. In many instances the knowledge and biological resources that are collected and 'developed' in the laboratories of developed countries are derived from indigenous peoples and their territories;
f. international pressure is being exerted through the Trade Related Intellectual Property (TRIPS) Agreement, signed as part of the Uruguay Round Final Act in 1994, to encourage all countries to develop, implement and enforce intellectual property rights in domestic legislation. The TRIPS Agreement is based on the belief that intellectual property law must be internationalised so that uniform standards of protection apply and are enforced in all countries. It does not accommodate the possibility of indigenous and non-indigenous intellectual property laws coexisting, as existing (Western) intellectual property law is the model underpinning the Agreement. In seeking to provide an adequate level of protection for all forms of intellectual property, the TRIPS Agreement will also significantly impact on the conservation of biodiversity. It is expected that the Agreement will both encourage and regulate the commercialisation of biodiversity and ge-

netic resources, and will therefore also significantly impact on indigenous peoples and their territories.

3.3 The Economic Value of Indigenous Cultural and Intellectual Property

Numerous scientific studies attest to the abundance and wealth of the Earth's biological diversity. These studies also show that the Earth's biochemical and genetic resources are predominantly located in the South, with the richest areas being tropical rainforests and coral reefs. These are also areas in or around which many of the world's indigenous peoples live, and where much crop domestication and development occurs.[23] In contrast, these same studies reveal that the Northern Hemisphere is comparatively 'gene poor' in terms of crop germplasm and biodiversity more generally.

Various writers have sought to quantify the contribution that indigenous peoples have made to contemporary Western agriculture and medicine as a result of their local biological knowledge, land management practices and conservation of their natural heritage. One estimate suggested that the market value of plant-based medicines alone sold in developed countries in 1985 amounted to US$43 billion.[24] It has also been estimated that of the 120 active compounds currently isolated from the higher plants and used in Western medicine, 75 percent show a positive correlation between their modern therapeutic use and the traditional use of the plant from which they were derived. Other research indicates that crop varieties developed and improved by traditional farmers for the international seed industry are worth some US$15 billion annually, while the use of traditional knowledge is said to increase the efficiency of screening plants for medicinal properties by more than 400 percent.[25]

The open access that Northern countries have enjoyed to the invaluable knowledge of indigenous peoples and the biodiversity that they have conserved has facilitated the development of applied biological sciences such as pharmacology, biotechnology and genetic engineering. It has also given rise to a situation in which less than 0.001% of the profits from drugs that originated from traditional medicine have ever gone to the indigenous peoples who led researchers to them.[26]

The potential economic value of indigenous knowledge and biological resources is also reflected in statistical information about the biotechnology industry in the United States. For example, product sales for the US biotechnology industry in 1991 totalled approximately US$4 billion - a 38 percent increase on 1990 figures - and by the year 2000, sales are expected to have grown more than ten fold to an estimated US$50 billion.[27] Whilst the growth of this industry has enormous financial benefits for the US companies that are involved in bioprospecting, the pharmaceutical and agricultural industries and so on, the economic returns to indigenous communities are comparatively minor and often include negative social and cultural returns.

The great irony which these statistics mask is that despite the vast commercial value embodied in indigenous cultural heritage and knowledge systems, they have historically been treated with scorn and contempt by non-indigenous societies.[28] However, as non-indigenous people look outside their own cultures and knowledge systems and find value and meaning in different approaches, the cultural integrity and survival of indigenous peoples and their communities are being threatened in new, but equally as destructive ways. As Greaves has commented,

> Indigenous societies find themselves poked, probed and examined as never before. The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honour and meanings, convert it to a product, and sell it. Each time that happens the heritage itself dies a little, and with it its people.[29]

3.4 Intellectual Property Rights

Intellectual property rights have a relatively long history under Western law.[30] Contemporary intellectual property law has its roots in the rise of the Nation State and the industrial revolution of the 18th and 19th centuries, and was designed to ensure industrial designers exclusive rights to their inventions and processes. The essence of intellectual property law remains its ability

to create State-sponsored monopolies over knowledge, processes, products and so on, which without State intervention would otherwise not be able to be monopolised.[31]

The fundamental principles underscoring the protection of indigenous cultural heritage are therefore not able to be reconciled with those of intellectual property law. The application of existing intellectual property laws, which provide protection for individual 'owners' over a limited period of time, and are designed to facilitate the dissemination and use of ideas and knowledge through licensing or sale, are fundamentally inconsistent with indigenous peoples' methods of protection and use of their cultural heritage.

In contrast to Western legal systems, indigenous cultural heritage cannot be owned or monopolised by an individual, just as it cannot be alienated, surrendered or sold on an unconditional basis. Rather, the cultural heritage of indigenous peoples is a collective right, and as such the responsibility for its use and management in accordance with indigenous laws and traditions is born by the community as a whole.

Rather than protecting the integrity of indigenous cultures, existing intellectual property laws would facilitate and indeed promote their commercialisation, ignoring indigenous peoples' laws and customs in relation to secrecy and the responsibilities born by those who share in indigenous culture. As Dr Erica-Irene Daes has noted:

> subjecting indigenous peoples to [existing intellectual property laws] would have the same effect on their identities as the individualisation of land ownership in many countries has had on their territories - that is, fragmentation in to pieces, and the sale of the pieces, until nothing remains.[32]

In view of these criticisms, the application of the customary tools of intellectual property (patents, copyright, trademarks, trade secrets, plant variety protection, and know-how) to indigenous knowledge and cultural heritage is not only inappropriate, but is in fact likely to do more harm than good to indigenous peoples.[33] As many indigenous peoples have warned, it would could even-

tually deny indigenous peoples rights to the biological resources they have managed for thousands of years, and grant legal monopolies to corporations over the knowledge and aspects of the cultural heritage of indigenous peoples.

Even if existing intellectual property laws were effectively applied to the situation of indigenous peoples, they would not recognise the real interests or serve to protect the survival of these peoples.

3.5 Effective Protection of the Cultural and Intellectual Property of Indigenous Peoples

Since the beginning of the European colonial era, the inherent rights of indigenous peoples have at best been legally ignored, and at worst completely denied by non-indigenous legal systems. Current measures to address this gross injustice include the initiatives taken by the United Nations through its human rights mechanisms to draft a Declaration on the Rights of Indigenous Peoples. Although when adopted, this Declaration will only constitute an aspirational statement (which in legal terms could be considered 'soft law'), it is representative of emerging international recognition of the rights and aspirations of the world's indigenous peoples.

Control of their own knowledge base and external respect for the cultural integrity of a people is integral to their survival as a distinct entity. Similarly, the elements of a people's cultural heritage which are contained within the notions of 'indigenous intellectual property' cannot be artificially segregated or excised from their other rights. It is therefore inappropriate to see a people's rights in relation to the exercise and integrity of their culture as somehow separate from their right of self-determination, or their land and territorial rights.

It is also inappropriate to 'try to subdivide the heritage of indigenous peoples into separate legal categories such as "cultural", "artistic" or "intellectual", or into separate elements such as songs, stories, science or sacred sites. This would imply giving different levels of protection to different elements of heritage'[34] Rather, it is crucial that the interrelationship of these elements of indigenous knowledge and cultural heritage is recognised and

appropriate mechanisms put in place to manage and protect them as 'a single, integrated and interrelated whole.'[35]

However, there is currently a disproportionate focus at both the domestic and international levels, on the extension of intellectual property law to the protection of biological resources, and comparatively little focus on the protection and conservation of cultural heritage. This emphasis on biological information 'partly reflects the large financial investments now being made by governments, and the pharmaceutical, agricultural, and cosmetic industries in "biodiversity prospecting"'. Other contributing factors include the resources of environment organisations which have been directed at the conservation of biodiversity (and not always in a manner that respects the rights of indigenous peoples), the effects of the specialty area of study known as ethnobotany, the international demand for the products produced from biological resources which transfers enormous economic power to corporations dealing in these products, and the specialised structure of the law that protects ownership rights to biological and biochemical materials.[36]

It is important to note also that this apparent attention to indigenous rights as they pertain to the conservation of biodiversity provides only a very limited interpretation of indigenous rights in relation to the protection and management of the natural environment. This stems from the fact that biodiversity is a non-indigenous scientific and legal concept that is not founded on respect for the rights of indigenous peoples. Rather than being concerned with a fundamental respect for life processes and natural processes, biodiversity is concerned with 'the variability among living organisms', including 'diversity within species, between species and of ecosystems'.[37]

As the Australian Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Dodson has commented:

> References to Indigenous interests in international instruments [such as the Convention on Biological Diversity] are, in effect, no more than gestures of etiquette while the pie of the world's bio-riches is sliced into Nation State servings. These servings are passed around the table amongst those who have been invited and can afford to sit there. ... Essentially the same political and economic forces are at work that have shaped many other international agreements. The law and science are the instruments of that work. The first wave of physical colonialism over-rode our laws and seized our lands. Now the danger is they will seize our biological and human resources of knowledge. They will be converted into 'more clever' ways of handling and exploiting nature. The game has not changed, merely its form and its pace.[38]

3.6 Alternative Legal Options for the Protection of Indigenous Cultural and Intellectual Property

It is undeniable that indigenous peoples within their own context and jurisdiction have a relationship with the nature environment that is structured according to indigenous laws and customs. The legal problems which exist today in relation to the protection and use of indigenous cultural and intellectual property are essentially caused by the failure on the part of non-indigenous cultures to recognise and respect these indigenous laws and customs.

The fundamental flaw in existing international and most national legal regimes in relation to the protection of intellectual property is their failure to acknowledge the very existence of indigenous cultural and intellectual property rights, as well as the laws developed by indigenous peoples to protect and manage that 'property'. Starting from this discriminatory position, it is inevitable that other serious omissions and flaws exist in contemporary legal regimes which perpetuate the marginalisation of indigenous peoples internationally.

The Convention of Biological Diversity for example, affords indigenous peoples only very limited and weak protection of their cultural and intellectual property. The Convention requires Parties only 'as far as possible and as appropriate, subject to national legislation, to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles' (Article 8(j)). Governments clearly have a number of grounds on which to base their reasons for not implementing this Article, and it remains unclear precisely how they should 'respect, preserve and maintain' indigenous knowledge, innovations and practices.

Widespread and fundamental reforms are needed to ensure that legitimate indigenous interests and rights are met in relation to the protection and control of indigenous cultural and intellectual property. The reforms must be based on the fundamental principles contained in the Draft Declaration on the Rights of Indigenous Peoples. Accelerated efforts must be made to translate these principles into concrete legislative models and proposals that are relevant to the different needs and aspirations of indigenous peoples.

The likelihood that domestic, *sui generis* legislation will satisfy the needs and aspirations of indigenous peoples is greatly diminished by the fact that legislation is dependent on the political will of governments, rather than any inherent indigenous rights perspective. In theory, the requirement under the TRIPS Agreement that Members implement *sui generis* legislation to guarantee the protection of intellectual property rights in relation to the patenting of plant varieties, could result in government support for patents which embody the principles contained in the Draft Declaration. However, in practice, the TRIPS Agreement recognises only private rights and makes no provision for the protection of intellectual property which is collectively held. Nor does it seek to alter the legal and scientific criteria by which patentability is accorded so that these criteria accommodate items or expressions of indigenous heritage. Furthermore, patent protection is available in most instances for only 20 years, after which the protected material reverts to the public domain. The Agreement therefore puts indigenous peoples in a position from which 'they stand to loose a great deal more than they are likely to gain'.[39]

Those human rights instruments on the environment which provide some recognition of indigenous peoples' right to the protection and enjoyment of their cultural heritage, such as the Convention on Biological Diversity, apply to Nation States - the sole subjects of international law. The rights of indigenous peoples are therefore not directly guaranteed through these legal instruments. Rather in ratifying an international treaty or convention, governments undertake to implement and enforce their provisions, and can be morally or legally bound to do so by their citizens or other Nation States. The onus then falls on national

governments to translate their obligations and responsibilities under the international law into legislation and policy. Monitoring and enforcing the implementation of international law is however an extremely costly process, which on financial grounds alone, is often not open to indigenous peoples.

Similarly, recourse to international bodies such as the International Court of Justice or the United Nations Human Rights Commission, is a remote option to indigenous peoples for a number of reasons. In most instances, Member States are the only bodies that may commence proceedings in the International Court of Justice. Furthermore, the judgements reached in international courts are only of an advisory nature, leaving it at the discretion of national governments as to whether they abide by that judgement. Certain international bodies (such as the WHO or FAO) may request an advisory, non-binding opinion of the Court.

Consequently, those international legal instruments which do provide limited recognition of the rights of indigenous peoples, or articulate inherent cultural rights which pertain to all peoples, should not be misinterpreted as being *the* means of guaranteeing the protection of indigenous cultural and intellectual property rights. Rather, they should be seen as an important means of establishing the standards which Nation States should strive to implement and enforce them within their jurisdictions, and by which other nations and indigenous peoples can judge them. It should be noted that the failure on the part of national governments to live up to their obligations and responsibilities under international law can attract severe international condemnation in international fora, such as the United Nations, and in some cases, may warrant the application of economic sanctions or boycotts by the international community. Often the threat of the application of these instruments is a powerful enough means of enforcing agreed international standards.

Indigenous peoples therefore need to look beyond the boundaries of international and national law, taking with them those aspects of non-indigenous legal systems that can be adapted to or accord with indigenous legal systems.

The proposed alternative models for the protection of indigenous knowledge and cultural heritage reviewed in this paper

each have their potential limitations and disadvantages. The principal reasons for this are firstly, that indigenous peoples are not recognised under international law as a legal entities or active subjects, and secondly, and often as a function of the first, indigenous communities generally are lacking in the resources, both financial and legal, to enter into negotiations with other parties on an equal footing.

Many of the proposed alternative models discussed in this paper identify national governments as the appropriate third party to engage in the negotiation process on behalf of indigenous peoples. However, it cannot be assumed that governments will consider this their role, or where they do, that they will act in the best interests of the indigenous peoples. If other third parties are brought into the negotiation process, such as 'middlemen', the need for caution on the part of indigenous peoples is equally as great. There is however, a clear role for organisations which represent indigenous peoples and are acknowledged by those indigenous peoples as their legitimate representatives, to act in the role of the 'middleman'. Such organisations are likely to have experience and some expertise in negotiating legal and business arrangements on behalf of indigenous peoples.

A number of professional and indigenous peoples' organisations, societies and conferences have produced codes of ethics and conduct to outline the terms of equitable relationships and expectations held by both the academic and business communities, and indigenous peoples. These codes primarily seek to outline the right of indigenous peoples to control access to their territories and resources; and the right of indigenous peoples to control access to their knowledge and the benefits that stem from the application of that knowledge. They operate as voluntary mechanisms which are designed to allow professionals to self-regulate their activities in a manner that allows indigenous peoples to strengthen their right of prior informed consent. These codes should not however, be seen as 'solutions' in and of themselves, but important tools that indigenous peoples can use to strengthen their bargaining position with bioprospectors and other business interests.

Until the legal framework for the protection of intellectual property is definitively determined in a manner which effectively

incorporates the principles that underpin the protection and management of indigenous cultural heritage (as articulated by indigenous peoples), then the protection of indigenous cultural and intellectual property is almost certain to remain inadequate.

Indigenous peoples must therefore face the challenge of playing an influential, if not a determinative role in the development of a legal framework to protect their knowledge and cultural heritage. In taking up this opportunity, indigenous peoples also have the potential to ensure that their right of self-determination, and the rights which flow from it, are internationally recognised and effectively protected.

CHAPTER

4

4. INTELLECTUAL PROPERTY LAW

4.1 Introduction

> The right to development and intellectual property represents a balancing of the private right of the creator or inventor to protection of his intellectual property against the right of the community to enjoy the benefits of the sum of human art and knowledge. Domestic laws and international treaties on intellectual property, for the most part, protect the creator's private right.[40]

This internal contradiction to both exclude strangers from privately owned resources, and to uphold public rights of access to share in a number of socially valued resources, lies at the heart of the intellectual property rights. However, for indigenous peoples, the possibility of absolute transferability, exclusive rights of use, and private ownership of 'property' which underpin the concept of intellectual property are virtually inconceivable in relation to their lands, territories, and sacred sites. The application of the Western concept of 'property' to elements of their heritage is therefore by definition inappropriate.

4.1.1 Property Rights

The concept of 'property' and particular rights in varying kinds of property are at the heart of the development of the English common law system. Although 'property' in a legal sense was originally synonymous with the ownership of land and natural resources and the legal rights associated with these 'things', it has, over time developed a more esoteric, amorphous meaning. As Gray writes[41]:

> ... 'property' is not itself the thing or resource that is 'owned'. .... Use of the term 'property' is a coded shorthand reference to a quantum of socially permissible power exercisable in respect of a socially valued resource. Thus property is not a thing but a power relationship. 'Property' is what we have in things, not the things that we think we have. ...There may be graduations of 'property' in a resource, and it becomes feasible to measure or calibrate the quantum of 'property' we have in a particular resource at a particular time."
>
> The concept of 'property' is, accordingly, not static, but dynamic. I may have 'property' in a resource today, but not tomorrow. Such is the case for instance, with patents, copyrights and other forms of intellectual property, whose expiration is governed by a statutorily authorised 'sunset clause'. Again, it is never permissible to do exactly as I wish with things or resources that are supposedly 'mine'. There are distinct limits, practical, moral and social, upon the amount of property I may claim in any resources. There may be a significant quantum of 'social property' in 'my' resources, which outweighs the value of my own claim of 'property' in those resources. ...[Similarly,] I can have 'property' even in resources that are supposedly 'owned' by someone else.
>
> ...'Ownership' breaks down, as it were, into distinct quantums of 'property' in a resource, which are then distributed variously to perhaps a vast range of persons. The concept of 'ownership' is thus reduced to a concealed form of percentage game, in which the winner - with the predominating percentage of quantum of 'property' in a particular resource - is collectively awarded the titular attribution of 'owner'.

4.1.2 Intellectual Property Rights

Protection of intellectual property has existed under international law since the nineteenth century in the form of bilateral agreements. With the development of science and the increasing sophistication of technology, these bilateral agreements have been replaced with international conventions, with the earliest examples being the Paris Convention for the Protection of Industrial Property in 1883, and the Berne Convention for the Protection of Literary and Artistic Works in 1886. These conven-

tions, although revised, continue to form a central part of the framework of international law in this area.

Among the core aims of international law in relation to intellectual property are:

a. to establish intellectual property rights within each Nation State, with the State holding sovereign rights to these resources;
b. 'national treatment' or reciprocal protection, which requires that State Parties undertake to protect subject matter produced in other member States to the same extent as their own nationals receive protection;
c. the standardisation of protection; and
d. the identification of new subject matter that can be protected.

Yet despite the international dimensions of intellectual property law, until the negotiation of the TRIPS agreement (the trade related aspects of intellectual property) and the creation of the WTO (see below), it has remained primarily a body of law that was developed, enacted and enforced at the national level. This reliance on national legislation and enforcement of intellectual property rights has resulted in uneven and often inadequate protection, particularly in the post-war period as countries have struggled to ensure that their domestic intellectual property laws kept pace with unprecedented levels of technological innovation. It is now expected that the recent TRIPS agreement will bring about a convergence of national intellectual property laws as countries come under increasing international pressure to amend their laws in conformity with the TRIPs agreement.

The recognised inadequacies and inherent limitations of the existing intellectual property regime are also a function of the manner in which this body of law has evolved. As McKeough and Stewart have noted:

> ... the basic concepts underlying the systems [of intellectual property] established to protect copyright, patents, trademarks and so on had mostly been worked out by the time it became fashionable to group them together. Not only had each system developed independently of the others, evolving its own solutions to the problems of how best to recognise the type of effort with which it was concerned, but that system had also been shaped by different forces from country to country.[42]

Related to this observation is the fact that intellectual property law seeks to protect an extremely broad range of disparate forms of 'property'. The breadth of its nature is indicated by the following definition taken from the 1967 Convention Establishing the World Intellectual Property Organisation, which provides that a definition of intellectual property includes rights relating to:

a. literary, artistic and scientific works;
b. performances of performing artists, phonograms and broadcasts;
c. inventions in all fields of human endeavour;
d. scientific discoveries;
e. industrial designs;
f. trademarks, service marks, and commercial names and designations;
g. protection against unfair competition;
and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. [43]

To regulate the economic rights of individuals in relation to industrial property, and literary and artistic creations, intellectual property law employs the following mechanisms which will be expanded on below:

a. patents;
b. petty patents;
c. copyright;
d. trademarks;
e. trade secrets; and
f. plant breeders' rights.

The extent to which these legal mechanisms are applied to intellectual property differs from country to country. As Gollin has

noted, 'Each country draws the boundaries between the public domain and intellectual property rights somewhat differently, based on the level of technology, domestic policy, commercial practices and social norms'.[44] In the United States for example, the Supreme Court has upheld the patentability of an artificially derived bacterium, bringing to an end the long-held view that living things are non-patentable[45] In contrast, the Indian Government has taken a more restricted approach to the application of intellectual property rights, preventing the application of patents to pharmaceutical products in order to ensure that greater public access to such information and knowledge is available.[46]

The Draft Declaration on the Rights of Indigenous Peoples indicates that the right to the recognition, control and ownership of indigenous cultural and intellectual property is an important, perhaps essential expression of their right of self-determination. Although full recognition of these rights is not afforded indigenous peoples by existing intellectual property laws, this is not to suggest that various types of intellectual property law cannot be applied to extend some limited forms of protection to indigenous peoples. The suitability of the various forms of intellectual property law therefore needs to be assessed on a case by case basis to establish which mechanism provides the maximum level of protection to a particular aspect of indigenous heritage. As the following analysis of intellectual property laws indicates, the level of legal expertise required to make such an assessment is often beyond the financial means of indigenous peoples, and usually not available on an on-going basis to ensure that a people can enforce whatever form of legal protection they put in place.

With these reservations in mind, it is useful to assess the extent to which indigenous rights can be advanced by existing intellectual property instruments.

4.2 Patents

A patent provides the holder the exclusive right to exploit an invention for a limited period, generally some 15 to 20 years. The exclusive nature of the right prevents all other people from

producing, using, selling or importing the invention during that period, and any breach of the patent can result in legal action. However, once the life-span of the patent has lapsed, details of the invention are required to be published, and revert back to the public domain.[47]

In determining whether an invention is eligible for patent protection, the patent office will first consider whether it complies with the following criteria. The invention should be:

a. useful - that is it must have industrial application;
b. novel - the invention must be original and not yet known in the public domain; and
c. non-obvious - that is it must not be obvious to a person skilled in the 'art' or technology, and more inventive than mere discovery of what already exists in nature.

In relation to the patenting of biotechnology, the question of whether an invention is 'novel' is often raised, and can constitute a significant hurdle for indigenous peoples seeking to protect traditional methods of plant and animal breeding or traditional microbiology. As McKeough notes:

> Different categories of biotechnological inventions exhibit a high degree of interrelationship and interdependency and the issue of how far the use of known techniques invalidates a claim of novelty with regard to a patent application is a separate but possibly overlapping issue with that of whether the result is patentable, or excluded as being a 'discovery'.[48]

Thus the onus is on indigenous peoples to prove to patent examiners that a particular invention is novel, and therefore that only one inventor exists.[49] This would require proof that no other indigenous group held that knowledge, and that indeed one *individual* had 'invented' something that was truly original. Given the practice of knowledge sharing that is common to many indigenous peoples, the collective nature of indigenous heritage, and the manner in which indigenous knowledge has evolved over thousands of years, the requirements of novelty, exclusive

ownership and non-obviousness are particularly difficult for indigenous peoples to satisfy.[50]

If however, a patent application was made based on knowledge or information acquired from an indigenous group, that group would be in a position to contest the application if their prior informed consent had not been obtained. The ability of the indigenous group to contest the right of another to patent an invention, or to defend their right to patent their own invention, relies a great deal on that group having access to effective and affordable legal assistance.[51]

Patents may be applied to products, uses, processes, and products produced using a specific process.[52] It is generally the case that they are not applicable to naturally-occurring organisms, chemicals or genes that have not been isolated, but can be used to protect non-naturally-occurring organisms. This often means that patents cannot be used for the protection of particular traditional medicines made from naturally-occurring substances, although the use of process patents may be appropriate to protect the methods used to produce such medicines, rather than the medicine itself. This also leaves open the possibility that a company may examine a biological substance that is known to an indigenous group, isolate the active ingredient in that substance, modify it some way so that for example a more stable or less toxic substance results (thereby complying with the 'non-obvious' test), and proceed to patent this 'new' substance on the grounds that it is an 'invention'.

The process of formulating and lodging a patent application may also prove a significant hurdle for indigenous peoples on account of the detailed, scientifically rigorous, time-consuming and expensive nature of the various requirements. Depending on the jurisdiction and the stringency of the review process, it is not uncommon for an application to be under consideration for over two years. Applicants are required to pay for filing the initial application, its examination by the national or regional patent office, the grant of the patent, and its annual renewal. The cost of this process, the time lag between lodging the application and receiving protection, and defending the patent may be prohibitive for many indigenous peoples, particularly when legal advice is required.

In addition to complying with the above-mentioned criteria, an application must explain how to make and use the invention; may require the inventor to disclose the source and location of the original sample; or if the invention involves a living organism, to deposit a culture collection from which others can obtain samples.[53] Again these requirements raise potential impediments for indigenous peoples, who may regard this information as highly confidential for spiritual or cultural reasons, and therefore render the option of patent protection unsuitable.

Synopsis

Patents are a potential legal mechanism for the protection of indigenous knowledge and cultural heritage on an international scale. However, their primary limitations include:

a. the requirement that one inventor is identifiable;
b. the requirement that the invention becomes commercially available;
c. the limited duration of the protection;
d. the requirement of public disclosure of the invention following the lapse of the patent;
e. the difficulties associated with proving that the subject of the patent is an 'invention';
f. the requirement of disclosure of all relevant information pertaining to the invention; and
g. the financial expense involved in formulating, lodging and defending the patent.

4.3 The Extension of Patents in the Biotechnology Industry

The protection of intellectual property provided by patents warrants the particular attention of indigenous peoples and countries of the South generally. This stems from the fact that increased use of patents is occurring to extend legal protection to biotechnical 'inventions' which previously were not able to satisfy the criteria for patentable subject matter. Where patents originally were restricted to the protection of industrial processes and applications, they are now applied to microor-

ganisms, animals, the species of an entire food crop, and the cell lines of human beings.

This broadening of the application of patents has been led by the United States. Courts in the US have kept pace with the development of the biotechnology industry, with cases such as *Diamond v. Chakrabarty* determining that the patenting of organisms that represent the product of 'human ingenuity' is lawful, while the patenting of naturally occurring organisms is not. It is interesting to note that the court also appeared to base its finding in part on the following observation: '[l]egislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown any more than Canute could command the tides'.[54]

Another recent case in the US Courts has raised further ethical concerns which relate directly to both indigenous and non-indigenous peoples. The case of *Moore v. Regents of the Univ. of California*[55] clearly demonstrates the paucity of legal remedy available to those individuals (both indigenous and non-indigenous) who believe that some aspect of their 'intellectual property' has been unfairly or unjustly appropriated. In this case, the plaintiff argued that the authorised removal of cells from his body by a physician, and the subsequent unauthorised use of these cells in a research project to develop a patented cell line with a potential market value of US$3.01 billion, constituted a breach of the tort of conversion and a breach of the physician's disclosure obligation. However, the court found that the 'extension of conversion law would hinder research by restricting access to necessary raw materials'. The court also found that Californian statutory law 'drastically limits any continuing interest of a patient in excised cells' to the extent that Moore could not establish his possession of the excised cells, and therefore could not argue the tort of conversion. Furthermore, the court found that the patented cell line 'is both factually and legally distinct from the cells taken from Moore's body', and that there was no doubt that it was not Moore's property.

Judgements of this nature extend a degree of liberty to the US biotechnology industry that is enjoyed by very few of its rivals in other countries. Some 20 countries do not allow patents for pharmaceutical compounds or compositions, and

over 25 others restrict patent for biotechnological processes and their products.[56] Among the latter group are most of the countries of the European Union, which are coming under increasing pressure from European corporations involved in the biotechnology industry to adopt a new Directive on Biotechnology. The new Directive, currently in draft form, would bring European law in this area more into line with US law, and therefore 'improve he competitive position of the European biotechnology industry in the global market'.[57] In view of these 'economic imperatives', it is to be expected that political and economic pressure to loosen legal restrictions on patentability will mount in other countries as well.

World Wide Fund for Nature (WWF) suggests that the extended application and increasing use of patent protection stems from the fact that patents are 'the strongest form' of intellectual property, providing 'the most comprehensive monopoly to an inventor. From a commercial point of view, this makes patent protection extremely desirable'.[58] WWF also notes that recent developments in the regulation of trade, and international law are likely to result in a further expansion in the use of patents, namely:

a. the TRIPS Agreement may require all countries to provide patent protection for many kinds of inventions, including biotechnological 'inventions';
b. patents are becoming increasingly relevant for the purpose of the Convention on Biological Diversity (refer to 4.1); and
c. *sui generis* intellectual property systems for plants (Plant Breeder's Rights) are increasingly being rejected by inventors in favour of patent protection for their 'new' plant varieties.[59]

However, just as there is increasing popularity for patent protection, there is also mounting concern on the part of numerous non-government organisations that the ethical questions raised by the patenting of life forms are not being adequately considered or debated.[60] These organisations have expressed the view that the extension of patents to plants and animals is a particularly undesirable development within intellectual property law

which is essentially 'an attempt to gain exclusive monopoly over the very nature of life' and an attempt to open the 45 percent of the world's economy that is based on biological products and processes, to the market.[61]

4.4 Petty Patents

Petty patents may provide indigenous peoples with an important mechanism to define their rights in relation to biodiversity conservation and management, particularly in relation to the protection of traditional medicinal knowledge derived from plants.[62] According to Gollin,[63] the usefulness to indigenous peoples of this form of patent stems from the less rigorous nature of the patent approval process. Petty patents could for example, allow patent protection to be granted to an extract or a method of extraction of an 'obvious' substance from a plant, providing that the 'inventive step' is distinct from other known methods of extraction and could be demonstrated as such. That is, petty patents require the inventor to prove usefulness, novelty, and an 'inventive step' (rather than the more rigorous requirement of non-obviousness). Petty patents also offer indigenous peoples other benefits by way of the fact that they are cheaper and more quickly obtained than the above-mentioned patents, with some countries replacing the patent examination with a registration system.

However, along with these apparent advantages come significant limitations that are likely to render petty patents an inadequate form of protection for indigenous knowledge and cultural heritage. The inherent limitations associated with petty patents include the following:

a. they are most suited to inventions that have a relatively short life in terms of commercial exploitation (generally some five to 10 years), and are therefore less able to provide adequate protection for more sophisticated developments; and
b. they are valid only in the country in which they are issued, and as yet only a few countries accept petty patents (such as Brazil, China, Germany, Japan and Malaysia).

In view of the global nature of the unauthorised appropriation and exploitation of indigenous knowledge and cultural heritage, the extent of the protection offered by petty patents is on the whole, inadequate. With little possibility of international recognition of petty patents occurring in the foreseeable future, they are a form of protection for indigenous cultural and intellectual property that should only be considered in light of their limitations.

4.5 Copyright

In relation to the protection of indigenous cultural and intellectual property, copyright protection is most commonly applied to literary and artistic works including books, paintings, ceramics and carvings; dramatic and musical works including dance, plays and music; and sound recordings or motion pictures including film, interviews and documentaries. The holders of copyright have the legal ability to prevent any unauthorised use of the protected material by way of copying or reproducing the work; performing it in public; making a recording or motion picture of the work; or broadcasting adapting or translating it. Those groups or individuals wishing to use the protected material are required to seek the permission of the copyright holder, and can expect to be required to pay royalties or some other form of compensation to the copyright holder in return.

There are however, a number of aspects of copyright protection which limit its ability to adequately protect indigenous heritage. These limitations include the following:

a. copyright protection covers only the *expression* of the ideas in a particular work, not the ideas or themes that are conveyed in the substance of the work. Similarly, the artistic styles and techniques used in a particular work are not protected. This means for example, that the acrylic dot style used in traditional Aboriginal art in Australia is not protected and could be used by a non-indigenous artist without breaching copyright law;[64]
b. copyright can only be vested in an identifiable author, such as an individual or a company. This requirement exempts a great deal of indigenous cultural heritage from copy-

right protection, as anonymity is a common characteristic. Copyright protection is also not able to exist as a communal right, and therefore often unsuited to the protection of cultural heritage that is vested in the custody of an indigenous group as a whole. As Dr Erica-Irene Daes commented in her Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples in relation to Aboriginal cultural heritage in Australia: 'Under Aboriginal law, the rights in artistic works are owned collectively. Only certain artists are permitted within a tribe to depict certain designs, with such rights being based on status within a tribe. The right to depict a design does not mean that the artists may permit the reproduction of a design. This right to reproduce or redepict would depend on permission being granted by the tribal owners of the rights in the design'.[65] Consequently, copyright law may make lawful actions which are in breach of indigenous customary law. For example, the sale of a work by an indigenous person that is sacred to their tribe may require the permission of the tribe as a whole or particular members, to be permitted under customary law; although under copyright law such a sale would be deemed lawful;

c. copyright protection can only apply to works that are 'original', a requirement that is often difficult to prove in relation to indigenous cultural expression because of its evolutionary and derivative nature. The question of originality is also intertwined with the question of authorship: to what extent is a piece of artwork the expression of that artist, or a 'copy' of a traditional theme expressed by indigenous ancestors? The question of originality is however, one raised by non-indigenous people, and one which is then answered according to non-indigenous criteria. Indigenous peoples, however, generally hold that the transmission of traditional themes to successive generations requires each artist to interpret those themes as an individual, with the inevitable result that changes occur and very original works are created. In relation to Aboriginal artworks in Australia, the originality of contemporary paintings based on pre-existing tradition and the

themes of dreaming stories has been recognised by the courts;[66]

d. protection is of a limited duration, generally the author's life plus fifty years. However, in a country like Australia where Aboriginal peoples have lived for over 40,000 years, ancient rock art, cave paintings and other aspects of cultural heritage are not eligible for copyright protection, and are poorly protected under other legislation relating to indigenous cultural heritage;[67]

e. in most countries works are required to be fixed, or have a tangible or material form. This requirement precludes oral works such as ideas or themes for copyright protection, thereby exposing much indigenous cultural heritage to unauthorised exploitation and misappropriation. This requirement is particularly inappropriate in relation to indigenous cultural heritage when so much of it is passed from generation to generation in oral form (such as poems, rhymes, slang, myth and legend, language, literature, rituals and so on), or in the form of musical expressions (such as songs and musical instruments) and bodily expressions (such as dance, drama, and rituals).[68] Puri notes that the *Tunis Model Law on Copyright* 1976 [69] did not seek to incorporate the fixation requirement on the grounds that the Party which acted to 'fix' the aspect of cultural heritage might then be eligible to claim copyright over the work;

f. there is considerable financial expense involved in enforcing copyright law. Presuming that breaches of copyright law do come to the attention of indigenous peoples, as they have in Australia,[70] litigation is not always an option for indigenous peoples due to the expense involved in acquiring the necessary legal advice, and the inherent uncertainties of the legal process. The following comment from Puri in relation to the inadequacies of the Australian legal system's ability to protect Aboriginal Australians' cultural heritage is broadly representative of the inadequacies of many other jurisdictions in this area: 'Many Aboriginal creators are in a particularly vulnerable position. The vast majority of them live in remote areas and

> have hardly any access to professional advice and assistance. The situation is exacerbated by the Western legal system which is primarily concerned with the economic exploitation of works. The Western laws do not recognise the cultural and religious significance attached to many forms of Aboriginal art, dance and music.'[71]

Synopsis

The narrow framework of copyright law renders it incapable of protecting many forms of indigenous cultural and spiritual expression, and able to protect others in only the limited circumstances when they do satisfy the principles of copyright law. In countries such as Australia where copyright law has been the primary form of protection for the works of contemporary indigenous artists, serious breaches have continued to occur which have caused great anxiety and sadness in Aboriginal communities. The experience in Australia highlights the need for moral rights and copyright legislation work in tandem to ensure that indigenous cultural expression is not able to be appropriated or 'reinterpreted' by non-indigenous artists in a manner that is offensive to indigenous peoples, but 'lawful' under copyright legislation.

Furthermore, the reliance on litigation (or the threat of it) to deliver a remedy for breach of copyright detracts from its ability to meet the needs of indigenous peoples, due to the expense and uncertainty of the legal process, as well as the reluctance many indigenous peoples have to engage in formal legal proceedings.

4.6 Trade Secrets

Trade secrets offer legal protection to some aspects of indigenous knowledge and 'know-how' that may not meet the requirements of patent law, but are of importance to the indigenous community. Although the holder of the trade secret is required to take steps to ensure that the information is not disclosed, the holder may authorise a second party to have access to or to use the information on a confidential basis. Consequently, trade secret law could be used in conjunction with contract law to develop legally-binding agreements between indig-

enous communities and companies that secure confidentiality and/or economic benefits for that community.[72] If the information is used without the trade secret holder's permission, legal action may be taken to force the individual or company to share what ever profits are made.[73]

The potential of trade secrets in relation to the protection of indigenous cultural heritage is most applicable to indigenous knowledge of biodiversity, traditional medicinal knowledge, and ecologically sustainable environmental management practices. More specifically, the knowledge held by a traditional healer about the healing properties of a particular plant, how to cultivate that plant, and how to extract and administer its medicinal properties, could be protected by a trade secret. Similarly, indigenous peoples could protect traditional methods of plant and animal breeding, or use trade secrets to restrict access to indigenous lands and territories if unauthorised access jeopardised the confidentiality of the information.

However, the usefulness of trade secrets in terms of their ability to protect indigenous knowledge is limited for the following reasons:

a. where knowledge is shared by the indigenous community as a whole, rather than a particular individual such as a shaman, trade secret law may not be applicable;[74]
b. information protected by a trade secret must have commercial value and give the owner a competitive advantage, which may not always be the case for some forms of indigenous knowledge that are not traded in a competitive market;
c. the information cannot be widely known or widely shared, which may conflict with or not be possible as a result of indigenous peoples' practice of knowledge sharing. Similarly, the restrictions that trade secrets pose on the exchange of scientific information, has attracted criticism from developed countries, and it is unclear whether this form of protection may be in conflict with the TRIPS Agreement;
d. enforcing trade secrets is problematic as the onus is on the holder to prove that they took adequate steps to prevent disclosure of the information;

e. if the protected knowledge is 'discovered' by lawful means, such as reverse engineering, independent discovery, or learned from a third party, the protection provided under trade secret law is extinguished; and
f. some countries provide little or no legal protection for trade secrets, in which case legislation to restrict access to particular areas may provide the only means to prevent the loss of secrecy.[75] Areas where indigenous peoples may want to restrict access to conserve particular habitats include rainforests and coral reefs, where biodiversity is richest, and where non-indigenous scientists are most eager to conduct research. In these areas, the potential economic benefits to the State from allowing bioprospecting may prove more persuasive than the efforts of indigenous inhabitants to prevent or restrict access.

4.6.1 'The Transformation of Traditional Knowledge into Trade Secrets' and Material Transfer Agreements: The Ecuador Proposal

Some South American countries are considering the broad-based application of the mechanism of trade secrets to protect the knowledge, practices and innovations of indigenous peoples in their jurisdiction. A proposal currently exists in Ecuador to establish a cartel over 'traditional knowledge' within Ecuador, with a view to introducing the organisational structure into neighbouring countries.[76]

Known as 'The Transformation of Traditional Knowledge into Trade Secrets', this proposal is expected to enter a pilot phase in 1997. Its primary objective is to catalogue traditional knowledge on databases located at universities or with NGOs, ensuring that confidentiality is maintained through a hierarchy of access restrictions and contractual obligations (although each participating community will manage its own file).

The purpose of the database is to establish what traditional knowledge is shared by indigenous communities, and what traditional knowledge is not yet available in the public domain. That knowledge which is not yet public can be negotiated as a trade secret in a Material Transfer Agreement between the indigenous community(s) possessing the knowledge, and companies seeking to use the knowledge. If the information is known to more than one community, the benefits from the MTAs are to be shared between the government and all communities that deposited the same knowledge in the databases. Communities are then required to invest any financial returns in 'public projects'.[77]

This proposal rests on a number of assumptions. Firstly, the success of the proposal requires that, under certain circumstances such as the assurance of strict confidentiality, many indigenous communities are willing to share their knowledge, and especially their secret knowledge of biodiversity, with interested third parties. Secondly, it assumes that indigenous communities are prepared to document this knowledge on computer databases that are located outside of their communities and controlled by NGOs and universities. Although the first of these assumptions may apply to many indigenous communities, there are many who would find the second assumption unreasonable. It should also be noted that the Material Transfer Agreements usually grant the recipient of the material the right to apply for patents if any of the material has commercial potential.[78]

In view of the significant limitations of trade secret mechanisms and patents, this proposal is one that indigenous peoples need to closely monitor.

4.6.2 Know-How Licence Agreements

While Ecuador is considering protecting indigenous knowledge under trade secret agreements, Peru and Colombia are considering the protection of indigenous knowledge using 'know-how' licence agreements.

In Peru, a know-how licence agreement has already been established between some members of the Aguaruna and Huambisa peoples of the Amazon, and the US-based International Cooperative Biodiversity Program (ICBG).[79] The pharmaceutical companies and universities involved in this licence agreement are primarily interested in the collection of plant resources that the Aguaruna traditionally use for medicinal purposes, as these plants may contain active ingredients that can be developed into marketable drugs.

The decision to develop a know-how licence agreement, reflects the fact that it is the *use* to which these plants are put that is valued by the ICBG Parties, rather than the *resource* itself. In this sense, know-how licence agreements allow indigenous communities to retain control of their natural resources and territories, while facilitating the sharing of their knowledge.

Know-how licences are generally valid over a limited period of time (usually a few years) and authorise bioprospectors to carry out sampling under controlled circumstances, by requiring the implementation of mechanisms such as bioprospecting codes of conduct. The right of access to medicinal plants, extracts and derived materials is only possible while the agreement is in place, and it may be terminated by either party, thereby terminating the rights of the bioprospector to the resources.

In the case of the Aguaruna people, compensation in the form of collection fees, an annual know-how license fee, advance royalty payments during clinical drug trials and, if a drug is developed, royalty payments, are among the direct and ongoing financial benefits to the community of the licence agreement. While these financial rewards are intended by the ICBG Parties to 'address biodiversity conservation and the promotion of sustained economic activity',[80] it must be noted that the community has essentially lost control of its knowledge related to traditional medicines. Although ICBG Parties have undertaken to conduct bioprospecting in a culturally and environmentally sensitive manner, and to compensate all members of the Aguaruna and Huambisa peoples (regardless of whether they were party to the agreement), this does not change the fact that the knowledge imparted to ICBG Parties is no longer secret. The fact that only 50 percent of the Aguaruna people were represented in the negotiation of the licence agreement is perhaps indicative that the sale of customary knowledge to commercial interests is not universally supported within indigenous communities.

4.7 Trademarks

Trademarks offer a potentially effective means of protecting some aspects of indigenous cultural heritage from unauthorised

commercial exploitation. However, the use of trademarks is only applicable for those tangible aspects of indigenous culture that indigenous communities want to sell for economic gain.

Trademarks offer protection for an unlimited period of time, and have the added advantage of being relatively simple to administer. Registered trademarks (as opposed to unregistered) allow owners to sue infringers, and to licence their trademark, thereby gaining exclusive use rights.[81] The threat of legal action can act as an effective deterrent against imitation or the passing off of indigenous art, as well as the use of deceptively similar trademarks on competing products. The Madrid Agreement Concerning International Registration of Trademarks enables the trademark applicant to obtain coverage in several countries with a single trademark application, and some 30 countries are signatories to this agreement.

Trademarks have proven an effective means of enabling consumers to exercise their sovereignty, in that they can determine the authenticity of the product and be assured that it is marketed with the consent of the artist or community. The competitive advantage that can be afforded indigenous products by a genuine trademark is significant, and, providing effective licensing or contractual arrangements are put in place, may help to ensure that indigenous communities are economically rewarded for their enterprise.

Trademarks also provide an effective means of reinforcing the linkage between indigenous culture and ecological sustainability. Companies such as the Body Shop have successfully sought to increase their market share by informing consumers of the ecological sustainability and/or cultural sensitivity of their products, such as their tropical rainforest products. As Posey and Dutfield note, many customers are willing to pay a little extra for a product which they are confident has not been produced in a manner that has harmed the environment or exploited indigenous knowledge or cultural traditions.[82]

4.7.1 Geographic Indications and Appellations of Origin

Geographic indications 'identify a good as originating in the territory of a Member, or a region or locality in that territory,

where a given quality, reputation or other characteristic if the good is essentially attributable to its geographic origin' (Article 22(1) of the TRIPS Agreement).

This form of intellectual property has been frequently applied across Western Europe to distinguish the distinctiveness and authenticity of the produce of particular regions, such as wines from the Champagne region of France. Local producers have acted collectively to restrict the application of the word 'champagne' to wines produced in their region, thereby preventing producers from other territories from producing wines that are similarly labelled, but which are necessarily of a different quality. The frequency of the use of this form of intellectual property law has led the European Union to develop a register of products protected by geographic indications.

Although this form of intellectual property protection could be extended to indigenous heritage,[83] it is questionable that it would deliver any significant benefits to indigenous peoples. It does not for example, provide indigenous peoples with the means to protect the knowledge that is contained in aspects of their heritage, or to control the use of this knowledge. Rather it provides indigenous peoples with the legal means to prevent the labelling of products that misleads the public into believing that the product in question originates from the territory of indigenous peoples, when in fact it does not. Where such misleading labelling is used, the indigenous community which is disadvantaged may request that the registration of a trademark which contains or consists of a geographic indication is either refused or invalidated (TRIPS, Article 22(3)).

For the purposes of protecting indigenous heritage, geographical indications are therefore most useful in those instances where indigenous communities are willing to share their knowledge, practices or innovations. However, it should be noted that the sharing of knowledge is not necessarily conditional on the pretext of prior, informed indigenous consent, and once available outside the indigenous community of its origin, the control of the knowledge is essentially lost to the people who consider themselves the custodians of that knowledge.

4.8 Plant Breeders' Rights

Plant Breeders' Rights are often heralded as a model which could be adapted to deliver indigenous peoples international recognition and protection of their cultural and intellectual property rights relating to flora. However, on closer examination, it is evident that the rights which are available to plant breeders are being increasingly narrowly defined in successive conventions in this area. Furthermore, the nature of these 'rights' is such that they have generally accrued to large corporations from the North, rather than at the local or community level.

4.8.1 The Origins and Nature of Plant Breeders' Rights

Prior to the 1960s, intellectual property rights had not been extended to plant varieties or genetic resources generally. Rather, the Earth's biodiversity and the natural environment were considered part of the 'common heritage of mankind', and therefore knowledge and resources were able to be freely exchanged. However, with the development in 1961 of the Union for the Protection of New Varieties of Plant (UPOV) and the first Convention on Plant Breeders' Rights, property rights were extended to 'new' plant varieties. Adapting the criteria required of inventions under intellectual property law, and in particular patent law, 'new' plant varieties were defined under the Convention as those which are novel, distinct, uniform and stable (although novelty and distinctness are interpreted more leniently than under patent law). Breeders holding such rights were able to prevent others from selling seeds of that variety, with the exception that farmers could save seeds for replanting, and other breeders could use protected seeds to develop new seed varieties.

The extension of the application of intellectual property law to this part of the agricultural industry proved highly beneficial to the predominantly Northern corporations who freely 'tapped' the biodiversity of the South for source material and farmers' germplasm. In contrast, UPOV Plant Breeders' Rights have done little to encourage or reward community-based innovation and conservation, despite the invaluable contribution indigenous and

local communities have made and continue to make to the conservation and development of the genetic stock which is now so prized by commercial researchers. As Nijar notes:

> the innovative contribution and knowledge of local communities to the evolution of the seeds concerned were ignored. This inequitable treatment between owners of germplasm and owners of technology spawned a debate in the FAO [Food and Agriculture Organisation] in the 1970s. Developing countries complained that 'the common heritage of mankind' taken from them within their borders for free was now returned as a commodity at a price.[84]

The gross inequity between Northern and Southern countries that resulted from the UPOV Convention acted as a catalyst for the debate in the United Nations Food and Agriculture Organisation (FAO) which ultimately gave rise in 1983 to the International Undertaking on Plant Genetic Resources, and the establishment of a Permanent Intergovernmental Commission on Plant Genetic Resources (which form part of the FAO Global System for the Conservation and Utilisation of Plant Genetic Resources). The Undertaking represented the first comprehensive international agreement concerning plant genetic resources, and is designed to act as 'a flexible framework for sharing the benefits and burdens' of the utilisation of plant genetic resources on an intergenerational basis. Although voluntary rather than legally binding, the Undertaking has the ambitious aim of engendering a cooperative approach to the conservation of genetic material that ensures that this material 'will be explored, preserved, evaluated and made available for plant breeding and scientific purposes'.

The Undertaking has not however, been effective in addressing the inherent inequities between Northern and Southern countries in relation to the sharing of benefits from the use of plant genetic resources. Furthermore, the funding mechanism that was established in 1983 to facilitate the implementation of the Undertaking and provide financial assistance for the conservation and utilisation of plant genetic resources has been starved of funds. In fact 'lack of contributions from Northern corporations

and their governments have rendered this fund inoperative';[85] that is, no grants have been made to date.

Successive amendments to the UPOV Convention have also failed to redress the imbalance between plant breeders in Northern and Southern countries. Plant Breeders' Rights as recognised under the first Convention on Plant Breeders' Rights have been modified by subsequent Conventions in 1972, 1978 and 1991. The provisions of the 1991 Convention have significantly weakened the rights that reside in indigenous and local farming communities. For example, where the 1978 Convention included the so-called 'farmers' privilege' (the right to plant saved seed), the 1991 Convention has put the farmers' right at the discretion of the contracting Parties, almost all of which are developed countries.[86] Furthermore, the 1978 Convention allowed protected varieties of seed to be kept by local farmers for use as an initial source of variation in the creation of new varieties or for the marketing of these new varieties; whereas the 1991 Convention prohibits unauthorised use of any variety that is 'essentially derived from a protected variety'.[87]

Both of these amendments represent significant restrictions on the farming practices of indigenous and local communities, and in so doing, also represent potential barriers to the conservation and maintenance of biodiversity. For example, in practice, the 1991 amendments are likely to mean that a farmer must obtain the breeder's consent (and when obtained, pay royalties) in order to lawfully produce, sell, reproduce, export or import, and stock protected seed varieties.[88] Posey and Dutfield have commented that these amendments appear to be an attempt to make the level protection offered by Plant Breeders' Rights as strong (or as weak) as that of a patent, and therefore equally as difficult to obtain.[89] This observation also suggests that Plant Breeders' Rights share many of the shortcomings of patents - shortcomings which would significantly limit the usefulness of Plant Breeders' Rights to indigenous plant breeders (refer to section 4.2).

The following requirements of plant breeders under the Convention also detract from its ability to protect indigenous plant breeders' rights, and therefore its relevance as a model to achieve international recognition and protection of indigenous knowledge in relation to flora:

a. the Convention is only binding on member States of which there are 20, and the majority of which are developed countries. Of the Member States, only the United States has signed the 1991 Convention, although several countries are in the process of drafting legislation to comply with it;[90]
b. protection of Plant Breeders' Rights is limited to 15 to 20 years;
c. Plant Breeders' Rights are vested in individuals and companies. They are not collective rights; and
d. to be eligible for protection under the 1991 Convention, the plant variety must comply with a number of strict criteria. For example, the variety must be distinct from other existing varieties; and it must be stable, uniform and novel.[91] This requires that indigenous peoples conduct comprehensive propagation trials to conclusively demonstrate that the criteria are satisfied; submit a written description of the variety; and deposit samples in the form of seeds, a dried plant or a live plant. Clearly these requirements demand a considerable degree of legal and scientific expertise, as well as the labour and expense of plant breeders.

Although the argument is used in defence of the UPOV Conventions that they offer States a 'ready made' legal instrument that is designed to protect Plant Breeders' Rights, Flitner *et al.* argue that such arguments overlook the fact that,

> at the very least, the implementation of a UPOV Plant Breeders' Rights system requires an intensive input of legal, economic and human intellectual resources. These resources ... could be better focused on the development of an adapted *sui generis* system, established in such a way which complies with the needs and specific circumstances of a developing country[92] and indigenous peoples.

4.8.2 A *sui generis* Approach to Plant Breeders' Rights?

In view of the increasingly narrow definitions of Plant Breeders' Rights under the various UPOV Conventions, WWF has recommended that developing countries which do not yet provide protection for plant varieties look beyond the legal framework of Plant Breeders' Rights in search of models which reward countries of origin and local and indigenous communities engaged in the conservation and development of plant genetic resources.[93] Rather than adopting a system of protection for plant varieties based on UPOV Plant Breeders' Rights, WWF encourages developing countries to develop their own *sui generis* intellectual property models which reflect their unique developmental, environmental and social priorities. By taking this approach, these countries can still fulfil their obligations under international instruments such as the Convention on Biological Diversity and the TRIPS Agreement, but in a manner that avoids the transfer of legislative frameworks which have been designed to serve the needs of plant breeders in developed countries.

Although this may be sound advice for developing countries, it is questionable that it is an approach that will provide any significant benefits for indigenous plant breeders. This stems from the fact that a *sui generis* approach to the realisation of plant breeders' rights is likely to be the primary responsibility of national governments. That is, the development, implementation and enforcement of a *sui generis* model depends on the commitment of a national government to undertake a legislative approach that delivers to indigenous peoples within its jurisdiction their rights as plant breeders. In most cases, indigenous peoples could at best hope to be consulted or involved in the process, rather than being able to be in control of the ownership, use and management of plant genetic resources which they regard as part of their cultural and intellectual property.

A *sui generis* approach has the potential to return benefits to indigenous peoples, providing that a totally new and truly '*sui generis*' approach is taken to recognise and reflect the values and aspirations of indigenous peoples, and the way they relate to themselves, as well as the wider community. History has shown that this is not a challenge that many States have been able to meet.

CHAPTER

5

5. THE CONVENTION ON BIOLOGICAL DIVERSITY AND FARMERS' RIGHTS

5.1 Introduction

The Convention on Biological Diversity entered into force in December, 1993 and has been ratified by some 134 States. It is the first broad and legally-binding international legal instrument which seeks to protect all ecosystems and all species. It is also the first international environmental treaty to tackle the issue of intellectual property and the need to ensure the equitable use and sharing of the benefits of biodiversity. Its incorporation of many of the principles of ecologically sustainable development reflects the Convention's origins in the UNCED (United Nations Conference on Environment and Development) process that culminated in the Rio Conference of 1992.

The overriding objectives of the Convention are to bring about :

a. conservation of biological diversity;
b. sustainable use of its components; and
c. fair and equitable sharing of the benefits arising from the utilisation of genetic resources (by *inter alia* appropriate access to genetic resources, appropriate transfer of technologies, and appropriate funding).

5.2 Key Provisions of the Convention Relating to Indigenous Peoples and Intellectual Property

The Convention on Biological Diversity:

a. requires each State Party to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities which contribute to the conservation and sustainable use of biological diversity (Article 8(j));
b. requires each State Party to promote the wider application of indigenous knowledge, innovation and practices,

subject to the consent and involvement of indigenous peoples in its application (Article 8(j));
c. imposes obligations on State Parties in relation to in situ and ex situ conservation (Articles 8 and 9);
d. provides that each State Party shall 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements' (Article 10(c));
e. requires State Parties to promote sustainable use of biological diversity by, *inter alia*, integrating this objective into the decision-making process, providing incentives, undertaking research and training, encouraging public education and requiring environment impact assessment (Articles 10-14);
f. affirms the right of State Parties to determine access to their biological resources (Article 15(1)); obliges States to facilitate access to their genetic resources for 'environmentally sound uses' (Article 15(2)); and empowers States to deny access if their prior and informed consent is not obtained (Article 15(5));
g. seeks to return the benefits derived from the exploitation of resources to the State of origin by requiring the extracting Party to share the proceeds and results of research in a 'fair and equitable way', and on 'mutually agreed terms' (Articles 15(4) and 19(2));
h. requires that each State Party 'in accordance with its capabilities' provides new and additional funding resources to developing countries (Article 21);
i. provides for transfer of technology to developing countries, subject to existing patent and other intellectual property laws (Article 16), noting that such exchange of information should include indigenous and traditional knowledge (Article 17(2));
j. requires Contracting Parties to 'encourage and develop methods of cooperation for the development and use of technologies', including traditional and indigenous technologies (Article 18(4)). Contracting Parties are therefore obliged to afford 'traditional and indigenous technologies'

the same status as other (Western) technologies that can contribute to the conservation of biodiversity, *and* to subject them to the technology transfer obligations of Article 16 that ensure protection of the rights of knowledge holders;

k. suggests that intellectual property rights and obligations deriving from an existing international agreement might actually be overridden 'where the exercise of those rights and obligations would cause serious damage or threat to biological diversity' (Article 22). When read in conjunction with Article 16, it appears that the Convention requires Member States to uphold intellectual property laws in all cases, except where this would be in breach of the objectives of the Convention as expressed in Article 1. However, this interpretation is yet to be tested.

5.3 Limitations of the Convention in Relation to the Protection of Indigenous Knowledge and Cultural Heritage

The Convention on Biological Diversity is limited in its ability to extend protection to the cultural and intellectual property of indigenous peoples in so far as this relates to biological diversity. There are in fact a number of significant limitations or disadvantages to the Convention:

5.3.1 Indigenous Peoples Are Not Able to Enforce the Convention

The Convention on Biological Diversity is not founded on the rights of indigenous peoples as expressed in the Draft Declaration on the Rights of Indigenous Peoples.

The Convention on Biological Diversity is founded on the principle of national sovereignty. That is, each individual State has the sovereign right to exploit the natural resources within its jurisdiction so long as this exploitation does not damage the environment either within or beyond its jurisdiction.

Although the Convention recognises the importance of indigenous communities to the conservation and sustainable use of biodiversity, the potential of the Convention to protect the rights of indigenous peoples in relation to their lands and territories,

knowledge and cultural heritage is fundamentally restricted by the following factors:

a. where specific reference is made to the vital role of indigenous and local communities in *in situ* biodiversity conservation, the language used is such that State Parties' actions to 'respect, preserve and maintain knowledge, innovations and practices' of these communities are completely at the States' discretion. For example, States are not 'required', but 'shall, as far as possible and as appropriate, subject to national legislation', fulfil their obligations in relation to indigenous and local communities as expressed in Article 8(j). In short, indigenous rights are what their national governments determine them to be, and even then, governments need only 'promote' and 'encourage' these rights;

b. the language of the Convention in relation to indigenous peoples recognises 'traditional lifestyles' and 'customary use'. As the Australian Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Dodson, has pointed out, this language 'may preclude or qualify the participation of Indigenous Peoples who, while clearly influenced by 'traditional' notions, live predominantly in urban or non-traditional areas with lifestyles which do not conform with the stereotypes projected over us by others'.[94] Related to this short-coming is the inference in the terms 'traditional lifestyles' and 'customary use', which imply that indigenous cultures are not 'living', but entrenched in the past. This is to deny the vitality and dynamism of indigenous cultures, and their ability to evolve and adapt and yet maintain a continuity with the beliefs and values that originally inspired them;

c. indigenous peoples are not recognised under international law as legal entities or active subjects, and therefore cannot directly seek a remedy for any alleged breach of the Convention, regardless of whether they are directly affected. If an indigenous community wanted to lodge a biodiversity claim, they would first have to convince their national government that the claim is in the national

interest and warrants the resources required to lobby the international community to uphold the claim. There is the theoretical possibility of persuading another government which has some relationship with the indigenous community to commence proceedings in the International Court of Justice. However, the likelihood of this occurring is so remote as to make it irrelevant.

5.3.2 The Convention Affirms the Effectiveness of Intellectual Property Law in the Conservation of Biodiversity

The Convention of Biological Diversity recognises that intellectual property rights can act as important mechanisms to assist States in the conservation of biological diversity. It does not seek to challenge the operation or legitimacy of intellectual property law, noting in Article 16(2) that access to and transfer of technology should only occur when this is 'consistent with the adequate and effective protection of intellectual property rights'.

The provisions of Articles 20(5) and 22 may however be open to the interpretation that where the enforcement of intellectual property law was inconsistent with the conservation of biodiversity, the objectives of the Biodiversity Convention would prevail to the extent of that inconsistency. The supremacy of the Convention in such a situation is however yet to be tested, and due to the inconsistencies in the Biodiversity Convention in relation to the application of intellectual property law, and the widely held view within the international trade lobby that trade restrictions on environmental grounds are barriers to trade, there is a strong argument that the Biodiversity Convention would not prevail. The resolution of inconsistencies in the obligations of Members to both the World Trade Organisation and the Biodiversity Convention is discussed in section 6.3.2.

Furthermore, the Convention does not acknowledge that intellectual property law generally fails to recognise or protect the legitimate rights and interests that indigenous communities have in relation to the 'ownership' and management of their knowledge of biodiversity. Nor does it acknowledge the existence of indigenous and customary laws regulating the use of and access to the cultural heritage of indigenous communities which have

regulated and minimised the impact of these communities on the Earth's biodiversity for countless generations.

5.3.3 The Convention does not Apply to *ex situ* Material Collected Prior to 1994

To date, the Convention does not apply to genebank and botanic-garden material that was collected prior to the coming-into-force of the Convention in December, 1993. Some members of the Crucible Group believe that unless this problem is resolved satisfactorily,

> almost all of the biomaterial that we know to exist and that is most likely to be commercialised in coming decades is unprotected ...and beyond the reach of countries in the South who were the major donors. By this analysis, the Convention only applies to that material that we do know to exist and that will probably be commercialised in the foreseeable future."[95]

This significant gap in the Convention is complicated by the fact that about two-thirds of the biomaterial contained in these collections is not located in the country of its origin, and about 65 percent of the material lacks any information to indicate the country of origin.[96] Furthermore, the volume of material in these collections would make any efforts to establish donor countries extremely expensive and time-consuming, and may not yield any sizeable benefit for donor countries in the instances where this was able to be ascertained.

In spite of the range of impediments to a simple solution to the question of these *ex situ* collections, the suggestion that indigenous and local communities should simply surrender any claims on the materials in the collections is totally inconsistent with the concept of Farmers' Rights, especially for those indigenous and local communities who contributed to the development of the collections.

The likelihood that *ex situ* collections established in genebanks prior to the CBD entering into force will be restored to their country of origin has all but been ruled out by the increasingly

dominant role the FAO is taking on in the management and regulation of international genebank collections. The extent of this role is indicated by the following developments:

a. in 1989 the International Network of Ex Situ Collections in genebanks (the Network) was established under the auspices of FAO, in line with Article 7.1(a) of the International Undertaking on Plant Genetic Resources. At this time, the Commission on Plant Genetic Resources for Food and Agriculture was concerned by the uncertain legal status of *ex situ* germplasm collected in genebanks around the world. Countries and institutions which voluntarily place their collections in the Network agree to ensure that the genetic material is safely conserved and will be available to the international community for plant breeding and research purposes. Thirty-two countries and the International Agricultural Research Centres, collectively holding 46 percent of the world's germplasm, have indicated their willingness to make their genebanks part of the FAO's Network;[97]
b. in 1994, FAO signed agreements with twelve Centres belonging to CGIAR (the Consultative Group on International Agricultural Research which is believed to hold the most significant and unique seed stock collections),[98] which saw these Centres place most of their *ex situ* collections (some 500,000 accessions) in the hands of the FAO's Network. Under this agreement, the Centres hold designated germplasm 'in trust for the benefit of the international community', and agree 'not to claim ownership, or seek intellectual property rights over the designated germplasm and related information';[99]
c. recommendations were made at the FAO's Fourth Technical Conference on Plant Genetic Resources in June 1996 to further develop the Network. In particular it was recommended that institutions which had signed agreements with the IBPGR (International Board for Plant Genetic Resources) prior to the CBD entering into force, should now place their collections in FAO's Network. FAO estimates that these collections, together with those of CGIAR, account for about a quarter of the world's collections of plant genetic resources for food and agriculture (and undoubtedly a much higher proportion of the world's unique accessions);[100] however, Nijar estimates that the Network will cover about 70 percent of global accessions.[101]

This internationalisation of *ex situ* genebank collections is significantly undermining the sovereign right of States in their biological resources. In particular, the Convention on Biological Diversity affirms the right of States to determine access to its biological resources (Article 15(1)); stipulates that access should only be granted with the prior and informed consent of the host State (Article 15(5)); seeks to channel the benefits derived from the exploitation of biological resources to the State of origin by requiring the extracting Party to share the proceeds and results of research in a 'fair and equitable way', as appropriate, and on mutually agreed terms (Articles 15(7) and 19(2)). Access on mutually agreed terms should include the right of States to participate in research and development activities related to its biological and genetic resources(Article 15.6), and the right to share in a fair and equitable manner the benefits arising from the commercial and other utilisation of these resources (Article 15.7).

The intention that *ex situ* genebank collections held under the auspices of FAO should be held in trust for the benefit of the international community would appear to be in breach of each of the above mentioned Articles of the Convention on Biological Diversity.

5.3.4. The Convention does not Adequately Recognize the Role of Indigenous Peoples in the Conservation of Biodiversity

The principal means by which the Convention seeks to conserve biodiversity are:

a. *in situ* conservation in the form of the establishment of protected areas such as national parks and conservation reserves; and

b. *ex situ* conservation in genebanks, botanical gardens, zoos and so on.

Although, as GRAIN (Genetic Resources Action International) argues, these 'traditional approaches' to the conservation of biodiversity each have their 'rationale, merits, social consequences and costs', both of them 'historically depend on the centralisation of resources and decision-making. A third, more decentralised and people-oriented approach has to be given equal footing and support'.[102] If indigenous peoples and local communities are to be recognised as true actors in the conservation and use of biodiversity, as the Convention explicitly states, they must be granted proper management rights over those resources.

The need to more fully recognise indigenous peoples as stewards of biodiversity is made all the more urgent by the fact that in some cases, the emphasis within the Convention on *in situ* conservation contributes to the dispossession of indigenous peoples and the loss of their cultural integrity. As GRAIN has commented:

> The major drawback of the current *in situ* approach is that local [and indigenous] peoples who depend on access to or interaction within the diversity zone in question are pretty much left out of the scheme. Their role in conserving, managing and using wildlife is ceased or relegated to the terrain of nearby 'buffer zones'. A recent review of protected area conservation approaches shows that there are numerous examples of local communities being expelled from their settlements (in to-be protected zones) without adequate provision for alternative means of work and income. Apart from the impact on people of this approach, its impact on the diversity it is meant to protect is increasingly questioned.[103]

GRAIN has suggested that the Conference of the Parties to the Convention on Biological Diversity should give effect to the Convention's stated intention to promote the equitable sharing of the benefits of biodiversity in the following ways:

a. require that indigenous and local communities are granted security of tenure related to land and other resources;
b. require that common property systems are respected and not destroyed by development schemes;
c. provide for the redirection of research and infrastructure projects to strengthen local community biodiversity management systems;
d. ensure that funding is allocated to community initiatives; and
e. ensure that the bias against indigenous knowledge systems, traditional farming systems and local cultivars is lifted from agricultural policies and development programs.[104]

5.4 Future Challenges for the Convention on Biological Diversity

One of the most important and most difficult issues confronting negotiations on the Convention on Biological Diversity is how to recognise and economically evaluate indigenous cultural and intellectual property rights as they relate to the conservation of biodiversity.

Related to this challenge is the need to:

a. resolve the foundation of the Convention on national sovereignty with the right of indigenous peoples to self-determination, and their associated rights in relation to land, natural resources and culture;
b. establish specific conditions or codes of conduct to facilitate and regulate access to genetic resources. GRAIN and other NGO's have called for a legally-binding Protocol on Biosafety to be attached to the CBD which Member States are invited to ratify. Furthermore, GRAIN argues that 'biosafety' is not solely about environmental protection, but includes the socio-economic, cultural and health impacts related to the use of biotechnologies. GRAIN has also called for a Protocol to the Convention on agricultural diversity, which could be developed in cooperation with the FAO. Any such addition to the Convention

should place particular emphasis on recognising the right of indigenous peoples to be directly involved in programs and strategies designed to conserve biodiversity;

c. establish specific conditions or codes of conduct to facilitate and regulate the fair transfer of technology between indigenous and non-indigenous peoples, and developed and developing countries; and

d. establish an effective funding mechanism to facilitate the transfer of technology.

A further, but equally contentious challenge confronting the CBD is posed by international pressure on the Conference of the Parties to incorporate Farmers' Rights in the Convention. Some NGOs, such as GRAIN and WWF, argue that the Convention on Biological Diversity should explicitly recognise and seek to promote Farmers' Rights, providing that these rights are implemented in a manner that recognises the right of farmers to choose farming technologies; guarantees farmers' control over seeds; recognises their cultural rights; and delivers adequate livelihood standards, compensation for genetic resources, and reparation of collected germplasm. However, as they are currently defined in the FAO's International Undertaking on Plant Genetic Resources, Farmers' Rights do not embody these principles of self-determination, and are yet to provide any direct benefits to farmers. In spite of the recognised shortcomings of Farmers' Rights, the close collaboration between the Convention on Biological Diversity and the FAO in the redefinition of these rights, and the calls for Farmers' Rights to be incorporated in the CBD itself, suggest that indigenous peoples need to pay close attention to developments in this area.

5.5 Farmers' Rights and the Conservation of Plant Genetic Resources

More so than Plant Breeders' Rights, Farmers' Rights have been heralded as a means of returning to farmers at the community and local levels some of the economic benefits that have arisen as a result of their development of plant genetic resources over many generations, while also ensuring that farmers are encouraged to maintain and develop these resources and the associated knowledge they have inherited.

However, as with Plant Breeders' Rights, international recognition of the existence of Farmers' Rights has not translated into significant benefits for farmers at the local and community levels. In fact, mechanisms are yet to be developed to give practical expression to Farmers' Rights and to provide adequate compensation to farmers for the exploitation of their cultural and intellectual property.

Although indigenous peoples support the efforts of farmers to assert their rights in relation to the plant genetic resources they have developed and conserved over generations, many indigenous peoples are concerned that the concept of Farmers' Rights is not an appropriate mechanism to further their rights. Farmers, generally speaking, are a component of the mainstream society, and are therefore located on a totally different political strata than that held by indigenous peoples. Not all indigenous peoples are farmers, and therefore not all indigenous peoples would benefit from the recognition of Farmers' Rights. Moreover, there is concern that Farmers' Rights will operate in a manner that actually undermines indigenous peoples' right of self-determination and strengthens the State's control over the use of plant genetic resources.

5.5.1 The Origin and Nature of Farmers' Rights

The concept of Farmers' Rights grew out of the intense debate that occurred within the FAO in the 1970s between Northern and Southern countries as a result of the implementation of Plant Breeders' Rights. Developing countries in the South strongly lobbied to have Farmers' Rights recognised as a counter-weight to Plant Breeders' Rights, and to thereby ensure that there would be greater equity between the owners of germplasm and the owners of technology.

In 1989, Farmers' Rights were defined in Resolution 5/89 of the FAO Commission on Plant Genetic Resources as being:

> rights arising from the past, present and future contribution of farmers in conserving and making available plant genetic resources, particularly those in the centres of origin/diversity. Those rights are vested in the international community,

> as trustees for present and future generations of farmers, and supporting the continuation of their contributions as well as the attainment of overall purposes of the International Undertaking [on Plant Genetic Resources].[105]

The Resolution also sought to 'ensure that farmers, farming communities and their countries, receive a just share of the benefits derived from plant genetic resources which they have developed, maintained and made available'.

The concept of Farmers' Rights has been accepted by the international community through the FAO Undertaking on Plant Genetic Resources and the International Fund to Implement the Undertaking. The importance of Farmers' Rights is also acknowledged in Resolution Three of the Nairobi Final Act, confirming the text of the Convention on Biodiversity, which calls on all governments to consider their incorporation into the Convention itself. Farmers' Rights are also recognised by the Earth Summit in Rio in 1992, and noted in Agenda 21, the blueprint for environmentally sustainable development.

In spite of the recognition given to the contribution of farmers to the development and conservation of plant genetic resources in these statements, the effect of Farmers' Rights has been quite different. As the Biodiversity Coalition has commented:

> by this definition, rights only arise when farmers 'make available' resources. In other words, no rights are recognised or conferred as a result of their custodial actions or exercise of stewardship or of recognition of their aboriginality or native rights. ...FAO's concept of 'Farmers' Rights is actually just a compensation mechanism to substitute for the wilful failure of sovereign States to recognise, grant or restore real resource rights to indigenous and local communities.[106]

Farmers' Rights do not encompass rights to the use and control of the knowledge and ecosystems essential for the development or conservation of plant genetic resources; they are not part of the regime or intellectual property law. Nor do Farmers' Rights apply to wild plants or animals. Rather Farmers' Rights are at best an indirect acknowledgment of the contribution that indigenous and local farming communities have made and continue to make to the conservation and development of genetic resources.

Furthermore, these 'rights' do not confer on farmers themselves any direct benefits, but are designed to reward the farmers' national governments in the form of financial and project assistance to ensure the conservation of these genetic 'resources'. As Nijar has commented, '[the Farmers' Rights scheme] is essentially a general obligation of the North to help the South, tied into the context of aid and dependency'.[107] They therefore do not confer 'rights' on indigenous peoples which give any meaningful effect to their right of self-determination, or their rights in relation to cultural and intellectual property.

A brief summary of the criticisms of Farmers' Rights as they related to the rights of indigenous peoples therefore includes the following:

a. Farmers' Rights do not recognise or promote the inherent rights of indigenous peoples, such as the right to use and control plant genetic resources which they have developed and conserved;
b. Farmers' Rights do not extend to wild plants and animals;
c. Farmers' Rights only come into existence when the resources are commercialised, which may not be considered appropriate or desirable by indigenous communities;
d. the fund established within the FAO to implement the International Undertaking on Plant Genetic Resources (and thereby give effect to Farmers' Rights) is yet to attract funds from any source;
e. if the funding mechanism does become operable, all monies are channelled through national governments, rather than accruing directly to the farmers; and
f. there is no mechanism for entrusting compensatory funds derived. Indigenous peoples totally reject trusteeship arrangements.

5.5.2 Farmers' Rights after the Leipzig Conference on Plant Genetic Resources

In June 1996 the FAO's Fourth International Technical Conference on Plant Genetic Resources was held in Leipzig at the

request of the FAO and the United Nations Conference on Environment and Development, through Agenda 21. The Conference adopted The Global Plan of Action for the Conservation and Sustainable Utilisation for Plant Genetic Resources, and the Leipzig Declaration. The conference also considered the first Report on the State of the World's Plant Genetic Resources, which was welcomed as 'the first comprehensive world-wide assessment of the state of plant genetic resources, conservation and use'.

The conference was keenly anticipated by non-government organisations (NGOs) working in this area, which saw it as a much needed opportunity to renegotiate the definition and implementation of Farmers' Rights, and to lobby for a more action-oriented approach to the conservation of the world's plant genetic resources. Some 120 NGOs from over 50 countries met in Leipzig prior to the Technical Conference to prepare a Peoples' Plan of Action on Agriculture, Food Security and Farmers' Rights. The Peoples' Plan of Action calls for the 'strengthening of systems which promote collective rights over the individuality of IPR [intellectual property rights], and cultural and agricultural diversity by supporting women farmers, indigenous peoples, and land rights issues'. It reflects the commitment of participating NGOs to achieve the international implementation of Farmers' Rights on the grounds that the recognition of these rights is 'a fundamental prerequisite to the conservation of agricultural diversity'.

Other important commitments expressed in this Plan of Action include the intention to:

a. create alternatives to intellectual property systems that safeguard the rights of farming and indigenous communities;
b. continue the transformation of the current conservation *ex situ* dominated system toward one based on community conservation;
c. ensure that the WTO review process in 1999-2000 removes agriculture from the Uruguay Round Agreement and the elimination of TRIPS; and
d. introduce a moratorium on the release of GEOs [genetically engineered organisms] unless and until a broadly debated and popularly accepted legally-binding international biosafety protocol, addressing social and economic as well as environmental impacts, is in place. Communities have the right to veto at all levels.

In addition, the NGOs passed a Resolution on Farmers' Rights for delegates at the Technical Conference which *inter alia*, sought to emphasise that:

a. the central objective of Farmers' Rights is to ensure control of and access to agricultural biodiversity by local communities, so that they can continue to develop their farming systems sustainably;
b. ownership and innovation at the local level are often of a collective nature. Farmers' Rights should be based upon this principle, and should protect and promote such collectively held knowledge systems and resources. Collective knowledge is intimately linked to cultural diversity, land and biodiversity and cannot be dissociated from either of these three aspects; and
c. Farmers' Rights should include legal recognition of land rights.

Despite the hopes of most NGOs in the lead-up to the Leipzig Conference that it could provide a forum to 'turn past political achievements into useful activities', specific projects, and funding commitments,[108] the Conference was not able to reach a consensus on how to formulate Farmers' Rights. Instead, the resolution of questions relating to these rights has been left to the Commission on Genetic Resources through its revision of the International Undertaking on Plant Genetic Resources, which has been underway since 1993. The Leipzig Declaration does, however, provide some indication of how Farmers' Rights may be constituted in the future.

5.5.3 The Leipzig Declaration and the Future Shape of Farmers' Rights

The Declaration is indicative of the FAO's recognition of the need to expand and radically re-define Farmer's Rights, and to do so in a

manner which allows a harmonisation of these rights with the provisions of the Convention on Biological Diversity. This is expressed most clearly in Article 11, which provides *inter alia* that:

> We [the signatory Parties] believe it important to complete the revision of the International Undertaking on Plant Genetic resources and to adjust the [FAO] Global System, in line with the Convention on Biological Diversity.

Furthermore, Article 1 of the Declaration expresses the commitment of Signatory Parties to 'the conservation and sustainable utilisation of [plant genetic resources] and to the fair and equitable sharing of the benefits arising from the use of [these resources] for food and agriculture'. The consistency of this language with that used in the Convention on Biological Diversity is made more apparent by the need for signatories to the Declaration to recognise 'the desirability of sharing equitable benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of plant genetic resources'. Furthermore, Article 1 closes with the conviction that 'these efforts can be an essential contribution to achieving the objectives, and facilitating implementation of the Convention on Biological Diversity'.

The Leipzig Declaration also reflects the growing appreciation within the international community and the FAO of the valuable role of 'indigenous and local communities, in conserving and improving plant genetic resources. Through their efforts, much has been and is still being accomplished to collect, conserve, improve and sustainably use plant genetic resources for food and agriculture' (Article 4). Article 9 reaffirms the vital role of indigenous peoples in conserving and sustainably using plant genetic resources, noting that world food security 'will require integrated approaches combining the best of traditional knowledge and modern technologies'. These direct and indirect references to the need to involve indigenous peoples in, and to equitably share with them the benefits of the use of plant genetic resources, marks somewhat of a 'progression' within the FAO.

Other important developments expressed in the Leipzig Declaration include:

a. recognition of the sovereign rights of States over their plant genetic resources, (reversing FAO's conviction in the 1983 International Undertaking that plant genetic resources are the common heritage of mankind and should be made freely available);
b. plant genetic diversity is still being lost in the fields and other ecosystems of virtually all countries, and even in genebanks, many of which are not able to meet minimum international standards (Article 5);
c. the recognition that national capabilities, particularly in developing countries, must be strengthened (Article 6);
d. access to and the sharing of both genetic resources and technologies are essential for meeting world food security; however, access and transfer of technology should be provided on terms which recognise and are consistent with the adequate and effective protection of intellectual property rights (Article 7) (a condition that is also expressed in Article 16 of the CBD).

5.5.4 Conclusions

Although the Leipzig Conference was not able to achieve consensus on the nature of Farmers' Rights, the Leipzig Declaration does provide some indication of the likely orientation of these rights once the Commission on Genetic Resources for Food and Agriculture has completed its revision of the International Undertaking. The fact that this revision is taking place in close cooperation with the Convention on Biological Diversity to ensure consistency between the two instruments, provides a further indication of the how Farmers' Rights might be constituted in the future.

Posey has speculated that this revision process could eventuate in the International Undertaking being converted into a legally-binding instrument, or perhaps a Protocol to the Convention on Biological Diversity.[109] Elevating the Undertaking to this status would represent a considerable advance in international practice, as Farmers' Rights would then be a more effective counter-weight to Plant Breeders' Rights (which have always been legally binding).

There is also the call from organisations such as WWF, that Farmers' Rights should be incorporated into the Convention on Biological Diversity. More particularly, WWF has recommended that Parties to the Convention on Biological Diversity recognise and develop Farmers' Rights as an important element of a *sui generis* system to implement their obligations under the CBD and under TRIPS.[110]

A rights-based approach for indigenous peoples has to be actively promoted in relation to both the Convention on Biological Diversity and the FAO. Indigenous peoples need to be aware of the limitations of Farmers' Rights as a means of promoting and strengthening their own right of self-determination. The pursuit of Farmers' Rights should not be misinterpreted as a vehicle for the recognition of the rights of indigenous peoples, not only because not all indigenous peoples are farmers, but also because there is considerable scepticism among indigenous peoples and their representative organisations that any real benefits are likely to be generated for farmers by the mechanism of Farmers' Rights.

In view of the shortcomings of the Convention on Biological Diversity, there is a clear need for indigenous peoples and their representative organisations to maintain and strengthen their role in the Conferences of the Parties to the CBD. This after all, is the Convention which is setting the standards with which Farmers' Rights will have to comply, and which currently provides only limited recognition and encouragement of the vital role of indigenous peoples in the conservation and management of biodiversity. The recognition of the need for protocols to the Convention to better regulate access to and use of genetic resources, and the transfer of technology, point to a number of areas where indigenous peoples' voices need to be strongly heard.

Equally, the work currently being undertaken by the FAO looks set to have widespread ramifications for indigenous peoples. This work includes the redefinition of Farmers' Rights, as well as the FAO's Draft Code of Conduct on Biotechnology (submitted to the 1995 Conference of the Parties of the CBD as an input to the possible development of a protocol on biosafety), and its formulation in 1993 of a voluntary International Code of Conduct for Plant Germplasm Collecting and Transfer. It is vital that the rights and perspectives of indigenous peoples are recognised and reflected in the work undertaken by the FAO if their rights in relation to genetic resources and the associated knowledge are to be realised.

INDIGENOUS HERITAGE AND SELF-DETERMINATION

CHAPTER

6

6. TRADE RELATED INTELLECTUAL PROPERTY: THE TRIPS AGREEMENT

6.1 Intellectual Property and International Trade: The Background to the Negotiation of the TRIPS Agreement

As technology and knowledge have become more easily traded and exchanged on an international scale, so the controversy surrounding patent, copyright and intellectual property rights generally has grown. Developing countries generally, and indigenous peoples in particular are at the centre of this controversy as it is their intellectual property that is in demand by transnational corporations for its potential economic value.

However, international recognition of the value of indigenous peoples' knowledge and cultural heritage is a double-edged sword.

Most developed countries, and in particular the United States, have argued that technology and knowledge can and should be treated in the same manner as all other goods and services. Furthermore, the United States has stridently argued that the failure on the part of the international community to implement internationally recognised and enforceable intellectual property rights is harmful to trade relations, and is in fact tantamount to permitting the existence of non-tariff barriers in this area.[111] It was on these grounds that the United States and other developed countries argued that the discussion of an international system of intellectual property rights fell within the competence of the General Agreement on Tariffs and Trade (GATT), as opposed to the World Intellectual Property Organisation (WIPO).[112]

The desire on the part of developed countries to have intellectual property matters included on the international trade agenda is motivated by their growing demand for an internationally recognised system of enforceable intellectual property rights. As the level of competition in international trade and the degree of technological sophistication have increased in the post-war period, so too has the assertion of developed countries that they need to protect their respective markets and the intellectual property embodied in their exports. From the perspective of many developed countries, an international system of enforceable property rights is an essential requirement for the maintenance of their competitive advantage in international markets and position as global technological leaders; it is also, they argue, a prerequisite for the liberalisation of world trade. As Acharya notes:

> By imitating new technological methods, developing countries, especially the [newly industrialised countries of East Asia], are expanding production and export of goods which would normally be produced in industrialised countries. The main reason for this 'unfair competition' is the system of patent protection which is different from country to country. As a result, patents registered in one country may or may not be recognised by another country, the consequence of which is the production of 'counterfeit goods' and a violation of the patent registered in the first country. ....The technology-led growth rates of the east Asian NICs demonstrated the important role that technology has played in their recent development.[113]

The mounting pressure being exerted by many developed countries to develop an internationally recognised and legally-enforceable system of intellectual property rights brought these issues onto the agenda of the Uruguay Round of multilateral trade negotiations. The Uruguay Round, initiated under the GATT, lasted from December 1986 to December 1993. One of the fifteen Negotiating Groups established to closely examine specific issues, focussed on Trade Related Aspects of Intellectual Property (TRIPS). As the following excerpt from the mandate of TRIPS suggests, the Negotiating Group was established to address unfair trade distortions, such as 'counterfeit goods', and to examine ways in which a uniform regime of intellectual property rights could be adopted by all nations who were a party to the negotiations:

> In order to reduce the distortions 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 disciplines.

Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in GATT.

These negotiations shall be without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organisation and elsewhere to deal with these matters.[114]

Although the impetus for raising this issue with GATT was to regulate and reduce trade in counterfeit goods, developed countries broadened the focus of discussions to include the development of minimum standards for the protection of intellectual property to be adopted by all negotiating countries.[115]

In contrast, developing countries were not successful in amending the mandate to require the Negotiating Group to examine the potential impact on the economic development process of developing countries that these 'protective' measures might have.[116] Rather the rhetoric prevailed that intellectual property law is 'a valuable part of a country's infrastructure.' By implication, it was suggested that an international property rights system would affect all nations and all peoples in a similar manner.

The establishment of the TRIPS Working Group was met with strong opposition from some developing countries, particularly India and Brazil. These countries felt that the internationalisation of new technologies and intellectual property rights could impinge on their sovereign right as a nation to exploit their resources in accordance with nationally-determined development policies and priorities. In addition, developing countries also anticipated that the liberalisation of international trade might restrict their access to new technologies, and consequently impact negatively on their economic development.

India and Brazil expressed the view that the discussion of intellectual property rights would be more appropriately dis-

cussed in a forum under the auspices of the World Intellectual Property Organisation. The United States however, favoured GATT on two grounds. Firstly, WIPO has no dispute resolution mechanism (although such a mechanism could be put in place on an ad hoc basis), and GATT does; and secondly, the WIPO is governed by an unweighted vote of its members, more than half of whom are developing countries, which would most likely result in stronger protection for the rights of developing countries.[117]

In spite of these concerns, many developing countries did participate in multilateral negotiations at the Uruguay Round. This is not to suggest that these developing countries lightly cast their concerns about the process aside, rather that the potential trade disadvantages to them that could flow from not participating in negotiations were felt to outweigh the advantages to be gained from abstaining. As one Asian trade expert commented in relation to the TRIPS Agreement: "We need to guarantee copyrights, trademarks and patents if we want to attract foreign investment capital."[118]

The view held by many developing countries that were party to the Uruguay Round of GATT and are Member States of the TRIPS Agreement are reflected in following comment:

> The Intellectual Property Rights agreement represents not a freeing up of trade, but a tightening of monopolistic control and an obstacle to the transfer of useful technology to developing countries. It represents a major win for the corporations and industry associations who with the support of their governments pushed so hard for it, and a major loss for the poor.[119]

6.2 The Key Provisions of the TRIPS Agreement and the Possible Implications for Indigenous Peoples

The TRIPS Agreement includes provisions on copyright and related rights, trademarks, geographical indications of source, patents, industrial designs, layout designs of integrated circuits, protection of confidential information, and control of anti-competitive activities vis a vis contractual licences. It is expected that owners of intellectual property will be able to effectively enforce their rights, something not provided for in existing intellectual property conventions.[120] Member States are required to provide

procedures and remedies under their domestic law to ensure that intellectual property rights can be effectively enforced (Article 1(1), by foreign right holders, as well as by their own nationals (Article 3(1)).

The TRIPS Agreement seeks to internationalise standards of protection under intellectual property law, thereby eliminating trade distortions and impediments to international trade that arise from incompatible legal systems. Article 3(1) for example, provides that each Member State of the World Trade Organisation (WTO) 'shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property'.

Furthermore, the implicit effect of the TRIPS Agreement is that intellectual property law as defined in existing legal instruments will prevail as the legal model for all Member States. For example:

a. the Agreement recognises only private rights and makes no provision for the protection of intellectual property which is held collectively, such as indigenous knowledge of plants or seeds;
b. Articles 2 and 15(2) provide that in relation to trademark law, there should be no derogation from the Paris Convention of the Protection of Intellectual Property 1967 to settle disputes over what material can be refused registration as a trademark; and
c. in relation to patentable subject matter, there is a general obligation for Member States to comply with the substantive provisions of the Paris Convention, and to provide a minimum 20 year patent term for most inventions (Articles 2 and 33).

6.2.1 The Potential Negative Implications of the TRIPS Agreement for Indigenous Peoples

Among the principal concerns raised by the idea of using trade access as a means of imposing intellectual property laws, and of internationalising the existing (Western) intellectual property regime are the following :[121]

a. that the TRIPS Agreement will lead to an extension of monopoly control by transnational corporations over production and distribution;
b. that innovation in the public domain, which is mostly for domestic, local and public use, will be rapidly privatised and exploited on a commercial basis;
c. that the customary practices of sharing knowledge and skills, and other informal, communal systems which have facilitated innovation in the public domain, will be dismantled and undermined;
d. that it will deepen the North/South rift, with ensuing unfair and unequal exchange;
e. that it will facilitate increased occurrence of bio-piracy of biological and genetic resources from indigenous peoples and local communities; and
f. that communities and cultures (particularly indigenous communities) may be irreversibly damaged by the forced introduction and enforcement of the foreign concepts of intellectual property law (such as the concepts of exclusive ownership and alienability), and the further erosion of their means of self-determination.

Although these concerns reflect the worst possible case scenarios that may arise as a result of the enforcement of the TRIPS Agreement, the language of the Agreement is such that they are all very legitimate concerns.

Much of the uncertainty surrounding the likely effect of the TRIPS Agreement on indigenous peoples stems from the broadly defined nature of the terms used in the instrument which are open to many levels of interpretation. For example, Article 27(1) which deals with 'patentable subject matter', provides that patents 'are available for any inventions whether products or processes, in all fields of technology, provided that they are new, involve an innovative step, and are capable of industrial application'. None of these terms are defined, leaving it unclear as to what constitutes a 'new' invention, or whether the Northern industrialised model of 'innovation', rather than that of indigenous and local communities, is intended. This Article also assumes that anyone wanting to patent an 'invention' does so in

order to commercially develop it through an industrial process; clearly an intention that should not be assumed in the case of indigenous peoples and local communities.

Similarly, Article 27(3)(b) presents a serious definitional question. This Article provides that there is scope for exemption from the application of patents for 'plants and animals other than microorganisms' and 'essentially biological processes'. Cameron and Makuch describe this language as "nebulous", pointing out that Western jurisprudence reflects the fact that the distinction between natural plants and animals, and genetically modified microorganisms is becoming increasingly blurred.[122] However, if this Article were interpreted in a manner that did permit patent protection for all proposals involving only one step in step-by-step methods of engineering, the effect could be that those Members to the Agreement who had previously narrowly interpreted this Article, could be required to amend their domestic intellectual property legislation to permit the patenting of other life forms. The obvious implication of such a development is impingement on State sovereignty, and the imposition on States of legal regimes that are inappropriate for their social, cultural, political and economic circumstances.

As an alternative to standardising domestic legislation in relation to intellectual property, Article 27(3)(b) of the TRIPS Agreement also allows Members to 'provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof'. As Nijar points out, the only international model for *sui generis* legislation in this area is the UPOV system under the auspices of the FAO, which provides Plant Breeders' Rights.[123] However, it is difficult to argue that this system provides 'effective' protection for new plant varieties, primarily because of the difficultly of developing a rigid set of criteria against which 'effectiveness' could be judged. In particular, it is highly questionable that Plant Breeders' Rights are able to provide indigenous plant breeders' 'effective' protection of their rights in relation to plant genetic resources (as discussed in section 4.8).

The implication of the language in Article 27(3)(b) is that the system of Plant Breeders' Rights is considered the suitable model for legislation in relation to plant genetic resource management,

and that the effectiveness and legitimacy of any *sui generis* designed to accord with this provision of the TRIPS Agreement will be judged against the UPOV model. The possibility that, from the perspective of many indigenous peoples and plant breeders in developing countries, the UPOV system is fundamentally flawed, has not been contemplated.

For those Members to the TRIPS Agreement who are concerned by the possible ethical implications and restrictions on sovereignty that could be raised under Article 27(3)(b), Article 27(2) provides a potential safety hatch. This Article allows States to exclude from patentability certain inventions, if necessary to prevent their commercial exploitation in the interests of morality (*ordre public*). It explicitly includes protection of human, animal, or plant life, health and the prevention of serious environmental damage. However, again, in spite of the potentially broad powers this Article may appear to create for States, Cameron and Makuch argue that it will most likely be narrowly interpreted by the World Trade Organisation. These authors suggest that there is likely to be an 'onerous' burden upon Members to unequivocally demonstrate the link between patent protection and detriment to 'human, animal or plant life, health protection, or environmental damage' which they will have extreme difficulty in doing.[124]

6.2.2 Opposing Views: The TRIPS Agreement Provides a Framework for the Protection of the Heritage of Indigenous Peoples

The potentiality that the TRIPS Agreement could be implemented in a manner which does not seriously compromise the rights of indigenous peoples is supported by Dr Erica-Irene Daes. In fact, in her *Supplementary report on the protection of the heritage of indigenous peoples,* Daes concludes that Member States of the WTO are 'required to provide protection, under national legislation, for those elements of the heritage of indigenous peoples which the peoples concerned choose to remain confidential'.[125]

Dr Daes' conclusion is drawn from her interpretation of a number of Articles of the Agreement. Firstly she refers to the ability of

Member States to implement domestic legislation which provides 'more extensive protection than is required by this Agreement', provided that this legislation does not contravene the terms of the Agreement (Article 1.1). Secondly, under the Agreement, Member States retain the power to make laws which they 'deem necessary to protect public health and nutrition, in addition to their power to promote the public interest in sectors of vital importance to their socio-economic and technical development" (Article 8). Thirdly, Dr Erica-Irene Daes notes the ability of Member States under Article 27(3)(b) of the Agreement, to deny patents to particular categories of invention, including those which are deemed to be in conflict with the ethical and moral values of the society in question, or 'diagnostic, therapeutic and surgical methods for the treatment of humans or animals'.

Finally, and perhaps most importantly, Dr Erica-Irene Daes also draws particular attention to Article 39.2 of the Agreement, which provides that:

> Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices as long as such information:
>
> a. is secret in the sense that it is not, as a body or in the precise configuration of assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
> b. has commercial value because it is secret; and
> c. has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

This provision of the TRIPS Agreement brings Dr Erica-Irene Daes to the conclusion that Member States of the Agreement are required to 'adopt laws for the protection of information which is undisclosed, and has commercial value, even if it is not eligible for copyright or patent protection'. In such instances, she notes that the duty of Member States to protect this information would

require them to develop a legal instrument(s) which provides a level of protection that exceeds that provided by the concepts of 'trade secrets' or 'know-how'.

Furthermore, Article 39.2 requires Member States to provide comprehensive protection for indigenous heritage. The language of this Article is 'broad enough to cover most of the teachings, ceremonies, songs, dances and designs that indigenous peoples consider sacred and confidential and are currently threatened by commercial exploitation. The Special Rapporteur is therefore drawn to the conclusion that States Members of the WTO are required to provide protection, under national legislation, for those elements of the heritage of indigenous peoples which the peoples concerned choose to remain confidential'.

Although, as eminent jurist, Dr. Erica-Irene Daes has correctly recognised, these Articles and in particular Article 39.2, provide Governments with the means to comprehensively and adequately recognise and protect the cultural and intellectual property rights of indigenous peoples, there are likely to be those Governments which interpret these Articles in a very different fashion. For example, Governments are within their rights under the Agreement to adopt a minimalist or lowest common denominator approach to the development of domestic intellectual property law; this is a real danger. They need only develop laws which are consistent with existing models of intellectual property as expressed in international instruments such as the Paris Convention; they are not required to provide more protection than that generally required under the Agreement.

Similarly, the ability to make new laws 'to promote the public interest in sectors of vital importance to their socio-economic and technological development' as set out in Article 8, is open to those Governments which decide such legislation is actually 'necessary'. In determining whether such legislation is in fact necessary, Governments must be certain that it would comply with the 'least trade restrictive' requirements imposed under various WTO Agreements.[126] Governments would also be restricted in the content of legislation drafted under Article 8 as any new laws must be consistent with the provisions of the TRIPS Agreement. Only measures outlined in Article 27 as

constituting grounds for exemption for the TRIPS Agreement would be permissible. Therefore, although the TRIPS Agreement appears to reaffirm the rights of sovereign Member States in relation to their development of domestic legislation, it encroaches upon the breadth of that sovereignty, and in so doing, may threaten the ability of indigenous peoples within Member States to more fully enjoy their right of self-determination. States may hide behind a conservative interpretation of the Agreement to deny indigenous peoples their rights to self-determination and their territories.

Furthermore, the language used in Article 39.2 presents a number of significant challenges to indigenous peoples seeking to protect their cultural and intellectual property. For example, where Governments are required to develop mechanisms to protect secret information, this information must not be known in the public domain, it must be commercially valuable, and sufficient steps need to have been taken 'by the person lawfully in control of the information, to keep it secret'. The latter of these requirements suggests that not only does the information have to be held by *one* person (rather than collectively held by a community), but that person must be 'lawfully' recognised as the holder of that information. This raises the question as to whether the national (presumably non-indigenous) legal system is able to recognise that under a particular indigenous legal system, the said person is deemed to be 'in control of the information'. The implication of this language is that where an indigenous legal system is not recognised by the State in question, the conditions of Article 39.2 could not be satisfied, and the duty of that State to protect indigenous cultural and intellectual property would not exist.

6.3 The World Trade Organisation and its Administration and Enforcement of the TRIPS Agreement

The approach taken by the World Trade Organisation (WTO) in its administration and enforcement of the TRIPS Agreement is likely to determine how this Agreement will impact on indigenous peoples. Obviously the Agreement presents Governments which are supportive of recognising and promoting the rights of

indigenous peoples within their jurisdictions, with a framework that allows them to take very positive steps to further these rights. However, the Agreement also contains sufficient loopholes for those recalcitrant Governments which prefer to ignore or marginalise the rights of indigenous peoples within their jurisdictions.

6.3.1 The Origins, Functions and Powers of the WTO

The decision to establish a new international body to oversee world trade was taken at the Uruguay Round of the GATT in 1994. This new body, the WTO has since replaced the long complex rounds of multilateral negotiations, like the Uruguay Round, which were characteristic of the GATT. In their place, the WTO holds negotiations on different aspects of trade separately and in parallel in separate committees or councils under its auspices. The Council for Trade Related Intellectual Property Rights is one of the three subsidiary councils under the GATT Agreement which was set up to monitor compliance with the TRIPS Agreement. The TRIPS Council also acts as a forum for consultations and assists in dispute settlement procedures.

The WTO has been designed to act as the forum for all future negotiations on trade and related matters, and as the mechanism for dispute settlement for all Uruguay Round and previous international trade agreements. It is proposed that the WTO will make all decisions on the basis of consensus, but where this cannot be reached, a majority vote, with each Member State having one vote will be held. However, in view of the operation of this system during the Uruguay Round, it should not be assumed that it is necessarily able to ensure that all countries have equal voting power. As Atkinson has noted,

> A constant complaint during the Uruguay Round was that the more powerful nations dominated. Smaller countries with fewer resources and smaller delegations found it difficult to keep up; and many important negotiations were simply carried out bilaterally between the big powers with other countries merely presented with a *fait accompli*.

In view of the fact that the voice of indigenous peoples will only be able to be voiced in the WTO through the filter of representative governments who choose to articulate those views, there is little to support the view that the WTO will become a forum that champions the rights of indigenous peoples.

It is also important to note that the WTO's powers of action to redress alleged breaches of the TRIPS Agreement are triggered only in response to complaints brought to it by Member States; it is not required or able to act as a watchdog on world trade. Nor do indigenous peoples have legal standing to bring proceedings before the WTO or to participate in such proceedings.

The WTO is equipped with multilateral consultative and dispute settlement mechanisms to deal with breaches of the various Agreements under the Uruguay Round. When a dispute between two countries is brought to the attention of the WTO and is not able to be settled by negotiation, a panel of experts is then asked to make a ruling. This ruling, if accepted by the General Council of the WTO (responsible for carrying out the functions of the WTO), becomes binding on all Parties.

Countries which do not fulfil their obligations under the ruling face stiff penalties. Those countries found by the WTO to be in breach of the Agreement can be subjected to retaliatory measures, such as trade sanctions against their major exports; prevention of access to lucrative markets; or import restrictions in any sector (not necessarily a sector that is governed by the TRIPS Agreement).

This ability to approve cross-retaliation gives the WTO 'enormous and unusual powers'.[127] The mere threat of such retaliatory action by the WTO could also act as a very effective means of further restricting the sovereign rights of many Member States to implement intellectual property regimes which are best suited to their individual, social, cultural, environmental, political or economical circumstances. Clearly there are potentially very detrimental implications for indigenous peoples if this power is exercised in a manner designed to internationalise intellectual property law at the current levels of protection.

6.3.2 The Interrelationship between the TRIPS Agreement and the Convention on Biological Diversity

It is currently unclear how the WTO would resolve a dispute between States which were in disagreement about whether their obligations under the Convention on Biodiversity or the TRIPS Agreement prevail, or vice versa. This is essentially a question of whether international environmental law can prevail over international trade law, or whether such questions can be determined by the WTO, and if so, whether international trade interests will prevail.

It is however clear that not all Members of the TRIPS Agreement are Contracting Parties to the Convention on Biological Diversity (CBD), and vice versa. China for example, is not yet a Member of either treaty. For a trade and environment dispute to arise between two States, regardless of which treaty prevails, it would first be necessary to ascertain which treaty each country is a Party to, and whether there is in fact any inconsistency in the treaty obligations of each Party. This is consistent with the Vienna Convention on the Law of Treaties, which provides that 'a treaty does not create either obligations or rights for a third State without its consent' (Article 34).

The Vienna Convention further provides that where there is an inconsistency between two treaties, the treaty most recently coming into effect (depending on the language in each treaty) will prevail (Articles 30, 59). As Brownlie writes,

> The relation of treaties between the same parties and with overlapping provisions is primarily a matter of interpretation, aided by presumptions. Thus it is to be presumed that a later treaty prevails over an earlier treaty concerning the same subject matter. A treaty may provide expressly that it is to prevail over subsequent incompatible treaties .... [and] a particular treaty may override others if it represents a norm of *jus cogens* [customary law].

There are, as yet, no expressed terms in either treaty to indicate which should prevail where inconsistencies arise. This is a matter which will become clearer as a body of law emerges in this area.

It is however anticipated by some legal commentators that inconsistencies could arise between the CBD and the TRIPS Agreement as a result of Article 22 of the CBD. As mentioned in section 5.3.2 of this paper, the CBD provides that the rights and obligations of Contracting Parties derived from any existing international agreement are not affected by the CBD, except where the exercise of those rights and obligations would cause serious damage or a threat to biological diversity (Article 22). When this provision of the CBD is considered in conjunction with the provisions of the TRIPS Agreement that allow certain inventions to be exempted from patentability on the grounds of *ordre public* (Article 27(2)), or if they are 'plants, animals and other microorganisms' (Article 27(3)(b), there is an obvious argument that the international community in both instruments intended to ensure that the Contracting Parties were provided a legal basis for State action to protect biodiversity.

Furthermore, given the special role that indigenous peoples have in the conservation of biodiversity, measures taken to protect indigenous rights in relation to their cultural and intellectual property could be located under the umbrella of the more general provisions of the TRIPS Agreement which are designed to accommodate activities that will protect biodiversity, such as those in Article 27(3)(b).

The WTO's Trade and Environment Committee (refer to section 8.8 of this paper) has been examining the question of whether there is any inherent conflict between the conservation of biodiversity and the promotion of 'effective and adequate' protection of intellectual property rights. Although the Committee concluded in December 1996 that there is no inherent conflict between these two objectives, it has also recommended that further work is required to more fully explore the relationship between the relevant provisions of the TRIPS Agreement and the goals of environmental protection and sustainable development.[128] It would therefore be premature to assert that the provisions of the TRIPS Agreement are consistent with and supportive of the provisions of the CBD.

6.3.3 WTO and its Investment Activities

Further to the impact of the TRIPS Agreement on indigenous peoples, is the potential impact of foreign investment in developing countries, and in turn, its impact on indigenous communities. The provisions of Trade Related Investment Measures (TRIMS) and the WTO Committees involved in monitoring TRIMS are other areas which indigenous peoples need to consider monitoring more closely.

CHAPTER 7

7. SUGGESTED ALTERNATIVE MODELS

7.1 Introduction

The need for a coherent legal framework that recognises indigenous peoples' rights generally, and more specifically their diverse knowledge systems and innovation in biological resource improvement and management, is of crucial importance. The existing international intellectual property framework has failed to perform this role, and clearly favours those with ready access to economic and legal resources. The TRIPS Agreement in particular, has not been tailored to acknowledge the intellectual contribution of informal innovators such as indigenous peoples, and therefore increases the vulnerability of the cultural practices, knowledge and innovations of indigenous peoples to exploitation and appropriation on an international scale.

Many contemporary domestic legal frameworks and the international legal framework do have the potential to accommodate mechanisms and processes which recognise and promote the rights of indigenous peoples. However, the crucial step that most States remain reluctant to take, is to give genuine effect to the right of indigenous peoples to exercise their self-determination. Most States involved in intergovernmental negotiations which impact on the right of indigenous peoples, are prepared only to recognise indigenous rights to the point that they remain subordinate to or compatible with the continuing sovereignty of the Nation State. This limited and conditional approach to indigenous rights ensures that the control of the use and allocation of natural resources, the national economy, political institutions and decision-making processes generally, remain primarily within the responsibility and control of States.

In reality, this approach towards indigenous rights reflects the persistence within many States of assimilationist and paternalistic sentiments towards indigenous peoples. It is also an approach which indicates that many States lack the strength of leadership

to accommodate indigenous political institutions and systems; indigenous ownership and control of land and natural resources; indigenous laws and customs; and indigenous cultures. Rather than being seen as a means of fostering reconciliation and cultural diversity between indigenous and non-indigenous peoples within their jurisdiction, most States see the recognition of these rights as a threat to the status quo - as destabilising and divisive. So long as the rights of indigenous peoples are not recognised by the world's governments as fundamental human rights, indigenous peoples will continue to wield very little economic and political power within their own countries, as well as on an international basis.

A number of strategies have been proposed to facilitate the realisation of the cultural and intellectual property rights of indigenous peoples. This chapter seeks to provide only a sample of these proposals (rather than an exhaustive list), and to evaluate the extent to which these models are likely to further the rights of indigenous peoples in this area. It is recommended that other commentators are consulted to provide a greater appreciation of the nature of the proposed alternative models.

7.2 The Assessment of Alternative Models

When evaluating alternative legal frameworks and models to provide effective protection for indigenous knowledge and cultural heritage, there are a number of criteria against which each model should be judged. The key criteria include:

a. is the proposed model presently applicable;
b. what political, legal or cultural changes are required for the implementation of the model;
c. what parties and individuals need to act to facilitate the implementation and enforcement of the model;
d. what resources of indigenous peoples are required to achieve and implement the model;
e. how will the model contribute to the practical protection of indigenous cultural and intellectual property;
f. how will the model enhance the evolution of principles designed to provide effective protection for indigenous cultural and intellectual property;

g. are there aspects of the model which could disadvantage indigenous peoples?

Similarly, the Draft Declaration on the Rights of Indigenous Peoples ('the Draft Declaration') contains a number of principles that relate directly to the protection of indigenous cultural and intellectual property against which any alternative model should be judged. In particular, Article 29 of the Draft Declaration should feature in any such evaluation as it provides a concise expression of the needs and aspirations of indigenous peoples in relation to the control and management of their 'cultural and intellectual property' (see section 2.2).

Furthermore, it is important that indigenous peoples consider which institutions and organisations have the power or authority to determine whether a particular model is implemented, or could play a role in its implementation.

7.3 Stephen Brush - Three Possible Approaches

Brush suggests there are three possible approaches to compensating indigenous knowledge. These approaches may be broadly summarised as being firstly a trusteeship scheme, direct compensation, and a rights-based approach. Each approach is outlined below.

7.3.1 Trusteeship

Firstly, the 'top-down approach' has been developed and promoted by international bodies such as the FAO, and national governments and organisations, primarily in developed countries. This approach may be conceptualised as a type of trusteeship between indigenous peoples and various national, regional or international bodies, which is designed to deliver indigenous communities indirect rights through the recognition of 'Farmers' Rights'. As noted in section 5.5, these so-called 'rights' are not legally enforceable, and nor are they a form of intellectual property law. Rather, as Brush notes, 'Farmers' Rights are conceived of as a way to recognise the contribution of farmers in crop genetic resource conservation without directly commercialising

their knowledge or genetic resources'.[129] It is proposed that Farmers' Rights will be indirectly recognised by the implementation of a broad range of conservation and development projects in regions of crop diversity, which are funded by (Northern) countries which have crop breeding industries operating under plant variety protection.

Brush suggests that the approach taken by Shaman Pharmaceuticals, Inc. (while quite separate from the concept of Farmers' Rights) is indicative of this 'trusteeship' approach. Shaman Pharmaceuticals uses indigenous knowledge of medicinal plants in the pre-screening phase to significantly reduce the number of plants that are intensively screened for active ingredients, and to increase the likelihood of success. To demonstrate the company's commitment to reciprocity and the value it places on indigenous knowledge, Shaman Pharmaceuticals channels a percentage of product profits, or compensation, back to the communities and countries in which it works. Compensation is delivered in the form of projects that help to conserve biological diversity, and these projects are developed in consultation with representatives of collaborating countries and indigenous organisations. Refer to section 7.7 for further discussion about Shaman Pharmaceuticals, Inc.

7.3.2 Direct Compensation Through the Existing Legal Framework

Secondly, Brush notes that there is a 'middle-ground approach' whereby indigenous peoples would seek direct compensation for the right to the use of their biological resources and knowledge by applying existing intellectual property mechanisms such as patents, copyright and trade secrets, to indigenous knowledge. An existing example of this model is provided by the National Cancer Institute in the United States, which has developed agreements with indigenous peoples to allow plants to be collected from indigenous lands on the condition that a portion of the profits from the eventual manufacture of anti-cancer drugs derived from those plants will be returned to the indigenous peoples.

7.3.3 A Rights Based Approach

Thirdly and finally, Brush identifies a 'bottom-up approach' whereby indigenous groups regard their cultural heritage as 'property' and require just and fair compensation for the right to use it. This approach differs from the middle-ground approach in that alternative legal instruments such as licenses or contracts, are adapted to ensure the protection and recognition of indigenous property rights. This approach would therefore also afford indigenous peoples the right to exclude others access to their lands and resources, and to veto projects which they did not support.

7.3.4 Critical Analysis

To varying degrees, each of the approaches identified by Brush recognises that indigenous cultural and intellectual property has economic value, and that indigenous peoples have the right to be compensated or rewarded where access to or use of that 'property' occurs.

The 'top down approach' only indirectly rewards indigenous peoples through the mechanism of Farmers' Rights. These rights extend only to farmers who are involved in conserving and making available plant genetic resources and will therefore not be available to all indigenous peoples. For those indigenous peoples who are 'farmers', there is only indirect recognition of their contribution to the conservation of biodiversity, and this recognition is in the form of funds for conservation purposes.

The restricted nature of Farmers' Rights suggests that parallels can be drawn between these rights and tied aid schemes. There are no requirements that the funds provided are commensurate with the commercial value of the knowledge or resources provided. Farmers' Rights do not encompass rights to the use and control of the knowledge and genetic resources they have developed, and cannot be seen as advancing indigenous self-determination as expressed in the Draft Declaration. Nor do they encompass the rights of indigenous peoples in relation to land, culture or intellectual property which are recognised in the Draft Declaration. The limited and inherently paternalistic nature of the Farmers' Rights approach should indicate to indigenous peoples the need for caution when considering this model.

The middle-ground, or direct compensation approach is essentially a continuation of the status quo and reliance on the existing intellectual property law. Clearly this approach is not adequate, due primarily to the failure of these legal mechanisms to acknowledge indigenous rights in relation to self-determination, land and culture, or to acknowledge indigenous knowledge systems and alternative forms of innovation. While some protection may be available to indigenous peoples where they can satisfy the requirements of copyright or patent legislation (for example), this protection will almost certainly be expensive and problematic to obtain and enforce, and will not apply in perpetuity. The degree to which resources are made available to indigenous peoples to negotiate protection of and compensation for their cultural and intellectual property will vary from State to State, as will the degree to which this protection and compensation is forthcoming. The middle-ground approach therefore does not enhance the protection of indigenous knowledge and cultural heritage - it perpetuates an inadequate and incoherent system.

The 'bottom-up approach' outlined by Brush is dependent upon indigenous peoples' rights as expressed in the Draft Declaration being broadly accepted in the community, and by industry and government. If for example, indigenous peoples are to negotiate contracts or seek to restrict access to their knowledge and natural resources by way of license agreements, sufficient resources, including legal and financial support would be needed to ensure that their negotiating strength relative to transnational corporations (for example) is improved. As Nijar suggests below, the negotiating strength of indigenous peoples would be significantly enhanced if domestic legislation was implemented and enforced to set the minimum terms and conditions for negotiations.

The implementation of the 'bottom-up approach' is therefore dependent on a series of significant developments occurring in relation to the recognition of the rights of indigenous peoples. It is likely to be an option in the future for indigenous peoples who have access to adequate resources and recognised rights, but

clearly an option that is worthy of closer consideration by indigenous peoples as a long-term goal.

7.4 Posey and Dutfield -'Traditional Resource Rights'

Posey and Dutfield argue that a new conceptual approach to indigenous intellectual property rights is required. They have devised the concept of 'traditional resource rights', which they regard as a process, rather than a term. The authors consider this new, rights-based approach to be more appropriate as 'knowledge and traditional resources are central to the maintenance of identity for indigenous peoples' and therefore, 'control over these resources is of central concern in their struggle for self-determination'.[130] The authors understand traditional resources to include both tangible and intangible aspects of indigenous resources, including 'plants, animals and other material objects that may have sacred, ceremonial, heritage or aesthetic qualities'.[131]

'Traditional resource rights' is an integrated rights concept that reflects the belief that all human rights are indivisible and interdependent.[132] It is an approach that seeks to integrate universally recognised human rights (such as the right to development) with implied environmental rights (such as the right to an ecologically sustainable environment), and the emerging rights of indigenous peoples as expressed in the Draft Declaration on the Rights of Indigenous Peoples.

A further rationale for a new conceptual approach lies in the inappropriate application of the term 'property' to the traditional resources of indigenous peoples. Posey and Dutfield point out that the concept of ownership and the ability to transfer ownership, which are fundamental to common law notions of property, are 'not only foreign but incomprehensible or even unthinkable' to indigenous peoples.[133] It should be noted however, that many indigenous societies did and do engage in trade of materials, knowledge and objects where such trade is considered mutually beneficial. While Posey and Dutfield acknowledge that indigenous and traditional communities are increasingly being drawn into the operation of the market, this move towards the commercialisation of traditional resources is one that is not always desirable or sought by indigenous peoples.

In the opinion of Posey and Dutfield, the strength of traditional resource rights lies in the fact that numerous international agreements already exist that are relevant to their protection which therefore could be used to form the basis of a *sui generis* system to protect and manage traditional resources. These international agreements include the Universal Declaration on Human Rights, the International Covenants on Human Rights, the Convention on the Conservation of Biological Diversity, ILO Convention 169, the Draft Declaration on the Rights of Indigenous Peoples, the World Heritage Convention, UNESCO conventions that relate to the protection of folklore and cultural property, and national laws.

7.4.1 Critical Analysis

The recognition on the part of Posey and Dutfield of the need to move away from the concept of intellectual 'property' that is alien to most indigenous communities is to be commended. However, it is questionable that its replacement with the terms 'traditional' and 'resource' is consistent with the aspirations of indigenous peoples.

Although at first glance the choice of language made by Posey and Dutfield may appear to facilitate a rights-based approach, it can also be interpreted as language which subtly undermines the principles upon which indigenous cultural and intellectual property rights are based.

For many indigenous peoples, the application of the term 'traditional' to their heritage legitimates and reaffirms inaccurate perceptions among non-indigenous communities in relation to the nature of that heritage. In particular, the suggestion that indigenous peoples have cultural rights based on 'tradition' implies that these rights are defined by and limited to past practices and beliefs. This leads many non-indigenous people to the false conclusion that 'indigenous cultures' were somehow frozen in time with the arrival of (Western) non-indigenous societies, unable to survive or to continue to evolve. However, many indigenous cultures have in fact survived and continue to develop. Their survival continues because they have adopted some elements of non-indigenous cultures and rejected others, whilst also

continuing to maintain and revitalise those aspects of their cultures which capture or reflect their fundamental beliefs and values.

One example of how non-indigenous people can misinterpret contemporary indigenous culture occurred recently in the State of New South Wales in Australia, where five national parks in that State were handed back to the 'traditional' Aboriginal owners to be jointly managed by the respective Aboriginal communities and the State National Parks and Wildlife Service.[134] Both prior and subsequent to the passing of the Act to facilitate this hand-back, a coalition of State environment organisations have been lobbying State Parliament to amend the Act so that Aboriginal peoples exercising their hunting and gathering rights in the parks cannot use modern hunting instruments such as guns, or access hunting grounds in the parks with four-wheel drives. These demands have deeply saddened the Aboriginal peoples of NSW, and reopened what many considered were healed wounds.

Similarly, the application of the term 'resource rights' to indigenous cultural heritage raises serious concerns among many indigenous peoples. These concerns stem from the fact that although applying the term 'resource' to an object implies the embodiment of value in that object, it is a value that can only be realised if that object is brought into the market. While it might be the intention of indigenous peoples in some communities to commercially develop aspects of their cultural heritage, the message which the term 'traditional resource rights' sends to the broader community is that indigenous cultural and intellectual property should be valued primarily because it is a resource, and as such should be commercially developed in order to have its value realised in the market place. Particularly in relation to secret and sacred aspects of indigenous heritage, this is clearly not the wish of all indigenous peoples. The use of the term 'resource' is therefore unlikely to assist indigenous communities in their efforts to protect their cultural and intellectual property from commercial exploitation and appropriation.

Posey and Dutfield envisage that traditional resource rights could 'provide a source of principles to guide the process of dialogue between indigenous and local communities and governmental and non-governmental institutions, for example, through

innovative contracts ... new codes of ethics and standards of professional conduct, socially and ecologically responsible business practices and holistic approaches to sustainability'. However, in view of the fact that most of the international agreements they suggest are relevant to the protection of traditional resource rights do not specifically refer to indigenous peoples and their rights, it is questionable that such agreements are suitable to form the foundation or to act as a guide in the protection and management of the rights of indigenous peoples. Similarly, reliance on voluntary mechanisms such as codes of ethics and professional codes of conduct are unlikely to significantly improve the level of protection currently available to indigenous knowledge and cultural heritage.

Furthermore, much of the legal framework outlined by Posey and Dutfield as relevant to the protection of traditional resource rights can be categorised as 'soft law' that is not legally enforceable. The poor record on the enforceability of international law generally, and universally recognised human rights in particular is widely documented elsewhere. It is important to note also that the one document referred to by Posey and Dutfield which relates specifically to indigenous peoples that has the status of law, ILO Convention 169, is the subject of stringent criticism by many indigenous peoples.[135]

While the Draft Declaration on the Rights of Indigenous Peoples is the strongest articulation of indigenous rights as expressed by indigenous peoples, it should be noted that this is a *Draft Declaration* - that until it is adopted by the United Nations General Assembly it does not yet carry the force of law. In the interim, the Draft Declaration is able to form the basis for analysis and legislative programs by national governments, and to thereby guide the development of *sui generis* legislative and policy programs, and it is in this capacity that its relevance to the protection of traditional resource rights should be understood.

7.5 Lesser - 'Reserved Rights'

As the name implies, reserved rights are rights that lie dormant in indigenous cultural and intellectual property, and are activated when the commercial value of this material is recognised at

some time in the future. The nature of the trigger mechanism is not defined by Lesser, but its activation appears to be dependent on the following steps occurring:

a. the commercial value of indigenous cultural and intellectual property is recognised both within and outside of the indigenous community in which it originated;
b. another Party (such as a corporation), wants to commercially develop these values; and
c. this other Party recognises that the indigenous custodians possess the right to some form of compensation or benefit in return for permitting the commercialisation of their cultural or intellectual property.

Lesser suggests that the term 'sequested rights' offers a more elaborate, legalistic means of expressing what 'reserved rights' are, whereby to 'sequester' means to take temporary possession of something as security against future claims. In this sense, 'reserved rights' could be interpreted as providing indigenous communities with the conceptual legal framework to develop formal agreements or contracts with corporations which express interest in commercialising indigenous intellectual property. A central element of any such agreements would be that the indigenous intellectual property holders gain formal legal rights in relation to determining the future use of the intellectual property that has been shared between the Parties.

A further rationale for Lesser's advocacy of a 'reserved rights' system stems from his conviction that the rights of indigenous peoples which are generated by their continuing development and management of plant genetic resources, differ fundamentally from the rights awarded to the owners of intellectual property. As Lesser notes,'indigenous rights to genetic resources are distinct from intellectual property rights. To use the terms interchangeably confuses and burdens the issue.'[136] Lesser also notes that 'referring to indigenous rights as intellectual property rights confuses the issue and flusters practitioners who have a personal commitment to the integrity of the existing mechanisms [of intellectual property law]'.[137] In this sense, Lesser shares the conviction of Posey and Dutfield that the cultural rights which

indigenous peoples possess as a result of their custodianship of their heritage, differ fundamentally from conventional intellectual property rights. It is therefore inappropriate and misleading to continue to suggest that existing intellectual property regimes can adequately recognise and protect the cultural rights of indigenous peoples.

The system of reserved rights proposed by Lesser therefore operates in a similar manner to contracts, rather than the legal mechanisms which are designed to protect intellectual property rights. However, where contracts are either secret or access to them is restricted by certain controls, reserved rights are designed to facilitate the sharing of knowledge. In this sense, reserved rights appear to be a modification of contract law which seek to recognise and protect the particular rights of indigenous peoples.

Lesser notes that the implementation and enforcement of appropriate national legislation is the first essential step in the process of establishing a reserved rights system. This legislation should be designed to extend to indigenous peoples 'exclusionary power' over their knowledge and resources, thereby ensuring them 'bargaining power' in negotiations with those who are interested in using and having access to their knowledge and resources. By empowering indigenous peoples to either permit or deny access to their knowledge and resources, indigenous peoples have the ability to protect and manage them. Legislation is also an important means of ensuring that indigenous peoples who choose to share their knowledge and resources with others have a statutory right to be financially rewarded for doing so.

The second purpose of legislation in this area is to regulate access to genetic resources. As Lesser explains,'once the knowledge is revealed, the form of control available is through access to the genetic resources themselves. If would-be users have both the resources and knowledge about use, nothing remains to withhold. ...If access can be regulated, then the ability to exclude connotes bargaining power. ...Access laws provide the negotiating power to which can be tied a requirement of payment. ...The minimum need is for the holder of the rights over the genetic material to agree to protect the knowledge rights of the indigenous peoples'.

One of the primary benefits of this duel contractual and legislative approach is, in Lesser's opinion, that indigenous peoples who make their knowledge of genetic resources available, are empowered to have their rights recognised and to seek compensation for sharing their knowledge on an on-going basis. For example, where an indigenous community has previously made their knowledge available to another Party for publication, they would be entitled to a payment from that Party. Furthermore, if this published material were subsequently commercialised, that indigenous community could also expect to receive royalties from its commercialisation.

Lesser identifies another of the key advantages of the 'reserved rights' approach as being its ability to separate the ownership of genetic resources from the ownership of knowledge about those resources. Indigenous peoples may for example, have difficulty in demonstrating their ownership of a particular variety of plant, but they are likely to have less difficulty in establishing ownership of knowledge in relation to that plant. Lesser does however, note that a reserved rights approach is unlikely to be able to extend protection to indigenous knowledge when that knowledge has been previously shared and is therefore considered to be in the public domain, which is often the case in relation to traditional remedies. One possible solution to this limitation which he proposes is the development of regional agreements.

Lesser notes that the appeal of the reserved rights approach to indigenous peoples may also be limited by the central role that the State is required to play in the implementation of the scheme. For example, in most cases, the State is likely to remain "the controller of the genetic resources", and as such indigenous peoples are likely to have to continue to rely on the State to ensure that their reserved rights are realised in each agreement. Lesser also notes that this coordinating role for government is one which they are likely to perform in return for substantial financial reward, a reward which Lesser expects is likely to be greater than that shared by the indigenous community. This is a 'limitation' which Lesser suggests is more acceptable than the State or the indigenous community receiving nothing.[138]

7.5.1 Critical Analysis

The concept of reserved rights is unlikely to be broadly appealing to indigenous peoples as it rests on the premise that indigenous rights are dormant until non-indigenous people develop a commercial interest in them. This concept is therefore fundamentally at odds with a central principle of all cultures, namely that they are living, organic expressions of identity. It appears that it primarily offers protection to indigenous peoples and local communities who are interested in commercialising knowledge that relates to plants, seeds, and extracts and medicinal treatments derived from flora and fauna, which would be of interest to transnational corporations. It seems less suited to the protection of indigenous artwork, language, sacred and significant places and objects, and so on.

Further limitations of a reserved rights approach include the central role that national governments play in the establishment, protection and enforcement of these rights. It is essential that national governments enact legislation to establish the rights of indigenous communities, and that governments are then willing to support indigenous efforts to negotiate fair access and compensation arrangements in relation to their knowledge and resources with other Parties. Associated with these limitations is the financial reward expected by governments for their political support in such negotiations, which is likely to significantly reduce the benefits returned to indigenous communities. This approach also fails to recognise the rights of indigenous peoples in relation to their ownership and control of natural resources; rather it reaffirms that the ownership and right to exploit these resources rests solely with the State.

On a positive note, Lesser's model does provide a means of separating the ownership of genetic resources from the ownership of knowledge about those resources, thereby improving the ability of indigenous communities to achieve some form of legal protection for their knowledge of resources. Furthermore, Lesser's model is oriented towards the sharing of knowledge and resources, which many indigenous peoples are seeking to do where they can make free and informed decisions for themselves which strengthen their territorial and cultural rights.[139] Lesser

does note however, that this sharing of knowledge can only occur where the knowledge is not widely known.

7.6 Nijar - Community Intellectual Property Rights and *sui generis* Legislation

Nijar proposes a comprehensive and integrated *sui generis* legal regime for the protection of 'community intellectual rights'; a regime which complies with the provisions of the TRIPS Agreement and the Convention on Biological Diversity. It is a proposal which recognises that the current intellectual property system was developed in response to the failure of property law to extend protection to the technological innovations of the industrial revolution, just as intellectual property law is now failing to meet the challenges thrown up by the emergence of biotechnology and the increasing recognition of 'community rights'.

Nijar has explicitly recognised that his is a pragmatic approach. Indeed, he states that,

> The proposed rights regime necessarily follows the route of the State as the central authority through which the rights of indigenous peoples and local communities are established, validated and claimed.

Nijar argues that his pragmatism is required by the nature of the international legal framework within which indigenous peoples exist. More particularly, he argues that the most likely vehicles for action are: the Convention on Biodiversity which rests upon the sovereignty of the State over the biodiversity within its geographic boundaries; the TRIPS Agreement which allows States to develop *sui generis* systems for the protection of plant varieties that are commensurate with UPOV Plant Breeders' Rights system; and the enforcement of the rights contained in international legal instruments which can only be implemented by States. In short Nijar argues that the international legal framework purports to exist to protect the rights of indigenous peoples - what remains to be achieved is a concerted effort on the part of States to interpret and apply that framework in a manner that protects the rights of indigenous peoples and local communities.

Nijar does however, acknowledge that many States have been a 'hindrance to and have marginalised' indigenous peoples. He therefore conditions his advocacy of the role of the State by arguing that it should only 'be seen as the authority vis-a-vis international enforcement' of the rights established by international instruments; rather than 'the appropriate channel for the vindication of the rights of indigenous peoples'.[140] It is also his view that the sovereign rights held by the State are rights which it holds 'in trust' for the community, which means that 'within the State, the real authority in relation to the control of these rights is accorded to, and vests in, the local community and indigenous peoples. Once the international community formally accepts indigenous peoples as legal entities in their own right, with a status equivalent to nation states, they will then of course, claim, enforce and defend their own rights'.[141] In other words, Nijar's model is proposed as an interim measure that is designed to extract the maximum levels of recognition and protection of the rights of indigenous peoples from the existing legal framework, until such time as indigenous peoples themselves are able to fully assert and protect their rights.

In addition to proposing the pragmatic utilisation of the international framework to the advantage of indigenous peoples, Nijar recognises that *sui generis* domestic legislation is necessary to adequately protect the knowledge of indigenous peoples and local communities. To this end, he has developed a *Community Intellectual Rights Act*, to operate in conjunction with a *Collectors of Biological Resources (Control of Licensing) Act*, and a *Contract between the Collector and the Government.*

7.6.1 Draft Model Community Intellectual Rights Act

The *Community Intellectual Rights Act* is based on the underlying belief that indigenous peoples and local communities need an effective mechanism to protect their innovations and knowledge from commoditisation. The Act implicitly acknowledges that the existing intellectual property regime has failed in this regard, and must be replaced by a *sui generis* system that formally recognises the right of these peoples and communities to deny access to their traditional resources.

The Act rests on the premise that indigenous peoples and local communities have a right to safeguard their cultures, lifestyles and practices, as they understand and practise them. It seeks to reassert the cultural values and practices of indigenous peoples through the following means:

a. recognition that among indigenous peoples and local communities, 'innovation' is a cumulative process that occurs informally, collectively and incrementally. It includes all of the manifestations of community creativity which have domestic, common and social value, rather than being limited to the technologically improved end-product which has an industrial application;
b. recognition that indigenous peoples and local communities are the 'sole custodians and stewards' of their innovations 'at all times and in perpetuity'.[142] Therefore, no innovation can be sold, transferred, leased or assigned without the consent of its custodians, and any transaction that does occur that impairs the integrity of that innovation can be declared void by its custodians;
c. by moving away from the requirement of exclusive, monopolistic ownership, the Act encourages and facilitates the non-commercial and free use and exchange of knowledge and innovation among indigenous peoples and local communities for non-commercial purposes,
d. allows indigenous peoples and local communities to commercially utilise their knowledge and innovations if they so choose, but in so doing, the provisions of free exchange would not apply. Rather, the full and informed consent of the community, or all of the communities which share in the stewardship of that knowledge, are required prior to commercialisation. The community(s) have the power to declare void any transaction which has the effect of destroying or impairing the integrity of their knowledge. The community(s) would also be entitled to a fixed percentage of the profits made upon the commercial use of their knowledge whether or not their consent was granted;
e. the onus of evidentiary proof in relation to the rightful ownership of an innovation is shifted to those challenging the declaration from an indigenous community that it is derived from their knowledge. Indigenous peoples and local communities can prove the existence of their innovation in any manner acceptable to their cultural practices, including folklore and oral history;
f. indigenous peoples could register their innovations on a 'Registry of Invention', although failure to register would not result in a forfeiture of their innovation rights, and would not be conditional on formal acceptance by a registering authority. Similarly, indigenous peoples could develop a 'Community Register' to document all known plant and animal species with full details of their uses. With each type of register, indigenous peoples would be in a position to refuse access to the register or to set conditions under which access would be allowed. These registers may also be useful as evidence of intimate knowledge of the local environment to support a claim to legal title of traditional territories; and
g. any State, non-government organisation, indigenous or local community or its representative organisation has the legal standing to enforce, monitor and further the right of indigenous peoples and local communities to their innovation and any matters in relation to the utilisation, exchange or impairment of this knowledge. The indigenous peoples or local community will always exercise the prior right to represent themselves, and to be informed at every stage of the process.

Nijar also proposes that the definition of 'community' to be used in the *Community Intellectual Rights Act* should encompass both indigenous peoples and local communities (including farmers). Furthermore, in view of the 'powerful and strong factors unifying the two groups,' (such as their claims to collective rights and land rights, their marginalised position in society, and their strong traditions of free exchange and transmission of knowledge and resources between communities and generations), Nijar suggests that it is appropriate to jointly refer to indigenous peoples and local communities as 'local communities'.

7.6.2 Draft Model Collectors of Biological Resources (Control and Licensing) Act

The draft model *Collectors of Biological Resources (Control and Licensing) Act* is designed to complement the draft model *Community Intellectual Rights Act* by controlling access to and use of biological resources. The Act is implemented by the signing of a contract between prospective collectors and the respective source State, which sets out the precise details of the duties and obligations with which each Party must comply.

Nijar recognises that the Convention on Biological Diversity broadly outlines the minimum terms and conditions for biodiversity prospecting, namely that access is made subject to 'prior informed consent' of the contracting Party providing the resources; the resources are used for 'environmentally sound' purposes; and access occurs on 'mutually beneficial terms'.

Accordingly, Nijar argues that legislation at the national level provides States the opportunity to define and implement these otherwise ambiguous terms in a manner that protects and promotes the rights of indigenous peoples and local communities within their respective jurisdictions. In turn, he proposes a contract system which gives States the ability to apply such legislation in a flexible manner and on a case by case basis, thereby meeting the varying needs of prospective collectors of biodiversity.

The proposed *Collectors of Biological Resources (Control and Licensing) Act* requires each applicant to apply to the respective State for a licence to collect biological or genetic materials. Those applicants granted a licence but who fail to comply with its requirements could have their licence revoked and face civil or criminal prosecution.

The suggested requirements and obligations to be agreed in the contract between the collector and the source State which should apply before, during and after the collection of samples, include the following:

a. development of bioprospecting plans prior to any actual collection, detailing what species would be collected and in what quantities, how they would be used and stored, what benefits would be generated by this process for the

source community/country, and the financial arrangements for the collection;

b. a commitment to abide by inter alia the cultural practices, traditional values and customs of local communities (where local community refers to both farmers and indigenous peoples);
c. the notification of local communities of the nature and purpose of the collection of materials, and their entitlement to obtain duplicate samples from the collector;
d. the lodgement of duplicate samples and scientific data with the source State and other stipulated persons/institutions
e. collaboration with individuals or institutions approved by the source State during all prospecting studies and experimentation;
f. payment to the source States of a fixed percentage of any income arising from the supply of germplasm extracts to a third party, or the payment of royalties arising from the creation or invention of a marketable product from the materials supplied; and
g. call for an endorsement from the collector's State agreeing to indemnify the source State or appropriate community for any losses it may sustain as a result of the collector breaching the licence.

The draft model proposed by Nijar also contains strict measures to prevent the 'usurpation of innovations of communities or indigenous peoples'.[143] To this end, the collector is required to guarantee that:

> No patent application shall be filed within or outside the country in respect of the collected specimens or any part thereof, its properties or activity or any derivatives which utilise the knowledge of indigenous groups or communities in the commercialisation of any product as well as to a more sophisticated process for extracting, isolating or synthesising the active chemical in the plant extracts or compositions used by indigenous peoples or if the seam represents the intellectual right of the indigenous communities.

A further advantage of this Draft Model Act is that it obliges collectors to sign contracts with the State, which 'are usually more easily enforceable outside the source countries' than legislation, which generally lacks any extra-territorial effect.[144]

7.6.3 Critical Analysis

The model proposed by Nijar highlights the problems associated with operating within a legal framework that does not recognise that indigenous peoples are both legal entities and active subjects of international law. While on the one hand Nijar advocates a rights-based approach, his decision to also be 'pragmatic' in relation to the international legal framework, inevitably leads him to accept the State 'as the central authority through which the rights of indigenous peoples and local communities are established, validated and claimed'.

However, if one accepts that the rights of indigenous peoples are inherent rights - that they exist independently of the State and the existing international legal system - then such pragmatism could contradict claims to a fundamental rights-based approach. For most indigenous peoples, accepting the rationale underpinning Nijar's pragmatism would be to bring into question the principles upon which their right of self-determination is founded. The right of indigenous peoples to self determination includes the option of developing political processes and legal systems which are not derived from the legitimate power of the State within which indigenous peoples are located (although in most instances, indigenous peoples opt to operate within the context of the State in which they are located).

Nijar's suggestion that the term 'local communities' could be defined in State legislation to include indigenous peoples, is one that denies the specificity and distinctiveness of indigenous peoples. Furthermore, it is a suggestion which could be misused to support assimilationist arguments, and one that many indigenous peoples would strenuously criticise.

In accepting the framework provided by the Convention on Biodiversity and the TRIPS Agreement, Nijar also accepts that the sovereign right to develop and exploit natural resources

resides solely in the State. His model therefore affirms and legitimates the States' ownership and control of all biological and genetic resources.

The successful operation of Nijar's model is contingent on:

a. the recognition by States of the rights of indigenous peoples in relation to self-determination, their lands and territories, and their cultural heritage;
b. the willingness of States to recognise and protect these rights (to the extent that they remain subordinate to the sovereign rights of the State) through the creation of legislation and licensing arrangements;
c. the willingness of States to support indigenous communities in the protection and assertion of their rights where they are involved in the negotiation of contractual agreements with bioprospectors and other commercial interests; and
d. the willingness of States to furnish indigenous peoples with the legal and financial resources they require in order to maximise their bargaining power vis a vis corporations and other contractual partners.

Although there are some examples of States which have enacted legislation to protect and assure respect for indigenous peoples' territorial, cultural, and intellectual property rights,[145] these States are the exception rather than the rule. However, some of these States, such as Malaysia, some states (internal) in India, and Colombia have chosen to 'pick and choose' from Nijar's model, enacting only those elements of the draft Acts which they feel are relevant. This approach suggests that there has been minimal and/or ineffective consultation with the affected indigenous communities in these countries about the nature of appropriate national legislation to protect their rights. It is therefore important that indigenous peoples closely monitor the implementation of national legislation which is purported to advance and protect the rights of indigenous peoples within particular States.

7.7 Shaman Pharmaceuticals: - Communal Conservation Trust Funds

Shaman Pharmaceuticals, Inc. is a Californian company established in 1990 that is focussed on the discovery and development of novel pharmaceuticals from plants with a history of indigenous use.[146] Guided by the spirit of the Convention on Biological Diversity and the principle of reciprocity, Shaman recognises that indigenous peoples are entitled to 'compensation' for the use of their knowledge about biodiversity. Indeed, Shaman stresses that the guiding principles in its negotiations with indigenous communities must be 'recognition, participation, and equal standing among all concerned'.[147]

A further motivation for Shaman's commitment to reciprocity and the value it places on indigenous knowledge stems from the company's recognition of the interdependence between ecological sustainability and the survival of indigenous cultures. As the company has explained,

> To preserve the rain forest without preservation of shamanic knowledge of the plants in the forest would be to cut ourselves off from cures for present and future diseases. In order to preserve that knowledge and ensure that it is passed on from generation to generation, we must also preserve not only the rain forest plants, but the indigenous knowledge and cultural uses of those plants.[148]

To ensure that the development of novel pharmaceuticals is rewarding for all Parties involved in its creation, Shaman has funded the establishment a non-profit, independent organisation, known as the Healing Forest Conservancy, to develop communal compensation options for the indigenous communities and national governments with whom it works. Although Shaman is yet to commercially market a product, compensation will be in the form of projects designed to:

a. conserve biological diversity by promoting local harvesting of natural products in forests;

b. generate local employment by providing training in technical skills for species collection, identification and inventory of local genetic resources;
c. provide resources to survey, demarcate and deed traditional territories to indigenous communities;
d. develop local markets for non-timber products such as medicinal plants;
e. build and strengthen indigenous institutions and representative organisations through education and communication between forest societies and the 'outside world';
f. link the United States and international practitioners and policy-makers to initiatives that foster the health and welfare of indigenous cultures and tropical forests.

Although Shaman recognises the need to compensate indigenous communities for the use of their knowledge of biodiversity, as well as the need to compensate those States which permit the use of their biotic material, the novelty of its approach is in the way compensation is shared. Regardless of which country the plant originates from, or which indigenous community supplies the knowledge about the use of that plant, Shaman will return a percentage of company profits to all of the indigenous communities and countries with which it has worked.[149]

The rationale for this approach stems from the fact that bioprospecting is a high-risk undertaking that generally requires 12 to 15 years and some US$300 million, but does not always result in a marketable product. The strategy devised by Shaman ensures that all countries and communities who collaborate with Shaman receive a return for their assistance. As Moran explains,

> After a product is commercialised, Shaman will channel a percentage of profits for compensation through the Conservancy. Following indigenous systems of resources use, the Conservancy will deliver to Shaman collaborators communal compensation programs through trust funds that benefit the culture group as a whole, rather than cash payments to an individual healer.[150]

These *communal compensation trust funds* are designed to be managed solely by the indigenous community, and to act as a mechanism for indigenous empowerment and self-determination. Shaman intends that they are administered by a board of local directors which is selected democratically by the community, and that the funds will be distributed long-term on a designated schedule, providing a stable source of income so long as Shaman shows a profit.

In addition to these longer-term compensation strategies, Shaman is also committed to providing indigenous communities with immediate reciprocity in the form of short to medium-term projects designed to enhance the health and welfare of indigenous peoples. Projects range from the provision of preventative and primary health care projects, such as clean water projects; to the establishment of infrastructure for ongoing public health programs; and the provision of laboratory equipment and technical assistance. Shaman stresses the importance of ensuring that the expressed desire of the community must be sought to determine which project(s) is appropriate, but that after 'centuries of inequitable exchange ...it is time for the ethnobiological, academic, and industrial research communities to set and maintain new precedents for ethical and reciprocal relationships' with indigenous communities.[151]

7.7.1 Critical Analysis

The desire on the part of Shaman Pharmaceutical, Inc. to compensate indigenous peoples for the use of their knowledge about biodiversity is commendable. Shaman is one of the few large pharmaceutical companies that recognises the vital role indigenous peoples play in conserving biological diversity, as well as the need to preserve cultural diversity in order to preserve indigenous knowledge. Although Shaman's commitment to 'recognition, participation and equity' is admirable, it is questionable that the strategies it has devised to achieve these outcomes would always be seen by indigenous peoples as consistent with their rights as they are expressed in the Draft Declaration on the Rights of Indigenous Peoples.

For example, it is questionable that indigenous communities would be prepared to recognise the State as holding exclusive sovereign rights over all biotic material within its jurisdiction, as this denies the right of indigenous peoples to 'determine and develop priorities and strategies for the development or use of their lands, territories and other resources' (Draft Declaration, Article 30). This in turn brings into doubt the preparedness of indigenous communities to enter into profit sharing agreements which compensate the State for its consent to grant access to what indigenous peoples consider their own plant resources and sources of traditional medicine.

The strategy proposed by Shaman also appears to be inconsistent with indigenous self-determination in a number of ways. Firstly and perhaps foremost, is the assumption that indigenous peoples will be prepared not only to share what they are likely to consider rightfully their own compensation package with indigenous communities in a range of different countries, but *also* that they would be willing to share it with foreign States. Considering the desire on the part of many indigenous peoples to improve their economic independence and to assert their right to development, it may be the case that they are not prepared to make their knowledge available in return for the promise of a financial compensation package for an unknown amount of money, and which will be shared with many other Parties.

Secondly, it may not always be the case that indigenous communities will want whatever compensation is awarded them to be administered through a trust which receives funds biannually, rather than in one large instalment. Although this might ensure some degree of long-term financial stability, it may not be the community's preferred method of payment, or the preferred means of administering the funds. Moreover, the concept of a democratically elected trust board which controls the funds and is accountable to the community, may be a totally foreign concept to many indigenous communities; it is certainly one that is not beyond corruption.

CHAPTER

8

8. OPTIONS FOR ACTION

8.1 Introduction

This final section proposes to outline some of the options open to indigenous peoples and their representative organisations to achieve greater recognition and protection of the rights of indigenous peoples in relation to their cultural and intellectual property. It is not suggested that any of the options presented here are, in and of themselves 'solutions', but rather that indigenous peoples need to consider a combination of some or all of them, and decide for themselves, which is likely to be the most useful and beneficial approach.

This section seeks to bring to the attention of indigenous peoples and their representative organisations some of the international fora which are active, or becoming increasingly active in relation to the rights of indigenous peoples generally, and indigenous cultural and intellectual property rights in particular. The increasingly inter-related activities of the United Nations Commission on Human Rights (UNCHR), UNESCO, WIPO, the FAO and UNCTAD in relation to indigenous intellectual property issues are touched on, as well as the interest which the WTO Trade and Environment Committee is taking in these issues.

Although not revisited in this chapter, indigenous peoples are already actively involved in the Conferences of the Parties to the Convention on Biological Diversity, and closely monitoring the activities of the WTO in relation to intellectual property. The interrelationship between the CBD and the TRIPS Agreement, and how the implementation of these instruments impacts on the conservation of biodiversity, and in turn, indigenous rights, are matters which indigenous peoples need to follow closely.

In view of the increasing level of activity within the various bodies of the UN in relation to the rights of indigenous peoples, a core recommendation of this section relates to the establishment of a Permanent Forum for Indigenous Peoples at a high

level in the United Nations. Such a Forum is essential for the coordination of the growing number of activities being conducted within the UN that will affect indigenous peoples, and to ensure that indigenous peoples have a strong and on-going voice in such activities.

A further core recommendation relates to the adoption of the Draft Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly, and the need to develop and implement a strategic approach to this end.

8.2 A Permanent Forum for Indigenous Peoples within the United Nations

The proposal to establish a Permanent Forum for Indigenous Peoples (the Permanent Forum) at the highest level within the United Nations (UN) system has been discussed for a number of years. Responding to the calls from indigenous peoples for such a forum, the Danish Government (as promoted by the Greenland Home Rule) has been particularly active in promoting the establishment of a Permanent Forum.[152] This has led to determinations and resolutions in the following fora:

a. United Nations Vienna Conference on Human Rights (1993);
b. UN General Assembly;
c. UN Human Rights Commission;
d. UN Sub-Commission on Human Rights; and
e. UN Working Group on Indigenous Peoples.

The New South Wales Aboriginal Land Council (NSWALC) based in Sydney has also expressed its support for the establishment of a Permanent Forum. In a paper distributed at the Fourteenth Session of the UN Working Group on Indigenous Peoples, and other UN fora (unpublished), NSWALC made the following comments and recommendations:

> ... NSWALC strongly supports, in broad terms, the proposal to create a Permanent Forum for Indigenous Peoples. Fur-

thermore, we consider that the relevant issues are on the table. It is time to discuss **how**, **when** and **where** the Forum should be established. NSWALC believes that the proposals have matured to the point that concrete steps can be commenced.

NSWALC noted also that the scope of the Permanent Forum should be broad in order to allow it to comprehensively deal with all matters that concern indigenous peoples. Concurring with the views of the Danish Government, NSWALC argued that the mandate for the Forum should reflect the fact that indigenous peoples share a very holistic view of the world. It would therefore be appropriate that the Forum take an active role in matters related to Human Rights, the environment, development, health and education, as well as cultural integrity and conflict prevention. It should also 'seek to coordinate the activities of all UN agencies which relate to Indigenous issues'.

Refer to Annexure B for the full text of the paper presented by NSWALC.

8.3 United Nations Commission and Sub-Commission on Human Rights

8.3.1 The Role of the Commission and Sub-Commission in the Protection of the Cultural and Intellectual Property Rights of Indigenous Peoples

As the Special Rapporteur on the Protection of the Heritage of Indigenous Peoples, Dr Erica-Irene Daes has commented,[153] the Sub-Commission and Commission on Human Rights have an instrumental role to play in promoting and protecting the cultural and intellectual property rights of indigenous peoples. Their action in relation to these matters not only falls within their mandates, but is crucial if the disparate activities of various other UN bodies in relation to trade, environment and culture generally are to be coordinated and harmonised.

The existence of several international instruments in the fields of trade, human rights and the environment which recognise the

rights of indigenous peoples to the protection and enjoyment of their heritage, provide a solid foundation from which the Sub-Commission could proceed to develop a legal instrument which provides comprehensive and adequate protection of the heritage of indigenous peoples. This would allow the Sub-Commission to build on the strong foundations and level of expertise it has developed in relation to the rights of indigenous peoples and the protection of their heritage, and to assume a leadership role in relation to other bodies and organs of the international system working on these matters.

8.3.2 The Adoption of the Draft Declaration on the Rights of Indigenous Peoples

It is also appropriate that the Sub-Commission advises the Human Rights Commission as to how best to interpret and apply the universally recognised principles of human rights law, in the context of the rights of indigenous peoples. The Sub-Commission has concentrated much of its attention and expertise on this task for many years, in particular through the development and negotiation of the Draft Declaration on the Rights of Indigenous Peoples by its Expert Working Group on Indigenous Peoples.

The negotiation of the Draft Declaration has directly involved indigenous peoples and their representative organisations, and is widely regarded as one of the most inclusive and democratic that has been conducted within the United Nations. The result is a Draft Declaration that articulates the needs and aspirations of indigenous peoples, and one that if adopted, offers indigenous peoples the opportunity to enjoy and promote those rights on an international scale. In view of the interdependence and indivisibility of the rights of indigenous peoples, it is crucial that the Draft Declaration is adopted in its current form.

8.3.3 Report of the Secretary-General on Human Rights and Bioethics

The UN Commission on Human Rights is concerned by the 'rapid development of the life sciences and the dangers that

certain practices may pose to the integrity and dignity of the individual'. In recognition of the serious ethical and medical implications of developments in this area, the Commission invited Governments, specialised agencies and other organisations of the UN system, and other intergovernmental and non-government organisations to inform the Secretary-General of 'activities being carried out to ensure that the life sciences develop in a manner respectful to human rights'.[154]

In particular, States were invited to inform the Secretary-General of legislative and other measures (such as the establishment of national consultative bodies) taken to address the present and potential problems posed to human rights by developments in the life sciences. One of the underlying reasons for collecting this information is to encourage the establishment of bilateral and multilateral links to facilitate technical cooperation, and exchange of experience and information among institutions, professional societies and Governments dealing with bioethics. Another is the eventual 'elucidation and universal adoption of basic bioethical principles, in a manner that acknowledges the world's diverse moral and cultural perspectives, priorities and values'.[155]

These submissions to the Secretary-General have formed the basis for two reports on Human Rights and Bioethics to date.[156] The focus of these reports has been on developments in the medical sciences, biotechnology and genetic engineering, population and reproductive health, and the broad ethical and moral questions raised by developments in the biological sciences. Although the impact of these developments on indigenous peoples are yet to be directly addressed in the Secretary-General's reports, the Human Genome Diversity Project alone is reason enough for indigenous peoples to seek to have their views in such matters incorporated into future reports.

It is also noted that the UN Sub-Commission has entrusted Mr El Hajje, a Lebanese expert, to prepare a working paper on the potentially adverse effects of scientific progress and its applications for the integrity, dignity and human rights of the individual. This initiative provides indigenous peoples and their representative organisations the opportunity to directly contribute their views for inclusion in the working paper.

8.4 UNESCO

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) is becoming increasingly interested in the protection of the cultural and intellectual property rights of indigenous peoples.

UNESCO has a relatively long history within the UN in relation to cultural issues. The main instrument of international law concerning cultural heritage is the 1972 *UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage,* (the World Heritage Convention). UNESCO also:

a. administers the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (the UNESCO Convention); and
b. in conjunction with the WIPO, developed the *WIPO-UNESCO Model Provisions for National Laws on Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (the Model Provisions on Folklore) in 1984. It should be noted that this instrument has not been adopted or come into force, but is useful as a source of ideas for legal principles and the development of national legislation.

The effectiveness of these instruments in the protection of the cultural and intellectual property of indigenous peoples has been assessed in detail elsewhere,[157] suffice to say here that in practice the strength of the provisions of these instruments depends very much on whether States choose to ratify or adopt each of them; the nature of the domestic laws they may or may not develop to give effect to the instrument within their own jurisdiction; and whether indigenous culture is recognised as the subject of such legislation.

Recent initiatives undertaken by UNESCO suggest that as the designated 'conscience of the United Nations', and in view of the ethical mission which underpins its Constitution,[158] it has a moral duty to promote and protect the cultural rights of the world's indigenous peoples. These initiatives include:

a) the establishment of the *World Commission on Culture and Development* in 1992, which has as its goal 'the development of a world-wide process of debate on the cultural challenges in development', and the mobilisation of the political will and public support to overcome them. To this end, the Commission has:
   i) prepared a detailed policy report entitled *Our Creative Diversity,* to intensify and focus international debate on the linkages between culture and development, and to put cultural perspectives more squarely on the international policy agenda. UNESCO sees the report as providing itself with an opportunity to strengthen its leadership in defining the culturally-sensitive development strategies. It calls on Member States to officially respond to the report, and on interested specialised agencies and non-government organisations for their input. It is intended that the governing bodies of the UN and UNESCO will issue guidelines on concrete measures to be taken, following consideration of the submissions;
   ii) *Our Creative Diversity* contains an international program of action entitled *International Agenda*, which is intended to mobilise action at the national and international levels to address cultural challenges. The suggested actions include the Commissions' annual publication of reports on culture and development; development of an inventory of cultural rights that are not protected by existing international instruments; development of an International Code of Conduct on Culture; consideration of establishing an independent International Ombudsperson for Cultural Rights; a review of accreditation for NGOs to the UN to ensure the widest possible participation of cultural minorities, indigenous peoples and others; the establishment of a World Forum of all accredited NGOs to the UN to offer its views on key global issues; establishment of a UN World People's Assembly to run parallel to the General Assembly; and a global summit on culture and development;

   iii) organised many conferences around the world, focussing on the protection and preservation of the traditional cultures, intangible heritage, cultural property, and the intellectual property aspects of folklore. One of the most recent, a *World Forum on the Protection of Folklore* held in April 1997 in Phuket, Thailand, was organised in conjunction with WIPO. This World Forum was welcomed by Dr Erica-Irene Daes. It marked a watershed for both of these organisations, particularly the WIPO which has been especially 'reluctant to claim any specific competence in this field'.[159] UNESCO and WIPO's joint hosting of the World Forum is indicative of their recognition that their mandates include the protection of the cultural and intellectual property rights of indigenous peoples;

b) the creation in 1994 of the *International Bioethics Committee* to keep abreast of progress in biomedical sciences, particularly genetics, whilst at the same time taking care to ensure respect for the values of human dignity and freedom in biomedical research. The IBC is a multicultural and pluridisciplinary committee made up of 60 members, including Nobel Prize Winners, jurists, philosophers, anthropologists, demographers and sociologists. It is designed to be a forum for discussion and the exchange of information. It also seeks to encourage States to establish national bioethics committees modelled on itself. In fulfilment of a further element of the IBC's mission, the Legal Commission of the IBC has developed a *Preliminary Draft of a Universal Declaration on the Human Genome and Human Rights*, with a view to adopting it in 1997. The Draft Declaration proclaims the human genome 'a fundamental component of the common heritage of humanity'; and it outlines the rights and obligations of researchers and States in these matters;

c) UNESCO proposes to report biannially on the state of protection of the heritage of indigenous peoples worldwide in its Report on the State of Culture;

d) UNESCO has established an Intersectoral Taskforce to deal with matters concerning indigenous peoples. Dr Erica-Irene Daes, has recommended that this Taskforce convene, at the earliest possible opportunity, a technical conference with indigenous educators, scientists and artists, to define the methodology that will be used to collect and evaluate information for future UNESCO reports, such as the proposed annual reports on the state of culture.[160]

These developments within UNESCO indicate that there are many recent developments which offer indigenous peoples important opportunities to participate directly in the discussion of matters which directly affect them. In particular, the development of new instruments of international law by various bodies under the auspices of UNESCO offers indigenous peoples a valuable opportunity to raise awareness and seek international recognition of their fundamental rights.

The ability of indigenous peoples to effectively utilise these opportunities for participation highlights the need which has been repeatedly highlighted, namely that adequate funding must be available to indigenous peoples to attend international meetings, and to contribute to the development of key reports which feed into the international process. Related to this recommendation is the need to broaden the scope within the United Nations system for the participation of indigenous peoples and their representative organisations.

8.5 WIPO

The World Intellectual Property Organisation's recent acknowledgment that the question of the protection of the heritage of indigenous peoples is within its mandate opens important opportunities to indigenous peoples.

Currently, WIPO identifies one of its 'main tasks' as 'cooperating with developing countries in their efforts for development as far as intellectual property is concerned'.[161] The ultimate intention of such cooperation is to encourage States to create or mod-

ernise domestic legislation and institutions, to accede to international treaties and to develop experts in the field of intellectual property.

Cooperation with developing countries is delivered in the form of advice, training and the furnishing of documents and equipment. The resources are provided by WIPO's budget, donor countries or organisations such as the UN Development Program. Generally, these resources are distributed in accordance with a strategic plan which is implemented over several years. Advice is given by the staff of WIPO, and experts selected by WIPO or in attendance at international meetings organised by WIPO. Training can be in the form of study visits, on the job training, or through courses, seminars and workshops in the developing country itself or another country; training tends to focus on the multilateral treaties administered by WIPO, the WTO and the TRIPS Agreement. A further level of training is provided by the WIPO Academy, which conducts encounter sessions on current intellectual property issues at the policy level for government officials from developing countries.

The inclusion of the issues raised by indigenous cultural and intellectual property rights in the programs delivered internationally by WIPO, could significantly advance international awareness about the need for protection of indigenous heritage. Similarly, the opening of a dialogue between indigenous peoples and WIPO, and the extension of these resources and programs to indigenous peoples could act as an important means of empowering indigenous peoples to apply pressure at the national and international level for the development of comprehensive and adequate protection measures for their cultural and intellectual property.

However, it is important that indigenous peoples are mindful of the fact that WIPO currently has a dominant role in determining the nature of the assistance provided to recipient countries and may not necessarily operate in a culturally-sensitive manner. Indigenous peoples would need to ensure that in entering into a relationship with WIPO, their right of self-determination would not be compromised in the process. Rather, it is envisaged that WIPO could adopt a role which would see it encouraging States to develop and enforce domestic legislation which is consistent

with the WIPO/UNESCO Model Provisions on Folklore, and which gives effect to the Guidelines on the Protection of the Heritage of Indigenous Peoples (see Annexure A).

8.6 FAO

The Food and Agriculture Organisation (FAO) has undertaken a number of important initiatives in relation to the regulation of plant genetic resources which pose significant implications for indigenous peoples through their impact on the conservation of biodiversity. These initiatives are referred to in more detail in section 5.5, and include:

a. the current revision of the International Undertaking on Plant Genetic Resources in harmonisation with the Convention on Biological Diversity;
b. the adoption of the Leipzig Declaration on Plant Genetic Resources, which commits Signatory States to take the necessary steps to implement the first Global Plan of Action for the Conservation and Sustainable Utilisation of Plant Genetic Resources for Food and Agriculture (1996);
c. the adoption of the Voluntary Code of Conduct for Plant Germplasm Collecting and Transfer (1993);
d. the development of a Draft Code of Conduct on Biotechnology (1993); and
e. FAO's Program on Conservation and Sustainable Use of Forest Genetic Resources.

As noted in section 5.5, it is important that the indigenous peoples and their representative organisations are directly engaged in the initiatives of the FAO as they relate to the conservation of plant genetic diversity and the operation of the Convention on Biological Diversity.

8.7 UNCTAD

In recent years, the Secretariat of the United Nations Conference on Trade and Development has been collaborating with the

Secretariat of the Convention on Biological Diversity on the issue of the economics of biodiversity conservation. UNCTAD is encouraging the use of economic instruments and incentives to ensure that environmental resources are conserved and used in an ecologically sustainable manner. UNCTAD is particularly concerned that biodiversity-rich developing countries develop the capability to compete in the emerging global market for biological resources, developing industries that produce 'biodiversity friendly products'.

To this end, UNCTAD has adopted a 'Biotrade Initiative', which is designed to provide 'the global community' information on how to responsibly develop the world's biodiversity through activities that include:

a. economic market research and analysis;
b. technology transfer and technological capacity building (especially between developing and developed countries);
c. alternative contractual arrangements and certification (such as eco-labelling);
d. analysis of bio-business development strategies;
e. the 'BioExchange'; and
f. exploration of innovative incentives for biodiversity conservation (such as specific financing tools for conservation, and new taxes and charges).

The Biotrade Initiative is in its infancy, but it is UNCTAD's intention to bring together those parties which it believes are the 'main actors' in biodiversity conservation, namely governments, the private sector, intergovernmental organisations and NGOs, indigenous communities and research institutions. In bringing these parties together, UNCTAD hopes to create a 'mutually beneficial framework in which appropriate mechanisms would be developed that will achieve simultaneously the objectives of conservation and sustainable development'.

Indigenous peoples and their representative organisations need to be closely involved in this undertaking by the Secretariat of UNCTAD, noting the relationship that is developing between this body and the Secretariat of the CBD.

8.8 The WTO Committee on Trade and the Environment

Towards the end of the Uruguay Round of the GATT, environment organisations became aware of the serious implications which the trade measures posed for the achievement of ecological sustainability. Their lobbying efforts to inject safeguards into the Agreement were unsuccessful, but at the GATT Marrakesh meeting in 1994, the decision was taken to create a Committee on Trade and Environment within the WTO to:

a. identify the relationship between trade measures and environmental measures, in order to promote sustainable development; and
b. to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required. Where the Committee identifies problems of policy coordination, these are to be resolved in a manner that upholds and safeguards the principles of openess, equity and non-discrimination which underpin the multilateral trade system.

One of the many issues which environment organisations are encouraging the Trade and Environment Committee to examine more closely is the need to review the TRIPS Agreement, and particularly the implications for the patenting of life forms and sustainable development. One environment organisation, FIELD (Foundation for International Law and Development) has called on the Committee to take up the following recommendations at its meetings:[162]

a. the Committee should develop broader language framing the Article 27 exceptions of the TRIPS Agreement, which are designed to protect human, animal and plant life and health, and the environment, taking account of the Precautionary Principle;
b. taking account of the provisions of the Convention on Biodiversity (especially Articles 16.5 and 22), the Committee should affirm that, in the event of a conflict between the WTO and the CBD, the Convention's provisions will prevail;

c. the TRIPS Agreement should not interfere with States' right to refuse to allow the release of genetically modified organisms that may have been approved in other States, or to set stricter regulations than those internationally agreed. Furthermore, the exercise of national sovereignty in relation to the control of biotechnology and the release of genetically modified organisms should not be open to challenge in the WTO on the grounds that such regulation constitutes a barrier to trade; and
d. the WTO should offer legal assistance and its offices to developing countries seeking to licence and defend their intellectual property claims on a *pro bono* basis.

8.9 Reviving and Reinvigorating Indigenous Customary Law and Practices - A Genuinely *sui generis* Solution

The essential element of any successful strategy to protect indigenous cultural and intellectual property is its foundation on the right of indigenous peoples to shape that strategy - to say what they want to protect, how they want it protected, and how they want to continue to use it. The right of an indigenous people to create a *sui generis* regime based on their customary laws and practices is therefore that essential element.

The creation of *an entirely new approach* to the protection and management of indigenous cultural and intellectual property is what is meant by a *sui generis* regime. Such a regime does not have to conform to the model of existing or past laws; nor does it have to be founded on pre-existing principles. A *sui generis* approach allows those framing that approach to start from the very beginning - or in the case of indigenous peoples, to return to the very beginning, to revive and reinvigorate those principles which have protected their heritage for thousands of years.

A *sui generis* approach does not necessarily mean the creation of 'laws' as we understand them in the tradition of Western jurisprudence. Rather, it leaves open to those framing the new approach the option of developing structures or institutions which are responsible for the enforcement of certain types of behaviour, or for the resolution of disputes, rather than the

articulation of 'laws' that are codified in statutes. The development of a *sui generis* approach to the protection and enjoyment of indigenous cultural and intellectual property is therefore a manifestation of the right of indigenous peoples to self-determination.

Countenancing the *formal* co-existence of indigenous customary law along side non-indigenous (Western) legal systems is perceived by many States as a threat to their own sovereignty. For many indigenous peoples it also poses a number of serious problems which may render formal recognition an undesirable option. The experience of Aboriginal Peoples in Australia is a useful case in point. From the point of view of many Aboriginal Peoples, two sets of laws govern their cultural and intellectual property in Australia: Anglo-Australian common law and legislation, and unwritten or customary Aboriginal law, which is generally unrecognised by the dominant culture, 'except to the extent that the Aboriginal laws happen to fit into the framework of the Anglo-Australian legal system'.[163] As a result, Aboriginal law and custom, and indeed Aboriginal culture itself is poorly understood by most non-indigenous Australians, despite its manifestation throughout the country.

As the Australian Law Reform Commission noted in its report on *The Recognition of Aboriginal Customary Laws* in 1986, there is little if any scope for the formal incorporation of Aboriginal customary law in whole or in part, into the general law by way of codification.[164] This stems from the fact that there is great diversity in Aboriginal customary law, just as there is great diversity among the lifestyles of Aboriginal Peoples depending on whether they are urban or rural based; there are difficulties associated with expressing Aboriginal customs and so-called 'laws' in a statutory form; artificial codification of these customs may result in uniformity being imposed on Aboriginal societies where none has previously existed, thereby preventing Aboriginal customs and practices from evolving; a significant proportion of Aboriginal custom is secret and not able to be publicly disclosed; and above all, it would be likely to result in Aboriginal Peoples losing control of their own laws.

Although the Law Reform Commission recommended against comprehensive, Australia-wide recognition of Aboriginal customary law, it did recognise that non-recognition contributes to the undermining of traditional law and authority, and to injustice. Furthermore, the report noted that Aboriginal People support some form of recognition of their laws, although they desire to maintain control of their law and to maintain secret aspects of it. The Law Reform Commission did however, conclude that there are good arguments for recognising Aboriginal customary law in relation to marriage, legitimacy of children, inheritance, adoption and aspects of criminal law such as evidence and sentencing, and made recommendations to that effect. It has been argued by an eminent Australian jurist that even if these recommendations were implemented in full, they would only 'scratch the surface [in removing the major sources of injustice] presented by the Australian legal system to the Aboriginal people of Australia'.[165]

The investigations of the Australian Law Reform Commission therefore indicate only that it is not appropriate to impose the constructs of the Anglo-Australian system of law onto the legal systems of Aboriginal Peoples, and expect the latter to function effectively. Aboriginal laws can and indeed should operate without codification. What is required is formal recognition by the non-indigenous legal system of the sovereignty of Aboriginal political and social structures and institutions which are recognised by Aboriginal Peoples to have the authority to implement and enforce Aboriginal laws and customs.

This formal recognition of indigenous laws and customs could be through the enactment of statutes which broadly express the rights of indigenous peoples in a manner which is similar to the language used in the Draft Declaration on the Rights of Indigenous Peoples, and which is consistent with the principles and guidelines for the protection of the heritage of indigenous peoples (see Annexure A). In Australia's case, these developments would merely formalise what, in the minds of most Aboriginal Peoples, has always been their reality. But that recognition of cultural rights, and of Aboriginal law carries as much importance for Aboriginal Peoples as recognition of their land rights.

Examples of legislation of this nature exist in some countries.[166] The *Brazilian Indigenous Societies Act* for example, seeks to protect and assure respect for indigenous peoples' social organisations, customs, languages, beliefs and traditions, and rights

over their territories and possessions. Among the provisions relating to the regulation of access to and use of indigenous knowledge are the following (Articles 18-29):

a. the right to maintain the secrecy of traditional knowledge;
b. the right to refuse access to traditional knowledge;
c. the right to apply for protection of intellectual property rights, which in the case of collective knowledge, will be granted in the name of the community;
d. the right to prior informed consent (to be given in writing) for access to, use of and application of traditional knowledge;
e. the right to co-ownership of research data, patents and products derived from the research; and
f. the right of communities to nullify patents derived from their knowledge.

8.10 Concluding Remarks

As has been noted throughout this paper, the development of *sui generis* approaches to the realisation of the rights of indigenous peoples are contingent on the willingness of States to recognise and respect the exercise of indigenous laws and customs within their jurisdictions. The active involvement of indigenous peoples and their representative organisations at the international level is crucial to achieve the necessary level of international pressure that will force States to fully acknowledge and promote the inherent rights of indigenous peoples.

The resolution of the problems faced by indigenous peoples vis a vis the protection of their heritage lies in their utilisation of the political processes in both the domestic and international arenas. Paradoxically, however, although legalistic and creative interpretations of existing legal instruments will have their utility, they are also the barriers which hinder indigenous peoples in the attainment of their aspirations.

NOTES

NOTES

1 Daes, Erica-Irene A. (1993) *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples,* United Nations Sub-Commission, (E/CN.4/Sub.2/1993/28), para. 24.

2 The Statute of the International Court of Justice (Article 38) provides that The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply [inter alia]: international custom, as evidence of a general practice accepted as law; and the general principles of law recognised by civilised nations.

3 Daes, Erica-Irene (1996) *Pacific Workshop on the United Nations Draft Declaration on the Rights of Indigenous Peoples,* paper presented at Suva, Fiji, September 1996, p. 28.

4 Daes, Erica-Irene (1996) supra note at 3, p. 37.

5 Falk, Richard (1992) 'The Rights of Peoples (In Particular Indigenous Peoples)', in XXX, p. 26.

6 Falk, Richard (1992) supra note at 5, p. 31.

7 Falk, Richard (1992), supra note at 5, p. 32.

8 Berman, H. (1985) 'Remarks by Howard Berman', in *Proceedings, Seventy-Ninth Annual Meeting of the American Society of International Law: Are Indigenous Populations Entitled to International Juridical Personality?,* New York, April 25-27, p. 192.

9 Berman, H. (1985) supra note at 8.

10 Berman, H. (1985) supra note at 8.

11 Refer in particular to Article 22 of the Universal Declaration, which provides that: '*Everyone, as a member of society ... is entitled to realisation .., of the economic, social and cultural rights indispensable for his dignity and the free development of his personality*'; and Article 27: '*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*'.

12 See Article 27 of the International Covenant on Civil and Political Rights: '*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language*'.

13 Article 17 of the Universal Declaration on Human Rights states that '*Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property*'. Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination provides that State Parties undertake to guarantee the right of everyone to equality before

the law, notably in the enjoyment of '*the right to own property alone as well as in association with others*'.

14 The International Covenants have a common Article 1(2), which provides that: '*All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence*'.

15 Daes, E. (1993) supra note at 1. Refer to pages 5 and 6 for a detailed overview of the establishment of the study.

16 Daes, E. (1993) supra note at 1, p.9.

17 Daes, E. (1993) supra note at 1, para 30.

18 Daes, E. (1993) supra note at 1, para 22.

19 Ryan, J. (1993) *Images of Power: Aboriginal Art of the Kimberley,* National Gallery of Victoria, Melbourne, p.2.

20 Egede, I. (1992) *Discrimination Against Indigenous Peoples: Report of the United Nations Technical Conference on Practical Experience in Realisation of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples,* Santiago, Chile, 18-22 May 1992, E/CN.4/Sub.2/1992/31, 23 June 1992, p. 16.

21 Brush, S. (1993) 'Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The Role of Anthropology', in *American Anthropologist,* Vol. 95, No. 3, September 1993, p. 657.

22 Brush, S. (1993) supra note at 21.

23 Kloppenburg and Kleinman (1987) in Brush, S. (1993) supra note at 21, p. 660.

24 Posey, D. and Dutfield, G. (1996) *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities,* International Development Research Centre, Ottawa, Canada, p.34.

25 Nijar, Gurdial Singh. (1996) *In Defence of Local Community Knowledge and Biodiversity: A Conceptual Framework and the Essential Elements of A Rights Regime,* Third World Network Paper 1, Penang, Malaysia, p. 4.

26 Posey, D. (1990) 'Intellectual Property Rights for Native Peoples: Challenges to Science, Business and International Law', paper prepared for the President's Symposium of the Society for Applied Anthropology, York, England, April 1990, p. 7.

27 Reid, W., Laird, S., Gamez, R., Sittenfled, A., Janzen, d., Gollin, M., and Juma., C. (1993) 'A New Lease on Life', in *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development,* World Resource Institute, Baltimore, p. 15.

28 Greaves, T. (1994) 'Introduction', in (ed.) Tom Greaves, *Intellectual Property Rights for Indigenous Peoples: A Source Book,* Society for Applied Anthropology, Okalahoma, p. ix.

29 Greaves, T. (1994) supra note at 28.

30 The First Patent Law was established in Venice, Italy in 1474.

31 Brush, S. (1994) 'A Non-Market Approach to Protecting Biological Resources', in (ed.) Tom Greaves, *Intellectual Property Rights for Indigenous Peoples: A Source Book*, Society for Applied Anthropology, Okalahoma, p.133.

32 Daes, E. (1993) supra note at 1, para. 32.

33 Brush, S. (1994) supra note at 31.

34 Daes, E. (1993) supra note at 1, p.9.

35 Daes, E. (1993) supra note at 1, p.9

36 Greaves, T. (1994) supra note at 28.

37 International Union for the Conservation of Nature (1992) *A Guide to the Convention on Biological Diversity*, Gland, Switzerland, p. 16.

38 Dodson, Michael (1996) *Aboriginal and Torres Strait Islander Social Justice Commissioner: Fourth Report*, Australian Government Publishing Service, Canberra, p. 161.

39 Atkinson, J. (1995) *GATT: What Do the Poor Get?*, Community Aid Abroad Background Report No. 5, September 1995, CAA, Fitzroy, Australia, p.13.

40 Rodriquez, L. (1992) *The Right of Everyone to Own Property Alone As Well As in Association With Others*, Commission on Human Rights, E/CN.4/1993/15, 18 December 1992.

41 Gray, Kevin (1995) 'The Ambivalence of Property', in (eds.) John Kirkby, Phil O'Keefe and Lloyd Timberlake, *The Earth Scan Reader in Sustainable Development*, Earthscan Publications, London, p. 223-226.

42 McKeough, J. and Stewart (11991) *Intellectual Property in Australia*, Butterworths, Sydney, p. 3.

43 Refer to Article 2 (viii) of the 1967 Convention Establishing the World Intellectual Property Organisation.

44 Gollin, M. (1993) 'An Intellectual Property Rights Framework for Biodiversity Prospecting', in (eds.) Reid et al, *Biodiversity Prospecting: Using Genetic Resources for Sustainable Development*, World Resources Institute, Washington, DC, p. 161.

45 *Diamond v. Chakrabarty*, 447 US. 303 (1980). The Court determined that if the bacterium was not the result of nature's handiwork, but the discovery of an inventor, and if it met the other criteria of novelty and usefulness, it could be patented. The patent claim was for a distinctive, non-naturally occurring organism with potential utility and so the patent was upheld.

46 Refer to Section 5 of the Indian Patents Act, 1970.

47 Gollin, M. (1993) supra note at 44, p. 166.

48 McKeough, J. (1992) *Intellectual Property: Commentary and Materials*, Law Book Company, Sydney, p. 421.

49 It should be noted that one indigenous group or people may constitute one 'inventor'. Refer to Posey and Dutfield (1996), supra note at 24, p. 79.

50 Posey, D. and Dutfield, G. (1996), supra note at 24, p.79.

51 Gollin, M. (1993), supra note at 44, p.167.

52 Posey, D. and Dutfield, G. (1996) supra note at 24, p. 78.

53 Gollin, M. (1993), supra note at 44, p. 166.

54 *Diamond v. Chakrabarty* 447 U.S. Reports 303, 317 (1980).

55 793 P.2d 479 (Cal. 1990).

56 Gollin, M. (1993), supra note at 44, p.169.

57 Jones, N. (1999) 'The New Draft Biotechnology Directive', in *European Intellectual Property Review*, Vol. 18, No. 6, June 1996, p.363.

58 Yamin, F. (1995) *The Biodiversity Convention and Intellectual Property Rights*, WWF International Discussion Paper, Gland, Switzerland, p.12.

59 Yamin, F. (1995) supra note at 58, p.12.

60 The NGOs referred to here include WWF, The Crucible Group, GRAIN (Genetic Resources Action International), and RAFI (Rural Advancement Foundation International).

61 The Crucible Group (1994) *People, Plants and Patents*, International Development Research Centre, Ottawa, p.20.

62 See Gollin, M. (1993) supra note at 44, p. 172; and Posey, D. and Dutfield, G. (1996), supra note at 18, p. 82.

63 See Gollin, M. (1993) supra note at 44, p. 172.

64 However, if the non-indigenous artist attempted to 'pass off' their work as Aboriginal art, they might be in breach of common law, or the *Trade Practices Act* 1974. Refer to Puri, K. (1993) 'Copyright Protection for Aborigines in the Light of Mabo', in (eds.) Stephenson, M. and Ratnapala, S., *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and Its Impact on Australian Law*, University of Queensland Press, St. Lucia, p. 142.

65 Daes, E. (1993), supra note at 1, p.20.

66 The Australian Federal Court found in *Milpurrurru and Others v Indofurn Pty Ltd and Others* (130 ALR 659) that although it was not required to deal specifically with this question, the artworks in question "follow traditional Aboriginal form and are based on dreaming themes, and each artwork is one of intricate detail and complexity reflecting great skill and originality."

67 At the Commonwealth level for example, the principal means of legislative protection is afforded by the *Aboriginal and Torres strait Islander Heritage Act* 1984, which deals with the protection of areas, relics, re-

mains and objects of traditional Aboriginal significance by way of affording them protection on application to the Federal Minister for Aboriginal and Torres Strait Islander Affairs. Such protection is therefore at the discretion of the Minister, and consequently a matter of political motivation.

68 Puri, K. (1993), supra note at 64, p. 134.

69 This model law for developing countries was jointly prepared by the WIPO and UNESCO with the expectation that such countries would adopt the principles embodied in the model when developing national legislation in this area.

70 Refer to Golvan, C. (1992) *An Introduction to Intellectual Property Law*, Federation Press, Sydney, p. 51-54.

71 Puri, K. (1993), supra note at 64, p. 136.

72 Posey, D. and Dutfield, G. (1996), supra note at 24, p. 88.

73 Gollin, M. (1993), supra note at 44, p. 164.

74 Posey and Dutfield note the comment made by Axt et al. 1993, that "if a shaman or other individual has exclusive access to information because of his status in the group, that individual or the indigenous group together probably has a trade secret". See Posey, D. and Dutfield, G. (1996), supra note at 24, p. 88.

75 Gollin, M. (1993), supra note at 44, p.164.

76 Vogel , Joseph (1997) 'Bioprospecting and the Justification for a Cartel', in *Bulletin of the Working Group on Traditional Resources Rights*, Winter 1997, No. 4, p. 17.

77 Vogel , Joseph (1997), supra note at 76.

78 Posey, D. and Dutfield, G. (1996) supra note at 24, p. 68.

79 Refer to Brendan Tobin, (1997) 'Know-How Licences: Recognising Indigenous Rights Over Collective Knowledge', in *Bulletin of the Working Group on Traditional Resources Rights*, Winter 1997, No. 4, p. 17-18.

80 Tobin, B. (1997) supra note at 79, p. 17.

81 Posey, D. and Dutfield, G. (1996), supra note at 24, p. 85.

82 Posey, D. and Dutfield, G. (1996), supra note at 24, p. 86.

83 Posey, D. and Dutfield, G. (1996), supra note at 24, p. 91.

84 Nijar, G. (1996) supra note at 25, p.6.

85 Nijar, G. (1996) supra note at 25, p.8.

86 See Flitner, M. et al, (1995) *Review of National Actions on Access to Genetic Resources and IPRs in Several Developing Countries*, WWF Discussion Paper, Gland, Switzerland, p. 4.

87 Flitner, M. et al (1995), supra note at 86, p. 4.

88 Laird, S. (1995), *The Biodiversity Convention and Intellectual Property Rights*, WWF International Discussion Paper, Gland, Switzerland, p. 16.

89 Posey, D. and Dutfield, G. (1996), supra note at 24, p.89.

90 Posey, D. and Dutfield, G. (1996), supra note at 24, p.89.

91 Posey, D. and Dutfield, G. (1996), supra note at 24, p.88.

92 Flitner, M. et al (1995), supra note at 86, p. 5.

93 Laird, S. (1995), supra note at 88, p. 17.

94 Dodson, M. (1996) supra note at 38, p. 165.

95 The Crucible Group (1994), supra note at 61, p.32.

96 The Crucible Group (1994), supra note at 61, p.32

97 Nijar, Gurdial Singh (1996) supra note at 25, p. 21.

98 Nijar, Gurdial Singh (1996) supra note at 25, p. 20.

99 FAO (1996) *The FAO Global System: International Agreements on Genebanks*, FAO internet site.

100 FAO (1996) supra note at 99.

101 Nijar, Gurdial Singh (1996) supra note at 25, p. 21.

102 GRAIN (1994) *Biobriefing: In Situ/Ex Situ: Forgetting the Farmers?*, May, p. 1.

103 GRAIN (1994) supra note at 102, p. 3.

104 GRAIN (1994) *Biobriefing: Intellectual Property Rights for Whom?*, No. 4, Part II, June, p. 4.

105 Resolution 4/89 of the FAO.

106 The Biodiversity Coalition, (1994) 'Access to Genetic Resources and 'Farmers' Rights'', in *The Biodiversity Coalition Newsletter'*, No. 9, September 1994, p. 8.

107 Nijar, S. (1996) supra note at 25, p. 8.

108 GRAIN (1995), *Biobriefing*, No. 5, May, p.2.

109 Posey, D. (1996) *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous Peoples and Local Communities*, IUCN - The World Conservation Union, Gland Switzerland, p. 100.

110 Yamin, F. (1995) supra note at 58, p. 4.

111 Bifani, P. (1989) 'Intellectual Property Rights and International Trade', in *Uruguay Round Papers on Selected Issues: United Nations Conference on Trade and Development*, United Nations, New York, p. 135.

112 Developed countries that did not share this view with the United States included Japan, EC countries and Nordic countries.

113 Acharya, R. (1992) *Intellectual Property, Biotechnology and Trade: The Impact of the Uruguay Round on Biodiversity*, African Centre for Technology Studies Biopolicy International Series No. 4, Acts Press, Nairobi, p. 4.

114 Yusuf, A. (1989) 'Developing Countries and Trade-Related Aspects of Intellectual Property Rights', *Uruguay Round: Papers on Selected Issues*, Geneva, UNCTAD, p. 185.

115 Acharya, R. (1992) supra note at 113, p. 11.

116 Sherwood, R. (1990) *Intellectual Property and Economic Development*, Westview Press, Boulder, p. 6.

117 Sherwood, R. (1990) supra note at 116, p. 5.

118 Atkinson, J. (1995) *GATT: What Do the Poor Get?*, Background Report No. 5, September, Community Aid Abroad, Fitzroy Australia, p. 13.

119 Atkinson, J. (1995) supra note at 118, p. 13.

120 Department of Foreign Affairs and Trade (1994) *Uruguay Round Outcomes: Intellectual Property Rights*, Services and Intellectual Property Branch, DFAT, Canberra Australia, p. 12.

121 Cameron, J. and Makuch, Z. (1995) *The UN Biodiversity Convention and the WTO TRIPS Agreement: Recommendations to Avoid Conflict and Promote Sustainable Development*, WWF, Gland, Switzerland, p.8.

122 Cameron, J. and Makuch, Z. (1995) supra note at 121, p.10.

123 Nijar, G. (1996) supra note at 25, p. 10.

124 Cameron, J. and Makuch, Z. (1995) supra note at 121, p.10.

125 Daes, E. (1996) *Protection of the Heritage of Indigenous Peoples: Supplementary Report of the Special -Rapporteur, Mrs. Erica-Irene Daes, submitted pursuant to Sub-Commission resolution 1995/40 and Commission on Human Rights resolution 1996/63*, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-Eighth Session, E/CN.4/Sub.2/1996/22, 24 June 1996, at 51.

126 Cameron, J. and Makuch, Z. (1995) supra note at 121, p. 8.

127 Atkinson, J. (1995) supra note at 118, p. 24.

128 Dutfield, G. (1997) 'The World Trade Organisation, TRIPS and the Biodiversity Convention', in *Bulletin of the Working Group on Traditional Resource Rights*', p.7.

129 Brush, S. (1993) supra note at 21, p. 662.

130 Posey and Dutfield, (1996) supra note at 24, p.95.

131 Posey and Dutfield, (1996) supra note at 24, p.95.

132 Posey and Dutfield, (1996) supra note at 24, p.95.

133 Posey and Dutfield, (1996) supra note at 24, p.95.

134 The restoration of these lands to their Aboriginal owners was facilitated by the creation of an amendment Act to the *National Parks and Wildlife Act* 1974 (NSW), entitled the *National Parks and Wildlife Amendment (Aboriginal Ownership) Act* 1996.

135 ILO Convention 169 is not a rights-based convention. It is, as its long title suggests, a 'Convention Concerning Indigenous and Tribal Peoples'. It is more accurate to categorise ILO Convention 169 as a 'process' convention, and as such one that does not commit governments to supporting the rights of indigenous peoples. The so-called 'rights' of indigenous peoples which many (incorrectly) believe are referred to in ILO 169 are not conferred by the Convention, but are left unstated. The Convention ensures that the State remains the determining authority in the decision-making process, retaining unilateral administrative and legislative powers over all of the matters that are addressed by the Convention. Although the Convention falls short of requiring the assimilation of indigenous peoples into non-indigenous society, it continues to allow States to maintain integrationist policies and practices without indigenous consent or consultation.

136 Lesser, W. (1994) 'An Approach for Securing Rights to Indigenous Knowledge', Paper presented at an Informal Workshop organised by the International Academy of the Environment, the World Conservation Union, World Wide Fund for Nature, and the UN Commission on Human Rights, 23 July 1994, Geneva, p. 23.

137 Lesser, W. (1994), supra note at 136, p. 23.

138 Lesser, W. (1994), supra note at 136, p. 24.

139 See Gray, A. (1991) 'Indigenous Peoples and the Marketing of the Rain Forest', in *The Ecologist*, Vol. 210, No. 6.

140 Nijar, G. (1996) supra note at 25, p. 31.

141 Nijar, G. (1996) supra note at 25, p. 31.

142 Nijar, G. (1996) supra note at 25, p. 57.

143 Nijar, G. (1996) supra notes at 25, p. 18.

144 Nijar, G. (1994) supra note at 25, p. 13.

145 See Laird, S. (1995) supra note at 88, p. 10-13.

146 Moran, Katy (1997) 'Returning Benefits from Ethnobotanical Drug Discovery to Native Communities', in *Biodiversity and Human Health*, (eds.) Francesca Grifo and Joshua Rosenthal, Island Press, Washington DC., p. 251.

147 Moran, K. (1997), supra note at 146, p. 260.

148 King, S., Carlson, T. and Moran, K. (1996) 'Biological Diversity, Indigenous Knowledge, Drug Discovery, and Intellectual Property Rights', in *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights*, (eds.) Stephen Brush and Doreen Stabinsky, Island Press, Washington DC., p. 168.

[149] Moran, K. (1997) supra note at 146, p. 252.

[150] Moran, K. (1997) supra note at 146, p. 252.

[151] King, S., Carlson, T. and Moran, K. (1996), supra note at 148, p. 183.

[152] The recommendations of the Danish Government are expressed in its 1995 Note Verbale (E/CN.4/1995/141).

[153] Daes, E. (1996) *Supplementary Report of the Special Rapporteur on the Protection of the Heritage of Indigenous Peoples,* Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/22, 24 June 1996, para 16.

[154] *Report of the Secretary-General on Human Rights and Bioethics,* Commission on Human Rights, Fifty-First Session, E/CN.4/1995/74, 15 November, 1994, para. 1.

[155] E/CN.4/1995/74, at para. 161.

[156] E/CN.4/1995/74; and E/CN.4/1997/66.

[157] See for example Posey, D. and Dutfield, G. (1996) supra note at 24, p. 99-100, 112-114.

[158] The Preamble of UNESCO's Constitution affirms that peace "must be founded, ... upon the intellectual and moral solidarity of mankind."

[159] Daes, E. (1996) supra note at 153, para. 15. Professor Daes noted (para. 5) that in communications between herself and WIPO, WIPO maintained that its activities "did not include the question of the protection of the heritage of indigenous peoples, and requested that references to WIPO be deleted from the draft principles and guidelines [for the protection of the heritage of indigenous peoples] prepared by the Special Rapporteur."

[160] Daes, E. (1996) supra note at 153, para. 55.

[161] WIPO (1997) *Cooperation with Developing Countries,* internet site of the WIPO.

[162] Cameron, J. and Makuch, Z. (1995) supra note at 121, p. 20-21.

[163] McRae, H., Nettheim, G. and Beacroft, L. (1991) *Aboriginal Legal Issues: Commentary and Materials,* Sydney Law Book Company, Sydney, p. 44.

[164] Australian Law Reform Commission (1986) *The Recognition of Aboriginal Customary Laws,* Report 31, Australian Government Publishing Service, Canberra.

[165] Justice Michael Kirby, cited in Reynolds, H. (1996) *Aboriginal Sovereignty: Reflections on Race, State and Nation,* Allen and Unwin, Sydney, p. 84.

[166] See Laird, S. (1995) supra note at 88, p. 10-13 for further examples.

ANNEXES

ANNEX A

PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLES

Elaborated by the Special Rapporteur of the United Nations Sub-Commission, Dr Erica-Irene Daes

PRINCIPLES

1. The effective protection of the heritage of the indigenous peoples of the world benefits all humanity. Cultural diversity is essential to the adaptability and creativity of the human species as a whole.

2. To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right and duty of indigenous peoples to develop their own cultures and knowledge systems, and forms of social organisation.

3. Indigenous peoples should be recognised as the primary guardians and interpreters of their cultures, arts and sciences, whether created in the past, or developed by them in the future.

4. International recognition and respect for indigenous peoples' own customs, rules and practices for the transmission of their heritage to future generations is essential to these peoples' enjoyment of human rights and human dignity.

5. Indigenous peoples' ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.

6. The discovery, use and teaching of indigenous peoples' knowledge, arts and cultures is inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection.

7. To protect their heritage, indigenous peoples must control their own means of cultural transmission and education. This includes their right to the continued use and, wherever necessary, the restoration of their own languages and orthographies.

8. To protect their heritage, indigenous peoples must also exercise control over all research conducted within their territories, or which uses their people as subjects of study.

9. The free and informed consent of the traditional owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage.

10. Any agreements which may be made for the recording, study, use or display of indigenous peoples' heritage must be revocable, and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application.

GUIDELINES

Definitions

11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works

which may be created in the future based upon its heritage.

12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines, and the rational use of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historic significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape or audiotape.

13. Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices.

Transmission of Heritage

14. Indigenous peoples' heritage should continue to be learned by the means customarily employed by its traditional owners for teaching, and each indigenous peoples' rules and practices for the transmission of heritage and sharing of its use should be incorporated in the national legal system.

15. In the event of a dispute over the custody or use of any element of an indigenous peoples' heritage, judicial and administrative bodies should be guided by the advice of indigenous elders who are recognised by the indigenous communities or peoples concerned as having specific knowledge of traditional laws.

16. Governments, international organisations and private institutions should support the development of educational, research, and training centres which are controlled by indigenous communities, and strengthen these communities' capacity to document, protect, teach and apply all aspects of their heritage.

17. Governments, international organisations and private institutions should support the development of regional and global networks for the exchange of information and experience among indigenous peoples in the fields of science, culture, education and the arts, including support for systems of electronic information and mass communication.

18. Governments, with international cooperation, should provide the necessary financial resources and institutional support to ensure that every indigenous child has the opportunity to achieve full fluency and literacy in his/her own language, as well as an official language.

Recovery and Restitution of Heritage

19. Governments, with the assistance of competent international organisation, should assist indigenous peoples and communities in recovering control and possession of their moveable cultural property and other heritage.

20. In cooperation with indigenous peoples, UNESCO should establish a program to mediate the recovery of moveable cultural property from across international borders, at the request of the traditional owners of the property concerned.

21. Human remains and associated funeral objects must be returned to their descendants and territories in a culturally appropriate manner, as determined by the indigenous peoples concerned. Documentation may be retained, displayed or otherwise used in such form and

manner as may be agreed upon with the peoples concerned.

22. Moveable cultural property should be returned wherever possible to its traditional owners, particularly if shown to be of significant cultural, religious or historical value to them. Moveable cultural property should only be retained by universities, museums, private institutions or individuals in accordance with the terms of a recorded agreement with the traditional owners for the sharing of the custody and interpretation of the property.

23. Under no circumstances should objects or any other elements of an indigenous peoples' heritage be publicly displayed, except in a manner deemed appropriate by the peoples concerned.

24. In the case of objects or other elements of heritage which were removed or recorded in the past, the traditional owners of which can no longer be identified precisely, the traditional owners are presumed to be the entire people associated with the territory from which these objects were removed or recordings were made.

National Programs and Legislation

25. National laws should guarantee that indigenous peoples can obtain prompt, effective and affordable judicial or administrative action in their own languages to prevent, punish and obtain full restitution and just compensation for the acquisition, documentation or use of their heritage without proper authorisation of the traditional owners.

26. National laws should deny to any person or corporation the right to obtain patent, copyright or other legal protection for any element of indigenous peoples' heritage without adequate documentation of the free and informed consent of the traditional owners to an arrangement for the sharing of ownership, control, use and benefits.

27. National laws should ensure the labelling and correct attribution of indigenous peoples' artistic, literary and cultural works whenever they are offered for public display or sale. Attribution should be in the form of a trademark or an appellation of origin, authorised by the peoples or communities concerned.

28. National laws for the protection of indigenous peoples' heritage should be adopted following consultations with the peoples concerned, in particular the traditional owners and teachers of religious, sacred and spiritual knowledge, and, wherever possible, should have the informed consent of the peoples concerned.

29. National laws should ensure that the use of traditional languages in education, arts, and the mass media is respected and, to the extent possible, promoted and strengthened.

30. Governments should provide indigenous communities with financial and institutional support for the control of local education, through community-managed programs, and with use of traditional pedagogy and languages.

31. Governments should take immediate steps, in cooperation with the indigenous peoples concerned, to identify sacred and ceremonial sites, including burials, healing places, and traditional places of teaching, and to protect them from unauthorised entry or use.

Researchers and Scholarly Institutions

32. All researchers and scholarly institutions should take immediate steps to provide indigenous peoples and communities with comprehensive inventories of the cultural property, and documentation of indigenous peoples' heritage, which they may have in their custody.

33. Researchers and scholarly institutions should return all elements of indigenous peoples' heritage to the tradi-

tional owners upon demand, or obtain formal agreements with the traditional owners for the shared custody, use and interpretation of their heritage.

34. Researchers and scholarly institutions should decline any offers for the donation or sale of elements of indigenous peoples' heritage, without first contacting the peoples or communities directly concerned and ascertaining the wishes of the traditional owners.

35. Researchers and scholarly institutions must refrain from engaging in any study of previously undescribed species or cultivated varieties of plants, animals or microbes, or naturally occurring pharmaceuticals, without first obtaining satisfactory documentation that the specimens were acquired with the consent of the traditional owners.

36. Researchers must not publish information obtained from indigenous peoples or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of indigenous peoples, without identifying the traditional owners and obtaining their consent to publication.

37. Researchers should agree to an immediate moratorium on the Human Genome Diversity Project. Further research on the specific genotypes of indigenous peoples should be suspended unless and until broadly and publicly supported by indigenous peoples to the satisfaction of United Nations human rights bodies.

38. Researchers and scholarly institutions should make every possible effort to increase indigenous peoples' access to all forms of medical, scientific and technical education, and participation in all research activities which may affect them or be of benefit to them.

39. Professional associations of scientists, engineers and scholars, in collaboration with indigenous peoples, should sponsor seminars and disseminate publications to promote

ethical conduct in conformity with these guidelines and discipline members who act in contravention.

Business and Industry

40. In dealings with indigenous peoples, business and industry should respect the same guidelines as researchers and scholarly institutions.

41. Business and industry should agree to an immediate moratorium on making contracts with indigenous peoples for the rights to discover, record and use previously undescribed species or cultivated varieties of plants, animals or microbes, or naturally occurring pharmaceuticals. No further contracts should be negotiated until indigenous peoples and communities themselves are capable of supervising and collaborating in the research process.

42. Business and industry should refrain from offering incentives to any individuals to claim traditional rights of ownership or leadership within an indigenous community, in violation of their trust within the community and the laws of the indigenous peoples concerned.

43. Business and industry should refrain from employing scientists or scholars to acquire and record traditional knowledge or other heritage of indigenous peoples in violation of these guidelines.

44. Business and industry should contribute financially and otherwise to the development of educational and research institutions controlled by indigenous peoples and communities.

45. All forms of tourism based on indigenous peoples' heritage must be restricted to activities which have the approval of the peoples and communities concerned, and which are conducted under their supervision and control.

Artists, Writers and Performers

46. Artists, writers and performers should refrain from incorporating elements derived from indigenous heritage into their works without the informed consent of the traditional owners.

47. Artists, writers and performers should support the full artistic and cultural development of indigenous peoples, and encourage public support for the development of greater recognition of indigenous artists, writers and performers.

48. Artists, writers and performers should contribute, through their individual works and professional organisations, to the greater public understanding and respect for the indigenous heritage associated with the country in which they live.

Public Information and Education

49. The mass media in all countries should take effective measures to promote understanding of and respect for indigenous peoples' heritage, in particular through the special broadcasts and public-service programs prepared in collaboration with indigenous peoples.

50. Journalists should respect the privacy of indigenous peoples in particular concerning traditional, religious, cultural and ceremonial activities, and refrain from exploiting or sensationalising indigenous peoples' heritage.

51. Journalists should actively assist indigenous peoples in exposing any activities, public or private, which destroy or degrade indigenous peoples' heritage.

52. Educators should ensure that school curricula and textbooks teach understanding and respect for indigenous peoples' heritage and history and recognise the contribution of indigenous peoples to creativity and cultural diversity.

International Organisations

53. The Secretary-General should ensure that the task of coordinating international cooperation in this field is entrusted to appropriate organs and specialised agencies of the United Nations, with adequate means of implementation.

54. In cooperation with indigenous peoples, the United Nations should bring these principles and guidelines to the attention of all Member States through, *inter alia* international, regional and national seminars and publications, with a view to promoting the strengthening of national legislation and international conventions in this field.

55. The United Nations should publish a comprehensive annual report, based upon information from all available sources, including indigenous peoples themselves, on the problems experienced and solutions adopted in the protection of indigenous peoples' heritage in all countries.

56. Indigenous peoples and their representative organisation should enjoy direct access to all intergovernmental negotiations in the field of intellectual property rights, to share their views on the measures needed to protect their heritage through international law.

57. In collaboration with indigenous peoples and Governments concerned, the United Nations should develop a confidential list of sacred and ceremonial sites that require measures for their protection and conservation, and provide financial and technical assistance to indigenous peoples for these purposes.

58. In collaboration with indigenous peoples and Governments concerned, the United Nations should establish a trust fund with a mandate to act as a global agent for the recovery of compensation for the unconsented or inappropriate use of indigenous peoples' heritage, and to assist indigenous peoples in developing institutional capacity to defend their own heritage.

59. United Nations operational agencies, as well as the international financial institutions and regional and bilateral development assistance programs, should give priority to providing financial and technical support to indigenous communities for capacity building and exchanges of experience focused on local control of research and education.

60. The United Nations should consider the possibility of drafting a convention to establish international jurisdiction for the recovery of indigenous peoples' heritage across national frontiers, before the end of the International Decade of the World's Indigenous Peoples.

Select Recommendations from the Special Rapporteur's Supplementary Report on the Protection of the Heritage of Indigenous Peoples

53. ... recognising the rights of indigenous peoples to their traditional knowledge it is needed to reconcile existing international instruments in the fields of trade, the environment and human rights.

55. The Special Rapporteur also welcomes the proposal by UNESCO to report biannually on the state of protection of the heritage of indigenous peoples worldwide. She respectfully recommends that the UNESCO Intersectoral task force on indigenous peoples convene, at the earliest possible opportunity, a technical conference with indigenous educators, scientists and artists, to define the methodology that will be used to collect and evaluate information for future UNESCO reports.

57. ...parallel efforts to reach an intergovernmental consensus on protection of the heritage of indigenous peoples are under way in several different United Nations organs and specialised agencies. There is an obvious and urgent need for communication and coordination to ensure consistent and mutually reinforcing results. A possible solution would be for a member of the Working Group on Indigenous Populations to be entrusted, with the approval of the Economic and Social Council, with a continuing mandate to exchange information with all parts of the United Nations system concerned with these issues, to facilitate cooperation and coordination, to promote the greatest level of participation by indigenous peoples in these efforts, and to report, as appropriate, through the Sub-Commission and the Commission to the Economic and Social Council.

58. The full and effective participation of indigenous peoples in the work of all relevant intergovernmental bodies is absolutely essential. ...States must give urgent and serious consideration to providing special funds for the participation of indigenous peoples in relevant international meetings, in particular those meetings organised under the auspices of the Commission on Sustainable Development, the Conferences of the Parties to the Convention on Biological Diversity, and UNESCO.

ANNEX B

NEW SOUTH WALES ABORIGINAL LAND COUNCIL CONSIDERATION OF A PERMANENT FORUM FOR INDIGENOUS PEOPLES

Paper Presented to the Fourteenth Session of the Working Group on Indigenous Peoples

29 July - 2 August, 1996

Madame Chair,

NSWALC welcomes the opportunity to comment on the proposal to create a Permanent Forum for Indigenous Peoples. We consider that the issues raised in the 1995 Note Verbale of the Danish Government (E/CN.4/1995/141), along with the papers and reports of the Workshop in Copenhagen in June 1995, constitute an essential basis for our discussion of this topic.

At the outset, I can indicate that NSWALC strongly supports, in broad terms, the proposal to create a Permanent Forum for Indigenous Peoples. Furthermore, we consider that the relevant issues are on the table. It is the time to discuss **how**, **when** and **where** the Forum should be established. NSWALC believes that the proposals have matured to the point that concrete steps can be commenced.

In this regard, the following brief comments follow the structure of the Copenhagen Workshop:

1. Scope of a Permanent Forum

NSWALC considers that the Permanent Forum should have a broad scope. We agree with the Danish paper that it should deal in a comprehensive manner with,

> "all matters that concern Indigenous Peoples and [should] undertake a multitude of different activities. Examples of the areas ... [include] Human Rights, the environment, development, health and education as well as cultural integrity and conflict prevention. Indigenous Peoples embrace a comprehensive and holistic view of the world which does not easily divide into mutually exclusive categories."

The Forum, once established, should seek to coordinate the activities of all United Nations agencies which relate to Indigenous issues. NSWALC agrees that the Forum will benefit from prioritising and structuring, and that in many instance, other agencies such as UNDP, UNEP, WHO and others will be in a position to supply on the ground assistance in relation to implementation measures.

2. United Nations Body to Which the Proposed Forum Would Report and its Relationship with the United Nations

NSWALC considers that the following three options are the most worthy of serious consideration:

a) Advisory Body of the UN General Assembly;
b) ECOSOC as a Focus for the Forum; or
c) Advisory Body to the Secretary-General.

a) Advisory Body to the UN General Assembly

The advantage of this option includes that it would raise the profile of Indigenous issues within the Intergovernmental bodies of the UN. Although doubts exist about the ability to secure broad participation at this level, this could perhaps be dealt with if the Forum was empowered to determine its own rules of procedure in this regard.

Having said that, the disadvantage of placing the Permanent Forum within the mechanisms of the General Assembly might be that the Forum's activities would be overshadowed by the complexity and workload of the General Assembly.

Nevertheless, NSWALC agrees that placement of the Forum at the General Assembly level would facilitate an enhanced treatment and recognition of the international political dimensions of Indigenous issues, as well as conflict resolution matters.

b) ECOSOC as a Focus for the Forum

Although this is not our preferred option, because it would not have the status of the General Assembly option, NSWALC sees some merit in having ECOSOC as the focus. We recognise that ECOSOC's role in coordinating agencies covering a wide range of issues would assist the Forum in its coordination role. However, NSWALC is concerned by the fact that ECOSOC is yet to emerge from the latest round of reviews as a reinvigorated body which has a real capacity to undertake the required functions in an effective manner.

c) Advisory Body to the Secretary-General

The obvious advantage of this includes direct access at the highest Secretariat level. The Secretary-General's coordinating role would be important. However, on the other hand, there would be a lesser profile at the Intergovernmental level.

Perhaps the advantages of this option could be achieved, to some extent, by having a highly-placed liaison and co-ordination officer representing Indigenous interests in the Secretary-General's 'Inner Office'.

3. Mandate and Terms of Reference

NSWALC considers, as did some of the participants of the Copenhagen Seminar, that the Forum should "deal in a comprehensive way in all issues affecting Indigenous Peoples." It should for example:

a. monitor the implementation of the Declaration on the Rights of Indigenous Peoples (when adopted), as well as monitor other legal and policy instruments;

b. coordinate the UN system of activities relating to Indigenous Peoples, and consider reports of the UN specialised agencies in relation to Indigenous issues;
c. conduct expert studies and other research activities into problems facing Indigenous Peoples, and develop policies;
d. make recommendations to its Parent Body;
e. provide guidance and advice to interested Parties through, amongst other things, the development of programs; and
f. disseminate information on the conditions and needs of Indigenous Peoples.

4. Activities that Might be Undertaken by the Forum

NSWALC agrees with the following suggestions contained in the Danish Paper regarding proposed activities to be undertaken by the Permanent Forum:

a. dissemination of information
b. establishing thematic or regional working groups
c. evaluation activities
e. urgent action procedures
f. country visits
g. the appointment of Special Rapporteurs
h. holding expert meetings
i. the elaboration of studies
j. small-scale projects
k. technical and expert advice to other United Nations bodies and agencies.

5. Participation of Indigenous Peoples

NSWALC suggests that a Committee of fifteen be appointed by the Secretary-General, made up of:

- five Governmental Members, nominated by Governments;
- five Indigenous representatives; and
- five independent experts appointed on the basis of nominations made by the international Indigenous Community.

Each of the three groups of five appointments would be representative of the five geographic regions of the UN. In this regard, we agree with the following comments in the Danish Paper:

> 'It would be necessary to bring Indigenous Peoples together at regional and international conferences in order to discuss the possibilities for establishing a proper procedure [to choose candidates for the Committee]'.

NSWALC believes that this proposal will ensure maximum accountability, efficiency and flexibility. There will be a balance between Indigenous and Governmental interests which will enhance the credibility of the Forum in the eyes of the international community generally.

Indigenous Peoples should have the same access to the Forum as we do to this Working Group.

6. Relationship with the Working Group on Indigenous Populations

We consider that the Working Group on Indigenous Peoples must have an on-going role. NSWALC strongly agrees with the proposition contained in the Danish Paper that:

> 'Rather than change the mandate of the Working Group, it should be perfectly possible to support and strengthen its continuing contribution to the recognition of Indigenous Rights'.

7. Financial and Secretariat Implications

NSWALC considers that the core operating expenses of the Forum, such as its Secretariat and conference costs should be guaranteed from recurrent UN expenditure. Governments should be encouraged to supply extra resources such as staff secondments, technical assistance, and funding for identified positions. As with other UN bodies, Governments should also sponsor seminars, workshops and conferences away from headquarters.

Other UN agencies could assist with expertise, technical support and the joint funding of projects and conferences.

A voluntary fund seminar to the already established fund for the Working Group could be established to assist Indigenous participants and observers to attend the Forum meetings.

8. Other Matters such as the Forum Location

The location of the Core Secretariat and principal meeting place of the Forum should not preclude many of the Forum's activities taking place in difference locations around the world, especially in areas of particular interest to Indigenous Peoples.

NSWALC believes, on balance, that the Forum's headquarters should be in NEW York, to maximise the Forum's role in coordinating and developing UN agencies' roles in Indigenous matters. We consider that the ECOSOC precedent of alternating meetings between New York and Geneva does not demonstrate any significant advantages. It should be noted however, that proximity to the Geneva-based Centre for Human Rights would give some benefits to Indigenous issues.

Although we recognise that locating the Forum in New York could pose some disadvantages and difficulties. For instance it is known that the institutional and bureaucratic culture of the New York headquarters is not as user friendly for Indigenous Peoples as Geneva or other smaller capitals. However, on balance, NSWALC believes that the Forum can best engage and deal with these particular problems by ensuring an effective permanent presence within the UN Headquarters.

ANNEX C

THE COBO STUDY - A WORKING DEFINITION OF 'INDIGENOUS'

It is widely accepted that self-identification is the critical factor in any definition of 'indigenous'. The rights of peoples generally, are recognised in the Charter of the United Nations and the International Bill of Human Rights, without there being any accompanying definition. However, the working definition of 'indigenous' contained in the Cobo Study, referred to below, provides useful guidance, but is in no way regarded as an authoritative, binding definition.

The *Study of the Problem of Discrimination Against Indigenous Populations* (E/CN.4/Sub.2/1986/7 and Add. 1-4), prepared by Special Rapporteur of the Sub-Commission, Mr J. Martinez Cobo, is regarded as an acceptable working 'definition' by many indigenous peoples and their representative organisations. Indeed, many argue that the formulation of a comprehensive, universal definition of 'indigenous' is not possible; the diversity of the world's indigenous peoples is such that some indigenous peoples would invariably be excluded by its language.

The Cobo Study understands indigenous communities, peoples and nations as:

> those which, having a historical continuity with pre-invasion and precolonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems.

Dr Erica-Irene Daes, Chairperson-Rapporteur of the United Nations Working Group on Indigenous Peoples, has noted[1] that this working definition highlights the following elements:

- the distinctiveness of indigenous peoples;
- the impact of colonialism on indigenous peoples; and
- "non-dominance at present", which implies that some form of discrimination or marginalisation exists, and justifies action by the international community. It does not however follow that a group ceases to be' indigenous' if, as a result of measures taken for the full realisation of its rights, it were no longer non-dominant.

[1] Daes, Erica-Irene (1996) *Pacfic Island Workshop on the United Nations Draft Declaration on the Rights of Indigenous Peoples,* paper presented at Suva, Fiji, September 1996, p. 24.

ANNEX D

DRAFT DECLARATION AS AGREED UPON BY THE MEMBERS OF THE UNITED NATIONS WORKING GROUP ON INDIGENOUS POPULATIONS AT ITS ELEVENTH SESSION

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigneous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-

determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration of the Rights of Indigenous Peoples:

PART I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the

right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic,social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addtion, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
e) Any form of propaganda directed against them.

Article 8

Indigenous people have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict. States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict and shall not:

a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
b) Recruit indigenous children into the armed forces under any circumstances;
c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;
d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred

places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

PART IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the land, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive

capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous material shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, rela-

tions and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the

resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

UN Doc.E/CN.4/Sub.2/1993/29.

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