# BREAKING THE DEADLOCK: DEVELOPING AN INDIGENOUS RESPONSE TO PROTECTING INDIGENOUS TRADITIONAL KNOWLEDGE

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## I Introduction

Since the epic journey in 1923 of Haudenosaunee Chief Deskaheh to Geneva to speak to the League of Nations on behalf of the Six Nations of the Iroquois, Indigenous peoples have looked to the international arena as a place to seek protection of their rights and their way of life and as a place for Indigenous voices to be heard. Chief Deskaheh was denied an audience with the League, as were other Indigenous leaders who sought its assistance.[1] Despite this ignominious beginning the international community is now heavily engaged in protecting Indigenous rights and raising awareness of Indigenous issues.

Ensuring the proper protection of Indigenous traditional knowledge is an important issue that has been debated in the international arena for decades. Indigenous traditional knowledge has been used commercially in artwork, music, medicine and numerous other forums without the consent of the Indigenous owners of that knowledge. One only needs to consider how often Indigenous designs appear on tourist gimmicks, or as a brand name for a new car or a sporting team, in order to begin to understand the magnitude of this issue. A pertinent example in Australia is the decision of the Federal Court in *John Bulun Bulun v R & T Textiles Pty Ltd*,[2] which highlighted the inability of the Australian legal system to properly protect Aboriginal traditional knowledge.[3] A painting by John Bulun Bulun which, with the permission of senior members of the Ganalbingu people, incorporated significant and sacred cultural material, was re-printed on fabric overseas, imported and sold in Australia. Mr Bulun Bulun successfully sought a declaration that his copyright had been infringed and was granted an injunction against future infringement. However, Mr George Milpurrurru, as second applicant on behalf of the Ganalbingu, was unsuccessful in arguing that the Ganalbingu had a right of collective ownership or communal title to copyright based on customary law. Justice Von Doussa recognised that Ganalbingu laws and customs regulated the use of the cultural material between Mr Bulun Bulun and the Ganalbingu but held that the Australian legal system was unable to recognise that the Ganalbingu held communal title to copyright:

> To conclude that the Ganalbingu people were communal owners of the copyright in the existing work would ignore the provisions of s 8 of the *Copyright Act*, and involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia.[4]

Although the Ganalbingu's right to protect their traditional knowledge was not recognised by Australian copyright law, Von Doussa J held that the unique relationship between the artist and the traditional owners gave rise to a fiduciary relationship, meaning that Mr Bulun Bulun was under an obligation not to exploit the work in a way contrary to Ganalbingu laws and customs and to take 'reasonable and appropriate action to restrain and remedy' any infringement of the copyright.[5] As Mr Bulun Bulun had taken action on notice of the copyright infringement, Von Doussa J held that he had fulfilled his fiduciary obligations.

This example provides an insight into ways in which traditional knowledge may be misappropriated or misused and the legal difficulties Indigenous people face in trying to protect their traditional knowledge. This lack of legal protection makes it impossible for Indigenous peoples to control the use of their own knowledge, meaning that Indigenous communities can lose control over their songs, dances, designs, artwork, stories, medicinal knowledge, environmental knowledge, cultural integrity and even community harmony.

For many years, Indigenous people have expressed concern about the inadequate protection of their traditional knowledge. Although this concern has not gone unheeded,

the issue remains unresolved. The challenge that confronts the international community is determining how the overall lack of protection of Indigenous traditional knowledge should be remedied.

'Indigenous traditional knowledge' is used in this paper to describe traditional practices, culture, and knowledge of plants and animals and their methods of propagation; it includes expressions of cultural values, beliefs, rituals and community laws and knowledge regarding land and ecosystem management. Traditional knowledge is, more often than not, unwritten and handed down orally from generation to generation. Some of this knowledge is of a highly sacred and secret nature and therefore extremely sensitive, culturally significant and not readily publicly available, even to members within the particular group. It is on this understanding of Indigenous traditional knowledge that this paper proceeds.[6]

Since its establishment in 2000, the United Nations Permanent Forum on Indigenous Issues ('Permanent Forum') has provided a central voice in the international arena for Indigenous concerns. The mandate of the Permanent Forum extends to the provision of advice and recommendations to the United Nations Economic and Social Council and the preparation and dissemination of information on Indigenous issues. In relation to Indigenous traditional knowledge, the Permanent Forum has made a number of recommendations calling for this issue to be addressed as a matter of urgency.[7] Recognising that numerous United Nations and intergovernmental bodies were already actively engaged in considering ways to remedy the inadequate protection of Indigenous traditional knowledge, the Permanent Forum recommended that an International Technical Workshop be convened in order to bring together Indigenous experts and United Nations agencies.[8] As a result, the International Technical Workshop ('the Workshop') convened in 2005 to discuss issues surrounding the protection of Indigenous traditional knowledge, including the approaches taken by different agencies, making numerous recommendations.[9] Recognising the relationship between Indigenous traditional knowledge and customary laws, the Workshop recommended that the Permanent Forum commission a study on 'customary laws pertaining to indigenous traditional knowledge in order to investigate to what extent such customary laws should be reflected in international and national standards addressing indigenous traditional knowledge'.[10]

On the basis of the Workshop's recommendation, at the conclusion of its fifth session in May 2006, the Permanent Forum appointed Michael Dodson as Special Rapporteur to prepare

> a concept paper on the scope of the study that would investigate to what extent such customary laws should be reflected in international and national standards addressing traditional knowledge ... The study would include an analysis of indigenous customary law as a potential sui generis system for protecting indigenous traditional knowledge. Relevant organizations of the system should collaborate to promote respect for and recognition of the customary legal systems of indigenous populations pertaining to indigenous knowledge in national legislation and policies as well as with regard to their application.[11]

In accordance with the Workshop's recommendation, the Special Rapporteur presented a 'Report on Traditional Knowledge' ('Report') to the Permanent Forum in May 2007.[12]

This article is substantially based on that Report. It examines the existing legal status of Indigenous traditional knowledge and the potential means of ensuring its future protection. A number of critical issues in this debate are examined, including the role of intellectual property law and the apparent deadlock the international debate has reached. In addition, various issues are identified that require the attention of the international community.

## II Overview of the Current Situation

The right of Indigenous peoples to protect and enjoy their traditional knowledge is presently recognised in a number of international instruments, including:

(a) Article 27 of the *Universal Declaration of Human Rights*;[13]
(b) Article 27 of the *International Covenant on Civil and Political Rights*;[14]
(c) Article 15(1)(c) of the *International Covenant on Economic, Social and Civil Rights*;[15]
(d) Article 8(j) of the *Convention on Biological Diversity*;[16]
(e) *International Treaty on Plant Genetic Resources for Food and Agriculture*;[17]
(f) Articles 13, 15 and 23 of the International Labour Organization *Convention (No 169) concerning Indigenous*

*and Tribal Peoples in Independent Countries*;[18]

(g) *Berne Convention for the Protection of Literary and Artistic Works*;[19]

(h) *Agreement on Trade-Related Aspects of Intellectual Property Rights*;[20]

(i) Article 3 of the *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and /or Desertification, Particularly in Africa*;[21]

(j) Paragraph 12(d) of the *Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*;[22]

(k) United Nations Department of Economic and Social Affairs *Agenda 21*, Paragraph 26.1;[23]

(l) World Health Organization, *Traditional Medicine Strategy 2002-2005*;[24]

(m) Principle 22 of the *Rio Declaration on Environment and Development*;[25] and

(n) Articles 11 and 31 of the *Declaration on the Rights of Indigenous Peoples*.[26]

In addition to these international instruments, there are numerous regional systems of protection, including the Organisation of American States *Draft Declaration of the Rights of Indigenous Peoples*,[27] the *Bangui Agreement* of the African Intellectual Property Organization,[28] the *Tunis Model Law on Copyright for Developing Countries*, and the UNESCO-WIPO *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*.[29] There are also a number of declarations, including the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous People*,[30] and the *Kari-Oca Declaration and the Indigenous Peoples' Earth Charter*.[31]

At a national level there is a plethora of legislative and policy initiatives aimed at addressing the issue of Indigenous traditional knowledge. The following examples from several different states, which address environmental, health, medicinal and intellectual property aspects of traditional knowledge, illustrate the diversity of these approaches.[32]

In Australia environmental protection regulations recognise the 'special knowledge held by Indigenous persons about biological resources'.[33] The Australian Government has also introduced guidelines for natural resource management, which recognise that throughout Australia Indigenous peoples 'have links to the land and sea that are historically, spiritually and culturally strong and unique'.[34] In the Northern Territory traditional medicinal knowledge is partially recognised through the utilisation of Aboriginal health workers, who act as a bridge between traditional healers, Indigenous communities and conventional medical practitioners.[35]

In Canada health practices are regulated through legislative means at the federal and provincial levels.[36] At the provincial level, some laws specifically do not apply to Aboriginal healers and midwives and thus by implication recognise Indigenous traditional medicinal systems and knowledge.[37] Indeed, some provincial laws specifically recognise Aboriginal healing practices.[38] The Canadian *Environmental Assessment Act 1992* provides for the consideration of 'aboriginal traditional knowledge … in conducting an environmental assessment'.[39] Canada also utilises Aboriginal skills under its National Forestry Strategy 2002-2008 and the Certification System for National Forest Management.[40]

In South Africa the *Traditional Health Practitioners Act 2004* recognises and regulates the practice of traditional medicine, while the *National Environmental Management Act 1998* directs decision makers on environmental matters to take into account all forms of knowledge, including traditional knowledge.

In Bolivia a national system of protected areas has been established under the *Supreme Decree No 24, 122 of 1995*, wherein traditional knowledge is acknowledged and used in management practice.[41]

In Ecuador the practice of traditional medicine is recognised in article 44 of the *Constitution of Ecuador 1998*. In the Philippines, traditional medicinal practices are recognised by the *Traditional and Alternative Medicine Act (TAMA) of 1997*. Section 4 defines traditional medicine as

> the sum total of knowledge, skills, and practice on health care, not necessarily explicable in the context of modern, scientific philosophical framework, but recognized by the people to help maintain and improve their health towards the wholeness of their being, the community and society, and their interrelations based on culture, history, heritage, and consciousness.

The World Health Organization Worldwide Review[42] indicates that 70 percent of the rural population of India depend on the Ayurveda system of traditional medicine.

The Indian Government regulates traditional medicinal knowledge through the *Indian Medicine Central Council Act* 1970.

In Nigeria Indigenous traditional knowledge is protected through intellectual property law, specifically the *Copyright Act 1990* c 68, which seeks to protect traditional folk law. Article 28(5) of that Act defines folklore as 'a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an inadequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means'. By contrast, the Central African Republic's copyright law defines folklore as 'all literary and artistic productions created by the national communities, passed on from generation to generation and constituting one of the basic elements of the traditional cultural heritage'.[43]

These domestic and international attempts to protect Indigenous traditional knowledge vary in status and involve differing legal standards. The aforementioned international instruments principally offer protection based on either general human rights standards or specific Indigenous concerns. Article 27(2) of *UDHR* and article 15(1)(c) of *ICESCR* are examples of general human rights based protection. Both of these provisions recognise 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'. This is a very general statement and provides little substantive protection for Indigenous traditional knowledge, given the problematic notion of authorship in the context of communal creation and ownership.

An example of a more specific Indigenous traditional knowledge provision is article 8(j) of the *Convention on Biological Diversity*, which calls upon parties to respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities that embody traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Although article 8(j) directly considers Indigenous traditional knowledge, it is limited to situations where traditional knowledge is relevant to biological diversity and is not designed to provide holistic protection for Indigenous traditional knowledge.

Arguably the most explicit provision for the protection of Indigenous traditional knowledge is contained in the *Declaration on the Rights of Indigenous Peoples* ('*Declaration*'),[44] which currently languishes before the General Assembly. Despite its current status, the *Declaration* provides a strong and persuasive statement in support of the protection of Indigenous traditional knowledge. Article 31(1) states:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Importantly, paragraph 2 of article 31 urges states to 'take effective measures to recognize and protect the exercise of these rights'. In addition to article 31 of the *Declaration*, article 11(2) emphasises the right to practice and revitalize cultural traditions and customs and urges states to provide redress through effective mechanisms, with regard to Indigenous 'cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs'.[45] The preamble of the *Declaration* also adds support to the protection of Indigenous traditional knowledge by recognising 'that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'.

## III Limitations of the Current Situation

While international, regional and national instruments provide a degree of protection for Indigenous traditional knowledge, this protection is by no means comprehensive. There are a number of United Nations agencies and intergovernmental organisations that are currently engaged in activities aimed at addressing this inadequate protection, including: the World Intellectual Property Organization ('WIPO'); the United Nations Development Programme; the United Nations Conference on Trade and Development; the Food and Agriculture Organisation of the United Nations; the Conference of the Parties to the Convention on Biological Diversity; the Working Group on Indigenous Populations; and, the United Nations Educational, Scientific and Cultural Organization.

WIPO's latest activities constitute the most recent development in international protection of Indigenous traditional knowledge. In 2000, WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('IGC') to act as a forum for considering the interplay between intellectual property law and Indigenous traditional knowledge. Two recent WIPO initiatives are of particular significance. First, the IGC has developed two comprehensive draft provisions addressing the protection of Indigenous traditional knowledge.[46] These documents set out a potential system of protection and aim to comprehensively address the practical issues that arise in the implementation of a *sui generis* system of protection. Second, the IGC has approved a study of customary law in recognition of the role of customary law and its relationship with Indigenous traditional knowledge.[47] The study is, however, still in its early stages.

WIPO, particularly through the creation of the IGC, has played a leading role in the push for the recognition and protection of Indigenous traditional knowledge. However, the pre-eminent role of WIPO has meant this international debate has occurred primarily within the parameters of intellectual property law. International intellectual property law provides protection for creators of certain works, whether it is in the field of science, literature, music, dance or art. Although the categories provided by intellectual property law do at times suffice, for the most part intellectual property law fails to protect Indigenous rights and interests. It seems that this failure is because Western constructs of intellectual property focus on individual knowledge and creativity, rather than communal trans-generational knowledge. Attempting to alter intellectual property law so that it can accommodate traditional knowledge is inherently problematic because traditional knowledge is wholly different to the individualised notions of creation and ownership underpinning Western intellectual property law. It is for this reason that new approaches are required.

It is important to note, however, that the call for *sui generis* protection has not necessarily been a call for an exchange of the current intellectual property system for an entirely new system. Rather, it is a call for a *sui generis* system that complements the current system by providing protection to those areas of traditional knowledge that receive no protection, or very limited protection, from international intellectual property law. Such a system must, in whatever form it takes, remain cognisant of the unique nature of Indigenous traditional knowledge and the role of customary law, and recognise the inherent limitations of intellectual property law in dealing with this issue.

## IV Objectives, Scope and Strategy of the Study

The international intellectual property regime has been examined in detail by various expert bodies in order to determine whether there is a way of protecting Indigenous traditional knowledge either through conventional intellectual property law or by creating a *sui generis* category or system of intellectual property law. Although there are differing views as to whether such a *sui generis* system of intellectual property law is plausible and if so, desirable, there is a growing view that the existing intellectual property regime is inadequate.[48] This view was raised at the Permanent Forum's Workshop and constitutes the crux of the issue before it. Acknowledging that the intellectual property regime is inadequate and recognising the nature of Indigenous traditional knowledge, the question becomes whether a *sui generis* system of protection should be established that is unimpeded by Western conceptions of intellectual property law and instead guided by Indigenous customary legal systems. If such a system is to be established, how should it operate? A *sui generis* system grounded in customary laws could set standards and provide guidance to states as to the appropriate protection of Indigenous traditional knowledge.

It is suggested that the Permanent Forum should commission a study, under its mandate to prepare and disseminate information, to determine whether there ought to be a shift in the focus on the protection of Indigenous traditional knowledge away from intellectual property law to protection via customary law, and if so, how this should occur. Such a study should consider how Indigenous traditional knowledge could be protected at an international level by utilising customary law, including the extent to which it should be reflected, thereby providing guidance to states and subsequently protection at national and regional levels.

## V Issues to be Considered by the Study

In the event of the Permanent Forum commissioning a study into appropriate means of protecting Indigenous traditional knowledge, there are a number of issues that need to be addressed.

## A Identifying the Question

There are three preliminary issues that must be considered: terminology; the nature of a *sui generis* system; and the intended beneficiaries.

### (i) Terminology

Terms such as 'Indigenous knowledge', 'traditional knowledge', 'Indigenous knowledge, cultures and traditional practice', 'folklore', 'Indigenous heritage' and 'Indigenous cultural and intellectual property' are invariably used in different contexts and attributed different meanings.[49] Regardless of the terminology the Permanent Forum ultimately uses, the term should be clearly defined to indicate the parameters of the study. However, providing a comprehensive definition of traditional knowledge is a difficult task and one that has questionable benefits. If traditional knowledge is to be recognised and protected by providing a framework within which Indigenous customary laws, as they relate to traditional knowledge, can operate, it may be in the best interests of Indigenous people to leave the term undefined. The benefit of using a term that is clearly delineated from other terms but is not explicitly defined is that the content of the term is not fixed and the term will therefore be able to adjust and adapt to dynamic customary legal systems and novel aspects of traditional knowledge. The downside of such an approach is that without a strict definition it may be difficult to ascertain what is actually included within such a term. This in turn may lead to unacceptable levels of uncertainty, potentially making any such instrument unworkable. In this regard, Article 31 of the *Declaration* may provide considerable guidance to the Permanent Forum.

### (ii) Nature of a *sui generis* system

It is imperative that there exists a clear understanding of what exactly is being asked for when there is a call for a *sui generis* system of protection. *Sui generis* is a term that has gained increased usage in Indigenous rights jurisprudence, particularly as a vehicle to describe the unique interaction between Indigenous peoples and dominant legal systems. Traditional knowledge is often labelled *sui generis* to indicate the failure of dominant legal systems, particularly the intellectual property system, to properly account for it. The term is also used to positively affirm the unique nature and status of Indigenous peoples and the right to protect their knowledge, customs and practices. However, it is important to ensure that *sui generis* does not ultimately result in 'lesser' protection, since history shows that Indigenous peoples have experienced the lesser nature of specialised protection in other situations.[50] It is crucial that protection, in whatever form is ultimately used, has a positive impact on Indigenous peoples and does not further alienate or misappropriate traditional knowledge and Indigenous customary laws.

The call for *sui generis* protection encompasses a number of subsidiary intentions. It may be used to indicate that the existing intellectual property regime is inadequate, and to declare that there is a need for that system to adapt itself in unique ways in order to properly address the misappropriation and misuse of Indigenous traditional knowledge. The call for a *sui generis* system may also be used to indicate that the current systems of protection are inadequate and that as a result of the unique nature of Indigenous peoples, their culture, knowledge and law, there is a need for a unique system of protection that is not bound by current systems and structures of national or international law. Finally, it may also be used to indicate that Indigenous legal systems are of their own kind and, as customary systems, bear little resemblance to Western legal systems of common law, civil law and international law. This inherent difference means that a unique way of protecting Indigenous traditional knowledge is required; one that is grounded in Indigenous legal systems.

### (iii) Intended beneficiaries

Much of the focus on the issue of Indigenous traditional knowledge has been on protecting Indigenous peoples from the misappropriation and misuse of their traditional knowledge without free, prior and informed consent. Any system of protection that is developed needs to comprehensively address this concern. It must be remembered that the desire to protect traditional knowledge also includes the desire to recognise ownership and control, which creates an opportunity for Indigenous people and communities to utilise a valuable resource. Without in any way justifying misappropriation, the fact that Indigenous traditional knowledge has been misappropriated for so long and in so many circumstances is indicative, inter alia, of the commercial value of traditional knowledge. Proper protection will enable Indigenous people to own and control traditional knowledge. This ownership and control will include the ability to protect secret and sacred aspects of traditional knowledge. It will also

enable Indigenous people to engage with local, national, and international economies in a commercially viable manner, if communities so desire. Indigenous people constitute some of the poorest communities in the world and disproportionately live in situations of poverty.[51] The opportunity to engage in trade and economically utilise a commercially viable resource should not be underestimated.

### B Determining the Relationship Between International, Regional, National and Communal Forums

In recommending the creation of the aforementioned concept paper, the Permanent Forum sought to investigate the extent to which customary laws should be reflected in international and national standards. It is clear that the issue of protecting traditional knowledge from misappropriation and misuse and ensuring Indigenous peoples' ownership and control of this knowledge has a number of dimensions, including intellectual property, human rights and trade. It is also clear that these dimensions intersect with international, regional, national and communal forums.

The centrality of customary law in providing protection for Indigenous peoples' traditional knowledge means that the international Indigenous community must be a central component in any discussion of Indigenous traditional knowledge. Generally speaking, rights to traditional knowledge are held collectively by Indigenous communities. This may involve a section of the community or, in certain instances, a particular person sanctioned by the community that is able to speak for, or make decisions in relation to, a particular instance of traditional knowledge. In any event, the role of the community is central.

There are roughly 350 million Indigenous people living in approximately 70 countries throughout the world, including 5000 distinct peoples and over 4000 languages and cultures.[52] Amongst this vast population, there are many Indigenous legal systems. For example, in Australia Aboriginal and Torres Strait Islanders account for 2.4 percent of the total population, approximately 460,140 persons.[53] It has been estimated that prior to colonial contact, there were 350-750 distinct Indigenous groups, languages and dialects, which would mean the existence of between 350-750 potentially distinct legal systems. Recent estimates indicate that there are now 200 languages still being used and it is probably reasonable to estimate a similar number of legal systems. On a global scale, it is not unreasonable to assume that there are at least as many legal systems associated with a fair proportion of Indigenous peoples throughout the world. These statistics provide a sharp insight into the myriad potential connections between Indigenous, domestic and international law.

The real challenge in developing a sustainable and equitable system for the protection of Indigenous traditional knowledge lies in deciphering the relationship or the potential relationships between Indigenous communities and international, regional and national forums.

### C Determining the Relationship Between the Study and Existing Structures, Activities and Resources

As Indigenous peoples' traditional knowledge covers a wide range of areas, the protection of Indigenous traditional knowledge necessarily intersects with various areas of law or international issues, such as intellectual property law, environmental law, heritage and sustainable development. This has meant that attempts to develop structures for the protection of traditional knowledge have tended to focus on either a particular aspect of Indigenous traditional knowledge or a particular interaction between Indigenous traditional knowledge and a specific area of law. In recognition of the diversity of Indigenous traditional knowledge, bodies such as UNESCO and WIPO have sought to collaborate in developing effective protection measures.[54]

This inherent diversity of Indigenous traditional knowledge means that a cohesive approach to its protection is needed. Indeed, a central aspect of the Permanent Forum's mandate is to promote the integration and coordination of activities relating to Indigenous issues within the United Nations system. It was the need for a coordinated approach that was one of the impetuses behind the Workshop and resonates throughout the Workshop's recommendations.

The process of determining existing systems and activities may occur in several ways. It may be efficient to initially commence a comprehensive literature review. Alternatively, it may be useful to initiate a follow-up Workshop. In addition to ensuring the Permanent Forum is updated as to the current status quo, a further Workshop would allow experts and agencies to discuss the best way forward. Depending on the approach taken by the Permanent Forum, a literature review may suffice and a Workshop, if needed,

may be more beneficial if it were to occur at a later stage in the study or perhaps even regularly throughout the duration of the study.

It is important that the Permanent Forum does not simply ascertain what systems, activities and resources already exist and then commission a study based on these arrangements. Once it has been determined what structures and resources either exist or are soon to exist, it will be necessary to assess their relevance and value as resources for this study. If such an assessment is not undertaken, the study may be misguided and the results of any study may be limited by assumptions embodied in prior work. For example, assessments should consider whether there are any assumptions underlying the work, such as whether the question and potential solutions being considered are located solely within a framework of intellectual property law and whether the work has been developed in consultation with Indigenous peoples. The question of how these mechanisms should be assessed will need to be addressed by the Permanent Forum. It may be that a list of objectives or criteria of relevance can be established that would guide any such assessment. In any event, the assessment of existing mechanisms and resources will be fundamental in ensuring that there is optimal utilisation of United Nations resources available to the Forum. Importantly, a proper assessment will identify areas that need to be addressed by the study and will also assist the Permanent Forum in determining the next step forward.

Once a proper assessment has occurred, the Permanent Forum will need to consider how any further developments that may result from the study can relate to existing mechanisms and resources. The Permanent Forum will also need to consider how any developments from the study will relate to any other developments that may occur, such as the creation of an international document by WIPO. It would be wise to ensure that any future developments by other United Nations or intergovernmental agencies complemented, rather than inhibited, the outcomes of this study and vice versa.

By ascertaining existing structures, activities and resources and engaging in an assessment of these, the Permanent Forum will be able to untangle the relationship between existing mechanisms and any study it seeks to undertake. Although this is a complex question at this stage, after an assessment has occurred, the Permanent Forum will have established a good foundation upon which a successful study could be developed. Importantly, undertaking an assessment will ensure the integration and coordination of United Nations activities, consistent with the Permanent Forum's mandate.

### D Potential Structures and Outcomes

The Permanent Forum seeks to enquire whether customary laws could be reflected in international and national standards. Despite developments both nationally and internationally, it seems clear that an international framework of some sort is necessary in order to provide guidance to states in this area. This need was succinctly put forth at the United Nations Conference on Trade and Development ('UNCTAD') meeting of experts in 2000:

> National *sui generis* systems by themselves will not be sufficient to protect [traditional knowledge] adequately. There is therefore a need to explore an international mechanism that might explore minimum standards of an international sui generis system for [traditional knowledge] protection.[55]

On this basis, the following discussion is limited to potential mechanisms of protection located within the international arena. The presumption is that any mechanism developed internationally will in due course filter down to states. Therefore, although this discussion is centred on potential international law developments, it is intended that ultimately these developments will be implemented nationally.

Although there are various available options at the international level, it seems that the principal push is currently for an international instrument. It has been suggested by both the Workshop and the Permanent Forum that customary laws should be reflected in international standards. This could occur through the creation of a treaty, a framework agreement, a memorandum of understanding, or a number of other structures. It should be noted that the mechanisms considered in this concept paper are not intended to limit in any way the potential structures that may be considered in the study.

A treaty is one way in which customary laws could be reflected in an international document and potentially provides a strong basis upon which traditional knowledge could be protected. If a treaty were developed for the sole purpose of ensuring protection of Indigenous traditional knowledge, rather than in unison with other issues, as for example has occurred in the elaboration of the *Declaration*, the level of

specificity would need to be carefully considered. If articles within a treaty were quite specific and provided detailed requirements as to what may constitute traditional knowledge or what circumstances may be afforded protection, then this could potentially raise concerns of inflexibility. This coincides with the previous discussion as to whether the relevant term, for example, 'Indigenous traditional knowledge', ought to be clearly and exhaustively defined or whether it ought to be given clear parameters and perhaps defined by way of a non-exhaustive inclusive definition. Inflexibility, however, is an issue not only limited to determining an appropriate definition but also to the operation of a treaty as a whole. For example, if customary law were to be completely reflected in an international treaty this could inhibit the development of customary law and be perceived as unnecessarily inflexible. A treaty that quite specifically details the subject matter will be uniform in nature, but Indigenous peoples, customary laws and traditional knowledge are not uniform in nature. The concern with a treaty such as this is that it may not provide the space or allow enough room for the operation of what are diverse customary legal systems of diverse Indigenous peoples throughout the world.

Similarly, in addition to potentially being inflexible as to its subject matter, a specific treaty that seeks to codify customary law may struggle to aptly protect the rights of Indigenous peoples to their traditional knowledge. The reason for this is that any attempt to codify customary law at an international level will be artificial. As noted previously, there are a vast number of Indigenous legal systems in the world and, as with other legal systems, they are not uniform. Although there may be certain commonalities, such as a tendency for communal rather than individual ownership, this may not always be the case. As a result, any attempt to reflect customary law in international law by articulating customary law principles as they pertain to traditional knowledge may in fact limit the operation of customary law and accordingly fail to protect traditional knowledge. Such an outcome could have disastrous effects on Indigenous people. This concern also applies in the event of codification at the domestic level.

A further issue to consider in assessing whether a treaty articulating customary laws would be an appropriate vehicle for the protection of traditional knowledge is the question of what mechanism would be put in place to handle disputes over the interpretation of Indigenous traditional knowledge. The issue of interpretation becomes particularly important in situations of secret or sacred knowledge. If customary law is subject to some form of codification, whether international or national, the question of who interprets the law is pertinent. In the case of an international treaty, disputes may be resolved by way of diplomacy, through an entity created by that treaty for that particular purpose (such as a tribunal or a committee), or in some circumstances through the International Court of Justice ('ICJ'). In this situation, it is important to recognise that it is states that have standing in the ICJ. Private persons, collectivities and international organisations are not entitled to access the Court, although certain public international organisations, including specialised agencies like WIPO and United Nations organs, do have access in various circumstances.[56] In order for the ICJ to deal with disputes under a treaty to protect Indigenous traditional knowledge it would be necessary for such a treaty to include a jurisdictional provision enabling this to occur.[57] It may be that the study finds that dispute resolution and legal interpretation via the ICJ is not the preferred option. In any event, the process of treaty making necessarily requires some mechanism or forum in which disputes, including disputes as to the interpretation of provisions, can be resolved. By codifying customary law and completely or substantially reflecting customary law in an international instrument, the danger for Indigenous peoples is that the power to interpret the treaty, including the power to interpret customary laws, will be vested in a non-Indigenous body. It may be that a central body would be useful to settle such disputes. However, such a decision must be made with recognition of the potential for such a body to usurp the power of interpretation and therefore law-making power from Indigenous peoples.

A study should also consider the development of a treaty that does not specifically articulate principles of customary law but still provides general protection to traditional knowledge. This would require greater detail than article 8(j) of the *Convention on Biological Diversity* or the *Declaration*, and should also provide the actual mechanics for such protection, including provisions for arbitration and enforcement. Such a treaty would reflect but not articulate customary law. Although situated nationally, an example of general protection is section 35(1) of the Canadian *Constitution Act 1982* which provides that '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. A provision that recognises and affirms Indigenous peoples' rights to their traditional knowledge may be a conduit for international recognition whilst avoiding the dangers of a detailed articulation of customary laws. Such a provision could provide legal space

for the operation of customary laws. However, it may be that subsequently a more complex legal relationship would need to be developed between Indigenous customary law and domestic law.

Two different approaches to the creation of a traditional knowledge treaty have been suggested: a specific treaty that codifies customary law to some extent, and a more general treaty that creates legal space for the continuing operation of Indigenous legal systems without impinging upon their operation. In considering whether either of these proposals are viable options, the study by the Permanent Forum should consider the relative benefits and detriments of each option. Issues of uniformity, flexibility, dispute resolution and interpretation ought to be part of the process of assessing the relative merits of these models. In addition, the study must carefully consider the issue of registration and closely examine the appropriateness of codification as this may not be the ideal method for Indigenous peoples to retain control of their customary law.

Regardless of which models are contemplated, the Permanent Forum will need to consider whether there should be a document, structure or forum that addresses all aspects of Indigenous traditional knowledge or whether there should a separation of issues across various documents, structure or forums. If there is to be a separation, then how could customary law be recognised across diverse areas? Could this occur with uniformity? On the other hand, if a central document or structure were to be created, how would this interact with existing instruments, such as article 8(j) of the *Convention on Biological Diversity*? These questions will need to be considered irrespective of which mechanisms of protection are examined. Further, the question of arbitration should be carefully considered. The study should consider whether a body should be established that is constituted by Indigenous people or whether an established forum, such as the Human Rights Council, could be utilised. Finally, no matter which vehicle is used, the question of enforcement and mechanisms for compliance will need to be addressed.

In addition to legal mechanisms for protection, it is important that non-legal approaches are considered. Although a legal response is most likely necessary, it may be beneficial to consider what structures could exist outside of the international forum. For instance, the Permanent Forum may be able to advocate initiatives, such as the creation of an Indigenous label similar to the Fairtrade mark, in order to identify Indigenous ownership.[58] Such a campaign may have far-reaching effects and assist in raising awareness of this issue globally. This may be undertaken as an initiative either separately or in addition to the creation of a formal instrument.

In summary, there are a number of potential mechanisms of protection located within the international arena that could reflect customary law to varying degrees and that could be developed in order to properly protect Indigenous traditional knowledge both at an international and a national level. Careful consideration of the relative benefits of each instrument will assist in developing a mechanism of protection that assists Indigenous people in their fight to protect their traditional knowledge. Although the process of developing an instrument or structure will not be easy and there are a host of difficult issues that will need to be addressed, the process itself is important. By engaging in a consideration of potential structures with an awareness of the issues outlined above, the Permanent Forum will be able to navigate its way through this complex area.

## E Developing the Study

The Permanent Forum may consider it appropriate to recommend to the Economic and Social Council that it commission a study under its own mandate. Furthermore, the Permanent Forum could consider providing advice to the Economic and Social Council about the conduct of the study, including what role the Permanent Forum might be given in the examination of this question. Alternatively, the Permanent Forum may decide to examine the issue itself under its own mandate.

If the Permanent Forum elected to commission a study it could create a subsidiary forum, such as an intersessional meeting, appoint a Special Rapporteur, or leave the matter with organisations currently engaged in this issue. The Permanent Forum could also, as another approach, appoint a designated number of its members to hold specialised meetings on Indigenous traditional knowledge during sessions of the Forum. If an intersessional meeting were decided upon, it could consist of members of the Permanent Forum and delegates from United Nations, intergovernmental agencies and Indigenous experts involved in this issue, which may be a suitable forum to oversee the study. The potential role of the inter-agency support group should also be taken into account. The Permanent Forum should also consider

whether a Special Rapporteur dedicated to this task should be appointed or whether the study should be left in the charge of other entities.

There are several other practical matters that may need to be addressed initially, such as whether there should be 'exploratory missions' and whether pilot projects should be established in particular countries, and if so, at what stage of the project. As these decisions will have budgetary ramifications, it would be beneficial if they were contemplated at the outset.

In constructing a study that aims to address the continued failure to protect Indigenous traditional knowledge, the Permanent Forum must develop an appropriate process for addressing this issue. The study should call upon the experience of those involved in the elaboration of the *Declaration*. The Permanent Forum may also wish to consider how, and to what extent, Indigenous people can be involved in setting up the study. This might involve consulting Indigenous people as to what process should be used or through developing a code of conduct.[59] Although this will take some time, if there is to be a shift to a truly *sui generis* system of protection, creating a *sui generis* system of enquiry may be a crucial first step.

If the Permanent Forum is of the view that a study should be undertaken, it is important that the foundations of the study are properly laid. Taking this approach will provide the Permanent Forum, and therefore Indigenous peoples throughout the world, with the best opportunity for a successful outcome.

## VI Conclusion

> The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States, shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.[60]

Despite being an issue of international attention for many years, Indigenous traditional knowledge is still vulnerable to misappropriation. It is time to recognise that Indigenous traditional knowledge is not simply an intellectual property issue. Likewise, it is not simply a human rights issue, a trade issue nor an amalgamation of these issues. The proper protection of Indigenous traditional knowledge is an Indigenous issue and Indigenous people should be central to this process.

In resolution 2000/22 the United Nations Economic and Social Council established the Permanent Forum as an advisory body to provide advice and recommendations to the Economic and Social Council, to raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system, and to prepare and disseminate information on Indigenous issues.[61]

The Economic and Social Council's mandate is specified in article 62 of the *Charter of the United Nations* and includes initiating studies and reports with respect to international economic, social, cultural, educational, health and related matters and making recommendations with respect to such matters to the General Assembly, members of the United Nations and specialised agencies.[62] It may also prepare draft conventions for submission to the General Assembly and call international conferences with respect to matters falling within its competence.[63]

The right of Indigenous peoples to protect and enjoy their traditional knowledge must be recognised and protected. Consistent with its mandate and that of the Economic and Social Councils, the Permanent Forum should strongly advocate for the commissioning of a study on Indigenous traditional knowledge, focusing on the protection of traditional knowledge via customary law. As the peak focus body within the United Nations system for Indigenous peoples, the Permanent Forum can and should take a lead role in developing discussion and dialogue that is aimed at resolving this issue.

## Endnotes

* This article has been prepared by Michael Dodson and Olivia Barr, and has been published with the permission and support of the United Nations Permanent Forum on Indigenous Issues. This article was originally prepared as a report by Special Rapporteur Michael Dodson for the Permanent Forum's Sixth Session, held in New York from 14 - 25 May 2007. The original report is UN Doc E/C.19/2007/10 <http://daccessdds.un.org/doc/UNDOC/GEN/N07/277/15/PDF/N0727715.pdf?OpenElement> at 1 August 2007.

1 A year after Chief Deskaheh attempted to speak to the League of Nations, Maori spiritual leader T W Ratana and a large delegation

of Maoris travelled to London to protest New Zealand's breach of the Treaty of Waitangi and petitioned King George for redress. This was denied. In 1925, Ratana also journeyed to Geneva to approach the League of Nations about his cause. However, like Chief Deskaheh, he too was turned away. See Faith A Ruffin, '10 Stories the World Should Hear More About: Indigenous Peoples: Living in Isolation', *UN Chronicle Online* <http://www.un.org/Pubs/chronicle/2004/issue2/0204p18.asp> at 1 August 2007.

2 (1998) 86 FCR 244.

3 See also, *Milpurrurru v Indofurn* (1994) 54 FCR 240, which involved the reproduction of artwork on carpets produced in Vietnam. Although this constituted a breach of copyright, statutory remedies did not recognise the infringement of ownership rights of traditional owners, which affected the award of damages. See further, *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, which involved a dispute between the artist, the artist's agent and the Reserve Bank over the use of an image of the Morning Star Pole on a commemorative $10 bank note.

4 (1998) 86 FCR 244, 258.

5 Ibid 245.

6 There is a variety of terminology in this field. The terms 'Indigenous traditional knowledge' and 'traditional knowledge', although vague, are widely used and commonly understood. Other examples of terminology are 'traditional knowledge, innovations and practices' used in article 8(j) of the *Convention on Biological Diversity*, 'indigenous knowledge, cultures and traditional practices' used in the *Declaration on the Rights of Indigenous Peoples*, and 'traditional cultural expressions' used by the World Intellectual Property Organization.

7 For recommendations relating to traditional knowledge adopted by the Permanent Forum during the First - Third Sessions, see Secretariat of the Permanent Forum on Indigenous Issues, *International Workshop on Traditional Knowledge: Background Note,* UN Doc PFII/2005/WS.TK, annex I, 8-14 (2005) <http://www.un.org/esa/socdev/unpfii/documents/workshop_TK_background_note.pdf> at 1 August 2007. For recommendations adopted during the Fourth Session, see UN Doc E/C 19/2005/9 [28], [34], [41-48], [106], [138], [140] and [141] <http://daccessdds.un.org/doc/UNDOC/GEN/N05/377/61/PDF/N0537761.pdf?OpenElement> at 3 August 2007. For recommendations adopted during the Fifth Session, see UN Doc E/C 19/2006/11 [32 – 35], [101], [108], [119], [120], [171] and [172] <http://daccessdds.un.org/doc/UNDOC/GEN/N06/384/35/PDF/N0638435.pdf?OpenElement> at 3 August 2007.

8 UN Doc E/C 19/2005/9 [140].

9 UN Doc E/C 19/2006/2.

10 Ibid [41].

11 UN Doc E/C 19/2006/11 [172].

12 UN Doc E/C 19/2007/10.

13 GA Res 217A(III) (10 December 1948) ('*UDHR*').

14 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

15 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

16 Opened for signature 5 June 1992, 31 ILM 818 (entered into force 29 December 1993).

17 Opened for signature 3 November 2001, FAO Res 3/2001 (entered into force 29 June 2004).

18 Opened for signature 27 June 1989, 1640 UNTS 383 (entered into force 5 September 1991).

19 First entered into force 9 September 1886, revised at Paris, 24 July 1971, 1161 UNTS 30.

20 Annex 1C, *Marrakesh Agreement Establishing the World Trade Organization*, 1869 UNTS 299 (entered into force 15 April 1994).

21 Opened for signature 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996).

22 Annex III, 'Report of the United Nations Conference on Environment and Development' (3-14 June 1992), UN Doc A/CONF.151/26 (Vol III) (1992) <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm> at 1 August 2007.

23 See <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> at 1 August 2007.

24 See <http://www.who.int/medicines/publications/traditionalpolicy/en/index.html> at 1 August 2007.

25 Annex I, Report of the United Nations Conference on Environment and Development (3-14 June 1992) UN Doc A/CONF.151/5/Rev.1 (1992) <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> at 1 August 2007.

26 UN Doc A/HRC/1/L.10.

27 Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Committee on Political and Juridical Affairs, Permanent Council of the Organization of American States, *Draft American Declaration on the Rights of Indigenous Peoples.* For the most recent version see Doc GT/DADIN/doc.283/07 corr. 1 (January 22-26 2007) <http://www.oas.org/consejo/CAJP/Indigenous%20special%20session.asp>at 1 August 2007.

28 African Intellectual Property Organization, *Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization* <http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf> at 1 August 2007.

29 See <http://www.wipo.int/tk/en/laws/pdf/unesco_wipo.pdf>at 1 August 2007.

30 Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Working Group on Indigenous Populations (adopted 19-30 July 1993). See Darrell A Posey and Graham Dutfield, *Beyond Intellectual Property,*

*Towards Traditional Resource Rights for Indigenous Peoples and Local Communities* (1996) 205-208.

31 World Conference of Indigenous Peoples on Territory, Environment and Development, Kari-Oca, Brazil (25-30 May 1992) <http://www.dialoguebetweennations.com/IR/english/KariOcaKimberley/KODeclaration.html>at 1 August 2007.

32 A comprehensive list of legislative text directed at the protection of traditional cultural expression can be found on the WIPO website <http://www.wipo.int/tk/en/laws/folklore.html> at 1 August 2007.

33 *Environmental Protection and Biodiversity Conservation Amendment Regulations (No 2) 2005,* Part 8A.01(c).

34 Australian Government, *Guidelines for Indigenous Participation in Natural Resource Management*, <http://nrm.gov.au/publications/guidelines/indigenous-participation.htm> at 1 August 2007.

35 *Health Practitioners and Allied Professionals Registration Act 1985* (NT).

36 *Canada Health Act*, RSC 1985, c C-6.

37 See, eg, Ontario's *Regulated Health Professions Act* RSO 1991, c 18, s 35(1).

38 See, eg, *Yukon Territory Health Act* RSY 2002, c 106, s 5(1).

39 *Environmental Assessment Act* SC 1992, c 37, s 16(1).

40 See *Crown Forest Sustainability Act* RSO 1994, c 25; *Forest Resources Management Act* SS 1996, c F-19.1.

41 The Decree set up the management of the Chaco National Park in conjunction with the Guarani, Izocenos, Chiquitano and Ayoreo peoples.

42 World Health Organization, *Legal Status of Traditional Medicine and Complementary/Alternative Medicine: A Worldwide Review* (2001).

43 *Ordinance No 85-002 on Copyright*, art. 9. See also, *Traditional Cultural Expression (Folklore)*, WIPO <http://www.wipo.int/tk/en/folklore/> at 1 August 2007.

44 UN Doc A/HRC/1/L.10.

45 See also, art 24(1) which recognises Indigenous peoples' rights to their traditional medicines.

46 WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions/Folklore* (2006) WIPO/GRTKF/INF/1 <http://www.wipo.int/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet.pdf> at 1 August 2007. WIPO categorises Indigenous traditional knowledge as 'traditional knowledge' and 'traditional cultural expressions' and attributes quite specific definitions to each category. As a result of this split definition, there are two draft documents: one for traditional knowledge and one for traditional cultural expressions/folklore. The most recent versions of the draft provisions are contained in WIPO Publication WIPO/GRTKF/INF/1. They have also been issued as documents WIPO/GRTKF/IC/9/4 (Traditional Cultural Expressions) and WIPO/GRTKF/IC/9/5 (Traditional Knowledge) and were discussed at the 9th session of the IGC (April 24 -28 2006). The same versions have been annexed to documents WIPO/GRTKF/IC/10/4 and WIPO/GRTKF/IC/10/5 for the continuing review of the IGC at its 10th session (Geneva, 30 November-8 December 2006), WIPO/GRTKF/IC/10. The IGC will hold its final working session from 3-12 July 2007, at which time it will finalise its position before reporting back to the WIPO Assemblies in late 2007.

47 WIPO, *Customary Law and Intellectual Property* <http://www.wipo.int/tk/en/consultations/customary_law/index.html> at 1 August 2007.

48 See, eg, UN Doc UNEP/CBD/WG8J/4/7.

49 It is likely that a contributing factor to the development of such varied terminology is the number of forums in which this issue has been considered over the years, as the issue has been defined and suitable terminology attributed in order to reflect the objective and mandate of the relevant United Nations or intergovernmental agencies.

50 See, eg, UN Doc UNEP/CBD/WG8J/4/7.

51 International Work Group for Indigenous Affairs, *The Indigenous World 2006* (2006) 10. See also, International Fund for Agricultural Development <http://www.ruralpovertyportal.org/english/topics/indigenous/index.htm> at 1 August 2007. Although precise estimates of the total population of the world's Indigenous peoples are very difficult to compile due to data inadequacies, the global Indigenous population is consistently estimated to be between 300-370 million, which is approximately five percent of the world's population. However, it is estimated that Indigenous people constitute approximately 15 percent of people living in circumstances of poverty.

52 See United Nations Development Program, 'UNDP and Indigenous Peoples: A Policy of Engagement' (Paper presented at the United Nations Workshop on Engaging the Marginalised: 'International Conference on Engaging Communities', 15 August 2005, Brisbane, Australia) <http://www.hreoc.gov.au/social_justice/conference/engaging_communities/unpan021101.pdf> at 1 August 2007.

53 Australian Bureau of Statistics, *Population Distribution, Indigenous Australians, 2001,* <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/14E7A4A075D53A6CCA2569450007E46C?OpenDocument> at 1 August 2007.

54 UNESCO and WIPO have a history of collaboration, including the development of the *Tunis Model Law on Copyright for Developing Countries* (1976) and the formulation of the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions* (1982).

For an extensive list of collaboration between parties to the *Convention on Biological Diversity* and WIPO see UN Doc UNEP/CBD/COP/8/INF/41.

55 UNCTAD, 'Outcome of the Expert Meeting', Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices (30 October-1 November 2000) <http://www.unctad.org/en/docs/c1em13l1.en.pdf > at 1 August 2007.

56 For a list of UN organs and specialised agencies that are authorised to request advisory opinion from the International Court of Justice see <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1> at 1 August 2007.

57 Two or more states could have a special agreement to submit jointly disputed issues to the Court or through unilateral declaration recognise the jurisdiction of the court as compulsory: *Statute of the International Court of Justice,* art 36(2).

58 See UNCTAD, 'Report of UNCTAD-Commonwealth Secretariat Workshop on Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework' (4-6 February 2004) <http://www.unctad.org/trade_env/test1/meetings/tk2/TKworkshop.report.final.2August2004.pdf> at 1 August 2007.

59 See, eg, UN Doc UNEP/CBD/WG8J/4/8.

60 *Declaration on the Rights of Indigenous Peoples*, HRC Res 2006/2, art 42.

61 Establishment of a Permanent Forum, UN Doc E/RES/2000/22 (28 July 2000) <http://www.un.org/esa/socdev/unpfii/pfii/mandate.htm> at 1 August 2007.

62 *Charter of the United Nations* art 62(1).

63 *Charter of the United Nations* arts 62(3) and 62(4).