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## International Trade Rules and Indigenous Knowledge: A Basic Introduction<sup>[1]</sup>

by Megan Davis

Indigenous peoples' knowledge relating to the sustainable use of land, ecosystems, plant varieties, medicine, folklore and craft and secret sacred knowledge is often referred to as traditional knowledge or Indigenous peoples' intellectual property. Indigenous peoples refer to this body of knowledge as 'Indigenous knowledge'. The Secretariat of the Permanent Forum on Indigenous Issues has said

*traditional knowledge is developed from experience gained over the centuries and adapted to the local culture and environment, and transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, artistic expressions, proverbs, cultural events, beliefs, rituals, community laws, languages, agricultural practices, including the development of plant species and animal breeds, traditional know-how relating to architecture, textile-making and handicraft-making, fishery, health and forestry management.*<sup>[2]</sup>

Over the past twenty years, commercial exploitation of Indigenous knowledge has become particularly aggressive. Global trade and investment in the arts is worth millions of dollars to trans-national corporations ('TNCs') and states yet most Indigenous peoples do not receive the economic benefits of their commercialised knowledge.<sup>[3]</sup>

This paper provides a conspectus of some of the current concerns about Indigenous knowledge in the context of the World Trade Organization ('WTO').

### Indigenous Knowledge

It is well established that Indigenous knowledge is an anomaly to the Western intellectual property law system and has not been readily accommodated.<sup>[4]</sup> The WIPO acknowledges that the intellectual property system is in direct conflict with traditional practices and lifestyles:

*[T]raditional knowledge holders are situated between their own customary regimes and the formal intellectual property system administered by governments and inter-*

*governmental organizations such as WIPO. ... The intellectual property needs of traditional knowledge holders receive their complexity, diversity and relevance from multiple intersections of these factors.*[\[5\]](#)

The problematic nature of these systems is also the result of inequalities in bargaining power between Indigenous peoples and the state. These inconsistencies are often overlooked by WTO member states, policy makers and TNCs.

*Indigenous peoples feel that the current approaches to traditional knowledge...have not necessarily corresponded to Indigenous views, and that the existing patent and copyrights system of protection does not adequately address their collective rights...*[\[6\]](#)

Moreover, many Indigenous peoples argue that Indigenous knowledge, its possession and uses are inherently inimical to the motivations of international trade and intellectual property protections – the acquisition and protection of monetary benefit for intellectual and creative output.

*The commodification of traditional knowledge is inherently problematic ... that commercialisation is not always desired and the regulated use of intellectual property rights is regarded as culturally inappropriate.*[\[7\]](#)

According to Dr Erica-Irene Daes, former Chairperson Rapporteur of the United Nations ('UN') Working Group on Indigenous Populations in her study on the protection of the cultural and intellectual property of Indigenous peoples,

*Indigenous peoples do not view their heritage in terms of property ... but in terms of community and individual responsibility. Possessing a song or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected.*[\[8\]](#)

## **Exploitation of Indigenous Knowledge**

Indigenous peoples argue that if Indigenous knowledge is to be exploited for enormous commercial benefit, the profits should be shared by Indigenous communities and the contribution of Indigenous knowledge to advances in science and technology should be acknowledged.[\[9\]](#)

A stark example of such exploitation is evident in the complicity of intellectual property laws advancing bio-piracy and theft of Indigenous knowledge. Patent offices in developed countries have granted patents over genetic resources of Indigenous communities without their consent and without economic benefit flowing to the communities. There have been claims of individuals and corporations using over-broad patent claims to appropriate material obtained from genes.[\[10\]](#) There are also concerns relating to cell lines and genes under the Human Genome Diversity Project and bioprospecting of Indigenous peoples' cells continues unabated.[\[11\]](#)

# WTO Trade Related Aspects of Intellectual Property ('TRIPS')

The WTO Trade Related Aspects of Intellectual Property ('TRIPS') Agreement is annexed to the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* and came into force in 1995.<sup>[12]</sup> TRIPS seeks the harmonisation of trade related intellectual property rights through standards for the enforcement of these rights such as copyright and patents.

Indigenous peoples have a number of concerns with TRIPS. Of particular concern is Article 8:

*Members may...adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.*

There are concerns regarding the effectiveness of this article and that the TRIPS Agreement could be manipulated to the detriment of the development of *sui generis* intellectual property systems.

Another significant challenge of TRIPS relates to patent protection. According to Caroline Dommen:

*Implicit in the TRIPs Agreement's criteria for a patent claim is that there must be an identifiable inventor. This definition almost immediately dismisses the knowledge systems and innovations of Indigenous peoples and farmers because they innovate communally, over long periods of time. Their innovations are often for the common good and are not intended for industrial application or financial benefit.*<sup>[13]</sup>

Indigenous peoples are also concerned as to how TRIPS directly relates to the success of the implementation of the *Convention on Biological Diversity* ('CBD'). It is unclear as to whether the CBD and TRIPS conflict or are potentially complementary.<sup>[14]</sup>

The CBD promotes the role of member states as having sovereign rights over the biological diversity within their borders and the authority to determine access to these resources in accordance with national legislation. Moreover, the CBD asserts that access to genetic resources must be obtained with the prior and informed consent of CBD parties and mutually agreed terms.<sup>[15]</sup> This contrasts with the TRIPS Agreement that promotes technological innovation through the principle of legal certainty and the universalisation of Western intellectual property systems. TRIPS obliges member states to provide product patents for micro-organisms and non-biological and microbiological processes whereas the CBD asserts its objective as at the discretion of the state.

The Australian Government has raised its concerns with the TRIPS Council regarding the potential inconsistency between the requirement to access genetic resources under Article 15 of the CBD and the conditions for the grant of a valid patent under Article 27 of TRIPS.<sup>[16]</sup> In the *Doha WTO Ministerial 2001: Ministerial Declaration*, members of the WTO called for the Council for TRIPS ‘to examine... the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore.’<sup>[17]</sup>

In the context of Article 8(j) of the CBD, which compels members to ‘respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles,’ there has also been criticism from Indigenous groups.

*It has been noted, for example, that the phrase ‘embodying traditional lifestyles’ suggests that this provision applies only to ‘Indigenous peoples who are isolated, fossilised in some cultural time-warp living in a never changing present’, and excludes peoples who have ‘adapted their lifestyles to reflect the contemporary and continuing colonial situation in which [they] find [themselves.]’*<sup>[18]</sup>

According to Fergus McKay, Article 8 (j) is ‘substandard’ when compared with the Organization of American States (‘OAS’) and UN Declarations relating to Indigenous peoples’ intellectual property and when the provision is subject to national legislation:

*In the first place, it is rendered inoperable, or at least subject to manipulation, in most cases due to the clause ‘subject to...national legislation,’ as most states’ legislation precludes the recognition of Indigenous intellectual property rights. This is even more the case given the emphasis placed upon intellectual property rights in international trade agreements, that protect the expropriator of Indigenous knowledge and culture rather than the Indigenous originators. Second, it only protects Indigenous intellectual property when relevant for ‘conservation or sustainable use of biological diversity’ and; finally, it merely ‘encourages’ the sharing of benefits derived from Indigenous knowledge.*<sup>[19]</sup>

## Conclusion

More broadly though, in relation to the concerns of Indigenous knowledge, awareness and discussion of the problems relating to the TRIPS Agreement and traditional knowledge, the relationship with CBD and issues with patent laws, has increased. As Bryan Mercurio states:

*WTO Member States and interested observers have recognised that significant gaps exist in the agreement with respect to patent protection and access to life-saving medicines in developing and least-developed countries (‘LDCs’); but finding and agreeing on improvements to the system has proven to be a much harder proposition.*<sup>[20]</sup>

There are many intellectual property scholars, Gervais and Oguamanam et al, who are emphatic in their argument that TRIPS does not necessarily represent a wholesale negative for Indigenous peoples.<sup>[21]</sup> Gervais, in particular, has explored a number of

ways in which the Western intellectual property system can better protect Indigenous knowledge considering the development of *sui generis* protection, unjust enrichment, misappropriation or geographical indications.<sup>[22]</sup> Either way, Gervais et al are adamant about the need for the intellectual property system to recognise its inflexibility in relation to non-Western notions of creativity and protection. This is something WTO state parties have been reluctant to acknowledge to date.

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[1] This paper is an adapted extract from the author's article 'International Trade, the World Trade Organisation and the Human Rights of Indigenous Peoples' (2006) 8 *Balayi: Culture, Law and Colonialism*.

[2] Secretariat of the Permanent Forum on Indigenous Issues, *Indigenous Peoples and the International and Domestic Protection of Traditional Knowledge* E/CN.4/Sub.2/AC.4/2005/CRP.4, (2005).

[3] E-I Daes, World Intellectual Property Organization, 'Opening Address' (Roundtable on Intellectual Property and Indigenous Peoples, Geneva, 23 July 1998).

[4] See generally, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* Geneva, WIPO/GRTKF/IC/1/12 Part 1 (2001).

[5] Intergovernmental Committee on Intellectual Property and Genetic Resources, *Traditional Knowledge and Folklore: First Session*, WIPO/GRTKF/IC/1/12 (2001). WIPO is the World Intellectual Property Organization.

[6] *Report of the Working Group on Indigenous Populations on its Twenty-third Session*, E/CN.4/Sub.2/2005/26 (2005).

[7] C Monagle, CIEL and World Wide Fund for Nature ('WWF') International, *Biodiversity and Intellectual Property Rights: Reviewing Intellectual Property Rights in Light of the Objectives of the Convention on Biological Diversity* (2001) <<http://www.ciel.org/Publications/tripsmay01.PDF>> at 11 August 2006.

[8] E-I Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and President of the Working Group on Indigenous Populations, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous People* Geneva, 45th Session, E/CN.4/Sub.2/1993/28 (1993).

[9] R Paterson and D Karjala, 'Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples' (2003) 11 *Cardozo Journal of International Law and Comparative Law* 633.

[10] Convention on Biodiversity Conference of the Parties ('COP'), *Biodiversity 2000* UNEP/CBD/COP/5/23/Dec V/26 (2000).

[11] See generally, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 'Chapter 5: International Issues' *Fourth Report: 1996, 104*; A O Wu, 'Surpassing the Material: The Human Rights Implications of Informed Consent in Bioprospecting Cells Derived from Indigenous People Groups' (2000) 78 *Washington University Law Quarterly* 979.

[12] 'Agreement on Trade-Related Aspects of Intellectual Property Rights,' *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[13] C Dommen, *Adding Values: Business, the WTO and Human Rights* (2006) International Council on Human Rights Policy  
<[http://www.ichrp.org/paper\\_files/107\\_w\\_03.doc](http://www.ichrp.org/paper_files/107_w_03.doc)> at 11 August 2006.

[14] See generally, J Jones, 'Protecting Indigenous Heritage in the Face of Globalisation' (2004) 6 *Indigenous Law Bulletin* 4, 4.

[15] *Convention on Biological Diversity* ('CBD'), Article 15(4) and (5).

[16] *Communication from Australia to WTO Council for TRIPS* (2001) IP/C/W/310.

[17] *Doha WTO Ministerial 2001: Ministerial Declaration* (2001) WT/MIN(01)/DEC/1.

[18] S Pritchard and C Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3 *Australian Indigenous Law Reporter* 473.

[19] F MacKay, Forest Peoples Programme, *The Rights of Indigenous Peoples in International Law* (1998) <[http://www.omced.org/cases/case\\_McKay.pdf](http://www.omced.org/cases/case_McKay.pdf)> at 11 August 2006.

[20] Bryan Mercurio, 'TRIPs, Patents and Access to Life-Saving Drugs in the Developing World' (2004) 8 *Marquette Intellectual Property Law Review* 211.

[21] Daniel Gervais et al, 'Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach' (2005) *Michigan State Law Review* 137; Chidi Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge' (2004) 11 *Indiana Journal of Global Legal Studies* 135.

[22] Daniel J Gervais et al, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (2002) 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 929.

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