CHAPTER III

PROTECTION OF THE RIGHTS OF THE INDIGENOUS PEOPLE UNDER INTERNATIONAL LAW

3.1 INTRODUCTION

The present chapter provides a general insight on the international conventions, treaties, agreements and the legislations and policies relating to the protection of the rights of the indigenous people in the human rights forum, global environmental agenda and IP regime.

Indigenous peoples are "composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons from a different culture or ethnic origin arrived there from other parts of the world". This definition, although not consented to, gives a preliminary indication of the group of individuals international protection is sought for. The reason why indigenous peoples are considered to need particular protection, that is to say a protection which exceeds the protection under international human rights regimes, is the fact that these peoples have been deprived by the immigration of other peoples of their rights. In particular, they have lost rights concerning the land they traditionally occupied, and the possibility to develop and sustain a community reflecting their particular values. Apart from that, these peoples face the danger of losing their identity or, at least, they face difficulties adjusting their traditional values or customs to new conditions of life. Although the endeavors to establish a regime for the protection of indigenous peoples are part of the ongoing process of a progressive development of international human rights, such a regime will, if accepted and implemented, add a new dimension thereto. Attempts to provide for an adequate protection of indigenous peoples date back to the 16th century when Francisco de Vitoria suggested that legal principles of indigenous peoples had to be respected.
Despite the development of international human rights under the aegis of the United Nations, international law has, so far, not been successful in finalizing a regime designed for the protection of indigenous peoples. It took nine years to elaborate a Draft Declaration on the Rights of Indigenous Peoples. The final adoption of a declaration on indigenous peoples is one of the goals of the International Decade of the World’s Indigenous Peoples declared by the United Nations General Assembly\(^1\). The General Assembly of the United Nations also emphasized the commitment of Member States to promote and protect the rights of indigenous peoples in its declaration on the occasion of the 50th anniversary of the United Nations. The fact that no comprehensive international regime exists for the protection of indigenous peoples does not mean that international law has left the individuals involved without protection. They benefit from international human rights standards and, in particular, from the International Labour Organisation (ILO)\(^2\) Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (ILO Convention No. 169), an international agreement regarding the preservation of indigenous rights. The nevertheless unsatisfactory state of affairs with respect to indigenous peoples has prompted the UN General Assembly to foster the attempts of the Human Rights Commission to finalize its work on a declaration on indigenous peoples. Such a declaration, although it will have no binding force, may serve as a starting point for a development that ultimately leads to the elaboration of a legally binding regime concerning the rights of indigenous peoples and members thereof.\(^3\)

3.2 TRADITIONAL KNOWLEDGE AND INDIGENOUS PEOPLE IN HUMAN RIGHTS AGENDA

The debate on the protection of traditional knowledge by intellectual property law has recently moved to the human rights forums. There are a

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\(^1\) Hereinafter referred to as UN General Assembly

\(^2\) Hereinafter referred to as ILO

number of reasons for this. First, the appropriation of the knowledge by industrialized country firms and scientists without fair compensation or reward to indigenous and local peoples is now seen as contravening fundamental moral, ethical and legal norms that protect people from any form of economic, ecological, political and social abuse. Second, knowledge of indigenous and local peoples is their property and there is no reason why international law should discriminate against them and create barriers to their enjoyment of the rights in that property. The concern in the human rights forums is therefore whether and how to apply international human rights standards and laws to protect traditional knowledge of indigenous and local peoples as their intellectual property.4

Indigenous peoples’ rights under international law have evolved from existing international law, including human rights treaties, to address the specific circumstances facing indigenous peoples as well as their priorities, such as rights to their lands, territories and resources, and self-determination. Unfortunately, many indigenous peoples continue to face a range of human rights issues. In fact, the implementation of their rights is far from perfect. Some of the most difficult human rights challenges for indigenous peoples stem from pressures on their lands, territories and resources as a result of activities associated with development and the extraction of resources. Their cultures continue to be threatened, and the protection and promotion of their rights resisted.5

3.2.1 INTERNATIONAL LABOUR ORGANISATION

As the world’s only tripartite multilateral agency, the ILO is dedicated to bringing decent work and livelihoods, job-related security and better living standards to the people of both poor and rich countries. It helps to attain those goals by promoting rights at work, encouraging opportunities for decent employment, enhancing social protection and strengthening dialogue on

4 Ibid.
work-related issues. The ILO is the international meeting place for the world of work. We are the experts on work and employment and particularly on the critical role that these issues play in bringing about economic development and progress. At the heart of our mission is helping countries build the institutions that are the bulwarks of democracy and to help them become accountable to the people. The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment and other standards addressing conditions across the entire spectrum of work-related issues.

The main objectives of ILO are the following:

1) Promote and realize standards and fundamental principles and rights at work,
2) Create greater opportunities for women and men to secure decent employment and income,
3) Enhance the coverage and effectiveness of social protection for all;
4) Strengthen tripartism and social dialogue.  

The ILO was the first United Nations agency to address issues of indigenous people’s rights. In 1926, the ILO established an expert committee to develop international Standards for the protection of native workers. This committee generated the basis for the adoption, the 1957, of the convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent countries. This convention commonly referred to as convention 107, essentially dealt with measure to integrate indigenous peoples into modern production systems. This convention was revised in June 1989 as convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Revised convention eschews the approach of promoting the assimilation of indigenous and tribal peoples.

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6Available at http://www.gpplatform.ch/pbguide/organisation/international-labour-organization-ilo(visited on 16.07.2015)
The main theme of the Convention No.169 finds expression in its Preamble, where ‘the aspirations of indigenous peoples are recognized to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.’ The Convention thus enjoins states to respect indigenous peoples’ expectations in all decision affecting them and includes provisions on indigenous cultural integrity and on non-discrimination of social welfare. Furthermore, importance is attached to the issue of land and resources rights. It promotes the protection of indigenous peoples as distinct and separate people. Article 2.2 (b) provides that governments shall have the responsibility of developing measures for “promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions”. These provisions should be broadly read to include recognition and protection of traditional knowledge of the indigenous peoples.

Although the ILO Convention No.169 does not explicitly refer to indigenous resources, folklore or traditional knowledge, a number of provisions are worth noting. In general Article 23 sets forth that ‘handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned shall be recognized as important factors for the maintenance of their cultures and in their economic self-reliance and development’. However, while this provision identifies the listed activities as important for indigenous culture, no inherent further value is recognized and needs to be protected. As traditional knowledge in biological resources and its preservation cannot be separated from the land which the

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7 ILO Convention No.169, Preamble para.5

8 Article 5 paras (a) and (b): (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected.

9 Article 3 of ILO Convention No.169: ‘Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination’.

10 ILO Convention No. 169, part II (Articles 13-19)
community occupies, the provisions on land rights are relevant for the given context.\textsuperscript{11} Article 13.1 states that “governments shall respect the special importance of the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable which they occupy or otherwise use, and in particular the collective aspects of this relationship.” This provision provides a basis for arguing for the enlargement of intellectual property reigns to accommodate collective rights of indigenous peoples.

Article 15(1) of the ILO Convention No. 169 specifies this by stating that “The rights of the people concerned to the natural resources pertaining to their lands shall be specially safeguarded”. These rights include the right of these peoples to participate in the use, management and conservation of the resources.

The adequacy of convention 169 is a concern of some indigenous groups. These groups have been concerned with a number of the provisions of the convention. First, the convention only requires that indigenous peoples be consulted on matters affecting them. It does not require that the consent of these peoples be sought before measures affecting them are instituted. Second, the groups are of the view that provisions dealing with land and natural resources are inadequate.\textsuperscript{12}

3.2.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948:

Existing international and national laws and programs do not explicitly recognize rights in traditional knowledge as part of the bundle of human rights. The Universal Declaration of Human Rights, 1948 (UDHR)\textsuperscript{13} contain provisions that could be interpreted to cover rights of indigenous and local peoples.

\textsuperscript{12} Available at http://www.gpplatform.ch/pbguide/organisation/international-labour-organization-ilo(visited on 16.07.2015)
\textsuperscript{13} Hereinafter referred to as UDHR
The objectives of UDHR are the following:

1) To promote interdependence among countries in all areas of cooperation by identifying country’s common strengths and opportunities which will help reduce poverty and improve the quality of life for people whilst developing a knowledge-based society within country and enhancing community and people empowerment;

2) To expand the trade and financial market within country and increase the bargaining power of Asian countries in lieu of competition and, in turn, enhances country’s’ economic competitiveness in the global market;

3) To ultimately transform the continent into community, capable of interacting with the rest of the world on a more equal footing and contributing more positively towards mutual peace and prosperity.

Article 27 of the UDHR could be invoked, albeit implicitly, to argue for protection of traditional knowledge of indigenous and local peoples as well as demand for the sharing (with the peoples) of benefits arising from the use of that knowledge. Article 27.1 of the UDHR states that “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.” Article 27.2 states that “Everyone has the right to the protection of which he is the author.” 14

Article 27.1 provides a ‘soft legal basis’ for indigenous and local peoples to be entitled to benefits arising from the use of their knowledge and resources. Denying them access to the benefits would be construed as an abuse of their human rights. Indigenous and local peoples have moral, cultural and material interests in their traditional knowledge and thus (invoking Article 27.2 of the UDHR) these interests should be protected by protecting that knowledge and its products.

On the whole, the UDHR contains provisions on a wide range of civil, political, economic, social and intellectual rights. As already observed, it is Article 27 of the Declaration that is particularly relevant to the issue of intellectual property protection of traditional knowledge. There are, however a

number of limitations to using it as a legal instrument to protect traditional knowledge of indigenous and local peoples. First, while traditional knowledge is a collective property and generates collective, the UDHR largely provides for individual rights.

Generally, the rights of indigenous peoples are said to include rights to land, natural resources, self-determination and culture. Inherent in each of these rights is the concept of collective rights. The emphasis has been on individual rights vis-a-vis the state. This emphasis may limit the utility of western concepts in helping indigenous peoples maintain their identity and rights in the face of pressure to assimilate and yield to the “modern world.”

The second limitation of the UDHR is that responsibility for enforcing its provisions is vested in the states.¹⁵

3.2.3 THE VIENNA DECLARATION

In 1993, Indigenous peoples were successful in expanding international consideration of their status and concerns beyond the working Group when they succeeded in having 1993 proclaimed by the General Assembly as the International Years of Indigenous People and by gaining special attention of the agenda of the 1993 World Conference on Human Rights. The 1993 World Conference adopted the Vienna Declaration and programme of Action that symbolized the historic steps being taken to promote and protect the rights of particular vulnerable groups such as women, children and indigenous peoples.

The World Conference on Human Rights in Vienna in 1993 confirmed the universality of human rights, refuting those who argued that human rights were not universal but historically, socially and politically contextual and contingent.

On 25 June 1993, representatives of 171 States adopted the Vienna Declaration and Programme of Action of the World Conference on Human Rights, thereby successfully closing the two-week conference and presenting

a plan for the strengthening of human rights work around the world. The Vienna Declaration and Programme of Action marked the culmination of a long process of review over the current status of human rights in the world.

It also marked the beginning of a renewed effort to strengthen and further implement human rights instruments that have been constructed on the foundation of the Universal Declaration of Human Rights (UDHR) since 1948.

The Vienna Declaration and Programme of Action (1993) stated:

- The universal nature of all human rights and fundamental freedoms is beyond question
- All human rights are universal, indivisible and interdependent and interrelated.\(^\text{16}\)

It also confirmed a role for international action to promote and protect human rights:

“...The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international co-operation, in the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community”.\(^\text{17}\)

It also stated:

“...While the significance of regional and national particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.\(^\text{18}\)

Principle 20 recognizes the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic,

\(^{16}\)Available at http://www.bbc.co.uk/worldservice/people/features/ihavearightto/four_b/treaties_vienna.s.html (visited on 21.03.2016)


\(^{18}\)Ibid.
social, and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous peoples, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, State should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination and recognize the value and diversity of their distinct identities, cultures and social organization.

This principle deals with the human rights of indigenous peoples which extend to include the rights related to the protection of their traditional knowledge.\(^\text{19}\)

### 3.2.4 Mataatua Declaration, 1993

The first International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, held under the auspices of the working Group on Indigenous Populations in 1993, resulted in the Mataatua Declaration. Although the Declaration has no formal legal power, it clearly indicates the issues and concerns of indigenous peoples regarding intellectual and cultural property rights.\(^\text{20}\)

It recognised 1993 as the United Nations International Year for the World's Indigenous Peoples; reaffirmed the undertaking of United Nations Member States to-adopt or strengthen appropriate policies and legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices, declared that Indigenous Peoples of the world have the right to self...


determination and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property, acknowledged that Indigenous Peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property, affirmed that the knowledge of the Indigenous Peoples of the world is of benefit to all humanity, recognised that Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community, insisted that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge, Declared that all forms of discrimination and exploitation of indigenous peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease.\(^\text{21}\)

3.2.5 DRAFT DECLARATION ON INDIGENOUS RIGHTS, 1993

In 1982, the UN Economic and Social Council established a Working Group on Indigenous Populations with the task of producing a declaration on the rights of Indigenous peoples. A “Draft Declaration on the Rights of Indigenous Peoples” was agreed on in 1993, and approved by the Working Group’s parent body, the Sub-Commission on the Protection and Promotion of Human Rights in 1994. In 1993, the Draft Declaration on the Rights of Indigenous Peoples included provisions related to the protection of indigenous cultures heritage and knowledge.\(^\text{22}\)

The main principles contained in the Draft Declaration are concerned with non-discrimination and fundamental rights, self-determination (including autonomy and participation rights), cultural integrity, rights to lands, exchange, and self-determination.

\(^{21}\) Preamble to the Mattatua Declaration

\(^{22}\) Available at https://www.uts.edu.au/sites/default/files/JIHLBP8_11_07_0.pdf (visited on 04.10.2016)
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territories and natural resources, and other rights relating to socio-economic welfare.\textsuperscript{23}

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.\textsuperscript{24}

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.\textsuperscript{25}

The recognition of cultural and intellectual property is formulated in the Draft Declaration. 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.\textsuperscript{26}

Indigenous peoples have the right to practice 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, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their

\textsuperscript{24} Article 24 of the Draft Declaration of the Indigenous Peoples, 1993
\textsuperscript{25} Article 29 of the Draft Declaration of the Indigenous People, 1993
\textsuperscript{26} Article 31 of the Draft Declaration of the Indigenous People, 1993
cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.\textsuperscript{27}

The rights contained in Article 31 (cultural property and intellectual property) and in some sense completed by the right to redress according to Article 11- could be considered in this context to form part of the broader right of self-determination of Article 3 and as a way of exercising it.

These rights are also connected to the provisions about the right to land and related resources. There is an essential relationship between the cultural and traditional knowledge of the indigenous peoples and their land and resources. Thus, the Declaration also states, that indigenous communities have the right to develop and manage resources according to their own laws, traditions and customs, and to determine and develop priorities and strategies to develop or use their lands, territories, and other resources. This includes the right to require that States obtain their free and informed consent before any projects affecting their lands, territories, or resources may be approved, ‘particularly in connection with the development, utilization, or exploitation of mineral, water or other resources’. Although, no direct mention is made of indigenous knowledge and traditional resources in this context, the term ‘other resources’ could be broadly interpreted to cover traditional knowledge and traditional resources.\textsuperscript{28}

While Article 31 of the Declaration contains express provisions on the protection of indigenous resources and traditional knowledge, the degree of protection that has to be guaranteed at state level is not specified. Much would depend on the kind of implementation of Article 11, which envisages a right to redress with regard to the ‘cultural, intellectual, religious and spiritual property’ of indigenous peoples which has been taken without their ‘free,

\textsuperscript{27} Article 11 of the Draft Declaration, 1993
prior and informed consent’ to be defined by national legislation. The same concern has to be raised with regard to the provisions on land rights. Such provisions go beyond the obligation in the ILO Convention No. 169 as they request a clear prior informed consent; the ILO Convention provides for mere participation. However, the Declaration does not represent binding international law.  

3.2.6 INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1996

The International Covenant on Economic, Social and Cultural Rights (ICESCR) together with its sister Covenant, the International Covenant on Civil and Political Rights (ICCPR), and the Universal Declaration, form the International Bill of Human Rights which is the pillar for human rights protection within the United Nations. The ICESCR was adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966. The Covenant reflects the commitments adopted after World War II to promote social progress and better standards of life, reaffirming faith in human rights and employing the international machinery to that end. Since the ICESCR is an international human rights treaty, it creates legally binding international obligations to those States that have agreed to be bound by the standards contained in it.

ICESCR establishes the right of self determination, including the right to dispose of natural wealth and resources. This implies the right to protect and conserve resources, including intellectual property.

The state parties to the present covenant recognize the right of everyone:
(a) To take part in cultural life:
(b) To enjoy the benefits of scientific progress and its applications;

30 Hereinafter referred to as ICESCR
31 Hereinafter referred to as ICCPR
32 Available at https://www.escr-net.org/resources/section-5-background-information-icescr(visited on 29.10.2016)
33 Article 1 of ICESCR, 1966
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.\textsuperscript{34}

3.2.7 THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2007

The High Commissioner for Human Rights welcomes the adoption of the United Nations Declaration on the Rights of Indigenous Peoples\textsuperscript{35} (UNDRIP) by the General Assembly on 13 September 2007, as a triumph for justice and human dignity following more than two decades of negotiations between governments and indigenous peoples' representatives.

The Declaration establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples.\textsuperscript{36}

A provision of particular significance to the Intellectual property protection of traditional knowledge from the UN Declaration on the Rights of Indigenous Peoples is as follows:

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

\textsuperscript{34}Article 15 of ICESCR, 1966
\textsuperscript{35}Hereinafter referred to as UNDRIP
\textsuperscript{36}Available at http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx(visited on 21.03.2016)
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of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have a right to maintain control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.37

The UNDRIP, 2007 also provides that States shall take effective measures to recognize and protect the exercise of these right in conjunction with indigenous peoples.38

3.2.8 EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

The Expert Mechanism on the Rights of Indigenous Peoples was established in 2007 by the Human Rights Council, of which it is a subsidiary body. It comprises five experts on the rights of indigenous peoples, usually one from each of the world’s five geopolitical regions, with indigenous origin a relevant factor in their appointment, in accordance with resolution 6/36.

The mandate of the Expert Mechanism is to provide the Human Rights Council with thematic expertise, mainly in the form of studies and research, on the rights of indigenous peoples as directed by the Council. The Expert Mechanism may also make proposals to the Council for its consideration and approval, within the scope of its work as set out by the Council.39

The Expert Mechanism’s first study examined lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education and was finalized in 2009. Its second study, undertaken over two years, examined indigenous peoples and the right to participation in decision-making. The Expert Mechanism studied the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples in 2011–2012 and indigenous peoples’ access to justice in 2012–2013. Each study is presented to the Human Rights Council and, from 2011 onwards, is

37 Article 31(1) UNDRIP, 2007
38 Article 31(2) UNDRIP, 2007
the subject of an interactive dialogue between the Council and the Expert Mechanism during one of the Council’s sessions. Each study includes advice which outlines the Expert Mechanism’s key findings related to the human right under study in the indigenous context.

The Expert Mechanism is a key body within the United Nations human rights structure in Geneva and provides a space for indigenous peoples to raise thematic human rights issues, related to the specific study undertaken by the Expert Mechanism each year. Like the former Working Group on Indigenous Populations, the rules governing participation in its annual sessions are relatively open, so that indigenous peoples’ organizations and individuals can usually attend if they have successfully applied for accreditation. Hundreds of representatives of indigenous peoples’ organizations, indigenous individuals and non-governmental organizations attend the annual sessions.40

3.2.9 SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES

The Special Rapporteur on the rights of indigenous peoples is a so-called special procedure of the Human Rights Council. The mandate of the Special Rapporteur was established in 2001 by the Commission on Human Rights and continued by the Human Rights Council in 2007. The Special Rapporteur reports to the Human Rights Council each year.41

The Special Rapporteur on the rights of indigenous peoples, inter alia:

- Examines ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples, in conformity with his/her mandate, and identifies, exchanges and promotes best practices;
- Gathers, requests, receives and exchanges information and communications from all relevant sources, including Governments, indigenous...
peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples;

- Formulates recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the rights of indigenous peoples; and

- Works in close cooperation and coordination with other special procedures and subsidiary organs of the Council, in particular with the Expert Mechanism on the Rights of Indigenous Peoples, relevant United Nations bodies, the treaty bodies and regional human rights organizations.

In fulfilling this mandate, the Special Rapporteur assesses the situation of indigenous peoples in specific countries; carries out thematic studies; communicates with Governments, indigenous peoples and others concerning allegations of violations of indigenous peoples’ rights; and promotes good practices for the protection of these rights. The Special Rapporteur also reports annually to the Human Rights Council on particular human rights issues involving indigenous peoples and coordinates work with the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples.42

### 3.3 TRADITIONAL KNOWLEDGE AND INDIGENOUS PEOPLES CONCERNS IN THE GLOBAL ENVIRONMENTAL AGENDA

Issues of indigenous and local peoples’ rights have been extensively discussed in global environmental process. The World Commission on Environment and Development43 (WCED) addressed the issue of indigenous people and sustainable development. The United Nations Conference on Environment and Development44 (the Earth Summit), held in Brazil in 1992, represented a turning point in the promotion of indigenous peoples’ rights

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42Available at www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx (visited on 12.03.2016)
43 Hereinafter referred to as WCED
44 Hereinafter referred to as Earth Summit
relating to the environment. A number of legal instruments adopted at the Earth Summit, such as the Rio Declaration, Agenda 21 and the Convention on Biological Diversity, established international legal standards to protect indigenous peoples’ rights to their traditional knowledge and practices in the area of environmental management and conservation. Most importantly, there now exists an international legal framework which recognises the unique relationship indigenous peoples have with their traditional lands.

3.3.1 THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT

The World Commission on Environment and Development\(^\text{45}\) (WCED) established in 1983 by the United Nations General Assembly devoted attention to issues of indigenous peoples, particularly their knowledge in the sustainable development process.

"A global agenda for change" - this was what the World Commission on Environment and Development was asked to formulate. It was an urgent call by the General Assembly of the United Nations: to propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond; to recommend ways concern for the environment may be translated into greater co-operation among developing countries and between countries at different stages of economical and social development and lead to the achievement of common and mutually supportive objectives that take account of the interrelationships between people, resources, environment, and development; to consider ways and means by which the international community can deal more effectively with environment concerns; and to help define shared perceptions of long-term environmental issues and the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long term agenda for action during the coming decades, and aspirational goals for the world community.\(^\text{46}\)

\(^{45}\) Hereinafter referred to as WCED

The Commission published its report *Our Common Future* also known as Brundtland Report in 1987 in which a reference was made to the situation of indigenous peoples in the following words.

“Tribal and indigenous peoples will need special attention as the forces of economic development disrupt their traditional lifestyles-lifestyles that can offer modern societies many lessons in the management of resources in complex forest, mountain and dry land ecosystems. Some are threatened with virtual extinction by insensitive development over which they have no control. Their traditional rights should be recognized and they should be given a decisive voice in formulating policies about resources development in their areas.”

According to the report, growing interaction with the larger world is increasing the vulnerability of these groups, since they are often left out of the processes of economic development. Social discrimination, cultural barriers, and the exclusion of these people from national political processes make these groups vulnerable and subject to exploitation. Many groups become dispossessed and marginalized, and their traditional practices disappear. They become the victims of what could be described as cultural extinction. These communities are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. Their disappearance is a loss for the larger society, which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems. It is a terrible irony that as formal development reaches more deeply into rain forests, deserts, and other isolated environment, it tends to destroy the only cultures that have proved able to thrive in these environments.

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Thus, the Commission calls for ‘the recognition and protection of their traditional rights to land and other resources that sustain their way of life—rights they may define in terms that do not fit into Standard legal systems.’ These groups own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. The report laid emphasis that the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area. Protection of traditional rights should be accompanied by positive measures to enhance the well-being of the community in ways appropriate to the group's life-style. For example, earnings from traditional activities can be increased through the introduction of marketing arrangements that ensure a fair price for produce, but also through steps to conserve and enhance the resource base and increase resource productivity. It further recommends that local institution through which indigenous and legal peoples socialize and conduct their economic activities should be strengthened. Though it did not explicitly address the question of intellectual property protection of traditional knowledge, it creates a political framework for addressing these issues within environmental circles.

3.3.2 THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT


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49 Ibid
adopted by more than 160 states at the UNCED contains a whole chapter on indigenous peoples’ concerns and makes a wide range of recommendations on how these peoples’ rights should be protected.

The Conference was an important development for indigenous peoples and their rights related to the environment. The Conference, or Earth Summit as it is called, recognized that indigenous peoples and their communities have a critical role to play in managing and developing the environment. The importance of indigenous peoples’ traditional knowledge and practices was acknowledged, and the international community committed itself to promoting, strengthening and protecting the rights, knowledge and practices of indigenous peoples and their communities. During the Earth Summit, indigenous peoples and NGOs gathered in Kari-Oca, Brazil, to share their concerns about the environment. The Kari-Oca Declaration and the Indigenous Peoples’ Earth Charter adopted at this meeting expressed the values of the world’s indigenous peoples and recognized their distinct relationship with the Earth. The united voice of indigenous peoples helped influence the outcome of the Earth Summit. Another important result of the Earth Summit was the adoption of the Convention on Biological Diversity. The Convention recognizes the close dependence of many indigenous communities on biological resources and the desirability of sharing the benefits that come from using traditional knowledge, innovations and practices to conserve biological diversity, including species diversity.\footnote{Available at http://www.ohchr.org/Documents/Publications/GuideIPleaflet10en.pdf(visited on 24.07.2015)}

3.3.2.1 THE RIO DECLARATION, 1992

The 1992 Rio Declaration on Environment and Development defines the rights of the people to be involved in the development of their economies, and the responsibilities of human beings to safeguard the common environment. The declaration builds upon the basic ideas concerning the attitudes of individuals and nations towards the environment and development. The Rio Declaration states that long term economic progress is
only ensured if it is linked with the protection of the environment. If this is to be achieved, then nations must establish a new global partnership involving governments, their people and the key sectors of society. Together human society must assemble international agreements that protect the global environment with responsible development.\textsuperscript{52}

Following are some of the main principles to the Rio Declaration.

- People are entitled to a healthy and productive life in harmony with nature.
- Development today must not threaten the needs of present and future generations.
- Nations have the right to exploit their own resources, but without causing environmental damage beyond their borders.
- Environmental protection shall constitute an integral part of the development process.
- Eradicating poverty and reducing disparities in living standards in different parts of the world are essential if we are to achieve sustainable development whilst meeting the needs of the majority of the people.
- Environmental issues are best handled with the participation of all concerned citizens.
- The polluter should, in principle, bear the cost of pollution.
- Sustainable development requires better scientific understanding of the problems. Nations should share knowledge and technologies to achieve the goal of sustainability.\textsuperscript{53}

The Rio Declaration specifically deals with the situation of indigenous peoples. Following are the principles which are related to the protection of the rights of the indigenous people.

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual

\textsuperscript{52} Available at http://www.sustainable-environment.org.uk/Action/Rio_Declaration.php (visited on 21.03.2016)
shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

Rio Declaration seeks to ensure that every person has access to information, can participate in the decision-making process and has access to justice in environmental matters with the aim of safeguarding the right to a healthy and sustainable environment for present and future generations.

### 3.3.2.2 FOREST PRINCIPLES

The Forest Principles (also Rio Forest Principles) is the informal name given to the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (1992), a document produced UNCED. It is a non-legally binding document that makes several recommendations for conservation and sustainable development forestry.

The Forest Principles recommends that “national forest policies should recognize and duly support the identity, culture and the rights of indigenous peoples, their communities and other communities and forest dwellers.”

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54 Principle 10 Rio Declaration  
55 Principle 22 Rio Declaration  
56 Also known as Rio Forest Principles  
58 Section 5(a) Forest Principles
It goes further to recommend that “benefits arising from the utilization of indigenous knowledge should therefore be equitable shared with such people.”\(^{59}\)

### 3.3.2.3 AGENDA 21

Agenda 21 was an action plan of UN initiatives to protect and promote conservation of global biological diversity. While many chapters of Agenda 21 referred generally to the role of indigenous peoples, Chapter 26 (Recognizing and strengthening The Role of Indigenous Peoples and their Communities) dealt specifically with indigenous peoples.\(^{60}\)

Chapter 26 of Agenda 21 begins by noting that indigenous peoples and their communities, which represent a significant percentage of the global population, have developed a holistic relationship with the natural environment. Over many generations, they have developed a “holistic traditional scientific knowledge of their lands, natural resources, and environment.” It observes that “indigenous peoples and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination” and recommends that governments should adopt policies and legal instruments that will protect intellectual and cultural property of indigenous peoples.\(^{61}\)

### 3.3.2.4 THE CONVENTION ON BIOLOGICAL DIVERSITY, 1992

The Convention on Biological Diversity was finalized in Nairobi in May 1992, discussed at the Earth Summit in June 1992, subsequently signed by 150 UN member States present at the United Nations Conference on Environment and Development (UNCED)\(^{62}\), and entered into force in

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\(^{59}\) Section 12 Forest Principles


\(^{62}\) Also known as the Rio de Janeiro Earth Summit, Rio Summit, Rio Conference, and Earth Summit (Portuguese: ECO92), was a major United Nations conference held in Rio de Janeiro from 3 to 14 June 1992.
December 1993.\textsuperscript{63} The 1992 convention and its particles are “conscious of the intrinsic value of biological diversity and of the educational, cultural, recreational and aesthetic values of biological diversity and its components.” Thus, the CBD unites concerns for biological and cultural diversity including traditional knowledge systems, into its efforts to conserve the world’s biodiversity.\textsuperscript{64}

The Preamble of the CBD states: “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity.”\textsuperscript{65}

The most significant provision of the CBD for indigenous peoples is Article 8(j) that provides that states shall, as far as possible and as appropriate: “Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

Other articles, such as Articles 10 (c), 17.2 and 18.4 also spoke directly and indirectly about issues affecting indigenous and local communities. Article 10(c) laid out sustainable use of components of Biological Diversity where states undertook to “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”. Article 17.2 dealt with Exchange of Information where states undertook to “protect and

\begin{itemize}
  \item \textsuperscript{63}Supra note 57, p.97
  \item \textsuperscript{65} Supra note 57
\end{itemize}
encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” Article 18.4 dealt with Technical and Scientific Co-operation where states undertook to “in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies and also to promote co-operation in the training of personnel and exchange of experts.”

Thus, it is clear that there is a general agreement within the international community that there is a need to recognize the traditional knowledge. The concern is to recognize it, take measures to ensure that communities are involved in the preservation and development of it and proper benefit return to them in case of commercial exploitation by others. But the method of achieving it is left to individual nations. But there are no uniform norms regarding the protection of different types of traditional knowledge owned by local communities. The reason being that the international community never had an occasion to look at the protection of traditional knowledge in its entirety.

Follow up to Article 8 (j) of the CBD, which deals directly with indigenous issues has included holding one workshop and establishing an inter-sessional working group to address the implementation of Article 8 (j) and related provisions of the Convention. At its four meeting (May 1998), the COP reviewed the report from a 1997 workshop and decided to establish an open-ended inter-sessional working group on Article 8 (j). The first meeting of the inter-sessional working group, held in Seville, Spain in March 2000, focused discussion on several areas:

- Application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities;
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- Implementation of Article 8 (j) and related provisions, in particular, the development and implementation of a programme of work at national and international levels;
- Development of a programme of work on Article 8 (j) and related provisions of the CBD;
- Priorities, opportunities for collaboration and implementation of the programme of work;
- Measure to strengthen co-operation among indigenous and local communities at the international level.

Concerns on intellectual property protection of traditional knowledge have occupied the agenda of the Conference of Parties (COP). The third COP called for dissemination of case studies on the relationship between intellectual property rights and the knowledge, innovations and practices of indigenous and local communities. COP4 in Decision IV/9 recognized the importance of making intellectual property-related provisions of the CBD and provisions of international agreements relating to intellectual property mutually supportive, and the desirability of undertaking further co-operation and consultation with the World Intellectual Property Organisation (WIPO).

COP 7 dealt with the indigenous people’s right and protection of traditional knowledge. At the Conference, delegates generally supported the recognition of indigenous peoples’ rights and prior informed consent, as well as sui generis systems for traditional knowledge protection on the basis of customary laws and traditional practices. On the development of elements of sui generis systems for the protection of TK, COPT asked the secretariat to compile information on customary laws and to develop a glossary of terms.

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67 Hereinafter referred to as COP
relevant to Article 8 (j), there will be more co-operation between the Access and Benefit sharing (ABS) and Article 8 (j) working Groups.  

3.3.3 THE NAGOYA PROTOCOL, 2010

Almost six years of negotiations held under the aegis of the United Nations Convention on Biological Diversity (CBD) culminated in the adoption in Nagoya, Japan in October 2010 of an international treaty that seeks to prevent biopiracy, or the misappropriation of genetic resources and associated traditional knowledge of indigenous people and local communities. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable sharing of Benefits Arising from their Utilization was adopted at the 10th meeting of the CBD Conference of Parties with the following objective is “the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources, including by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use its components.”

The Preamble to the Protocol does recognize “the unique circumstance where traditional knowledge associated with genetic resources is held in countries, which may be oral, documented or in other forms, reflecting a rich cultural heritage relevant for conservation and sustainable use of biological diversity.”

The scope of the Protocol applies to traditional knowledge associated with genetic resources within the scope of the CBD and to the benefits arising from the utilization of such knowledge and to the benefits arising from the utilization of such knowledge.

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Although the Protocol goes further than the CBD in spelling out the rights of indigenous peoples and local communities, the provision are heavy with qualifications leaving much to the discretion of national governments. Article 5 on Fair and Equitable Benefit-Sharing states in paragraph 2, “Each party shall take legislative, administrative or policy measures, as appropriate with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.”

Article 6 on Access to Genetic Resources states in Paragraph 2, “in accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where there have established the right to grant access to such resources.”

Article 7 deals with Access to Traditional knowledge Associated with Genetic Resources “In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.”

Article 12, which is on Traditional knowledge Associated with Genetic Resources, requires domestic law implementing the Protocol to “take into consideration indigenous and local communities’ protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.”

The effective participation of indigenous and local communities is required when Parties establish mechanisms to inform potential users of traditional
knowledge associated with genetic resources about their obligations with genetic resources about their obligations.

Parties, in their implementation of the Protocol “shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objective of the convention.”

3.4 PLANT BREEDERS’ RIGHTS AND PROTECTION OF THEIR TRADITIONAL KNOWLEDGE

Plant breeder’s rights are used to cover plant varieties. They nest exclusive exploitation rights in the developers of new varieties of plants as an incentive to pursue innovative activity and to enable breeders to recover their investment in breeding. Like most intellectual property rights, plant breeders’ rights are limited in time, at the end of which the varieties pass into the public domain.

3.4.1 FOOD AND AGRICULTURE ORGANISATION

In 1983 the UN Food and Agriculture Organisation (FAO) adopted the International Undertaking on Plant Genetic Resources (IUPGR), as a non-binding instrument in order to ensure that plant genetic resources for food and agriculture will be preserved, explored and made available for plant breeding and scientific purpose. In 1989 the FAO Conference recognized Farmers’ Rights and in 1991 it agreed that Farmer’s Rights would be implemented through and international fund for plant genetic resources. In 1993, the FAO Conference decided to renegotiate the International Instrument in harmony with the CBD and for the realization of Farmer’s Rights. After seven years of negotiations, the FAO Conference adopted the International Treaty on Plant Genetic Resources for Food and Agriculture which provides in Part III for the

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70 Ibid.
72 Hereinafter referred to as FAO
73 Hereinafter referred to as IUPGR
recognition of farmer’s rights, including the protection of traditional knowledge relevant to plant genetic resources for food and agriculture.”

3.4.2 THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (THE UPOV CONVENTION)

The UPOV Convention was signed in Paris in 1961. It came into force in 1968. It was revised in Geneva in 1972, 1978 and 1991. Plant breeders’ rights under the UPOV Convention provide intellectual property protection to plant varieties that are distinct, novel, uniform and stable.

Regarding TK and UPOV system, it is important to note that UPOV Convention exclusively deals with the protection of new plants varieties and is silent on the subject of TK and genetic resources. The mentioned system protects the plant variety itself, so it must exist physically to be protected. Knowledge frequently does not exist physically hence it will not be suitable for protection under UPOV system. However, new varieties developed by indigenous communities of farmers, and based on their traditional knowledge that fixed identity when reproduced, may, in cases, meet the UPOV criteria and can be protected.

The UPOV convention does not forbid the granting or creation of rights in respect of traditional knowledge, or categories of plant material, which are not plant varieties protected under the convention. Member states are free to establish a special system the purpose of the protection of TK so long as it does not conflict with UPOV convention.

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75 Hereinafter referred to as the UPOV Convention
76 E. Verkey. “Legal Protection of Traditional Knowledge”, Available at iimk.ac.in/wto/seminar/Elizabeth verkey.doc (visited on 28.01.2015)
78 A. Yupari, “International negotiation related to biodiversity and traditional knowledge” available at www.biotrade.org/resourcespublications/international%negotiations%20related%20to%20biodiversity%20and%20traditional%20knowledge.pdf (visited on 17.02.2015)
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3.5 PROTECTION OF INDIGENOUS PEOPLES’ KNOWLEDGE UNDER TRIPS (TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS)\textsuperscript{79}

The negotiation and adoption of the TRIPS Agreement as part of the Uruguay Round in 1994 have added new dimensions to the debate on intellectual property rights in traditional knowledge. The trips agreement sets minimum standards for countries to follow in protecting intellectual property. Article 1 of the TRIPS Agreement (on the nature and scope of the obligations) provides some flexibility in the implementation of the provisions of the Agreement. It states in paragraph one of that Article that “members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by the Agreement, provided that such protection does not contravene the provisions of the Agreement.” According to outfield, parties to the TRIPS Agreement can invoke this provision to enact legislation for protecting traditional knowledge. He asserts, “The absence of any mention of traditional knowledge in the Agreement, does not prevent any Member enacting legislation to protect such a category of knowledge.”\textsuperscript{80}

TRIPS provide that patents shall be made available for any inventions-products or process in all fields of technology provided that they are new, involve an invention step and re capable of industrial application.\textsuperscript{81} The agreement fails to define terms like ‘new’, ‘inventive step’ and ‘industrial application’, leaving the door open for interpretations that suit the interests of the more dominant member states.

“Members may exclude from patentability plants and animals other than micro-organisms, and essential biological process for the production of plants or animals other than non-biological and microbiological process. However, member states shall provide for the protection of plant varieties either by patents or by an effective sui generis system by any combination

\textsuperscript{79} Hereinafter referred to as the TRIPS Agreement
\textsuperscript{81} Article 27(1) The TRIPS Agreement
thereof”82 clearly, according to TRIPS, micro-organisms must be provided patent protection. But the Article fails to provide an exhaustive list of subject matters that cannot be patented. This allows scope for interpreting discoveries as patentable if they fulfill the utility criterion. If the agreement had explicitly discovered from being patented, developed countries could not have extended patent protection to non-inventions, especially in the area of bio-technology.

The indigenous knowledge developed over centuries, passed on from one generation to another, is recognized by some developed countries like the US as ‘prior art’ only if it has been recorded in writing. This has enabled research institutes to obtain information from indigenous people and patent their knowledge by merely identifying and isolating particular chemicals or giving scientific names to age-old practices.

Moreover, TRIPS does not protect indigenous knowledge, thus enabling multi-national companies to earn penny to the peoples who are the sources of the original information. Indigenous and local communities lack the means to obtain intellectual property protection over their innovations. Although the significant amount of biological resources used and maintained by indigenous people are useful to industry and to the world community, there is no effort to provide protection to this knowledge.

Lord Hoffman has said, “it was not necessary for an active substance to be identifiable or reproducible for it to have been made available to the public.” He gave the example of Amazonian Indians who had known for centuries that the cinchona bark can be used to treat material and other fevers. It was only in 1820 that quinine was isolated and extracted from the bark. According to him, the Amazonian Indians who believed that the effect of cinchona was due to the spirit of the bark could ‘know’ about quinine even though they did not know the chemical by name, not its chemical structure. If one were to take a cue from this, it would follow that plant and animal products, including herbal preparations, lack novelty even if there is no prior

82 Article 27.3(b) The TRIPS Agreement
public knowledge of the presence of a particular active substance that produces the desired results.

Thus, it can be said that most indigenous peoples know about the utility of the biological resources in their region and use them for various purposes. It would be unfair to award patents over products based on such indigenous knowledge without due credit being given to the original holders of such knowledge. It is totally unjust to allow multinational companies (MNC’s) to exploit such knowledge in order to reap rich rewards for them without enabling any benefit to flow back to the indigenous people who possessed the knowledge in the first place. Developing countries are therefore, justified in demanding a review of Article 27.3 (b) and asking for indigenous knowledge to be protected under the TRIPS Agreement. The developing countries, in its joint communication to the WTO, has urged the following modifications to be made to the Agreement: Inclusion of provisions to prevent bio-piracy as well as to protect TK; Recognition of the right of traditional communities or traditional practitioners to decide whether or not to commercialize their knowledge; inclusion of a provision mandating prior informed consent from indigenous people for the use of their knowledge and preventing third parties from using, offering for sale, selling, exporting or importing their knowledge without such consent; Inclusion of a provision guarantying full remuneration to the indigenous communities for their traditional knowledge.

3.6 THE WORLD INTELLECTUAL PROPERTY ORGANISATION (WIPO)

The WIPO is a specialized agency of the United Nations with the aim to harmonize intellectual property legislation and to develop and international intellectual property legislation and to develop and international intellectual property system.

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83 Hereinafter referred to as MNCs
85 Hereinafter referred to as WIPO
In 2000, the WIPO installed the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional knowledge and Folklore as a forum for debating intellectual property, traditional knowledge, genetic resources and traditional cultural expressions/folklore. Meeting once or twice per year, the IGC is currently discussing two sets of draft provisions for the enhanced protection of traditional knowledge and traditional cultural expressions or expressions of folklore against misappropriation and misuse. In 2006, the draft of traditional knowledge was prepared which is contained in document WIPO/GRTKF/IC/9/5 of January 2006 with the title The Protection of traditional knowledge: revised objective and principles: Article 1 of the draft calls for protecting traditional knowledge against misappropriation, which is defined very broadly as its unfair or illicit acquisition or utilization. Such protection may be implemented through various legal instruments, including individual or collective property rights in accordance with national and international laws.\textsuperscript{86} Protection should at least be available for traditional knowledge that is transmitted between generations, distinctively associated with a community and integral to its cultural identity;\textsuperscript{87} it should directly benefit the collective and individual holders.\textsuperscript{88} Benefits from commercial use (also of traditional knowledge already in the public domain)\textsuperscript{89} should be shared fairly and equitably, with possibly only non-monetary benefits in the case of non-commercial use.\textsuperscript{90} Users should indicate the source of traditional knowledge and obtain prior informed consent from its holders, subject to national laws.\textsuperscript{91} The protection of traditional knowledge should be implemented in such a way as not to hinder the continued customary use and exchange by its holders.\textsuperscript{92} Where traditional knowledge is associated with

\textsuperscript{86} Article 11 The Draft of Traditional Knowledge 2006
\textsuperscript{87} Article 4 The Draft of Traditional Knowledge 2006
\textsuperscript{88} Article 5 The Draft of Traditional Knowledge 2006
\textsuperscript{89} Article 8.2 The Draft of Traditional Knowledge 2006
\textsuperscript{90} Article 6.1, 6.2 The Draft of Traditional Knowledge 2006
\textsuperscript{91} Article 6.3 The Draft of Traditional Knowledge 2006
\textsuperscript{92} Article 7.1 The Draft of Traditional Knowledge 2006
\textsuperscript{93} Article 8.1 The Draft of Traditional Knowledge 2006
genetic resources, it should be accessed and used in accordance with national laws concerning these genetic resources.\textsuperscript{94}

Every year discussions are going on in the IGC meeting on the draft provisions for the protection of traditional knowledge. It may be fair to contend that the current WIPO/IGC draft is the most systematic international instrument for TK protection, at least in terms of IP protection. It not only provides lofty objectives and principles, but also a definite and well-structured legal foundation. If widely accepted and implemented, it would to a certain degree promote TK protection on a global basis and advance the rights and interests of TK holders as well. Not surprisingly, the WIPO has been considered to be the appropriate forum for formulating relevant rules on TK protection.\textsuperscript{95}

Although the IGC work has not yet been finalized, the influence of the draft over international legislation progress cannot be underestimated. Indeed, several regional and national process have availed themselves of the draft WIPO provisions in developing and designing their TK protection measures.\textsuperscript{96}

The WIPO’s Intergovernmental Committee is held every year in Geneva. The Committee works on concrete outcomes for the protection of traditional knowledge and cultural expressions. Discussions are made on set of draft provisions compiling suggestions on policy objectives and core principles to help protect TK and cultural expressions against misappropriation and misuse, relevant issues, including how specific methods to protect TK might fit within the existing intellectual property system and possible reforms of the intellectual property system.\textsuperscript{97}

\textsuperscript{94} Article 12 The Draft of Traditional Knowledge 2006
\textsuperscript{95} Available at www.wipo.int/meeting/en/doc-details.jsp?dic_id=129915(visited on 21.01.2015)
\textsuperscript{97} Available at biodiversity-.iisd.org/news/wipo-committee-disasses-traditional-knowledge-protection/ (visited on 17.03.2015)
3.7 FIRST WORLD CONFERENCE ON INDIGENOUS PEOPLES (22-23 SEPTEMBER, 2014)

The first World Conference on Indigenous Peoples was held on 22-23 September 2014. The meeting was an opportunity to share perspectives and best practices on the realization of the rights of indigenous peoples, including pursuing the objectives of the United Nations Declaration on the Rights of Indigenous Peoples. Following the opening of the first World Conference on Indigenous Peoples in New York, UN Member States adopted a landmark Outcome Document in which they renewed their commitment to the full realization of the rights of Indigenous Peoples. Opening the World Conference, the President of the General Assembly, H.E. Sam Kutesa, welcomed the “active participation of Indigenous Peoples in its preparation, as well as the cooperation between Member States and Indigenous Peoples in the preparation of the Outcome document.” In his remarks in the opening session, Secretary-General Ban Ki-moon underscored that “Indigenous Peoples are central to our discourse of human rights and global development.” Noting that the Conference’s “deliberations and decisions will reverberate across the international community with concrete effects in the lives of indigenous people”, he stressed that their engagement would be critical in the global drive for a more sustainable future and pledged the full support of the United Nations to indigenous peoples. Indeed, the United Nations works closely with Indigenous Peoples to advance their rights, in particular through the Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples and the Permanent Forum on Indigenous Issues. Addressing the opening session of the Conference as a special guest, Nobel Peace Prize and indigenous rights activist Rigoberta Menchú expressed her deep concern with the persistent violations of the rights of Indigenous Peoples and urged Member States to “apply national and international law, particularly the rights enshrined in [ILO] Convention 169

98 Available at http://nhri.ohchr.org/EN/Themes/IndigenousPeoples/Pages/WorldConference.aspx(visited on 05.07.2015)
and the UN Declaration on the Rights of Indigenous Peoples, which establishes minimum standards for their survival, dignity, well-being and rights.” While significant progress has been made since the adoption of the Declaration in 2007, Indigenous Peoples continue to face numerous obstacles to the full realization of their rights, with many of them struggling to remain on their lands and retain the right to their natural resources. While they make up about five per cent of the world’s population, they constitute 15 per cent of the world’s poor and about one third of the world’s 900 million extremely poor rural people. In the concise and action oriented Outcome Document, prepared on the basis of inclusive and open consultations with Member States and Indigenous Peoples, Member States reiterated their support for the objectives of the United Nations Declaration on the Rights of Indigenous Peoples. They further reaffirmed their commitment to consult and cooperate with Indigenous Peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. The document also calls to focus on the special needs of older people, persons with disabilities, women and youth in indigenous communities.99

In conclusion, it can be said that though there are many international instruments which recognize the rights of the indigenous people, conventional international intellectual property law does not protect the plant based traditional knowledge of indigenous peoples adequately. Thus, there is a need to devise new regimes or enlarge existing ones to accommodate the protection of traditional knowledge of the indigenous people associated with their biological resources. However, so far no coherent and inclusive international efforts are being made to address this concern as a consequence of which biopiracy disputes are increasing and violating the human rights of the indigenous peoples.
