

Fact Sheets on International Bodies Considering Traditional Knowledge

Introduction

There is no clear definition of what is considered traditional knowledge. However, it can loosely be defined as “knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment, and passed on orally from generation to generation”.¹

Examples of traditional knowledge might include: mahi raranga (weaving), kapahaka (performing arts), whakairo (carving), rongoa (Maori medicine), hanga whare (house building), whai (string games) nga waiata Maori (Maori songs) korero-a-iwi (tribal stories) mahi hii ika (fishing practices) matauranga taiao (environmental knowledge), ruruku kai (food gathering)

Contrary to common perception, traditional knowledge is not necessarily old knowledge. It is evolving all the time, a process of continuous, even daily creation as individuals and communities take up the challenges presented by their social and physical environment.² In many ways, therefore, traditional knowledge is actually contemporary knowledge. Traditional knowledge is embedded in traditional knowledge systems, which each community has developed and maintained in its local context.³

The protection of traditional knowledge is the subject of widespread discussion at national, regional and international levels. It is an issue being considered in various fora by governments and non-government organisations.

The Ministry of Economic Development has prepared these fact sheets to provide information on the various international processes and bodies considering issues related to traditional knowledge. This is the first phase of a broader project to increase awareness of these issues and develop a framework in which further consideration of traditional knowledge, and its interface with the intellectual property rights system, can take place.

There are fourteen fact sheets in total. Each fact sheet provides introductory information under the following headings:

- Background on the organisation or forum discussing traditional knowledge;
- Consideration of traditional knowledge - why is traditional knowledge being considered in this forum and what is being done?;
- Future work of the forum on traditional knowledge; and the
- New Zealand position - what views or positions have been expressed or taken by New Zealand?

¹ Convention on Biological Diversity Website (<http://www.biodiv.org/programmes/socio-eco/traditional/>). The World Intellectual Property Organisation (“WIPO”) suggests some useful ways to characterise traditional knowledge. This includes knowledge which is: generated, preserved and transmitted in a traditional context and between generations; distinctively associated with or linked to a traditional or indigenous culture or community (or communities) through a sense of custodianship or cultural responsibility; or identified by the source community as being traditional knowledge.

² [http://www.geocities.com/rotraditional knowledgewe/IntellectualProperties2.html](http://www.geocities.com/rotraditional%20knowledgewe/IntellectualProperties2.html)

³ [http://www.geocities.com/rotraditional knowledgewe/IntellectualProperties2.html](http://www.geocities.com/rotraditional%20knowledgewe/IntellectualProperties2.html)

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1. Disclaimer

Any statements made or views expressed in these fact sheets are the views of the organisations canvassed in these fact sheets and do not necessarily reflect New Zealand government policy. Readers are advised to seek specific advice from a professional qualified in the relevant subject area before undertaking any action in reliance on the contents of these fact sheets.

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2. United Nations

Background

The United Nations (“UN”) was established in 1945 to pursue four key purposes: to maintain international peace and security; to develop friendly relations among nations; to achieve international co-operation in solving international social, economic, cultural or humanitarian problems and to promote human rights; and to be a centre for harmonising the actions of nations to achieve these ends.

Structure of the UN

The UN has six principle organs. The highest body of the UN is the General Assembly (UNGA). It meets annually to review all of the UN activities. Each member country (including New Zealand) has one vote in the UNGA.

The UN Security Council is the primary organ responsible for maintaining international peace and security. It has the power to make decisions that are binding on UN members. The Security Council is not directly involved in human rights issues so it is unlikely to be involved in issues directly related to indigenous issues.

The UN Secretariat, staffed by international civil servants from all Member States, is responsible for administering the UN’s programmes and policies. Its duties are as varied as the problems dealt with by the UN. The most senior UN official is the Secretary-General.

The UN comprises a number of subsidiary bodies covering a wide variety of issues, including human rights, legal issues, disarmament, women’s rights and more. Many of these bodies come under the Economic and Social Council (ECOSOC), which, in turn, reports to the General Assembly.

The UN is also comprised of many bodies with a degree of independence, called Specialised Agencies. They address specific technical issues such as health, food, education, and include organisations such as the World Intellectual Property Organisation (WIPO) (see fact sheet 6), United Nations Educational, Scientific and Cultural Organisation (UNESCO) (see fact sheet 3), the International Labour Organisation (ILO) (see fact sheet 11) and the World Health Organisation (WHO) (see fact sheet 10), each of which has an interest in the situation of indigenous peoples and traditional knowledge. For more information on these specialised agencies, please refer to the fact sheets on these bodies.

The UN also includes the International Court of Justice (ICJ), which is the principle judicial organ of the UN. The ICJ only considers disputes between governments and does not receive submissions from individuals.

Consideration of Traditional Knowledge

As outlined above, a number of commissions, specialised agencies and related organisations of the UN consider traditional knowledge and related issues as part of

their work programmes. The UN Permanent Forum on Indigenous Issues is one such body.

UN Permanent Forum on Indigenous Issues

The proposal to create a permanent forum focused on indigenous issues was officially introduced at the Vienna World Conference on Human Rights in 1993 (although indigenous peoples had been advocating for a forum for many years prior). After seven years of deliberation, the ECOSOC established the United Nations Permanent Forum on Indigenous issues on 28 July 2000.

The purpose of the Permanent Forum is to serve as an advisory body to ECOSOC, with a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health and human rights.

The Permanent Forum aims to promote and co-ordinate the UN agencies that deal with indigenous issues. The Permanent Forum achieves this through preparing and disseminating information on indigenous issues to other UN agencies. The Permanent Forum also attends and participates in other UN agency meetings, for example, WIPO (see fact sheet 6).

The Forum is made up of 16 independent experts, with eight of the members nominated by indigenous peoples and eight nominated by Governments. Indigenous members are nominated according to seven regions as determined by indigenous groups. The regions are: Africa; the Arctic and Europe; Asia; Central and South America and the Caribbean; the Russian Federation and Eastern Europe; North America; and the Pacific - with one additional seat that rotates among the three most highly populated regions: Africa; Asia; and Central and South America and the Caribbean. The indigenous members of the Permanent Forum do not represent a particular State, indigenous community or region; but are experts serving in their personal capacities.

The Permanent Forum is unique in two ways. First, both State and indigenous representatives sit alongside each other in the deliberations. This is regarded as revolutionary because traditionally the UN has been a forum reserved only for States. Second, the process allows indigenous peoples to raise and highlight issues that exist in their countries whereas traditionally, the UN was used as a forum to highlight issues between States.

The Permanent Forum held its first meeting in May 2002, which was attended by a number of indigenous delegates, including Maori. It has met twice since. The Permanent Forum reports annually to ECOSOC, which then reports to the United Nations General Assembly.

New Zealand Involvement

Since its inception, New Zealand has been an active supporter of the activities of the UN. We take pride in our reputation as a good international citizen, and remain committed to international burden sharing and seeking global solutions to global problems. New Zealand also endeavours to support indigenous issues in the various fora within the UN system.

Acknowledgement

The Ministry of Economic Development would like to acknowledge the United Nations and the Ministry of Foreign Affairs and Trade for the information used in preparing this fact sheet.

To access a definitive chart of the structure of the United Nations visit:

<http://www.un.org/aboutun/unchart.pdf>.

For further information visit: www.un.org or www.mfat.govt.nz.

3. United Nations Educational, Scientific and Cultural Organisation (UNESCO)

Background

The United Nations Educational, Scientific and Cultural Organisation (“UNESCO”) is a body established under the Economic and Social Council of the United Nations. UNESCO was established in 1945 by the Charter of the United Nations. Its objective is to contribute to peace and security in the world by promoting collaboration among nations through education, science, culture and communication in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion. There are currently 190 Member States of UNESCO, including New Zealand (which is a founding member).

Consideration of Traditional Knowledge

UNESCO is the only international organisation whose mandate expressly refers to the safeguarding of all aspects of heritage, including intangible heritage. In recognition of the importance of, and urgent need for proper protection of intangible cultural heritage, UNESCO has prepared the International Convention for the Safeguarding of the Intangible Cultural Heritage (the “Convention”) and the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity (the “Proclamation”).

The UNESCO General Conference has also decided that work should commence on an international convention on the protection of the diversity of cultural contents and artistic expressions (also referred to as cultural diversity). The Declaration on Cultural Diversity recognises cultural diversity as a “common heritage of humanity” and considers its safeguarding to be imperative. The first draft of the Convention is expected to be presented to the next session of the General Conference.

International Convention for the Safeguarding of the Intangible Cultural Heritage

The Convention was adopted by a majority of Member States at the 32nd General Conference in 2003, however, thirty ratifications are necessary to bring it into force. It is designed to promote the safeguarding of oral traditions and expressions, including language as a vehicle of the intangible cultural heritage, rituals and festive events, social practices, knowledge and practices about nature and the universe, performing arts and traditional craftsmanship. It is intended that the establishment of international co-operation and assistance mechanisms, notably the creation of an Intangible Cultural Heritage Fund, will make it possible to develop safeguarding projects at national, regional and international levels.

To achieve the safeguarding of intangible cultural heritage, the Convention stipulates that Parties to the Convention must establish inventories of intangible culture. The intention is to ensure better visibility at an international level of this particularly vulnerable heritage.

Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity

The Proclamation was adopted at the 29th session of the General Conference. The Proclamation encourages governments, non-governmental organisations (NGOs) and local communities to identify, safeguard, revitalise and promote their oral and intangible heritage. It also aims to encourage individuals, groups, institutions and organisations to contribute to its management, preservation, protection and promotion.

In 2001, UNESCO's Director General proclaimed 19 of the world's most remarkable examples of the oral and intangible heritage of humanity. UNESCO has so far proclaimed 47 "Masterpieces of the Oral and Intangible Heritage of Humanity" from all regions of the world. The Proclamation is a bi-annual process, the next proclamation is scheduled to take place in 2005.

Requests are made to the Director General by Member States, intergovernmental organisations in consultation with the National Commission for UNESCO in the country concerned and non-government organisations who have a formal relationship with UNESCO. All requests are made with the Indigenous group's consent.

For more information on the process visit http://portal.unesco.org/culture/en/ev.php-URL_ID=2226&URL_DO=DO_TOPIC&URL_SECTION=-277.html.

New Zealand Participation

New Zealand participates in the activities of UNESCO through the New Zealand National Commission for UNESCO and through a permanent representative to UNESCO based in Paris. There is also a Pacific Office in Apia, Samoa which is responsible for the 16 Pacific States, including New Zealand.

The New Zealand National Commission comprises a Chair and five specialist members appointed by the Minister of Education. The role of the National Commission is to advise UNESCO on the development of its policies and programmes and to manage and facilitate the relationship between New Zealand and UNESCO. It also assists in the implementation of those policies and programmes in New Zealand and the South Pacific. For more information on the National Commission for UNESCO, visit www.unesco.org.nz.

Future Work

To give effect to the International Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO is required to establish a Representative List of the Intangible Heritage of Humanity and a second list of Intangible Cultural Heritage in Need of Urgent Safeguarding. These lists will rely on the information generated through the establishment of inventories by Parties to the Convention.

New Zealand Position

New Zealand supports the work of UNESCO. New Zealand, however, abstained from voting on the Intangible Cultural Heritage Convention.

Acknowledgement

The Ministry of Economic Development would like to acknowledge the UNESCO website for information used in preparing this fact sheet. For more information on the International Convention for the Safeguarding of the Intangible Cultural Heritage visit www.unesco.org/culture/index.htm.

4. United Nations Commission on Human Rights (UNCHR)

Background

The United Nations Commission on Human Rights (“UNCHR”) is a body established under the Economic and Social Council (ECOSOC) of the United Nations (see fact sheet 2). The United Nations Commission on Human Rights (CHR) comprises 53 Member States elected to consider international human rights issues. Member States are elected by ECOSOC for a term of three years. Each year, the Council elects one third of the Commission members. The election is based on the criterion of geographic distribution: 15 members from Africa, 12 from Asia, 5 from Eastern Europe, 11 from Latin America and the Caribbean, and 10 from the West European Group and Others. New Zealand is not a member of the Commission but is an active observer.

In 1947, the UNCHR established the Sub-Commission of the Prevention of Discrimination and Protection of Minorities. In 1999, the name was changed to the Sub-Commission on the Promotion and Protection of Human Rights (“Sub-Commission”) and it is now the main subsidiary body of the UNCHR.

Consideration of Traditional Knowledge

Traditional knowledge is not regularly discussed in the UNCHR but is part of a range of issues considered by two subsidiary bodies of the UNCHR: the Working Group on the Draft Declaration on the Rights of Indigenous Peoples (“WGDD”) and the Sub-Commission on the Promotion and Protection of Human Rights.

Draft Declaration on the Rights of Indigenous People

The draft Declaration on the Rights of Indigenous Peoples (the “draft Declaration”) was completed by experts appointed to the Working Group on Indigenous Peoples (“WGIP”) in 1994. WGIP was established by the Sub-Commission on the Promotion and Protection of Human Rights, and comprises 5 expert members in indigenous rights with over 20 years collective experience. The main achievement of WGIP has been the development of the draft Declaration.

The draft Declaration deals with the rights of indigenous peoples in areas such as self-determination, culture and language, education, health, housing, employment, land and resources, environment and development, intellectual and cultural property, indigenous law and treaties and agreements with governments.

The UNCHR formed the WGDD to consider and further develop the draft Declaration. Indigenous Peoples and States participate equally in the Working Group but it is States who make final decisions. The WGDD has met nine times but many States have difficulties with aspects of the draft Declaration and subsequently, States have only been able to provisionally agree on 2 of the 45 articles.

Article 29 of the draft Declaration is the provision of most relevance to traditional knowledge. It states:

“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”.

New Zealand Position

New Zealand is committed to obtaining a strong declaration which advances indigenous rights while recognising the political and constitutional integrity of New Zealand. The New Zealand government, however, cannot accept all articles of the draft Declaration as currently written but is working actively with other States to come up with amended articles, which may form the basis for consensus.

Acknowledgement

The Ministry of Economic Development would like to acknowledge the United Nations Commission on Human Rights website for information used to prepare this fact sheet.

For more information on the United Nations Commission on Human Rights please visit their website at <http://www.unhcr.ch/html/menu2/2/chr.htm>.

5. United Nations Conference on Trade and Development (UNCTAD)

Background

The United Nations Conference on Trade and Development (“UNCTAD”) was established in 1964 as the principle organ of the United Nations General Assembly (see fact sheet 2) to provide a focal point for discussion on trade and development and the interrelated issues in the areas of finance, technology, investment and sustainable development.

UNCTAD is a permanent intergovernmental body comprising 191 Member States, including New Zealand. It meets every four years to further advance its goal to maximise the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis.

Consideration of Traditional knowledge

Although UNCTAD has been involved in international discussions about intellectual property, it has limited its focus to certain specific areas, including traditional knowledge. UNCTAD is interested in the economic development opportunities that may arise from the utilisation of traditional knowledge.

UNCTAD, in collaboration with the Commonwealth Secretariat (see fact sheet 12) has organised a range of seminars and workshops to consider traditional knowledge issues. These workshops brought together experts in a range of areas including environment, trade, indigenous issues, economic development, capacity building and intellectual property.

For example, in October/November 2000, the UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovation and Practices was held with over 200 experts from some 80 countries in attendance. The experts addressed the objectives of Traditional knowledge protection systems and possible means of achieving those ends, including prior informed consent, access and benefit sharing mechanisms, strengthening customary/traditional law, using intellectual property instruments, developing *sui generis* systems, documenting traditional knowledge, as well as measures to encourage traditional knowledge-based innovations and the development and export of traditional knowledge-derived products (where appropriate). For more information, visit http://r0.unctad.org/trade_env/TRADITIONAL_KNOWLEDGE2.htm

Additionally, in February 2004, a workshop on the Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework was held. The purpose of the workshop was to identify a menu of actions and policies which could be included in holistic national systems for the preservation, protection and promotion of traditional knowledge, innovations and practices. This list could serve as a practical guide for countries wishing to develop holistic national *sui generis* systems. For more

information, including papers presented at the workshop visit http://r0.unctad.org/trade_env/TRADITIONAL_KNOWLEDGE2.htm.

UNCTAD has also been involved in a joint capacity building project on Intellectual Property Rights and Sustainable Development with the International Centre for Trade and Sustainable Development. This project aims to improve understanding of the development implications of the TRIPS Agreement (see fact sheet 7); and strengthen the analytical and negotiating capacity of developing countries so that they can participate in intellectual property rights related negotiations in an informed manner to further their sustainable development objectives.

The project attempts to achieve this by producing a number of documents including:

- Policy Discussion Paper: This will raise awareness about the key policy issues raised by intellectual property rights and their impact on economic development, poverty alleviation and sustainable human environment;
- Research Tools: Research on background material including a literature survey on intellectual property rights and sustainable human development and information on technology-related indicators for example, a compilation of royalty payments;
- Resource Book on TRIPS and Development: This will provide background and technical information on the main issues under discussion in TRIPS; and
- Case Studies: The case studies will supplement the Resource Book and Policy Paper. They will look at the various intellectual property rights and will cover sectors such as compulsory licensing, technology transfer, food security, and geographical indications. It is intended that they will shed light on their impact and relevance in developing countries.

For more information, visit <http://www.iprsonline.org/unctadictsd/description.htm>.

New Zealand Position

New Zealand has not actively participated in UNCTAD's work on traditional knowledge as the focus of this work has been on assisting developing countries.

Acknowledgement

The Ministry of Economic Development would like to acknowledge the UNCTAD and ICTDS websites for the information used in preparing this fact sheet. For more information, visit their websites at www.unctad.org and www.iprsonline.org.

6. World Intellectual Property Organisation (WIPO)

Background

The World Intellectual Property Organisation ("WIPO") is a specialised agency of the United Nations. The Convention Establishing the World Intellectual Property Organisation (1967) states its objective as the promotion of the protection of intellectual property throughout the world through co-operation among States and, where appropriate, in collaboration with any other international organisations.

WIPO administers more than twenty international treaties in the fields of copyright (and related rights), patents, industrial designs and trade marks. It also facilitates the conclusion of new international treaties in this area and assists States with the modernisation of national legislation.

Consideration of Traditional Knowledge

WIPO, in consultation with the United Nations Educational, Scientific and Cultural Organisation ("UNESCO") (see fact sheet 3), has undertaken work in the area of traditional cultural expressions (often referred to as "folklore" – a subset of traditional knowledge) since the 1970s. In 1982, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions were developed, but not widely adopted. Following on from the 1997 World Forum on the Protection of Folklore, WIPO and UNESCO convened four regional consultations on the protection of traditional cultural expressions.

In 1998 and 1999, the Global Issues Division of WIPO undertook a series of nine Fact-Finding Missions ("FFMs") to collect information on the intellectual property needs and expectations of the holders of traditional knowledge. The results of the FFMs have informed the organisation's current work in this area and are available on the WIPO website at: http://www.wipo.int/traditional_knowledge/en/traditional_knowledge/ffm/report/final/pdf/annex.pdf.

In 1998, as part of WIPO's work on biological diversity and biotechnology, a study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge was commissioned by WIPO and the United Nations Environment Programme ("UNEP"). Issues related to intellectual property and genetic resources also began to be discussed by the Standing Committee on the Law of Patents and a Working Group on Biotechnological Inventions. Following a special meeting on Intellectual Property and Genetic Resources, and the Diplomatic Conference for the Adoption of the Patent Law Treaty, held in 2000, it was recommended that a distinct body within WIPO be established to facilitate discussions on these issues. The Twenty-Sixth Session of the General Assembly of the Member States of WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the IGC").

WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

The IGC is mandated to discuss intellectual property issues that arise in three areas:

1. Access to genetic resources and benefit-sharing;
2. Protection of traditional knowledge, whether or not associated with genetic resources; and
3. The protection of expressions of "folklore" (as a subset of traditional knowledge, also referred to as "traditional cultural expressions").

Genetic Resources

The IGC's work on intellectual property and genetic resources is in response to concerns about the patenting of inventions based on genetic resources and in some cases traditional knowledge associated with those resources. Its work to date has focused on the use of contractual agreements to govern access to genetic resources and determine how benefits, such as intellectual property rights, resulting from the use or development of genetic resources should be shared by stakeholders, including the holders of traditional knowledge.

The IGC has developed an on-line database of contractual practices and clauses relating to intellectual property, access to genetic resources and benefit-sharing (see http://www.wipo.int/traditional_knowledge/en/databases/contracts/index.html). The object of the database is to provide a practical resource to assist those involved in negotiations about the access to and the use of genetic resources, through the provision of a range of options for dealing with intellectual property issues in access and benefit-sharing contracts. The IGC also intends to develop guide contractual practices and model clauses.

At the invitation of the Conference of the Parties of the Convention on Biological Diversity ("CBD") (see fact sheet 8), WIPO conducted a study on disclosure requirements in patent applications related to genetic resources and traditional knowledge.

WIPO's work in this area contributes, in part, and through the contribution of technical information, to the current debate about the relationship between the CBD and the World Trade Organisation Agreement on the Trade Related Aspects of Intellectual Property Rights ("WTO - TRIPs") which is considered further in fact sheet 7.

Traditional Knowledge

The IGC has generally considered the interface between intellectual property rights and traditional knowledge from two perspectives:

- The availability of intellectual property protection for traditional knowledge holders (either for the protection of traditional knowledge or to enable traditional knowledge holders to exploit such knowledge, where appropriate); and
- The acquisition by parties other than traditional knowledge holders of intellectual property rights over traditional knowledge-based creations and innovations.

Much of the IGC's work in this area has focused on defensive measures designed to prevent the grant of patent rights to third parties in situations where that would not be

appropriate. For example, the IGC is considering ways that public domain (not secret) traditional knowledge can be made available to patent examiners conducting searches for novelty or inventiveness. It is hoped that making such information available will reduce the likelihood that patents would be granted for inventions based on traditional knowledge, where such an invention was already known to indigenous people or local communities.

This work has involved the compilation of inventories of publicly available traditional knowledge-related periodicals and databases. While a number of countries have stressed the usefulness of documenting traditional knowledge in databases so that it is available as "prior art" (information relating to an invention that was publicly available at the time the invention was made), New Zealand (and others) has raised concerns about the risks of documentation initiatives. Risks include making traditional knowledge more accessible and traditional knowledge becoming prior art preventing indigenous people from registering a patent for an invention based on traditional knowledge. The IGC is, therefore, developing an Intellectual Property Documentation Toolkit to assist traditional knowledge holders to address the intellectual property implications of the recording of traditional knowledge and any subsequent disclosure and dissemination of that knowledge.

The IGC has also studied a range of positive legal measures for protecting traditional knowledge through existing intellectual property mechanisms and through systems specifically designed for that purpose. The Committee has shared national experiences in this area and held preliminary discussions about the possible characteristics of new mechanisms for the protection of traditional knowledge. It is currently developing an *overview of policy objectives and core principles for traditional knowledge protection*, and an *outline of policy options and legal elements of the protection of traditional knowledge*.

Traditional Cultural Expressions

The IGC is undertaking a study of the legal protection of traditional cultural expressions which analyses current intellectual property rights and new options. It is currently preparing an overview of policy objectives and core principles for protection of traditional cultural expressions and an outline of policy options and legal mechanisms for the protection of traditional cultural expression subject matter. This work, and that on traditional knowledge, includes consideration of the possible development of models for national laws and issue of international protection.

On a more practical level, WIPO is developing a Practical Guide on the Legal Protection of Traditional Cultural Expressions. A number of case studies on intellectual property and traditional cultural expressions are available on the WIPO website at http://www.wipo.int/traditional_knowledge/en/studies/cultural/minding-culture/index.html. Technical assistance is also available to States wishing to establish national or regional systems.

WIPO has also worked with the International Trade Centre (a technical co-operation agency of the United Nations Conference on Trade and Development and the World Trade Organisation) to produce the practical guide *Marketing Crafts and Visual Arts: the Role of Intellectual Property* available from www.wipo.int/ebookshop/.

Participation in the IGC

The IGC is open to Member States of WIPO. Other United Nations members, intergovernmental organisations and accredited non-governmental organisations ("NGOs") may participate as observers, and are regularly permitted to take the floor. Approximately 175 accredited NGOs take part in the IGC's discussions, a number of which represent the specific interests of indigenous communities and traditional knowledge holders. Currently Te Iwi Moriori Trust Board is the only New Zealand NGO to seek and obtain accreditation as an IGC observer.

The IGC has recently considered ways to enhance the participation of local and indigenous communities in its work. It was decided that a voluntary fund be established to assist indigenous participation at IGC meetings (subject to the continued existence of the IGC). While the practical aspects of such a fund are being worked through, it has been agreed by Member States that an informal consultative forum for indigenous and local representatives should be established, and that voluntary donors be encouraged to provide funding support to accredited observers.

States are also encouraged to include persons from indigenous and local communities as part of their delegations. New Zealand supports this practice.

WIPO Standing Committee on Patents and Working Group on Reform on the Patent Co-operation Treaty

Traditional knowledge issues are also being considered by the Standing Committee on Patents ("SCP") and the Working Group on Reform of the Patent Co-operation Treaty ("PCT").

In the SCP there is a Brazilian proposal to amend Article 2 of the draft Substantive Patent Law Treaty. Essentially the aim of the proposal is to ensure that nothing in the Substantive Patent Law Treaty will prevent a Contracting Party from making provision to meet what it considers to be its obligations under such international agreements as the Convention on Biological Diversity (see fact sheet 8). The intention is not to require all Contracting Parties to make such provisions, just to ensure that Contracting Parties are not prevented from making such provisions if they wish.

The PCT working group is considering a Swiss proposal to amend the PCT regulations so that national patent legislation may require the declaration of the source of genetic resources and associated traditional knowledge in patent applications.

New Zealand Position

Discussions in the IGC, and other WIPO bodies, about intellectual property and traditional knowledge have obvious relevance for New Zealand and Maori in particular.

New Zealand has been very supportive of the IGC's work and participates in this forum with the dual objectives of highlighting concerns expressed by Maori about intellectual property and matauranga Maori, and obtaining information and experiences which can be discussed domestically.

As the work of WIPO in this area is at a preliminary or scoping stage New Zealand has not been called upon to take any position that would require it to alter domestic policy or legislation. It has expressed support for a bottom up approach involving the development of a menu of options for the protection of traditional knowledge which can be tested and adapted to national circumstances. New Zealand has also been supportive of discussions in the SCP and the PCT working group about patenting of biotechnological inventions and the identification of the origin of genetic resources and traditional knowledge.

Further information on WIPO and the treaties it administers can be found on its website www.wipo.int. For more specific information on the IGC consult the Global Issues Division website: www.wipo.int/globalissues which provides detailed information on WIPO's work on traditional knowledge including meeting agendas, papers, surveys, publications and other resources. The IGC has also established an accredited observers webpage [http://www.wipo.int/traditional knowledge/en/igc/ngo/index.html](http://www.wipo.int/traditional%20knowledge/en/igc/ngo/index.html).

7. World Trade Organisation (WTO)

Background

The World Trade Organisation (WTO) was established in 1995 and is the only global international organisation dealing with the rules of trade between States. The WTO is the successor to the General Agreement on Tariffs and Trade (GATT) which was first signed in 1947. The WTO's relationship to the United Nations is as a "related organisation".

At the centre of the WTO are the various agreements designed to help producers of goods and services, exporters, and importers conduct their business. Of particular relevance is the Trade Related Aspects of Intellectual Property Agreement ("TRIPS").

Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS)

The TRIPS Agreement sets minimum international standards for each of the different categories of intellectual property, including: copyright, trademarks, patents, location specific 'naming rights' called geographical indications, industrial designs, and layout-designs of integrated circuits for electronics. Finalised in 1994, along with other WTO agreements on subjects such as agriculture, services and investment measures, its purpose is to set minimum standards of intellectual property protection among all countries that are members of the WTO and to ensure that intellectual property rules do not become barriers to trade.

All 146 WTO members must make sure that their domestic legislation meets the standards set in the TRIPS Agreement. Members are, however, free to determine the appropriate method of implementing the provisions of TRIPS within their own legal systems and practice. The standards in the TRIPS Agreement therefore, underpin the intellectual property legislation of the majority of countries in the world, including New Zealand and all the other developed countries.

The TRIPS Agreement is subject to ongoing review. The TRIPS Council, comprising all WTO members is responsible for monitoring the operation of the TRIPS Agreement, and, in particular, how members comply with their obligations under it. The TRIPS Council also looks to clarify, improve or strengthen various parts of the Agreement. The protection of traditional knowledge is one of the issues under discussion.

Consideration of Traditional Knowledge

The issue of protection of traditional knowledge was originally raised in the TRIPS Council in the context of discussions on the provisions in the TRIPS Agreement on patents (Article 27(3)(b) in particular). Some argue that TRIPS rules are not in the interests of traditional knowledge-holders because they allow governments to grant patents for inventions that could be based on genetic resources or traditional knowledge, without the knowledge or consent of the person or community that owns or controls that knowledge.

In addition, some countries have found that the criteria and rules around the granting of intellectual property rights set out in the TRIPS agreement do not always meet the needs of protecting their traditional knowledge. For example, the requirement that ideas must be new or the limited time period for the life of the intellectual property right.

In response to this, it was agreed at the last WTO Ministerial Meeting in Doha in November 2001, that the issues needed to be considered further. Ministers instructed the TRIPS Council to:

- Examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD); and
- Examine the protection of traditional knowledge and folklore, and
- Continue to conduct a review of Article 27.3(b) of TRIPS, which sets out the exclusions from patentability.

The TRIPS Agreement and the Convention on Biological Diversity

Some WTO Members argue there is an inherent conflict between the TRIPS Agreement and the CBD, as TRIPS allows for private rights to be established over inventions based on genetic resources, while the CBD provides that countries have sovereign rights over their genetic resources (see fact sheet 8). They argue that the relevant provisions of TRIPS should be amended to reflect or support CBD principles, such as prior informed consent and fair and equitable benefit sharing. Others consider that no conflict exists and that the TRIPS agreement allows Members flexibility to meet their CBD commitments if they wish. Some States are of the view that the potential for conflict can exist depending on how the two agreements are implemented and that care needs to be taken to ensure that they are implemented in a supportive manner.

Protection of Traditional Knowledge

As mentioned above, some WTO members are concerned that the TRIPS Agreement is too focussed on conventional forms of intellectual property and needs to be amended to take the protection of traditional knowledge into account. There are also concerns that the TRIPS Agreement should be amended to prevent intellectual property rights being granted to persons using inventions or creations based on someone else's traditional knowledge, particularly in third world countries.

Article 27.3(b) of the TRIPS Agreement – Patentable Subject Matter

As a general principle the TRIPS Agreement provides in Article 27 that patent protection shall be available for any inventions subject to a limited list of exceptions.

Article 27.3(b) of the TRIPS Agreement describes these exceptions, it provides that:

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

Developing countries are concerned about allowing patenting over life forms, such as plants and animals, for a wide range of reasons; they are linked to concerns about the use of their genetic resources and traditional knowledge. There are development and food security concerns as patent protection of plants may prevent small farmers from being able to use certain seeds, and they also have environmental, cultural and moral issues about these sorts of patents. However, because these exceptions are voluntary, it has not been implemented in a number of developed countries where a large number of patents have been granted over life forms, including human genes.

For these reasons, developing countries would like to amend Article 27.3(b) to prohibit the patenting of all life forms and of inventions based upon traditional knowledge, or inventions which violate the provisions of the CBD (see also the section above on the relationship between the CBD and TRIPS). This is being resisted by a large number of developed countries who consider that patents are critical to economic development and that Article 27.3 is sufficient to modulate patents protection to the needs, interests and ethical standards of each country. If there are to be future negotiations over the wording of Article 27.3, these countries are likely to propose that patent protection be extended to all patentable inventions of plants and animals.

Overlap with Work Going on Elsewhere

One of the difficulties of dealing with these related issues is that they are relevant to a number of international fora and are already the focus of work in several different international organisations. There are three major areas where the TRIPS Council discussions overlap with discussions elsewhere.

Within the CBD work is underway on developing rules to ensure there are appropriate controls on access to genetic resources and that there is fair and equitable sharing of benefits from which those resources are derived with indigenous communities.

In addition the World Intellectual Property Organisation (WIPO) has established an Intergovernmental Committee (IGC) (see fact sheet 6) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The IGC has already made considerable progress in identifying ways that conventional intellectual property rights may pose a threat to traditional knowledge, and measures that could be used to avoid intellectual property rights based upon traditional knowledge being granted to third parties. In future the IGC is likely to continue its work, including focussing on measures that would help traditional knowledge holders protect their knowledge.

The ongoing negotiations to conclude a Declaration on the Rights of Indigenous Peoples is also relevant, with Article 29 of the draft Declaration focussing specifically upon intellectual property (see fact sheet 4).

There are also related discussions going on within the Food and Agriculture Organisation (see fact sheet 9) and WIPO's deliberations on an international treaty to harmonise rules on patents.

Future Work

To date progress in the TRIPS Council on the issues discussed above has been slow. The complex linkages between the three issues and their relationship with work taking

place in other fora has complicated discussion. Some developing countries (notably India and Brazil) would like negotiations to be launched immediately in regard to all of these issues. But so far, Member States have been unable to reach agreement on what the WTO's responsibility with respect to these issues is, let alone agree to a negotiation mandate.

New Zealand Position

To date, New Zealand's position in the TRIPS Council has been guided by the Royal Commission on Genetic Modification's recommendation that New Zealand be proactive in pursuing cultural and intellectual property rights for indigenous peoples internationally. Due to the lack of progress in the TRIPS Council, we have so far indicated our support for continued discussion of these issues but have not, as yet, moved beyond these generalities to develop a detailed national position.

For New Zealand, it is important to ensure that any international rules allow adequate flexibility to enable the development of domestic policy. This includes allowing flexibility for the government to respond to the flora and fauna claim (WAI 262) and to meet its Treaty of Waitangi obligations. New Zealand is, therefore, wary of negotiations being launched too soon – in case international debate moves ahead of domestic policy.

For more information on the WTO please visit their website at www.wto.org.

The Ministry of Economic Development would like to acknowledge the Ministry of Foreign Affairs and Trade for assistance in preparing this fact sheet.

8. Convention on Biological Diversity

Background

The Convention on Biological Diversity (the “CBD”) was developed by the United Nations Environment Programme. It was adopted in June 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro, commonly known as the Earth Summit, and came into force in December 1993.

The CBD is an international treaty and as such, a legally binding instrument. To date, it has been ratified by 188 countries, including New Zealand. In ratifying the Convention, Parties have committed themselves, in general terms, to undertake national and international measures to achieve three core objectives: the conservation of biological diversity; the sustainable use of biological components; and the equitable sharing of benefits arising out of the utilisation of genetic resources.

Consideration of Traditional Knowledge

Relevant Provisions of the CBD

The CBD contains a number of provisions of particular importance to Indigenous and local communities regarding their traditional knowledge.

The Preamble to the CBD explicitly recognises the close and traditional dependence of many Indigenous and local communities on biological diversity and the desirability of sharing equitably the benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components. There is also a broad recognition of the contribution that traditional knowledge can make to both the conservation and the sustainable use of biological diversity, two core objectives of the CBD.

Article 8(j) is the pivotal provision of the CBD regarding traditional knowledge. It contains three general commitments. It calls upon Parties to:

- i. respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities;
- ii. promote the wider application of this knowledge, these innovations and these practices with the approval and involvement of the holders of this knowledge;
- iii. encourage equitable sharing of the benefits arising from the use of such knowledge, innovations and practices.

Article 8(j) states:

Each contracting Party shall, as far as possible and as appropriate:

Subject to 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 utilisation of such knowledge innovations and practices.

The CBD also contains a number of provisions related to Article 8(j) that are relevant to traditional knowledge. These include:

- Article 10(c) which requires Parties to "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements". The traditional knowledge, innovations and practices of most Indigenous and local communities directly derives from the customary use of biological resources, therefore it is important to read Article 10(c) in conjunction with Article 8(j);
- Article 17.2 which provides for the repatriation or return of information, which is of importance to Indigenous and local communities embodying traditional lifestyle relevant for the conservation and sustainable use of biological diversity; and
- Article 18.4 which sets out the requirements for technical and scientific cooperation and provides that Parties shall encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of the Convention.

Convention Bodies

The primary body under the Convention that considers traditional knowledge is the Working Group on Article 8(j) and Related Provisions. However, as traditional knowledge is a cross-cutting issue that affects many aspects of biodiversity, its consideration extends to other bodies under the Convention such as the Working Group on Access and Benefit Sharing. Additionally, CBD discussions on thematic areas such as forest biodiversity have addressed issues relating to Article 8(j).

The Conference of Parties

Countries who have ratified the CBD meet every two years at the Conference of the Parties, commonly referred to as the 'COP'. This is the governing body of the Convention. Its key function is to keep under review the implementation of the Convention and to steer its development. At a practical level, this involves, among other things, identifying priorities and agreeing on programmes of work for its subsidiary bodies to elaborate or clarify aspects of the Convention.

To date, there have been seven ordinary meetings of the COP. Thousands of people from around the world attend COP meetings. This includes government representatives, Indigenous peoples, non-government organisations (such as Greenpeace) and inter-governmental organisations (such as the World Health Organisation).

Working Group on Article 8(j) and Related Provisions

This Working Group was established specifically to address the implementation of Article 8(j) and related provisions of the Convention. Indigenous and local communities' representatives play an active role in its work. Its mandate includes providing advice to the COP on the application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of Indigenous and local communities.

For further information on the Working Group on Article 8(j) and Related Provisions, visit <http://www.biodiv.org/programmes/socio-eco/traditional/>

Working Group on Access and Benefit Sharing

The CBD requires Parties to endeavour to create conditions to facilitate other Parties access to genetic resources. In addition, Parties are also required to take measures, as appropriate, with the aim of fairly and equitably sharing the benefits arising from the commercial and other utilisation of genetic resources. This Working Group was established to assist with the implementation of these obligations. Its mandate also extends to considering ways to ensure the respect, preservation, and maintenance of knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological resources.

For further information on the Working Group on Access and Benefit Sharing, visit <http://www.biodiv.org/programmes/socio-eco/benefit/>

Participation of Indigenous and Local Communities in CBD Meetings

The importance of the full and effective participation of Indigenous and local communities in meetings under the CBD has been recognised on an ongoing basis by the COP. At its seventh meeting, the COP decided to establish a voluntary funding mechanism to facilitate the participation of Indigenous and local communities in CBD meetings. In addition, Parties have been invited by the COP to facilitate the participation of representatives of Indigenous and local communities in official meetings under the CBD.

The CBD is viewed by many Indigenous groups as a key instrument for advancing the recognition, preservation and promotion of their traditional knowledge. Accordingly, Indigenous and local communities are very active in CBD meetings. Some of the ways in which they participate are described below.

International Indigenous Forum on Biodiversity

The International Indigenous Forum on Biodiversity (the "IIFB") was established at COP3 in 1996. The IIFB has also been recognised by the COP as an advisory body regarding work around Article 8(j) and related provisions. The IIFB is open to all Indigenous peoples and meets before each of the major meetings of the CBD, such as the COP, the Subsidiary Body on Scientific, Technical and Technological Advice, the Working Group on Access and Benefit Sharing and the Working Group on Article 8(j) and Related Provisions.

During the IIFB, participants talk about their concerns and strategies around the CBD. They draft text as well as opening and closing statements for the official CBD meetings. Participants are also very active during the CBD meetings in lobbying government officials to better address Indigenous issues.

For more information on the IIFB, visit www.iifb.net

Indigenous Women's Biodiversity Network

The Indigenous Women's Biodiversity Network (the "IWBN") was established in 1998 at the COP4 meeting. This network is open to all Indigenous women. It was created so that Indigenous women could share their unique experiences and perspectives on the environment and biodiversity. They also discuss ways to have the CBD documents include appropriate wording on gender and recognition of Indigenous women's traditional knowledge and their use, and conservation of biodiversity.

The meetings of the IWBN are generally one day long and take place at COP meetings and at the Working Group on Article 8(j) and Related Provisions.

Future Work

The work programme on Article 8(j) and related provisions will continue to be progressed within the Working Group on Article 8(j). This includes continuing its consideration of elements of sui generis systems for the protection of traditional knowledge, innovations and practices. As part of this work, the Working Group will consider non-intellectual-property-based sui generis forms of protection, further develop elements for sui generis systems, assess the role of databases and registers in the protection of traditional knowledge, and explore existing as well as new forms of intellectual property protection.

Negotiations on an international regime on access to genetic resources and benefit-sharing will commence in the Working Group on Access and Benefit Sharing in 2005 with the aim of adopting an instrument(s) to effectively implement the provisions in Article 15 and Article 8(j) and the three objectives of the CBD. Some of the elements that will be considered by this Working Group for inclusion in the international regime include:

- Measures to ensure compliance with prior informed consent of Indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j);
- Recognition and protection of the rights of Indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located;
- Code of ethics/Code of conduct/Models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with Indigenous and local communities; and
- Customary law and traditional cultural practices of Indigenous and local communities.

Both Working Groups will provide advice and recommendations on these issues to the COP for consideration at its eighth meeting in May 2006. The next meeting of the Ad-Hoc Open-ended Working Group on Access and Benefit Sharing is scheduled to take place in February 2005, while the next meeting of the Ad Hoc Open-ended Working Group on Article 8(j) is scheduled for March 2006.

New Zealand Position

New Zealand has been an active participant in CBD meetings considering traditional knowledge. New Zealand continues to be supportive of CBD initiatives aimed at developing a better understanding of the issues relating to the protection and use of biodiversity-related traditional knowledge and possible options for addressing these issues, including consideration of *sui generis* mechanisms.

New Zealand has taken the approach that mechanisms should be developed at the domestic level to ensure Parties can accommodate their own characteristics and requirements. As our domestic policy development in this area is at an early stage, it is important that sufficient domestic flexibility is maintained.

We have also emphasised the importance of avoiding duplication of effort across the range of international fora considering traditional knowledge issues. In this regard, New Zealand has suggested that the CBD consider a wide range of protective mechanisms and lessen its focus on intellectual property issues which are being considered by the World Intellectual Property Organisation.

Regarding the participation by representatives of Indigenous and local communities in CBD meetings, the New Zealand government has supported efforts to facilitate their participation. New Zealand has also included Maori on official delegations to a number of meetings under the CBD to provide expertise on traditional knowledge matters.

For further information on how New Zealand is implementing its obligations under the CBD through the New Zealand Biodiversity Strategy, visit <http://www.biodiversity.govt.nz>

Acknowledgement

The Ministry of Economic Development would like to acknowledge the Convention on Biological Diversity website for information used in preparing this fact sheet. For further information on the CBD, visit <http://www.biodiv.org>.

9. Food and Agriculture Organisation (FAO)

Background

The Food and Agriculture Organisation (“FAO”), a specialised agency of the United Nations, was founded in 1945 with a mandate to raise levels of nutrition and standards of living, to improve agricultural productivity, and to better the condition of rural populations. It has 183 members, including New Zealand, and is the lead agency for agriculture, forestry, fisheries and rural development.

Consideration of Traditional Knowledge

Treaty on Plant Genetic Resources for Food and Agriculture

In November 2001, after seven years of negotiations, the FAO Conference adopted the International Treaty on Plant Genetic Resources for Food and Agriculture (“ITPGR”). ITPGR’s objectives, as set out in Article 1, are:

“the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits derived from their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security”

ITPGR recognises the sovereign rights and the inter-dependence of countries over their plant genetic resources, establishing a multilateral (involving more than two nations) system that aims to facilitate access and benefit sharing (“ABS”). ABS is to be regulated by standard material transfer agreements (“MTA”), which will also apply to transfers to third parties and any subsequent transfers thereon. However, it applies to only 65 genera of plants. The only one associated with traditional Maori knowledge is the *Ipomoea* – kumara.

Article 9 of ITPGR, which deals with the concept of ‘farmers’ rights’, is particularly relevant for Indigenous peoples. It recognises the contribution that farmers’ and their communities have made and continue to make to the conservation and development of plant genetic resources. It also recognises farmers’ rights to freely access genetic resources, to use and save seeds, subject to national laws. This is the basis for farmers’ rights, which include the protection of traditional knowledge, and the right to participate equitably in benefit-sharing and in national decision-making about plant genetic resources. Parties to ITPGR have an obligation to implement measures that recognise and provide for these rights.

ITPGR entered into force on 29 June 2004.

Future Work

It is possible that the FAO will provide a forum for discussion on traditional farming knowledge because of the provisions in ITPGR.

New Zealand Position

New Zealand is currently considering acceding to ITPGR.

Acknowledgement

The Ministry of Economic Development would like to acknowledge the FAO for information used in preparing this fact sheet. For more information on the FAO please visit their website at www.fao.org or <http://www.fao.org/ag/cgrfa/itpgr.htm>.

10. World Health Organisation (WHO)

Background

The World Health Organisation (“WHO”), the United Nations specialised agency for health, was established on 7 April 1948. The WHO's objective, as set out in its Constitution, is the attainment by all peoples of the highest possible level of health. Health is defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

Consideration of Traditional Knowledge

Interest in both the health care and economic development aspects of traditional medicine has been increasing worldwide. As the economic and trade value of traditional knowledge, particularly the knowledge of traditional medicine and medicinal plants, is becoming increasingly recognised, more and more WHO Member States have become concerned with the need to protect it and to secure the fair and equitable sharing of any benefits derived from its utilisation.

As a result of requests from its Member States to co-operate with other international organisations considering the protection of traditional knowledge, such as the World Intellectual Property Organisation (see fact sheet 6) and the United Nations Conference on Trade and Development (see fact sheet 5), WHO has established a work programme on traditional knowledge, with a particular focus on traditional medicines.

Through its work programme, the WHO supports Member States in their efforts to formulate national policies on traditional medicine, to study the potential usefulness of traditional medicine, including evaluation of practices and examination of the safety and efficacy of remedies, to upgrade the knowledge of traditional and modern health practitioners, as well as to educate and inform the general public about proven traditional health practices.

As an example, the WHO recently published “Guidelines on Developing Consumer Information on Proper Use of Traditional, Complementary and Alternative Medicines”. These guidelines were developed in response to concerns that while there are many benefits from the use of traditional medicines and therapies, there are also risks associated. Although consumers today have widespread access to various traditional treatments and therapies, they often do not have enough information on what to check for when using these medicines in order to avoid unnecessary harm.

These guidelines, therefore, provide governments and other stakeholders with an overview of the general principles and activities necessary for the development of reliable consumer information. The document will also be a useful reference to consumers in guiding them on the information they need to have in order to choose traditional medicines and therapies that are safe and effective. To view the guidelines, please visit: <http://www.who.int/medicines/library/trm/Consumer.pdf>

Another initiative of the WHO was the Inter-regional Workshop on Intellectual Property Rights in the Context of Traditional Medicine held in December 2000. This workshop produced a number of recommendations for Member States of the WHO, including:

- Ways and means need to be devised and customary laws strengthened to protect traditional medicinal knowledge from biopiracy;
- Governments should develop and use all possible systems including the *sui generis* models to protect traditional medicine and promote equitable benefit sharing; and
- Governments should develop guidelines or laws and enforce them to ensure benefit sharing with communities where traditional medicinal knowledge is used for commercial purposes.

Future Work

The WHO will continue to provide support to Member States in their efforts to formulate national policies on traditional medicine, including providing guidelines on how governments can incorporate traditional medicinal knowledge into mainstream medicine practices. It will also monitor the World Trade Organisation (see fact sheet 7) and any amendment to Article 27 of the TRIPS agreement.

New Zealand Position

New Zealand supports the preservation and protection of traditional knowledge in the area of health while continuing to maintain our international obligations.

Acknowledgement

The Ministry of Economic Development would like to acknowledge the WHO website for the information used to prepare this fact sheet. For more information on the WHO, please visit their website at www.who.org

11. International Labour Organisation (ILO)

Background

The International Labour Organisation (ILO) is a specialised agency of the United Nations (UN). It was founded in 1919 and became the first specialised agency of the UN in 1946.

Its main objectives are to promote social justice and international recognition of human and labour rights. It achieves this by formulating international labour standards in the form of conventions and recommendations which set minimum standards of basic labour rights and provides practical help to governments and others to implement these.

The ILO is unique in the UN system because it is not composed solely of State representatives. Rather, it has a tripartite arrangement in which each country is represented by the state, an employer and a worker representative.

Consideration of Traditional knowledge

The ILO Convention No. 169 (“ILO 169”) concerning Indigenous and Tribal Peoples in Independent Countries was the second international legal instrument to specifically address Indigenous and tribal peoples – its predecessor Convention No.107 (“ILO 107”) being the first.

ILO 107

ILO 107 concerns the 'Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries' and was adopted by the International Labour Conference in 1957. Governments at the time thought that the best way to protect the health and well-being of indigenous peoples was to assimilate and integrate indigenous peoples with other peoples within their countries. As the name suggests, the ILO 107 made it a duty of governments to integrate Indigenous peoples within their countries.

ILO 107 was rejected by Indigenous peoples around the world who called for the adoption of new standards that would recognise Indigenous peoples' rights to exist as separate, distinct peoples. The International Labour Conference adopted a new Convention, ILO 169, in 1989 which revised ILO 107. This means that the latter is no longer open to further ratifications; but it is still in force in those countries which ratified it and have not yet ratified ILO 169.

ILO 169

ILO 169 consists of 44 articles and is based on respect for cultures and their way of life, traditions and customary laws of Indigenous and tribal peoples. The underlying principle of ILO 169 is that Indigenous and tribal peoples will continue to be distinct parts of their national societies with their own structures and traditions. ILO 169 also recognises that Indigenous and tribal peoples have a right to take part in the decision-making processes of the States in which they live.

During 1988-1989, when ILO 169 was being drafted and adopted, Indigenous people actively participated at the meetings. In the case of New Zealand, the delegation was comprised of the government delegate, the then Secretary of Maori Affairs, and as the workers' delegate, a Maori union representative from the New Zealand Council of Trade Unions.

There is considerable debate surrounding the ratification of ILO 169. For example, some Indigenous people have rejected ILO 169, advising their governments not to ratify and preferring to wait until a better, more comprehensive and philosophically acceptable statement of Indigenous peoples' rights is drawn up.⁴

Others argue that while ILO 169 may not be perfect, it is better than anything else currently available. They support ILO 169 on the basis that it identifies Indigenous peoples' rights not specified elsewhere in international law or in many countries' domestic laws. Therefore, ratification by States could give the Indigenous peoples in that country more rights than they have at present.⁵

Project: Small Enterprise Development and Job Creation in the Culture Sector in the Southern African Development Community region

The ILO has recently commissioned a set of five studies looking at the small enterprise development and job creation in the culture sector in the Southern African Development Community ("SADC") region.

The project focuses on 5 key areas that play an important role in terms of employment and income generation and offer potential for growth in local and international markets. The 5 areas of focus are: performing arts and dance; crafts and visual arts; the film and television industry; the music industry and the Ethno-tourism industry. The research has investigated how traditional knowledge within the SADC has been successfully utilised as a means of wealth generation. For more information on the studies, please visit <http://www.ilo.org/seed>.

New Zealand Position

In 1999, the then Minister of Maori Affairs released a discussion document canvassing the issue of whether New Zealand should ratify ILO 169. Submissions received were generally supportive of ratifying ILO 169. New Zealand has not yet ratified ILO 169.

Acknowledgement

The Ministry of Economic Development would like to acknowledge the International Labour Organisation website for information used in preparing this fact sheet. For more information visit their website at www.ilo.org

⁴ Catherine Iorns, "Australia Ratification of International Labour Organisation Convention No.169", E Law – Murdoch University Electronic Journal of Law, Vol 1, No 1 (1993)

⁵ *ibid*

12. The Commonwealth

Background

The Commonwealth is a voluntary association of independent sovereign states including both developed and developing States. It comprises 53 members including New Zealand with 16 associated states including Cook Islands, Niue and Tokelau. Once part of Great Britain, but now independent, Commonwealth States are bound by a common history and still have shared interests and bonds. Today it helps to advance democracy, human rights and sustainable economic and social development within its Member States and beyond.

Commonwealth Secretariat

The Commonwealth Secretariat is the main body and the executive arm of the Commonwealth. It was established in 1965 to facilitate consultation and co-operation among Member States. Its work encompasses a whole range of Commonwealth activities, including overseeing the activities of the various subsidiary bodies covering issues such as health, human rights and science. The Commonwealth Secretariat is also responsible for organising Commonwealth Heads of Government Meetings (CHOGM) and executive development programmes.

Consideration of Traditional Knowledge

At its meeting of Commonwealth Law Ministers held in November 2001, the Commonwealth Secretariat considered the relationship between The World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property (TRIPS) (see fact sheet 7) and the protection of traditional knowledge.

Ministers discussed the development of the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture and the Regional Model Law for the protection of Traditional Ecological Knowledge (see fact sheet 14). Ministers also invited the World Intellectual Property Organisation (see fact sheet 6) to consider the need to have international recognition and protection of traditional knowledge and related rights.

Future Work

At the meeting of Commonwealth Law Ministers held in November 2001, Ministers shared the view that the wider subject of intellectual property in the international arena was one which could very usefully be addressed in their future work. The next meeting of Commonwealth Law Ministers is set to take place in October 2005, in Ghana.

New Zealand Position

New Zealand supports the work of the Commonwealth.

The Ministry of Economic Development would like to acknowledge that Commonwealth website for the information. For more information on the Commonwealth Secretariat please visit their website at www.commonwealth.org.

13. Asia Pacific Economic Co-operation / Intellectual Property Rights Expert Group APEC / IPEG

Background

What is APEC?

The Asia-Pacific Economic Co-operation (APEC) is a forum comprising 21 Member States, including New Zealand, established in 1989 in response to the growing interdependence among Asia-Pacific economies. Its goal is to advance Asia-Pacific economic dynamism and sense of community. For further details on APEC, please visit the APEC Secretariat's website at <http://www.apecsec.org.sg>.

What is IPEG?

In 1996 APEC created the Intellectual Property Rights Experts' Group ("IPEG") to undertake work related to intellectual property.

The IPEG's objectives are to:

- Encourage discussion on intellectual property policy;
- Survey and exchange information on the current status of intellectual property rights protection and administrative systems;
- Study measures for the effective enforcement of intellectual property rights;
- Fully implement the Agreement on Trade-related Aspects of Intellectual Property (TRIPS) no later than 2000; and
- Facilitate technical co-operation to that end.

Consideration of Traditional Knowledge

In March 2002 Hong Kong, China hosted the APEC Symposium on Traditional Medicine. Expert speakers from various countries and international organisations spoke about the role and social and intellectual property aspects of traditional medicine in the 21st century.

The symposium focussed on the economic opportunities that could be derived from the commercialisation of traditional medicine and the concerns related to governing the trade of traditional medicines. To a large degree the Symposium focussed on Chinese medicine. The symposium report stated that:

"Despite the existence of the entrenched pharmaceutical systems based on synthetic drugs, it is foreseeable that many traditional medicinal products will enter the international market during this decade. Through a modern marketing approach, the traditional

knowledge sector can be developed to become a value added industry for both developed and developing economies as part of their strategies to support economic growth.”⁶

Future Work

The symposium made two recommendations: that States assess the option of compiling databases of traditional knowledge; and make proactive use of existing intellectual property protection to help create a viable traditional medicinal product and service industry. This recommendation was influenced by China based on its experience in the traditional medicine industry. They also commented that patent protection is regarded as the most effective way to protect traditional medicine under the existing intellectual property framework.

All Member States were also encouraged to be involved in the work of the World Intellectual Property Organisation Intergovernmental Committee on Intellectual Property, Genetic resources, Traditional Knowledge and Folklore.

New Zealand Position

New Zealand supports the work of the APEC/IPEG, and will continue to be involved in the work on the WIPO IGC as recommended. WIPO to date, has been engaged in work on the compilation of inventories of traditional knowledge related periodicals and databases as a means of providing protection for traditional knowledge by reducing the likelihood that patents would be granted for inventions based on traditional knowledge. New Zealand has raised concerns about the risks of documentation initiatives, for example the risk of making traditional knowledge more accessible and traditional knowledge becoming prior art preventing indigenous people from registering a patent for an invention based on traditional knowledge.

The Ministry acknowledges the APEC/IPEG website for the information used in preparing this fact sheet. For more information please visit their website at www.apecipeg.org

⁶ Report on APEC Symposium on Traditional Medicine Los Angeles, California, USA July 22-23, 2002, APEC Intellectual Property Rights Expert Group, page 3.

14. Pacific Island Initiatives

Background

In the Pacific there are currently two mechanisms that seek to assist Pacific Island Countries and Territories to legally protect its traditional knowledge. Although at different stages of development, both initiatives have taken an essentially similar approach in that they have both developed model legislation to give effect to a *sui generis* national system.

The more advanced of the two is the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, which was developed by the South Pacific Community in conjunction with UNESCO.

The second concerns the protection of traditional knowledge and biodiversity titled “The Draft Regional Framework for the Protection of Traditional Ecological Knowledge”. It is being developed by the Pacific Island Forum in conjunction with the South Pacific Regional Environmental Programme (“SPREP”) (www.sprep.org.ws).

Consideration of Traditional Knowledge

Draft Regional Model Law for the Protection of Traditional Ecological Knowledge

The Pacific Island Forum and the SPREP have been working on the draft Regional Model Law for the Protection of Traditional Ecological Knowledge (and guidelines) since 1999. This draft Regional Model Law concerns the protection of traditional knowledge regarding biological resources. Its purpose is to prevent the unauthorised use of traditional ecological knowledge, innovations and practices and to ensure the equitable sharing of benefits derived from the use of such knowledge, innovation and practices.

The draft Regional Model Law on Traditional Ecological Knowledge has yet to be endorsed regionally but a regional meeting is being planned for this purpose.

Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture

The Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, developed by the Secretariat of the Pacific Community (www.spc.int) is the most advanced of the two initiatives. The Regional Framework provides a resource for Pacific Island countries wishing to enact legislation for the protection of traditional knowledge and expressions of culture by creating a new range of statutory rights for traditional owners of traditional knowledge and expressions of culture.

The approach taken in the Regional Framework is to create new rights in traditional knowledge and expressions of culture which previously might have been regarded, for the purposes of intellectual property law, as part of the public domain. Two types of rights are envisaged: traditional cultural rights and moral rights. The existence of these rights would not depend on registration or other formalities.

The Regional Framework is supportive of traditional based creativity and innovation, including commercialisation, subject to prior informed consent and benefit sharing. Any

new rights created under the Regional Framework are designed to complement and not undermine existing intellectual property rights.

The Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture is now ready for individual countries to adopt or adapt to suit their national circumstances. A number of Pacific Island Forum countries are preparing to implement this Regional Framework into their domestic law.

Future Work

The Forum Secretariat, in conjunction with the SPREP, will continue to develop the draft Regional Framework for the Protection of Traditional Ecological Knowledge.

New Zealand Position

New Zealand is a strong supporter of work to address Pacific Island countries' concerns about the protection of traditional knowledge. We have participated actively in this work through attendance at meetings and detailed examination of both Regional Frameworks in their developmental stages.

The Ministry of Economic Development would like to acknowledge the Pacific Island Forum website (www.forumsec.org.fj) and the Secretariat of the Pacific Community website (www.spc.int) for the information used in preparing this fact sheet.

15. Call of the Earth - Llamado de La Tierra

Background

The Call of the Earth is a new, independent, international Indigenous Peoples' initiative on intellectual property policy which provides a forum in which indigenous experts, representatives, community members and elders can meet to develop and present considered policy positions on intellectual property issues.

On November 2002, 19 indigenous experts in cultural and intellectual property issues met in Bellagio, Italy to discuss the creation of a network that would allow indigenous people to meet and discuss intellectual property issues and establish the Call of the Earth. The Call of the Earth was officially launched in Geneva on December 13, 2002 at the World Intellectual Property Organisation Inter-Governmental Committee Meeting on Traditional Knowledge.

Why was the Circle of the Earth Established?

Indigenous peoples have raised concerns that emerging international intellectual property policies and discussions of traditional knowledge do not adequately reflect or respond to the experience, needs, and priorities of indigenous peoples. The Call of the Earth Circle was formed to ensure indigenous perspective on these issues are effectively articulated and considered.

Call of the Earth aims to enable indigenous people to reframe the debate on intellectual property rights and traditional knowledge through indigenous perspectives within indigenous cultures. In so doing, the Call of the Earth aims to develop responses at local (community), national (i.e New Zealand), regional (i.e Pacific) and international levels to all policy and legal developments that adversely impact on the tradition of preserving indigenous cultural heritage for future generations.

Consideration of Traditional Knowledge

The Call of the Earth concerns itself with all cultural intellectual property issues. At the meeting held in Bellagio, Italy, topics of discussions included appropriation of expressions of folklore, appropriation of human genetic material, and traditional medicine and medicinal plants.

How is Intellectual Property Policy Considered?

The Call of the Earth has a unique cyclic approach to policy consideration and development. In recognition that "one policy does not fit all", the Call of the Earth prefers to focus on specific situations facing indigenous communities, as opposed to allowing intellectual property to become the central focus.

The Call of the Earth comprises 7 bodies each with distinct but interrelated objectives. They are the Steering Committee, the Call of the Earth Circle, the Call of the Earth Forum, the Circle of the Wise, the Goodwill Ambassadors, the Secretariat and the Circle of Friends and Supporters. Each body has input, through various methods, into the consideration and development of policy.

The Steering Committee – comprising eight indigenous representatives will provide overall strategic guidance and implement initiatives developed by the Call of the Earth.

The Call of the Earth Circle – comprising up to 30 indigenous experts from a range of areas meets annually to discuss and analyse intellectual property issues of concern to indigenous peoples and develop strategies to address those concerns. Circle members are also instrumental in organising local, national and regional meetings.

The Call of the Earth Forum – comprising all indigenous organisations that participate in Call of Earth activities forms a central part of the initiative.

The Circle of the Wise brings together indigenous Shamans, elders and other cultural guardians, to discuss issues related to knowledge protection and provide spiritual and cultural guidance to the process.

The Goodwill Ambassadors are to be appointed by the Steering Committee, comprising high calibre indigenous ambassadors in a variety of fields (i.e sports, education, music) who will draw attention to indigenous peoples' issues and the values and analyses of the Call of the Earth.

The Circle of Friends comprising non-indigenous individuals with expertise in intellectual property and indigenous knowledge issues as well as a demonstrated commitment to supporting indigenous issues. These individuals will mentor indigenous scholars and review analysis developed by the Call of the Earth.

The Secretariat is in charge of organising global and regional activities and assists in the co-ordination of national activities. The Secretariat, which is hosted in Tokyo, Japan, at the Institute of Advanced Studies within the United Nations University is responsible for:

- helping to articulate a shared overall conceptual framework;
- increasing interaction between indigenous organisations and communities;
- increasing strategic policy interventions; improving fund raising;
- maintaining a website and communication among participants;
- co-ordinating events/participation before major international meetings related to indigenous peoples and intellectual property.

Future Work

The Call of the Earth will be active in a number of areas. In particular, the Call of the Earth Circle, will continue to host an annual gathering in Bellagio, Italy. The Call of the Earth will provide strategic analysis and policy options for the benefit of indigenous organisations seeking to engage in intellectual property policy debate.

The Call of the Earth Circle is also establishing a number of national, regional and international workshops, including a Pacific regional meeting on Life Patents and a Meso-American regional meeting on Traditional Knowledge of Plants & Healing Practices. For more information visit the Call of the Earth website at www.earthcall.org.

The Ministry of Economic Development would like to acknowledge the Call of the Earth website and Aroha Te Pareake Mead for information used in preparing this fact sheet. For more information visit their website at www.earthcall.org.

16. Glossary

Accede / Accession	To become party to an agreement or treaty. It has the same legal effect as ratification (see below)
Acquisition	Act of acquiring
Biodiversity	The variety of life, including the variety in genes, species, and ecosystems, and the ecological processes that connect everything within a common environment.
Biological diversity	same as <i>Biodiversity</i> (see above)
Biological resources	includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.
Biopiracy	The unauthorised and uncompensated taking of biological resources
Biotechnology	Any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use
Cross-cutting issue	An issue that arises in relation to range of areas, for example, health, education, economic development etc
Ex situ	Off site; away from natural situation or location Gene banks and botanical gardens hold ex situ collections.
Genetic resources	the genes found in plants and animals that are of actual or potential value to people
Humanitarian	someone devoted to the promotion of human welfare and to social reforms
In situ	in the natural or original position or place
Intangible	lacking substance or reality; incapable of being touched or seen
Interface	A linkage between two things
Intergovernmental body	a body of various governments
Material Transfer Agreement	A Material Transfer Agreement (MTA) is a legal agreement to share biological resources. The MTA assures that the person receiving the material cannot give it to anyone else or commercialise the material.
Public domain	Any material, work or information that is publicly available and does not have any intellectual property protection, for example, copyright or patents, usually because the intellectual property right has expired or been nullified somehow.
Ratify	To confirm or accept an agreement by formal consent. At this stage, the party will be bound to comply with the agreement or treaty.
Specialised agency	An autonomous organisation that has joined the United Nations through special agreements – for example the World Intellectual Property Organisation. Specialised agencies coordinate their work with the United Nations but are separate, autonomous organisations.
Sui generis	Latin for “of its own kind”. Having a distinct character of its own; unlike anything else, unique
Tangible	something of substance that you can hold and touch