

## **INTERNATIONAL TRADE, THE WORLD TRADE ORGANISATION AND THE HUMAN RIGHTS OF INDIGENOUS PEOPLES**

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It is wrong to speak of the conflict of interest between Indigenous groups and commercial interests as the new frontier, because they constitute one of the oldest frontiers.<sup>1</sup>

### **I. INTRODUCTION**

Since the 1970s, Indigenous peoples advocacy in international law has been traditionally situated in the United Nations human rights system. This advocacy has ostensibly been successful with the United Nations (hereafter 'UN') proclaiming two International Decades of the World's Indigenous Peoples,<sup>2</sup> a Permanent Forum on Indigenous Issues,<sup>3</sup> an annual Working Group on Indigenous Populations<sup>4</sup> (hereafter 'WGIP'), a Commission on Human Rights working group elaborating a Draft Declaration on the Rights of Indigenous Peoples<sup>5</sup> (hereafter 'Draft Declaration') and a Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous peoples (hereafter 'the Special Rapporteur').<sup>6</sup> Despite this impressive framework dedicated to addressing the global concerns of Indigenous peoples, there is growing frustration and disengagement with a system that is providing limited remedy to Indigenous peoples.

Hampered by state parties ineffective domestic implementation of international human rights law, Indigenous peoples often do not benefit from the non-binding nature of international human rights law in the absence of effective domestic rights protections. Indigenous peoples are also acutely aware of the way in which successful international advocacy utilising international human rights standards can be thwarted politically by the rhetoric of classical

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<sup>1</sup> Nicole Schabus, 'No Power to International Free Trade With Indigenous Property' (2000) XVIII/2 *Journal für Entwicklungspolitik* 99.

<sup>2</sup> *International Decade of the World's Indigenous People*, GA Res 48/163, UN GAOR, 48th sess, U.N. Doc. A/48/49 (1993); See also Programme of activities for the International Decade of the World's Indigenous People, UN Doc A/RES/50/157 (21 December 1995); *Second International Decade of the World's Indigenous People*, GA Res A/59/500, (2004).

<sup>3</sup> UN ESC Res 2000/22; See generally, John Carey and Siegfried Wiessner, 'A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues' (April 2001) *ASIL Insights*.

<sup>4</sup> UN ESC Res 1982/34.

<sup>5</sup> UN Doc E/CN.4/Sub.2/1994/2/Add1/.

<sup>6</sup> UN Res 2001/57.

state sovereignty.<sup>7</sup> The malleable nature of sovereignty as it relates to the implementation of international trade rules is particularly vexing given that many contemporary violations of Indigenous human rights have been the direct result of international trade agreements and the conduct of multilateral trade institutions and transnational corporations (TNC's) on Indigenous lands. Fundamental to this is ...

... that while other agreements rely on moral persuasion and diplomacy to make sure the parties act accordingly the trade liberalisation movement has ensured that strong enforcement mechanisms have been included in the provisions of these agreements that force nations and communities to comply.<sup>8</sup>

The faithful implementation of most World Trade Organisation (WTO) agreements<sup>9</sup> by many states and the proliferation of free trade agreements in recent years have meant that Indigenous peoples by necessity have turned their attention toward examining multilateral trade institutions, WTO trade agreements, free trade agreements<sup>10</sup> and the legalities of the activities of transnational corporations on Indigenous lands.

This paper considers the human rights dimension of this 'newest assault on the rights of Indigenous peoples'.<sup>11</sup> Part I recalls the lengthy history of Indigenous peoples international trade and cogitates upon their unrecognised contribution to the infant industries and economies of settler states. Part II introduces the central arguments of the human rights and trade debate in public international law and provides a brief overview of the human rights issues arising from Indigenous peoples interaction with multilateral trade institutions. Part III provides a conspectus of Indigenous concerns about the impact of WTO agreements upon Indigenous communities such as the *Agreement on Trade Related Aspects of Intellectual Property*<sup>12</sup> (TRIPS), *General Agreement*

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<sup>7</sup> See generally, Devika Hovell, 'The sovereignty stratagem - Australia's response to UN human rights treaty bodies' (2003) 28 *Alternative Law Review* 297; Joanne Kinslor, 'Killing off" international human rights law: An exploration of the Australian Governments relationship with United Nations human rights committees Australian' (2002) 8(2) *Australian Journal of Human Rights* 79; Spencer Zifcak, *Mr Ruddock goes to Geneva* (2003); Hilary Charlesworth, Madelaine Chaim, Devika Hovell and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2004) 25 *Sydney Law Review* 424.

<sup>8</sup> Schabus above n 1, 107.

<sup>9</sup> *Marrakesh Agreement Establishing the World Trade Organization*, Apr. 15, 1994, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

<sup>10</sup> See for example, Valerie J. Phillips, 'Identifying National and International Vacuums Potentially Impacting NAFTA and Indigenous Peoples' (2001) 2 *The Estey Centre Journal of International Law and Trade Policy*; Larissa Behrendt and Megan Davis, 'Adverse effects of free trade deal will hit Indigenous groups hard', *Sydney Morning Herald* (Sydney), March 8 2004; Megan Davis, 'Indigenous Australia and the Australia-United States Free Trade Agreement' (2004) *Indigenous Law Bulletin* 5.

<sup>11</sup> Schabus, above n 1, 99.

<sup>12</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, *The Legal*

on Trade in Services<sup>13</sup> (GATS) and the Agreement on Agriculture<sup>14</sup> (AOA). Part III also examines the use by Canadian aboriginal groups of the *General Agreement on Subsidies and Countervailing Measures*<sup>15</sup> (SCM). When the Appellate Body of the WTO Dispute Settlement Body, interpreted the rules to enable third party submissions to WTO disputes<sup>16</sup> - the Interior Alliance of Canada argued as *amicus curiae* that the failure to adequately recognise aboriginal land title constituted a subsidy to Canadian softwood lumber producers. Dispute resolution mechanisms such as the WTO may provide alternative ways in which Indigenous peoples can raise awareness of human rights violations. This avenue of dispute resolution contributes to a burgeoning framework of accountability for Indigenous peoples in international law. While the outcome in effect may not be enforceable or effect change in domestic law, this international advocacy would be no less influential than the important moral persuasion of non-binding general comments and concluding observations of UN human rights treaty bodies that have become powerful advocacy tools for Indigenous peoples, particularly in Australia.

## **PART I: INDIGENOUS PEOPLES UNEXAMINED CONTRIBUTION TO THE GLOBAL ECONOMY**

Prior to the colonisation period, trade was integral to Indigenous cultures, indeed Russel Barsh has argued that there was an 'aboriginal world system' in North America that was predicated upon international trade between aboriginal tribes.<sup>17</sup> In Australia, the most popular account of international trade between indigenous nations is that of the Yolgnu and other aboriginal groups in far north Australia who established a long standing trading partnership with the Macassans from Indonesia in trepang (also known as 'sea cucumber' or 'beche-de-mer') and 'a trading relationship sprang up whereby the Aborigines provided turtle shell, pearl shell and buffalo horns and in return ... received dugout canoes, tobacco, rice, cloth, iron and alcohol':

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*Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>13</sup> *General Agreement on Trade in Services*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1B, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

<sup>14</sup> *Agreement on Agriculture*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 33 (1999), 1867 U.N.T.S. 410.

<sup>15</sup> *Agreement on Subsidies and Countervailing Measures*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, *Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* 264 (1994).

<sup>16</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

<sup>17</sup> Russel Lawrence Barsh, 'Indigenous Peoples and International Order: The Aboriginal North-American World System' (2001) 3 *Balayi* 87.

Every wet season between the late 1600's and 1906 Macassan sailors traded for trepang or sea slug with Yolgnu people along the Arnhem land coast. Trepang was prized by the Chinese as an aphrodisiac. The Yolgnu were employed to collect and cure the trepang and paid in knives, food and tobacco – establishing Australia's first export industry.<sup>18</sup>

According to Denise Russell, 'the Makassans came in small sailing boats on the winds of the north-west monsoon and returned some months later on the south eastwinds ... the trepang were taken back to Makassar and traded with Chinese'.<sup>19</sup> These trading links lasted until they were statutorily prohibited in particular by South Australia and thus 'Indigenous trade routes and concentrations of Indigenous power were inadvertently refocused by the imposed patterns of exploitation and settlement'.<sup>20</sup> Laws prohibiting established trading links and restricting the capacity to freely engage in trade contributed to the cycle of poverty that has endured in Indigenous Australia.

Apart from international trade, the vast Australian continent was a site of extensive trading activity between aboriginal nations in goods such as spearheads, stone axes, bailer shells, cabbage palm baskets and turtle shells.<sup>21</sup>

Generally trade routes lay like fine mesh over the land, representing a network of interaction which traditionally linked many differently oriented cultural and language groups. Goods moved initially within the range of recognised kin and then to defined partners living in adjacent territories and then farther afield, travelling clockwise or anti-clockwise according to convention.<sup>22</sup>

Similarly in North America Indigenous groups engaged in trade between Indigenous nations. Prior to colonisation, Indigenous groups began trading with nations such as England and Spain and South America who wanted to 'secure alliances and ensure the perpetuation of trading relations for mutual benefit'.<sup>23</sup>

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<sup>18</sup> Trisha Morton-Thomas, *Trepang – A Tale of Discovery* (2002) ABC – Aboriginal and Torres Strait Islander Online <http://www.abc.net.au/message/tv/ms/s645986.html> at 12 April 2005; See generally, 'A Brief Historical Overview' in *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FAC (6 July 1998).

<sup>19</sup> Denise Russell, 'Aboriginal-Makassan interactions in the Eighteenth and Nineteenth centuries in northern Australia and Contemporary sea rights claims' (2004) 1 *Australian Aboriginal Studies* 5.

<sup>20</sup> See, eg, Clive Moore, 'Refocusing Indigenous Trade and Power: The Dynamics of Early Foreign Contact and Trade in Torres Strait, Cape York and Southeast New Guinea in the Nineteenth Century', (2000) 17 *Royal Historical Society of Queensland Journal* 289, 298.

<sup>21</sup> *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at 154.

<sup>22</sup> K Akerman, 'Material Culture and Trade in the Kimberleys Today' in RM & CH Berndt (eds) *Aborigines of the West: Their Past and Present* (1980) 243, 250 cited in John Toohey, Background Paper 5 on *Aboriginal Customary Laws Reference - An Overview Background Paper*, Western Australia Law Reform Commission, 38 available at <[http://www.lrc.justice.wa.gov.au/Aboriginal/BackgroundPapers/P94-5\\_background-Toohey.pdf](http://www.lrc.justice.wa.gov.au/Aboriginal/BackgroundPapers/P94-5_background-Toohey.pdf)> at 12 April 2005.

<sup>23</sup> Marcus Colchester and Fergus Mackay, 'Indigenous Peoples, Collective representation and the Right to Free, Prior and Informed Consent' (Paper presented at the 10th Conference of the

Indeed, 'states competed with one another for access to Indigenous trade and took steps to insure that their relations with Indigenous Nations were tranquil'.<sup>24</sup> Many of these trading relationships including Indigenous trade relations across borders were recognised in treaties such as the *Jay Treaty*<sup>25</sup> and the *Treaty of Ghent*.<sup>26</sup> Eventually however the desire to expand markets and discover natural resources resulted in most treaties or trading clauses in treaties being dishonoured.<sup>27</sup> Policies were implemented that forced Indigenous peoples from their lands, territories and resources.

Once the traders had established their factories and forts, assembled enough arms and munitions, and secured independent means of food supply, they were able to bargain with the local peoples from positions of greater strength. Trading relations soon became more unequal and this was compounded by devastating epidemics of introduced diseases which reduced native numbers and undermined their morale.<sup>28</sup>

Trade was not the only motivator in dispossessing Indigenous peoples of their lands. Religion also influenced the pursuit of new lands and the discovery of new peoples to civilize. El Hadji Guisse, member of the United Nations Working Group on Indigenous Populations describes the impact of these policies upon Indigenous peoples:

The consequence of the principal colonial powers on Indigenous peoples was the extreme poverty in which many Indigenous peoples were living today. The continued exploitation of Indigenous lands and resources was what could be called globalization. Globalization had stripped Indigenous peoples of their rights because it had destroyed the healthy environment upon which the survival of Indigenous communities depended.<sup>29</sup>

Indigenous peoples contribution to the establishment of infant industries in colonies whose domestic economies now dominate the global economy remains largely unexamined. This contribution includes the dispossession of their lands, territories and natural resources, unpaid labour and the theft of Indigenous culture and knowledge. In Australia, Indigenous peoples are rarely recognised for their achievements in establishing infant industries such as the cattle, dairy and sugar industry. Prime Minister Paul Keating recognised this contribution to Australia in his now famous *Redfern speech*, 'Where Aboriginal Australians have been included in the life of Australia they have made

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International Association for the Study of Common Property, Oaxaca, August 2004) <[http://www.danadeclaration.org/text%20website/fpic\\_ips\\_may04\\_eng\\_dft.pdf](http://www.danadeclaration.org/text%20website/fpic_ips_may04_eng_dft.pdf)> at 12 April 2005.

<sup>24</sup> Robert H Berry III, 'Indigenous Nations and International Trade' (2003) 24 *Brooklyn Journal of International Law* 239, 254.

<sup>25</sup> *Treaty of Amity, Commerce and Navigation of 1794*, 8 Stat. 116 (1794)

<sup>26</sup> *Treaty of Peace and Amity of 1814*, 8 Stat 218 (1814).

<sup>27</sup> Berry, above n 24, 258-265.

<sup>28</sup> Colchester and MacKay, above n 23.

<sup>29</sup> Report of the Working Group on Indigenous Populations on its twenty-first session, E/CN.4/Sub.2/2003/22 [36] (2003).

remarkable contributions. Economic contributions, particularly in the pastoral and agricultural industry'.<sup>30</sup>

Intergenerational poverty caused by dispossession was exacerbated by state policies such as the removal of children from their families, the regulation and controlling of aboriginal people including restrictions on freedom of movement and labour, the misappropriation of wages and entitlements and the exclusion of Indigenous peoples from succession laws.<sup>31</sup>

For years Aboriginal cattlemen were excluded from the *Cattle Station Industry (Northern Territory) Award 1951*, which eventually led to the famous Wave Hill strike led by Gurindji leader Vincent Lingiari. When cattle station owners were legally compelled to pay award wages to aboriginal workers many of the Aboriginal cattlemen who had worked for decades for no wages were made redundant and more devastatingly were moved off their traditional lands. Ironically, Australian historians often pinpoint the Equal Wages cases as the genesis of many Aboriginal communities reliance upon welfare.<sup>32</sup>

Another example of the causes of intergenerational poverty and the ignored contribution of Indigenous peoples to the economy is the 'Stolen Wages' history dominant in Queensland and New South Wales. For decades Protection Acts administered the lives of Indigenous peoples in NSW and QLD.<sup>33</sup> For many Indigenous peoples who lived under the Acts, their wages and entitlements were siphoned into government run trust accounts administered by the Protector of Aborigines (or the Aborigines Protection Board as in the case of NSW).<sup>34</sup>

To access their monies, Indigenous peoples were required to write letters to request use of their own monies for restricted items such as blankets, radios or interstate travel for events such as funerals or cultural ceremonies. The money rationed and the record keeping was inadequate in both states. The wages of Aboriginal Australians were never repaid in full to those Indigenous beneficiaries who were administered under the Act. In Queensland much of the money was used to resuscitate an ailing Queensland economy, to build roads,

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<sup>30</sup> Prime Minister Paul Keating, Redfern Park Speech cited in (2001) 57 *Indigenous Law Bulletin* 9

<sup>31</sup> See generally, Human Rights Equal Opportunity Commission, *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997), Australian Government Publishing Service; *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qd); *Aboriginal Protections Act 1909* (NSW); the *Northern Territory Aborigines Act 1910* (SA); the *Aborigines Ordinance 1911* (NT); the *Aborigines Ordinance 1918* (NT); the *Welfare Ordinance 1953* (NT); the *Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qd); the *Aborigines Act 1911* (SA); the *Aborigines Act 1934* (SA); the *Aboriginal Affairs Act 1962* (SA); the *Aborigines Protection Act 1886* (WA); the *Aborigines Act 1905* (WA); the *Native Welfare Act 1963* (WA).

<sup>32</sup> Bill Bunbury, *Its not the Money It's the Land: Aboriginal Stockmen and the Equal Wages Case* (2002).

<sup>33</sup> See, for example, *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qd); *Aboriginal Protections Act 1909* (NSW); the *Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qd).

<sup>34</sup> *Aborigines Protection Act 1909* (NSW).

schools and hospitals.<sup>35</sup> In both QLD and NSW, schemes have been established in an attempt to address the injustice. Aboriginal cattlemen's wages and the 'stolen wages' are just two documented narratives in Australian history that exemplify the unexamined contribution of Aboriginal peoples to the Australian economy.

It is these histories of dispossession and the ongoing subjugation of Indigenous peoples throughout the world using a variety of methods such as legislation, militarization or assimilation that informs Indigenous peoples advocacy at the United Nations in establishing human rights standards specific to Indigenous peoples. These narratives also facilitate a more important role, to raise new awareness of the lengthy historical interconnectedness between Indigenous peoples and trade and raise questions about the unexamined contribution of Indigenous peoples to the world economy. The significant sacrifices Indigenous culture involuntarily forfeited to the establishment of the global economy transforms the Western neo-liberal perception, as in Australia, of Indigenous peoples as merely unproductive recipients of welfare. Indeed as Schabus asserts: 'It is wrong to speak of the conflict of interest between Indigenous groups and commercial interests as the new frontier, because they constitute one of the oldest frontiers'.<sup>36</sup>

## PART II: INDIGENOUS PEOPLES HUMAN RIGHTS ISSUES AND TRADE

The link between international human rights law and international trade law, in particular the laws of the WTO, have generated great debate in public international law. There has been a multitude of writings on the technicalities of the linkage debate - the normative link between trade and public international law, in particular, international human rights law.<sup>37</sup> This linkage debate is important for Indigenous peoples given the persuasive moral value of international human rights law. It is a normative link that has always been apparent to Indigenous peoples.

Human rights scholars place particular emphasis upon the Preamble to the WTO Agreement, whose establishment and commitment to trade liberalisation is:

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<sup>35</sup> See generally, Ros Kidd, *The Way We Civilize* (2000); *Stolen Wages and Entitlements Aboriginal Trust Funds in New South Wales* Indigenous Law Centre, University of New South Wales (August 2004).

<sup>36</sup> Schabus, above n 1, 99.

<sup>37</sup> See generally, Ernst-Ulrich Petersmann (2003), 'Human Rights and the Law of the World Trade Organization', *Journal of World Trade*, 241-281; Ernst-Ulrich Petersmann, 'Time for a United Nations Global Compact for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', (2002) 13 *European Journal of International Law* 621 - 650; Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 (4) *European Journal of International Law* 815-844; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *European Journal of International Law* 753-814; Caroline Dommen, 'Raising Human Rights Concerns in the World Trade Organization Actors, Processes and Possible Strategies' (2002) 24 (1) *Human Rights Quarterly* 317-318.

With a view to raising standards of living, ensuring full employment, and a large steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.

Accordingly, because of the status of international human rights law in public international law, human rights are relevant to WTO rules and their interpretation. The alternative view is that the law of the WTO is a discrete area of international law to which international human rights law can not automatically be applicable. This argument is predicated upon assumptions about 'whom the WTO serves or ought to be serving' as well as 'the implementation of, compliance with, and the effectiveness of international norms'.<sup>38</sup> The United Nations in particular has been instrumental in noting the linkage between the law of trade and human rights, 'The realms of trade, finance and investment are in no way exempt from human rights obligations and principles'.<sup>39</sup> Those human rights obligations and principles include labour standards and labour conditions, environmental policies and access to life-saving drugs.

Most of the world's 500 million Indigenous peoples live in the poorest nations of the world and have experienced the most acute interaction with the policies of multilateral trade institutions such as the World Bank Group and the International Monetary Fund (IMF) and the agreements of the WTO.

We are not blind to the powers of the World Trade Organisation, the IMF and the World Bank and bodies like the Organization for Economic Cooperation and Development or the Group of Eight. Those economies that do not fall in line become pariahs. The globalization of the production and consumption systems of the few elite countries corporations and individuals is a threat to the continued existence of diverse and sustainable Indigenous livelihoods.<sup>40</sup>

Indigenous peoples have been particularly savvy in utilising the mechanisms that are available to them to complain about and remedy the impact of multilateral trade institutions upon them. Whether this involves a Request for Inspection with the World Banks Inspection Panel, *amicus curiae* submissions to the WTO or complaints to the United Nations human rights system or the Inter-American Human Rights Commission, Indigenous peoples have been effective in raising awareness of their grievances - the *Awas Tingni* decision<sup>41</sup> is an example of this.

At the 2004 United Nations Working Group on Indigenous Populations examining the impact of globalization upon Indigenous peoples, many

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<sup>38</sup> Jose E. Alvarez, 'The WTO Linkage Machine' (2002) 96 *The American Journal of International Law* 153-154.

<sup>39</sup> Office of the High Commissioner for Human Rights, *Human rights as the primary objective of trade, investment and financial policy* Sub-Commission resolution 1998/12.

<sup>40</sup> Victoria Tauli-Corpuz, 'Igorots: In Defence of Home' (2000) *The UNESCO Courier* 25.

<sup>41</sup> I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Ser. C No. 79 (2001).



Indigenous peoples took the opportunity to raise complaints about financial institutions:

[P]articipants called the attention of the Working Group to practices of international financial institutions such as the World Bank, the International Monetary Fund and the Asian Development Bank that were detrimental to the practical implementation of their rights and freedoms... and that the imposition by those institutions of economic liberalisation and privatization had paved the way for the unprecedented exploitation of Indigenous resources in disregard of their collective rights.<sup>42</sup>

Many Indigenous lands have been subjected to World Bank sponsored projects with TNCs of which Indigenous peoples have had minimal or no prior consultation that has led to severe environmental damage and the destruction of traditional lands and disruption of cultural practices.

In the case of developing and less developed countries the desire to increase exports can lead to greater pressure for the further exploitation of the lands and resources of Indigenous peoples who are often among the most vulnerable people within those countries. This pressure has resulted in development projects which have inflicted severe damage on environmentally sensitive areas, seriously disrupted biodiversity and pre-existing eco-systems and devastated the lives of Indigenous communities.<sup>43</sup>

Indeed the World Bank has conceded that 'its half billion dollars in transmigration loans produced irreversible impacts on Indigenous peoples – including seizure of land and destruction of traditional subsistence patterns by short – sighted development schemes'.<sup>44</sup> Indigenous peoples are particularly frustrated by the persistent denial from the World Bank that broader international human rights law does not apply to its operations. Its main argument has been that its Articles of Agreement prohibited it from dealing with human rights. According to the Articles of Agreement, the World Bank can only take into account 'economic considerations' as relevant when making decisions.<sup>45</sup> This interpretation has been widely disputed and criticised because the historical justification for ignoring political considerations is not relevant any longer, 'The Cold War is over and the Bretton Woods architects could not have anticipated the mainstreaming of human rights discourse'.<sup>46</sup> Given the

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<sup>42</sup> *Report of the Working Group on Indigenous Populations on its twenty-second session* E/CN.4/Sub.2/2004/28, [51], (2004).

<sup>43</sup> David Hume, 'Indigenous Peoples and the World Trade Organization' (2000) 4(26) *Indigenous Law Bulletin*, 21.

<sup>44</sup> Dana Clark, 'The World Bank and Human Rights: The Need for Greater Accountability' (2002) 15 *Harvard Human Rights Journal* 205, 215; Emeka Duruigbo, 'The World Bank, Multinational Oil Corporations and the Resource Curse in Africa' (2005) 26 *University of Pennsylvania Journal of International Economic Law* 1.

<sup>45</sup> World Bank Articles of Agreement Article 4, section 10 (as amended 1999).

<sup>46</sup> Genoveva Hernandez Uriz, 'To Lend or not to Lend: Oil, Human Rights and the World Banks Internal Contradictions' *Harvard Human Rights Journal* 197, 226; Korinna Horta, 'Rhetoric and Reality: Human Rights and the World Bank' *Harvard Human Rights Journal* 227; Dana L. Clark, (2002) 15, 'The World Bank and Human Rights: The Need for Greater Accountability' *Harvard Human Rights Journal* 205.

extensive complaints about the World Bank and IMF, the World Bank has been acknowledged by some as making a greater effort to become attuned to the complaints of civil society.

Of the two institutions, the World Bank is generally recognised to have made more progress in attempting to address many of the criticisms against it, especially concerning its addiction to grandiose projects, its insensitivity to environmental, Indigenous and minority concerns and to the issue of gender.<sup>47</sup>

Similar to the World Bank, the IMF has been the subject of human rights complaints by Indigenous peoples. For example, many Indigenous communities have suffered detrimentally from the economic shifts instigated by structural adjustment plans (SAP's) imposed by the IMF.

The structural adjustment visited on the Indigenous peoples of the poorest nations of the world through development programs over the last several decades will now be visited on the Indigenous peoples of the richest nations through trade liberalisation agreements.<sup>48</sup>

In particular Indigenous women have suffered from the severe economic shifts initiated by SAP's.

Under the yoke of the SAPs that have been in vogue in most African countries since the early 1980s, women whose work is outside the arena of the globalized market in goods and services have been adversely affected. Rendered invisible by concepts such as 'efficiency', 'stabilization' and 'cost-effectiveness', the labour of African women becomes the shock absorber of the processes of adjustment and the social costs that result therefrom.<sup>49</sup>

Compared to the efforts of the World Bank, the IMF has been accused of being less amenable to the concerns of civil society and international human rights law ...

... the Fund has been much more recalcitrant about being drawn into the debate about the human rights implications of its operations, arguing that its founding Charter mandates that it pay attention only to issues of an economic nature.<sup>50</sup>

Indigenous peoples are particularly concerned about how multilateral trade institutions facilitate access of TNCs on their lands and are particularly concerned about the pressure that is placed upon states to provide access to Indigenous lands complaining that, 'the World Bank, the International Monetary Fund and other international financial institutions had facilitated the access of TNC's to Indigenous peoples' territories, disregarding their

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<sup>47</sup> J Oloka-Onyango and Deepika Udagama, *The Realisation of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights* E/CN.4/Sub.2/2000/13 [21] (2000).

<sup>48</sup> Schabus, above n 1.

<sup>49</sup> J Oloka-Onyango and Deepika Udagama above n 47, [38].

<sup>50</sup> Ibid, [22].

environment and their rights'.<sup>51</sup>

The activities of TNCs have been the subject of much debate and discussion at UN Indigenous meetings. Some frequently invoked examples of the egregious human rights violations by TNCs on Indigenous lands include the Ogoni people of Nigeria whose interests were eschewed by the World Bank and its government who 'in all their dealing with the Oil Consortiums ... did not involve the Ogoni communities in the decisions that affected the development of Ogoniland'.<sup>52</sup> Another example is the Freeport mine in West Papua that has destroyed the lands, forests and environment of the West Papuan Indigenous peoples<sup>53</sup> and the operations of ChevronTexaco in Ecuador.<sup>54</sup> There are many other examples from Bolivia, Canada, Chile, Columbia, Indonesia, Malaysia, New Caledonia, Peru, the Russia Federation and the United States of the impact of TNC's activity upon Indigenous lands and the way in which some TNC's have supported oppressive and corrupt political regimes.

TNCs often help support a regime that repays them with concessions of Indigenous peoples' territories. This can result in a further cycle of exploitation and violence, in which the Government's efforts to suppress dissent lead to greater resistance, an increasing need for hard currency to pay for military operations, and satisfying that need through more extensive disposals of lands and resources to TNCs. By cooperating with such regimes in the liquidation of natural resources, TNCs support them.<sup>55</sup>

Whether the activity involves the construction of mega-dams, natural resource extraction or logging, Indigenous peoples have identified a core group of concerns regarding TNC's and multilateral financial institutions that include lack of free, prior and informed consent, environmental damage, involuntary resettlement of Indigenous communities and lack of benefit-sharing.<sup>56</sup>

The principle of free, prior and informed consent in particular has become significant for Indigenous peoples in their dealings with the World Bank and TNCs. Recognised to varying degrees in international law, the principle requires that Indigenous peoples are consulted on the decisions that affect their communities.<sup>57</sup>

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<sup>51</sup> El Hadji Guissé, *A supplementary working paper on Globalization and Indigenous peoples*, E/CN.4/Sub.2/AC.4/2004/3 [7] (2004).

<sup>52</sup> Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation, *Legal Commentary on the Concept of Free, Prior and Informed Consent*, E/CN.4/Sub.2/AC.4/2005/WP.1 [18] (2005) ; See generally, 'The Ogoni Case before the African Commission on Human and Peoples Rights', (2003) *International and Comparative Law Quarterly* 749.

<sup>53</sup> Report of the Working Group on Indigenous Populations on its twenty-first session, E/CN.4/Sub.2/2003/22, [41](2003).

<sup>54</sup> Maxi Lyons, 'A case study in multinational corporate accountability: Ecuador's Indigenous peoples struggle for redress' (2004) 32 *Denver Journal of International Law and Policy* 32.

<sup>55</sup> *Transnational investments and operations on the lands of Indigenous peoples*, Report of the Centre on Transnational Corporations submitted pursuant to Sub-Commission resolution 1990/26, E/CN.4/Sub.2/1994/40, [12], 6(1994).

<sup>56</sup> Above n 42, [51] 12.

<sup>57</sup> For example, Articles, 6, 7, 15 The International Labour Organization, Indigenous and Tribal Peoples Convention, 1989 (No. 169); General recommendation XXIII, on the rights of

Substantively, the principle of free, prior and informed consent recognizes Indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by Indigenous peoples about their development path.<sup>58</sup>

The Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights recognizes the principle of free, prior and informed consent in the context of Indigenous peoples by stating that:

Transnational corporations and other business enterprises shall respect the rights of local communities affected by their activities and the rights of Indigenous peoples and communities consistent with international human rights standards such as the Indigenous and Tribal Peoples Convention, 1989 (No. 169). They shall particularly respect the rights of Indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property. They shall also respect the principle of free, prior and informed consent of the Indigenous peoples and communities to be affected by their development projects.<sup>59</sup>

Finally, in considering the impact of the international trade and finance institutions and TNCs upon Indigenous peoples, it would be remiss not to recognise that many Indigenous peoples have benefited from the work of multilateral trade institutions and trade liberalisation.

Globalization improved communications and networking among Indigenous communities, in certain cases ensured greater access to food even in very remote areas and led to a sense of belonging to a global society.<sup>60</sup>

Indeed in some instances the relationship between Indigenous peoples and TNCs is a more formative relationship than that between Indigenous peoples and the state. For example TNCs may provide health and medical services or education services that the state fails to adequately provide. Rio Tinto in Australia is one example of how TNCs forge excellent working

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Indigenous peoples, the Committee on the Elimination of Racial Discrimination calls upon States to "ensure that members of Indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent" (para. 4 (d)); The Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights E/CN.4/Sub.2/2003/38/Rev.2, para. 10 (c); Articles 10, 12, 20, 27 and 30 The Draft United Nations Declaration on the Rights of Indigenous Peoples.

<sup>58</sup> Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation, above n 52, [56].

<sup>59</sup> Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/38/Rev.2, [10 (c)] (2003).

<sup>60</sup> Report of the Working Group on Indigenous Populations on its twenty-first session above n 53, [48].

relationship with local aboriginal groups whether in the provision of health services and employment or the provision of an Australia wide fund that provides finance to Indigenous activities across the nation.<sup>61</sup> An editorial in *Foreign Policy* acknowledged the 'newly acquired political clout' of Indigenous peoples because of globalisation. According to *Foreign Policy*, globalisation has ...

... transformed intolerance for human rights violations, for ecological abuses and for discrimination of any kind into increasingly universal standards among governments, multilateral bodies, NGOs, and the international media.<sup>62</sup>

Nevertheless these supra-national trade and finance institutions like all institutions must evolve to meet changing circumstances and address criticisms. The WTO acknowledged this in its ten year review and as Amartya Sen has argued in regard to the importance of globalization - because of the expansion of markets and the opportunities that come with that - there are many challenges ahead and, 'institutional reforms can make its reach more fair and equitable'.<sup>63</sup>

### **PART III: INDIGENOUS PEOPLES AND THE WORLD TRADE ORGANISATION**

Indigenous peoples awareness of the WTO and their concerns about its role in trade liberalisation is naturally a direct result of WTO membership by their respective states. For years, Indigenous peoples have been raising concerns about WTO agreements with the WGIP. The Permanent Forum on Indigenous Issues has invited the WTO to attend its meetings and the WTO has begun to provide information to the Permanent Forum about its activities as they specifically relate to Indigenous peoples.

Indigenous peoples from developing economies in particular have been acutely affected by the transformative power of WTO Agreements to which their states are committed.

One of the primary concerns Indigenous peoples have about the WTO is the potential curbing of states capacity to legislate and regulate in areas that may benefit Indigenous peoples for example, the environment, telecommunications and most importantly, Indigenous specific legislation such as preferential education policies such as special entry to universities or land management policies that may be viewed as potentially discriminatory under WTO laws.

Even though Indigenous peoples have succeeded in gaining special legal recognition

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<sup>61</sup> See, generally, John Hall, 'The social responsibility of corporations' (2002) 27 *Alternative Law Journal* 12.

<sup>62</sup> Moises Naim, 'An Indigenous World' (2003) *Foreign Policy*, available online at <<http://www.foreignpolicy.com/story/files/story181.php>> at 30 June 2005.

<sup>63</sup> Amartya Sen, Address at St Clara University Institute on Globalization (October 29, 2002) <http://www.scu.edu/globalization/speakers/senlecture.cfm>.

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of their right to limit external influences on their land and culture, those gains will be subject to the WTO's power to disallow laws on the principle of non-discrimination.<sup>64</sup>

Indeed the jurisprudence of the WTO over the past decade has been of great concern to Indigenous peoples.

The WTO has declared illegal every environmental and public health law brought before it as violating the free trade principle laid down in its agreements. Laws aimed at protecting the environment or safeguarding the traditional knowledge of Indigenous peoples or maintaining cultural diversity are all vulnerable to the extent that they can be portrayed as breaching the non-discrimination principle.<sup>65</sup>

The impact of agricultural subsidies on Indigenous communities has been devastating because, 'The subsidies had led to artificially cheap agricultural products, leading to the loss of livelihood of thousands of Indigenous peoples and farmers'.<sup>66</sup> The impact on Indigenous women in particular has been noted by the Sub-Commission report on Globalization and its impact on the full enjoyment of human rights.

Women in the agricultural sector have also been adversely affected by the promotion of export-oriented economic policies, trade liberalisation and TNC's activities in agricultural-related industries. Emphasis on export crops has displaced women workers in certain countries from permanent agricultural employment into seasonal employment.<sup>67</sup>

A study conducted by the Food and Agriculture Organization of the United Nations found that in one particular case, 300,000 people were adversely affected by a surge of imports from tariff reductions.<sup>68</sup> The study highlighted the lack of opportunities for diversification. The UN High Commissioner for Human Rights has queried whether the WTO Agreement on Agriculture requires additional safeguards to protection against import surges, for example mechanisms that can set different rates of liberalisation for those crops that are crucial to rural employment and food security and of the additional safety nets that could counter rural unemployment and poverty.<sup>69</sup>

## **INDIGENOUS KNOWLEDGE AND TRIPS**

Indigenous peoples knowledge relating to the sustainable use of land, ecosystems, plant varieties, medicine, folklore and craft and secret sacred

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<sup>64</sup> David Hume, above n 43.

<sup>65</sup> Ibid.

<sup>66</sup> Report of the Working Group on Indigenous Populations on its twenty-first session above n 53, [46].

<sup>67</sup> J Oloka-Onyango and Deepika Udagama, above n 47, [37].

<sup>68</sup> Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries Vol. ii, Country Case Studies, Commodities and Trade Division, Food and Agriculture Organization of the United Nations 2000.

<sup>69</sup> 'Human Rights and Trade', Office of the High Commissioner for Human Rights, 5th WTO Ministerial Conference, Cancun, Mexico (2003).

knowledge is often referred to as 'traditional knowledge' or 'Indigenous peoples intellectual property'. Indigenous peoples themselves refer to this body of knowledge as 'Indigenous knowledge'. The World Intellectual Property Organisation (WIPO) has stated that 'Indigenous knowledge fits into the traditional category, but traditional knowledge is not necessarily Indigenous'.<sup>70</sup>

From an Indigenous perspective, traditional knowledge is developed from experience gained over the centuries and adapted to the local culture and environment, and transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, artistic expressions, proverbs, cultural events, beliefs, rituals, community laws, languages, agricultural practices, including the development of plant species and animal breeds, traditional know-how relating to architecture, textile-making and handicraft-making, fishery, health and forestry management.<sup>71</sup>

Over the past twenty years commercial exploitation of Indigenous knowledge has become particularly aggressive, its commercial value is worth billions of dollars to TNCs and states. Equally commercially valuable is Indigenous arts and craft that have led to the development of a worldwide market of Indigenous artistic works, yet most Indigenous peoples do not receive the economic benefit of their commercialised knowledge.

Global trade and investment in the arts and knowledge of Indigenous peoples has grown millions of dollars per year yet most Indigenous peoples live in extreme poverty and their languages and cultures continue to disappear at an alarming rate.<sup>72</sup>

It is well established that Indigenous knowledge is an anomaly to the Western intellectual property law system and has not been readily accommodated.<sup>73</sup> WIPO acknowledges that the Western intellectual property system is in direct conflict with traditional practices and lifestyles:

... traditional knowledge holders are situated between their own customary regimes and the formal intellectual property system administered by governments and inter-governmental organizations such as WIPO.... their intellectual property needs and expectations are shaped by the contact and interactions between these systems. The intellectual property needs of traditional knowledge holders receive their complexity, diversity and relevance from multiple intersections of these factors.<sup>74</sup>

The interaction of these systems is problematic for Indigenous

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<sup>70</sup> World Intellectual Property Organisation, *Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge 1998-1999*, [26] (2001).

<sup>71</sup> Secretariat of the Permanent Forum on Indigenous Issues, *Indigenous peoples and the international and domestic protection of traditional knowledge* E/CN.4/Sub.2/AC.4/2005/CRP.4, (2005).

<sup>72</sup> Opening Address, Madam Erica-Irene World Intellectual Property Organization, Roundtable on Intellectual Property and Indigenous Peoples, Geneva, July 23 and 24, 1998.

<sup>73</sup> See for generally, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) Geneva, WIPO/GRTKF/IC/1/12 Part1 (2001).

<sup>74</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore : First Session, WIPO/GRTKF/IC/1/12, (2001).

knowledge and defined by the inequality in bargaining power between Indigenous peoples and the state. It is this core inconsistency that is often overlooked by WTO member states, policy makers and TNCs.

Indigenous peoples feel that the current approaches to traditional knowledge adopted by various UN agencies have not necessarily corresponded to Indigenous views, and that the existing patent and copyrights system of protection does not adequately address their collective rights on traditional knowledge.<sup>75</sup>

Moreover many Indigenous peoples argue that Indigenous knowledge is inherently inimical to the motivations of international trade and intellectual property protections - the acquisition and protection of monetary benefit for intellectual and creative output.

The commodification of traditional knowledge is inherently problematic ... that commercialisation is not always desired and the regulated use of intellectual property rights is regarded as culturally inappropriate.<sup>76</sup>

According to Dr Erica Irene Daes, former Chairperson Rapporteur of the United Nations Working Group on Indigenous Populations in her study on the Protection of the Cultural and Intellectual Property of Indigenous People.

Indigenous peoples do not view their heritage in terms of property at all ... but in terms of community and individual responsibility. Possessing a song or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected.<sup>77</sup>

Indigenous peoples argue that if Indigenous knowledge is being exploited for enormous commercial benefit then the profits of such knowledge should be shared at the very least by Indigenous communities and the contribution of Indigenous knowledge to advances in science and technology be acknowledged. Nevertheless there is an inherent tension between the intangible nature of Indigenous cultural property and the commodification of Indigenous knowledge that is not easily reducible to Western notions of intellectual property and economic gain.<sup>78</sup>

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<sup>75</sup> Report of the Working Group on Indigenous Populations on its twenty-third session, E/CN.4/Sub.2/2005/26, (2005).

<sup>76</sup> *Biodiversity and Intellectual Property Rights: Reviewing Intellectual Property Rights in Light of the Objectives of the Convention on Biological Diversity* (2001) Centre for International Environmental Law available at:

<http://www.ciel.org/Publications/tripsmay01.PDF>.

<sup>77</sup> Dr Erica-Irene Daes 'Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous People' (1993) cited in M Blakeney 'The Protection of Traditional Knowledge under intellectual property law' (2000) 6 *European Intellectual Property Review* 251-261.

<sup>78</sup> Robert K Paterson and Dennis S Karjala, 'Looking beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples' (2003) 11 *Cardozo Journal of International Law and Comparative Law* 633.



A stark example of the way in which the intellectual property laws operate to exploit Indigenous knowledge is evident in the complicity of intellectual property laws advancing bio-piracy and theft of Indigenous knowledge. Patent offices in some developed countries have granted patents over genetic resources of Indigenous communities from the developing world without consent and without any economic benefit flowing to them. The Human Genome Diversity Project (HGDP) for example, was controversial among Indigenous communities and had aimed to ...

... [t]ake blood, tissue and hair samples from at least 25 members of each of 722 endangered Indigenous communities worldwide. The HGD project seeks to discover potential differences from the human norm of gene information – differences such as Indigenous peoples evolved special resistance to disease, for example – because this is where the potential profit for the multi-national corporation lies.<sup>79</sup>

The concern about bioprospecting of Indigenous peoples cells continues.<sup>80</sup> In 1993 the US Secretary of Commerce filed a patent claim on the cell line of a 26-year-old Guaymi woman from Panama. The claim was withdrawn after widespread condemnation. Controversy also arose when a patent was granted to the US Department of Health and Human Services and the National Institute of Health on the cell lines of a Hagahai man from PNG. This patent was approved by the US patent and trademarks office but was withdrawn after international protest.<sup>81</sup> Another example is a patent granted to a US citizen by the US Patents and Trademark Office for a variety of the Ayahuasca vine – a vine that had been used by Indigenous people of the Amazon in ceremonies and healing. It was challenged and the patent was overturned for lacking novelty.<sup>82</sup> Even so it must be noted that the cost of litigation to challenge bio-piracy deters Indigenous peoples from asserting claims over Indigenous knowledge.

## TRIPS

The Trade Related Aspects of Intellectual Property Agreement (TRIPS) is an agreement annexed to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and came into force in 1995. The Agreement involves the harmonization of trade related intellectual

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<sup>79</sup> Jeanette Armstrong, 'Global trade targets Indigenous gene lines', (1995) *National Catholic Reporter*.

<sup>80</sup> See, generally, Chapter 5. Aboriginal and Torres Strait Islander Social Justice Commissioner Fourth Report (Human Rights and Equal Opportunity Commission) Canberra: Australian Government Publishing Services, November 1996; Annie Wu, 'Surpassing the Material: The Human Rights Implications of Informed Consent in Bioprospecting Cells Derived from Indigenous People Groups' (2000) 78 *Washington University Law Quarterly* 979.

<sup>81</sup> 'Implications of Genetic Research for Indigenous Peoples' available at: <http://www.ipcb.org/action/implic.html>.

<sup>82</sup> Catherine Menangle, 'Biodiversity and intellectual property rights: Reviewing intellectual property rights in light of the objectives of the convention on biological diversity' Centre for International Environmental Law and world Wildlife fund (1993).

property rights. It provides standards for protecting intellectual property rights and the enforcement of those rights in relation to copyright, products and processes by patents, industrial designs and geographical indicators etc.

The TRIPS preamble states that Members must seek to 'promote effective and adequate protection of intellectual property rights' and 'allow for effective and appropriate means of enforcement of trade related intellectual property rights, taking into account different international legal systems'. The Agreement commits members to...

... reduced distortions and impediments to international trade by enforcing their intellectual property system and ensure measures and procedures to enforce rights do not themselves become a barrier to legitimate trade.<sup>83</sup>

Indigenous peoples have a number of concerns with TRIPS, one of them being how TRIPS relates to patent protection. According to Caroline Dommen:

Implicit in the TRIPs agreement's criteria for a patent claim is that there must be an identifiable inventor. This definition almost immediately dismisses the knowledge systems and innovations of Indigenous peoples and farmers because they innovate communally, over long periods of time. Their innovations are often for the common good and are not intended for industrial application or financial benefit.<sup>84</sup>

Indigenous peoples are also concerned with how TRIPS directly relates to the implementation of the *Convention on Biological Diversity* (CBD). The CBD deals with genetic resources, species and ecosystems and links traditional conservation to the economic goal of making use of biological resources sustainable. The objectives of the CBD include the conservation of biodiversity, the sustainable use of the components of biodiversity, the sharing of benefits arising from the commercial and other utilization of genetic resources in a fair and equitable way. The core principle that underpins the agreement is the equitable sharing of benefits from the use of genetic resources particularly those resources that are used for commerce.

Indigenous peoples have been concerned about the potential threat posed by TRIPS to this principle as it is unclear as to whether the CBD and TRIPS conflict are potentially complementary. The CBD promotes the role of member's states as having sovereign rights over the biological diversity within their borders<sup>85</sup> and have the authority to determine access to these resources in accordance with national legislation.<sup>86</sup> Moreover the CBD asserts that access to genetic resources must be obtained with the prior and informed consent of CBD parties and mutually agreed terms.<sup>87</sup> The respect for sovereignty and the discretion of member states to protect their own biological resources is in

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<sup>83</sup> Preamble, TRIPS Agreement.

<sup>84</sup> Caroline Dommen, *Adding values: Business, the WTO and Human Rights* International Council on Human Rights Policy available at: <http://www.ichrp.org/ac/excerpts/79.doc>.

<sup>85</sup> CBD Preamble and Article 15(1).

<sup>86</sup> CBD Article 15(1).

<sup>87</sup> CBD Article 15(4) and (5).

contrast with TRIPS that promotes technological innovation through the principle of legal certainty and the universalisation of Western intellectual property systems. TRIPS obliges members to provide product patents for microorganisms and non-biological and microbiological processes whereas the CBD asserts its objective as at the discretion of the state. The Australian government, for example has raised its concerns with the TRIPS Council regarding its concerns about the potential inconsistency between the requirement to access genetic resources under Article 15 of the CBD and the conditions for the grant of a valid patent under Article 27 of TRIPS.<sup>88</sup> In the Doha Ministerial Declaration, members of the World Trade Organization (WTO) called for the Council for TRIPS 'to examine . . . the relationship between the TRIPS Agreement and the Convention on Biological Diversity [and] the protection of traditional knowledge and folklore.'

There has been increased awareness and discussion of the implications of the TRIPS Agreement for traditional knowledge, the relationship with CBD and patent laws. As Bryan Mercurio states of the situation:

WTO Member States and interested observers have recognized that significant gaps exist in the agreement with respect to patent protection and access to life-saving medicines in developing and least-developed countries (LDCs); but finding and agreeing on improvements to the system has proven to be a much harder proposition.<sup>89</sup>

There are many intellectual property scholars, Gervais, Dutfield and Oguamanam *et al* who are emphatic in their argument that TRIPS does not necessarily represent a wholesale negative for Indigenous peoples.<sup>90</sup> Gervais in particular has explored a number of ways in which the Western intellectual property system can better protect Indigenous knowledge considering the development of *sui generis* protection, unjust enrichment, misappropriation or geographical indications.<sup>91</sup> Either way Gervais *et al* are adamant about the need for the intellectual property system to recognise its inflexibility in recognising non-Western notions of creativity and protection. Even so, according to *Nature* the TRIPS agreement, 'if left unmodified on the questions of Indigenous knowledge and community rights risks enhancing social disparities and thereby fostering social conflict'.<sup>92</sup>

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<sup>88</sup> Communication from Australia to WTO Council for TRIPS (2 October 2001) IP/C/W/310.

<sup>89</sup> Bryan Mercurio, 'TRIPSs, Patents and Access to Life-Saving Drugs in the Developing World' (2004) 8 *Marquette Intellectual Property Law Review* 211.

<sup>90</sup> Daniel Gervais, 'Traditional Knowledge & Intellectual Property: A TRIPS-Compatible Approach' (2005) *Michigan State Law Review* 137; Chidi Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge' (2004) 11 *Indiana Journal of Global Legal Studies* 135.

<sup>91</sup> Daniel J Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (2002) 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 929.

<sup>92</sup> *Nature* April 9 1998.

## **GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)**

The GATS framework agreement was adopted during the Uruguay Round in 1994 and entered into force on 1 January 1995. From the outset GATS has been subject to much public scrutiny and controversy and has been viewed as a successor to the controversial and now defunct Multilateral Agreement on Investment (MAI).<sup>93</sup> Indeed GATS has attracted 'much controversy and disagreement among other Contracting Parties, especially developing countries'<sup>94</sup> and that 'due to the insistence of the United States [that] trade in services was placed on the Uruguay Round agenda'<sup>95</sup> and 'without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp, there would have been no services agreement'.<sup>96</sup>

Arguments about the democratic deficit of the WTO are particularly pronounced in the context of GATS. Civil society arguments that, 'states are progressively losing their ability to decide for themselves their own policy directions and priorities', was acknowledged by the WTO report, *The Future of the WTO Addressing institutional challenges in the new millennium*.<sup>97</sup>

GATS was negotiated because the most significant proportion of trade in services occurs within domestic economies and these service businesses rarely trade across borders preventing TNCs from participating in much domestic service sector trade. TNCs argued that there are too many obstacles to accessing service sectors because of government regulation and ownership, cumbersome administration and foreign ownership restrictions.

There are broad GATT exceptions to GATS for measures necessary to protect public morals or maintain public order; protect human, animal or plant life or health. However it is clear from the jurisprudence of the WTO Dispute Settlement regime that there is great difficulty in proving that these exceptions should be permitted. The key exception to GATS is Article I:3 of the agreement excluding 'services supplied in the exercise of governmental authority' meaning public services.<sup>98</sup> Such a service would be supplied neither

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<sup>93</sup> See generally, Eric Neumayer 'Multilateral Agreement on Investment: Lessons for the WTO From the Failed OECD-Negotiations' (1999) 46 *Wirtschaftspolitische Blätter*; Jürgen Kurtz, 'NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment' (2002) 3 *Melbourne Journal of International Law*, 213-246.

<sup>94</sup> Ibid.

<sup>95</sup> Michael J Trebilcock and Robert Howse, *The Regulation of International Trade* (2<sup>nd</sup> ed 2000) 278.

<sup>96</sup> Richard Sanders, 'GATS: The End of Democracy?' *Australian Financial Review* (Sydney), 15 June 2001.

<sup>97</sup> 'The Future of the WTO Addressing institutional challenges in the new millennium', Report by the Consultative Board to the Director-General Supachai Panitchpakdi.

<sup>98</sup> 3. For the purposes of this Agreement:

(a) 'measures by Members' means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or aities;

on a commercial basis, nor in competition with one or more service suppliers. Therefore the operation of Article I:3 is predicated upon what is meant by: 'service supplied in the exercise of governmental authority'. There are two elements to this, first, that the service is not supplied on a commercial basis and second, not in competition with one or more service suppliers.

The exception will depend upon how the WTO Dispute Settlement Body will define *commercial basis* and *in competition*. If there is a narrow definition of *commercial basis* and a narrow definition of *in competition*, then the scope of governmental authority is broader and therefore more services are not covered within the GATS agreement. Alternatively if there is a broader reading of *commercial basis* and *in competition* then the scope of governmental authority is narrow and all services will effectively be covered by GATS.

The WTO itself is not clear on how the scope of Article I:3 will be interpreted. However it has provided some clarity on how different services may be viewed in the light of Article I:3. For example in the context of health services the Secretariat has stated that:

The institutional arrangements governing the provision of health, medical and social services may vary widely, from complete government ownership and control to full market orientation.

It would seem that where there is a system that involves a combination of government owned health services and private institutions then it raises questions about the applicability of GATS.<sup>99</sup> However the Secretariat has also stated that:

It is perfectly possible for governmental services to co-exist in the same jurisdiction with private services. In the health and education sectors that is so common as to be virtually the norm ... It seems clear that the existence of private health services, for example, in parallel with public services could not be held to invalidate the status of the latter as governmental services.<sup>100</sup>

A WTO Council for Trade in Services meeting has indicated that the interpretation will be narrow:

Members drew attention to the variety of policy objectives governing the provision of

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In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory;

(b) 'services' includes any service in any sector except services supplied in the exercise of governmental authority;

(c) 'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

<sup>99</sup> Health and Social Services Background Note by the Secretariat, 18 September 1998, S/C/W/50 at 10.

<sup>100</sup> *WTO Market Access: Unfinished Business. Post-Uruguay Round Inventory and Issues Special Study No 6*, Geneva April, at 123.

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health and social services, including basic welfare and equity considerations. Such considerations had led to a very substantial degree of government involvement, both as a direct provider of such services and as a regulator. However, this did not mean that the whole sector was outside the remit of the GATS; the exception provided for in article I.3 of the agreement needed to be interpreted narrowly.

Further, according to the WTO Trade in Services Division:

Because no question has been raised by any Member about services supplied in the exercise of governmental authority there has been no need for interpretation of this phrase. This issue could only arise if a specific measure which has been challenged in dispute settlement were to be defended on the ground that it applied only to services supplied in the exercise of governmental authority and was therefore outside the scope of GATS.

Nevertheless in the WTO Appellate Body decision in *Japan – Alcoholic Beverages II*,<sup>101</sup> the AB commented:

The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreements.<sup>102</sup>

It is interesting to note, however, that the Australian government lists services provided under a governmental authority as a service that falls outside the scope of GATS. This is significant for Indigenous Australians because of Indigenous specific services such as general health services, dental services, sexual health services and pre-natal services. These services are important for Indigenous communities particularly in rural and remote areas.

## **GENERAL AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES**

The *General Agreement on Subsidies and Countervailing Measures* (SCM) has been of increasing interest to Indigenous peoples. In 2001, Russell Barsh argued that failure to adequately recognise aboriginal title may breach the SCM.<sup>103</sup> These arguments were taken up by the Interior Alliance aboriginal group of British Columbia who intervened as amicus curiae in the Softwood Lumber dispute between Canada and the United States.

The Interior Alliance is a group of five Indigenous nations in the South Central Interior of British Columbia. Their interest in the softwood lumber dispute was based on the fact that the vast majority of softwood lumber extraction is conducted in British Columbia, Canada. For over two decades

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<sup>101</sup> Japan – Alcoholic Beverages II, Dispute Settlement Reports (1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

<sup>102</sup> Ibid 97 at 108

<sup>103</sup> Russel Lawrence Barsh, 'Is the Expropriation of Indigenous Peoples Land GATT-able?' (2001) 10 *Reciel* 13.

Canada and the US have been embroiled in a dispute over softwood lumber and the argument that Canadian federal and provincial governments subsidize softwood lumber producers by charging a below market stumpage fee.<sup>104</sup>

The US Department of Commerce investigated the allegation that the below market fee disadvantages US softwood lumber producers and considered the injury to the housing market in the US. Following the DOC investigation, countervailing duties were imposed upon Canadian softwood lumber imports to offset the injury. The WTO established a panel at Canada's request to consider the dispute to investigate whether the countervailing duties were inconsistent with the SCM Agreement.<sup>105</sup>

The Interior Alliance amicus brief essentially rested upon a core argument that Canada's failure to adequately recognise aboriginal land title and consult with Indigenous peoples constituted an unfair advantage to Canadian softwood lumber producers.<sup>106</sup>

Canada is arguing that its competitive advantage comes from the fact that Canada has more trees. When in reality it comes from the fact that it gives the forests over to the companies who pay only a small extraction fee and no-one pays a dime to the aboriginal co-owners of the forests or even to the people of Canada.<sup>107</sup>

The central propositions that can be drawn from the Alliance brief include that Supreme Court jurisprudence requires that aboriginal title be taken into account 'when allocating rights to harvest timber and making land use decisions'.<sup>108</sup> This constitutes an additional requirement for the acquisition of full, unencumbered ownership.<sup>109</sup> Therefore there should be a new determination of market prices that remunerate aboriginal peoples. Any other pricing regimes confer a benefit on Canadian forestry companies. According to Grand Chief Stan Beardy of Nishnawbe Aski Nation in Ontario (Treaty #9) who supported the brief :

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<sup>104</sup> See generally, SM Osman Rahman and Stephen Devadoss, 'Economics of the US-Canada Softwood Lumber Dispute: A Historical Perspective' (2002) 2 *The Estey Centre Journal of International Law and Trade Policy* (for a detailed historical overview of the dispute); Stephen Devadoss and Angel Aguiar Roman, 'Recent Developments in the US – Canadian Softwood Lumber Disputes' *The Estey Centre Journal of International Law and Trade Policy*

<sup>105</sup> See Annex 1A: Multilateral Agreements on Trade in Goods, Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization and Final Act, Legal Instruments - Results of the Uruguay Round vol. 1 33 I.L.M. 1144 (1994)(WTO Agreement).

<sup>106</sup> See generally for background of amicus brief, The Grand Council of Treaty #3, 'Native Leaders Join Together to Pursue Softwood Lumber Issue' (Press Release, June 10 2002) [www.treaty3.ca/pages/specific\\_press.php?linkid=24](http://www.treaty3.ca/pages/specific_press.php?linkid=24) accessed at 19 December 2005; Canada to review ITC Ruling and Indigenous Brief in Lumber dispute (2002) International Centre for Trade and Sustainable Development Weekly Trade News Digest [www.ictsd.org/weekly/02-05-07/story2.htm](http://www.ictsd.org/weekly/02-05-07/story2.htm) at 19 December 2005; .

<sup>107</sup> Press Release above n 106.

<sup>108</sup> See Megan Davis, 'International Trade Law and Indigenous Peoples: A New Direction in Human Rights Advocacy?' (2005) 9 *Australian Indigenous Law Reporter* 16.

<sup>109</sup> *Delgamuukw v British Columbia* (1997) 3 SCR, 1010 at 111.

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In our area, half of our 49 First Nations have experienced significant depletion of their natural resources without receiving any compensation in recognition of our proprietary interests in the resources, as intended by the Treaty ... if the proprietary Treaty interests of our First Nations were to be properly implemented, it would have a significant impact on the market price for lumber taken in Ontario and that it would be more of an accurate reflection of the true value of the wood harvested from our territory.<sup>110</sup>

Another second proposition that the Alliance argued is that Canada has an obligation to consult with Indigenous peoples arising from Canadian common law, the Constitution and Canada's international obligations under Article 8(j) of the CBD. In *Haida Nation v BC and Weyerhaeuser*.<sup>111</sup>

... companies ... have to consult with aboriginal peoples and accommodate their proprietary interests in a meaningful way before extracting resources in their traditional territories especially in the absence of government taking aboriginal title and rights into account.

The Interior Alliance also worked with United States Indian tribes whose own forestry operations were negatively impacted by the cheap importation of Canadian softwood lumber. The United States DOC was supportive of a submission and asked both groups from the United States and Canada to document ...

... how Indian people presently are excluded from the industry and how existing bidding processes are still influenced by big industry and also provide alternatives and how Indian people envision the forest industry with their involvement ensuring more sustainable forest management.<sup>112</sup>

Ultimately the United States DOC decided that the question of land was a political one to be dealt with internally by Canada. Cognisant of the potential state sovereignty issues in relation to its brief the Interior Alliance argued that:

We are not asking international trade tribunals to resolve land disputes but to take into account Indigenous arguments when it comes to the interpretation and application of the SCM agreement. Indigenous interests have to be taken into account by international trade tribunals because of our special status as rights holders on the national and international level in as far as the violation of Indigenous rights potentially leads to a violation of international trade law.<sup>113</sup>

In the end no parties or third parties commented on the submissions and therefore the panel declined to engage substantively with the legal issues raised by the brief.<sup>114</sup> The report simply stated that:

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<sup>110</sup> Press Release above n 106.

<sup>111</sup> 2002 BCCA 147 Docket: CA 027999, Date 20020227.

<sup>112</sup> INET Comments regarding US and Canadian Tribal Interests submitted by INET on the Proposed policies regarding the conduct of changed circumstances reviews under the Countervailing duty order on softwood lumber from Canada, (C 122 839) at 3.

<sup>113</sup> 2002 BCCA 147 Docket: CA 027999, Date 20020227, 9.

<sup>114</sup> Arthur Manuel and Nicole Schabus, 'Indigenous Peoples at the Margin of the Global



As a preliminary matter we noted that in the course of these proceedings we decided to accept for consideration one unsolicited amicus curiae brief from a Canadian NGO, the Interior Alliance.<sup>115</sup>

#### PART IV: CONCLUSION

This paper has provided a conspectus of Indigenous engagement with WTO agreements and international trade in general. The successful accommodation of amicus curiae by the WTO system has meant that Indigenous communities such as the Interior Alliance are able to examine trade agreements not just in a passive sense but in defensive mode – to hold states to the standards and principles that they themselves have agreed to. The use of amicus curiae submissions also raise questions about the effectiveness of international human rights law in states that have limited incorporation of rights or weak rule of law and lack of respect for rights.

The fact that aboriginal groups are looking to the World Trade Organisation, underscores the failure of the International Labour Organisation or the United Nations collection of institutions to effectively deal with aboriginal issues.<sup>116</sup>

Whether the WTO agreements will provide further basis from which Indigenous peoples can formulate challenges to internal policies and legislation is yet to be seen. In Australia, Indigenous communities are entering into agreements with corporations and state owned departments to trade Indigenous commodities on the international market. These have included bush tucker or traditional aboriginal food, traditional knowledge, sea sponges and aboriginal art. Similarly Indigenous peoples globally have had varying success in participating in international trade. Yet the capacity to build successful trading businesses will depend on the type of land ownership that is enjoyed by Indigenous communities. Indigenous peoples native title in Australia is significantly different in terms of security and capacity to use the land as guarantee than the lands owned by US Indians or Canadian Indian groups. The capacity of Indigenous peoples to truly participate in this rapidly open market is therefore also directly related to the nature of the rights that are recognised by the domestic legal system. For example Indigenous peoples have no constitutionally protected or legislatively protected rights in Australia compared with the constitutional rights of Canadian Indigenous groups whose High Court jurisprudence also equates to a right to be consulted that directly flows from the constitutional protection. Moreover as this paper has also highlighted Indigenous peoples have already made enormous contributions to

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Economy: A Violation of International Human Rights and International Trade Law' (2005) 8 *Chapman Law Review* 229.

<sup>115</sup> United States Preliminary Determinations with Respect to Certain Softwood Lumber from Canada Report of the Panel WT/DS236/R September 27, 2002, 7.2.

<sup>116</sup> Charles M. Gastle, 'Shadows of a Talking Circle: Aboriginal Advocacy Before International Institutions and Tribunals' (2002) *The Estey Centre for Law and Economics in International Trade* 5.

domestic economies – an unacknowledged contribution.

Nevertheless Indigenous peoples have created institutions for themselves within the United Nations in which they can continue to remind the world of this contribution as well as continue to raise awareness of the impact of multilateral trade institutions and transnational corporations upon Indigenous cultures and communities. In this way Indigenous peoples can maintain a significant role in making member states accountable for their actions and their inaction and to continue to make TNCs more accountable for the activities on Indigenous lands.

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