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Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States

Paul Kuruk*

- I. INTRODUCTION
- II. PART ONE: PROTECTION OF NATIVE AMERICAN CULTURAL HERITAGE
 - A. *Government Policy Towards Native Americans*
 - B. *Legislative Initiatives on Cultural Heritage*
 - C. *Tribal Courts' Control of Indigenous Heritage*
- III. PART TWO: CONSTITUTIONAL ISSUES IN THE QUEST FOR BETTER PROTECTION OF NATIVE AMERICAN CULTURAL HERITAGE
 - A. *Traditional Knowledge as Part of the Public Domain*
 - 1. Free Access to Information
 - 2. Intellectual Property Rights
 - a. *Copyright*
 - b. *Patents*
 - c. *Trademarks*
 - d. *Duration and Costs*
 - B. *Freedom of Religion and Free Speech*
 - 1. Free Exercise Clause
 - 2. The Establishment Clause
 - 3. Freedom of Religion
 - 4. Trademark Law and Free Speech

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IV. PART THREE: UNITED STATES INTERNATIONAL POLICY ON TRADITIONAL KNOWLEDGE

- A. *International Obligations*
- B. *Agenda of International Organizations*
 - 1. UNESCO
 - 2. UNEP
 - 3. WIPO
 - 4. WTO
 - 5. FAO
- C. *An Invitation to the Bargaining Table*
 - 1. U.S. Experience with Reciprocity
 - 2. Reciprocity and the International Protection of Traditional Knowledge
 - 3. Need for Special Concessions

V. PART FOUR: MUTUAL RECOGNITION AGREEMENTS AS A POLICY RESPONSE

- A. *Mutual Recognition Agreements*
 - 1. Recognition of Foreign Rights
 - 2. Mutual Recognition Agreements as Reciprocal Arrangements
 - 3. Relevance of Mutual Recognition Agreements to Traditional Knowledge
- B. *Scope of Mutual Recognition Agreements on Traditional Knowledge*
- C. *U.S. and the Proposed MRA*

VI. CONCLUSION

I. INTRODUCTION

Misappropriation of traditional knowledge refers to the unauthorized exploitation of traditional knowledge¹ without the consent of its indigenous

1. The World Intellectual Property Organization [hereinafter WIPO] defines traditional knowledge as “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names, and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.” See WORLD INTELLECTUAL PROPERTY ORGANIZATION, INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS: WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (1998-1999) 25 (2000) [hereinafter INTELLECTUAL PROPERTY NEEDS]. In this context, tradition-based refers to “knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment.” *Id.*

Categories of traditional knowledge recognized under the WIPO definition include: (i) agricultural knowledge; (ii) scientific knowledge; (iii) ecological knowledge; (iv) medicinal knowledge, including related medicines and remedies; and (v) biodiversity related knowledge. *Id.* The definition also includes “expressions of folklore” in the form of music, dance, song, handicrafts,

owners. It includes biopiracy, which is defined broadly as the acquisition of intellectual property rights in indigenous peoples' biological resources² or commercialization of their knowledge on biological resources, often without appropriate compensation to the communities.³ As one of the major markets for traditional knowledge, the U.S. has also been the venue for numerous acts of misappropriation. Notorious examples include: patents awarded to RiceTec in 1997 on several lines of basmati rice⁴ traditionally grown in India; plant breeder Sally Fox's acquisition in the 1980s of two plant variety protection certificates over colored cotton derived from identical varieties⁵ grown by indigenous people in Central and South America; and a patent granted in 1986 to two University of Mississippi scientists on the use of turmeric to make open wounds heal faster,⁶ a use long known to indigenous groups in India. Other examples are a patent obtained in 1986 by a U.S. scientist (and president of the International Plant Medicine Corporation) on the ayahuasca plant⁷ used for medicinal and ritual purposes throughout the Amazon basin, and the awards of U.S. patents to two University of Wisconsin scientists for a protein sweetener isolated from a berry plant grown in Gabon, Central Africa, and known in the local community for its sweet taste.⁸

To the extent the acts of misappropriation occurring in the U.S. have involved traditional knowledge originating in foreign countries, the national laws of those countries cannot be expected to provide adequate relief for these cross-border transgressions.⁹ The only option available to foreign

designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties." *Id.*

2. Biological resources include plants, animals, organs, microorganisms and genes.

3. Michael Woods, *Food for Thought: The Biopiracy of Jasmine and Basmati Rice*, 13 ALB. L.J. SCI. & TECH. 123, 134 (2002); see also Nuno Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing the TRIPS Agreement: The Problem and the Solution*, 2 WASH. U. J. L. & POL'Y 371, 375 (2000).

4. One of the patents even claims that rice produced from this line of rice has "characteristics similar or superior to those of good quality basmati rice." U.S. Patent No. 5,663,484 (filed July 8, 1994). See Sumathi Subbiah, *Reaping What They Sow: The Basmati Rice Controversy and Strategies for Protecting Traditional Knowledge*, 27 B.C. INT'L & COMP. L. REV. 529, 534-37 (2004).

5. See Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 919, 924 (1995).

6. See U.S. Patent 5,401,504 (filed Dec. 28, 1993).

7. See U.S. Patent 5,751 (filed Sept. 5, 1848).

8. See U.S. Patent No. 5,741,537 (filed Oct. 19, 1995); U.S. Patent No. 5,527,555 (filed Feb. 16, 1993); U.S. Patent No. 5,346,998 (filed June 29, 1993); U.S. Patent No. 5,326,580 (filed May 13, 1994). See Someshwar Singh, *Rampant Biopiracy of South's Biodiversity*, <http://www.twinside.org.sg/title/rampant.htm> (last visited Jan. 17, 2007).

9. Although a number of foreign countries have adopted regulatory regimes premised on access

indigenous rights holders of the misappropriated traditional knowledge would be to initiate legal action in the U.S. Under these circumstances, it becomes critically important to determine the avenues for redress available in the American legal system to the foreign rights holders or custodians of such knowledge. This, in turn, requires an assessment of the adequacy of the regulatory framework for protecting traditional knowledge in the United States which cannot be understood without reference to government attitudes towards Native Americans, the main indigenous group in the United States.

The objective of this Article is to evaluate the extent to which traditional knowledge issues are addressed under U.S. law, and propose the use of mutual recognition agreements as remedial measures. Part One surveys various government legislative initiatives on indigenous cultural heritage and describes the use of Native American tribal courts to control the exploitation of traditional knowledge. Part Two discusses some constitutional issues regarding domestic protection, including public domain, intellectual property rights, free access to information, freedom of religion, and free speech. After an assessment of the nature of international commitments (not) assumed by the U.S. in relation to traditional knowledge, Part Three summarizes the U.S. stance on ongoing debates at various global fora regarding the adoption of a binding international arrangement for the protection of traditional knowledge. Part Four proposes mutual recognition agreements (“MRAs”) as alternatives to binding international treaties and highlights the need for the provision of adequate incentives to ensure U.S. commitment to protect traditional knowledge. It also suggests that only through a narrowly tailored approach which targets foreign traditional knowledge and eschews politics would there be any realistic hope of overcoming the deep-seated inertia in U.S. government circles regarding traditional knowledge.

II. PART ONE: PROTECTION OF NATIVE AMERICAN CULTURAL HERITAGE

A. Government Policy Towards Native Americans

As a minority group in the United States, Native Americans over the years have engaged in a determined struggle with the federal government to regain a more meaningful form of self-governance after having been stripped of their powers as sovereign entities and forced to assimilate into

to traditional knowledge resources based on the prior informed consent and the equitable sharing of benefits among contracting parties, such contract based solutions are of rather limited use in cases that have international dimensions. For example, the best drafted domestic contract on traditional knowledge is meaningless where a party moved out of the foreign country to live in the United States to avoid foreign court jurisdiction or the enforcement of a judgment issued against him in the foreign country for breach of an access and benefit sharing contract. Without the cooperation of the U.S., courts in the foreign country cannot acquire jurisdiction over the party or enforce the judgment.

American culture.¹⁰ Although some form of autonomy has been conceded to them in the form of tribal governance schemes,¹¹ it is not as far-reaching as they would like, forcing them to resort to every plausible avenue to press their claims for greater independence. Thus, a constant tension has characterized U.S.-Native American relations.¹²

An area in which this tension has been felt is the matter of government policy towards indigenous heritage. Native American knowledge, once marginalized, has become commercially attractive in recent years.¹³ However, because such commercialism has also taken a toll on indigenous culture, Native Americans have demanded rights of control over the exploitation of their indigenous knowledge.¹⁴ While laws exist for the preservation of important historical and cultural objects,¹⁵ they often are of limited scope in their application to Native American cultural heritage, and therefore, ineffective to prevent the disruptive effects of commercial development, entertainment and other commercial uses of sacred lands by non-indigenous people. Native Americans have also been concerned about

10. Article I, Section 8 of the U.S. Constitution, which grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” is viewed as an acknowledgment of the sovereign rights of Indian tribes. See Steven C. Moore, *Managing Across Boundaries: The Rights of Native American Tribes on Federal Lands* SF34 ALI-ABA 65, 67 (2000).

11. Indian groups have been granted powers of “internal self-government including taxation . . . civil affairs, and criminal jurisdiction. Rudolph C. Ryser, *Between Indigenous Nations and the State: Self-determination in the Balance*, 7 TULSA J. COMP. & INT’L L. 129, 141 (1999).

12. In the words of one commentator, “the failure of the U.S. government to enter into a genuine effort aimed at the elevation of Indian nations to a full level of self-government foreshadows growing tensions between Indian governments and the United States.” *Id.* at 161.

13. INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK, at ix (Tom Greaves ed., 1994)

14. The issues may be summarized as follows:

Indigenous societies find themselves poked, probed and examined as never before. The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honored meanings, convert it to a product, and sell it. Each time that happens the heritage itself dies a little, and with it its people. . . . Indigenous communities, indigenous leaders, and advocates for indigenous rights have sought ways to gain some control in a rapidly worsening situation. At bottom, intellectual property rights consist of efforts to assert access to, and control over, cultural knowledge and to things produced through its application. The most urgent reason to establish that control is to preserve meaning and due honor for elements of cultural knowledge and to insure that these traditional universes, and their peoples, maintain their vitality. Subsidiary . . . goals are to manage the degree and process by which parts of that cultural knowledge are shared with outsiders, and in some instances, to be justly compensated for it.

Id.

15. See *infra* notes 31-88 and accompanying text.

the looting of indigenous grave sites,¹⁶ the sale of culturally significant and sometimes irreplaceable items,¹⁷ the misrepresentation of goods as Indian made,¹⁸ and the use of Indian names or symbols in a manner perceived to be degrading.¹⁹

The quest by Native Americans for greater control rights over cultural heritage has clear political implications. Central to the demands of Native Americans is access to and preservation of land recognized as an inseparable component of their religious beliefs.²⁰ Native Americans also demand the right to self-determination which will enable them to become the final arbiters regarding uses of their heritage. Although U.S. domestic policy affirms unambiguously the government's acceptance of the principle of self-determination for Native Americans,²¹ its international policy offers a sharp contrast.²² Before the U.N. Commission for Human Rights, for example, the U.S. has resisted the application of international standards for self-determination to Indian tribes and other indigenous peoples.²³

This international stance may be attributed to U.S. concerns that the incorporation into a treaty of what the U.S. has termed "aspirations" of

16. The remains of thousands of indigenous people taken from Indian grave sites have been stored in museums and scientific institutions, of which the Smithsonian Institution alone is said to house the remains of 18,500 individuals. Significant numbers of remains are also found in private collections. See generally Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 LA. L. REV. 545, 545-88 (2004).

17. Some of these items have religious significance and their sale may be contrary to indigenous law. Where culturally significant items that have been sold are found and agreement is reached to return them, repatriation efforts can be bogged down by difficult questions regarding tribal communities' entitlement to the items. With respect to items not culturally significant, and whose return is not seriously requested, Native American people often insist on having a say as to how they are held, and demand especially, that the holders exhibit respect for Indian identity and culture.

18. Problems of authenticity arise from the mass production of native goods, often with inferior materials which reduce the aesthetic quality or religious significance of the goods. Moreover, large-scale production reduces the novelty and commercial value of goods, to the financial detriment of indigenous people producing them.

19. In the sports industry, Indian terminology is used to name mascots or identify sports teams. Prominent examples include the Atlanta Braves and their fan ritual known as Tomahawk Chop; the Cleveland Indians and their Chief Wahoo mascot; and the Washington Redskins of the National Football League. Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend?*, 72 COLO. L. REV. 415, 423 (2001). The federal trademark register is replete with filings under well known Indian tribal names such as Cherokee, Navajo, Sioux, Dakota, or Lakota.

20. See *infra* note 177 and accompanying text.

21. Congress in the 1970s passed various statutes establishing the framework for tribal government's to govern themselves. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (2000).

22. In general, the U.S. has been reluctant to ratify international instruments that guarantee indigenous rights. Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 124 (1999).

23. Ryser, *supra* note 11, at 158.

indigenous peoples,²⁴ could be used to support domestic Native American agitation for greater self-determination²⁵ or even secession.²⁶ Indeed, in the debate on traditional knowledge, the association is frequently made between cultural heritage protection and the recognition of rights of indigenous peoples to self-determination. For example, Erica-Irene Daes, former special rapporteur of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities has noted quite forcefully that “[t]he protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples.”²⁷ Similarly, it has been observed that “[i]n numerous statements and declarations, indigenous peoples . . . have stated that they feel that their quest for self-determination is the most important reason to engage in efforts to protect their knowledge.”²⁸

Given these political implications in the international recognition of cultural rights, it is hardly surprising that the U.S. government has not approached issues on traditional knowledge with the same detached, apolitical perspective evident in other countries.²⁹ This suspicious attitude

24. The United States representative at a meeting of the Human Rights Commission Working Group was reported to have cautioned the Working Group against “convert[ing] aspirations and objectives into ‘rights’ in order to draw attention to them.” U.N. Econ. & Soc. Council [ECOSOC], Human Rights Commission Working Group, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, ¶ 40, U.N. Doc. E/CN.4/1999/82, (Jan. 20, 1999) [hereinafter *Report of the Working Group*].

25. The demands for greater self-determination have been resisted by state governments and many non-Native Americans. See Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 498 (1999).

26. The U.S. allegedly initially opposed the term “peoples” in the U.N. Draft Declaration of Indigenous Peoples because of its association with the right to self-determination suggested by others to connote independent statehood and secession under international law. *Report of the Working Group*, *supra* note 24, at ¶ 40.

27. Erica-Irene A. Daes, *Protection of the Heritage of Indigenous People*, United Nations Human Rights Study Series, vol.10, at 1 (1997).

28. CRUCIBLE II GROUP, *SEEDING SOLUTIONS VOL. 2: OPTIONS FOR NATIONAL LAWS GOVERNING CONTROL OVER GENETIC RESOURCES AND BIOLOGICAL INNOVATIONS* 35 (2001).

29. In an earlier work, this author noted the following with reference to Africa:

Most Africans belong to tribes and have roots in traditional communities, whether they live in villages or cities. The lowest rural shepherd boy is no more a traditionalist than is the President of the country living in the state capital. Also, tribal groups are as much a part of the national government as any group could possibly be. As such, they are not minority groups fighting for political power. That central governments in Africa are not threatened politically may explain why they have readily acknowledged in legislation the entitlement of traditional groups to their folklore. Consequently political considerations . . . are irrelevant to the debate about protecting folklore in Africa.

Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States* 769 48 AM. U. L. REV. 769, 841 (1999).

appears to have colored the government's definition of the issues and its preparedness to commit to broad solutions regarding the protection of traditional knowledge whether at home or abroad.³⁰

B. Legislative Initiatives on Cultural Heritage

Concerned about the increased interest of scientists and art dealers in Native American skeletal remains and other funerary objects, Congress passed the Antiquities Act of 1906³¹ ("Antiquities Act") giving the President power to set aside as national monuments certain historic landmarks, structures and other objects of historic interest.³² Under the Act, persons who excavated, appropriated, injured, or caused the destruction of any historic or prehistoric ruin or antiquity on land owned or under the control of the federal government, without permission from the federal department holding jurisdiction over the land,³³ could be fined or imprisoned.³⁴ While the Antiquities Act has facilitated the management of a number of significant structures,³⁵ by and large, it has been ineffective in protecting indigenous cultural property due to funding problems, inadequate staff,³⁶ vagueness in some of its provisions and a general failure by the National Park to take indigenous interests into account when selecting which properties to protect.³⁷

30. See *infra* notes 227-69 and accompanying text.

31. 16 U.S.C. §§ 431-33 (2000).

32. *Id.* § 431.

33. Permits for the examination of ruins, excavation of archaeological sites and gathering of objects of antiquity upon lands under their respective jurisdictions could be obtained from the Secretaries of the Interior, Agriculture and the Army. However, the permits would only be granted to institutions deemed qualified to conduct the activity for which permission was sought. In addition, the activity had to be undertaken for the benefit of reputable museums, universities, colleges or other scientific or educational institutions with the object of increasing knowledge about such objects and also permanently preserving them in public institutions. See *id.* § 432.

34. *Id.* § 433.

35. Examples of national monuments established under presidential proclamation pursuant to the terms of the Act are Ackia Battleground National Monument in Mississippi; Andrew Johnson National Monument in Tennessee, Casa Grande National Monument in Arizona, Grand Canyon National Museum in Arizona, and the Statue of Liberty National Museum. See *id.* § 431.

36. Raymond Cross & Elizabeth Brennehan, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5, 17 (1997).

37. Jason C. Roberts, *The Protection of Indigenous Populations' Cultural Property in Peru, Mexico and the United States*, 4 TULSA J. COMP. & INT.'L L. 327, 350 (1997).

To improve the regulatory framework, the Historic Sites, Buildings and Antiquities Act³⁸ (“Historic Sites Act”) was passed in 1935 empowering the National Park Service to restore, reconstruct, and maintain sites and objects of historic interest.³⁹ Although the Historic Sites Act has facilitated the protection of noteworthy sites,⁴⁰ its implementation, like that of the Antiquities Act before it, reflected a bias towards the preservation of structures associated with European colonization, and not much use was made of the Historic Sites Act to protect the interests of indigenous peoples in their cultural property. The next effort towards the protection of historic sites occurred in 1966 under the National Historic Preservation Act⁴¹ (“NHPA”), which established a federal policy of cooperation with Indian tribes, private organizations and individuals on the subject.⁴² NHPA provided for the maintenance of a National Register of Historic Places⁴³ composed of “districts, sites, buildings, and objects significant in American history, architecture, archaeology, engineering and culture”⁴⁴ and required the Secretary of the Interior to establish a program to help Indian tribes preserve their particular properties,⁴⁵ taking into account tribal values.⁴⁶

Around the time the Historic Sites Act was passed in 1935, the federal government also responded to concerns regarding the misrepresentation of Indian artifacts⁴⁷ and promulgated the Native American Arts and Crafts

38. 16 U.S.C. §§ 461-67.

39. *Id.* § 462(d).

40. See generally Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993).

41. 16 U.S.C. § 470.

42. The National Historic Preservation Act was passed in recognition of the significance of the national heritage as the foundation for the “spirit and direction of the Nation” and the need to preserve it as part of “community life and development in order to give a sense of orientation to the American people” as well as maintain “its vital legacy of cultural, educational, aesthetic, inspirational, economic and energy benefits” for future generations of Americans. *Id.* § 470(b). Under the Act, it was envisaged that the government would *inter alia*, “provide leadership in the preservation of the prehistoric and historic resources of the United States,” “administer federally owned, administered or controlled prehistoric or historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations,” and assist Indian groups to “expand and accelerate” their preservation activities. *Id.* § 470-1.

43. Significantly, the National Historic Preservation Act also provides that properties of traditional religious and cultural importance to Indian tribes or Native Hawaiian organizations are eligible for inclusion in the National Register, and calls for consultations with the relevant Indian groups in connection with the determination of the eligibility of tribal religions and cultural properties for inclusion in the register. *Id.* § 470a(d)(6)(A)-(B).

44. *Id.* § 470a(a)(1)(A).

45. *Id.* § 470a(d)(1)(A).

46. *Id.* § 470a(d)(1)(B).

47. It is not uncommon in the United States to find art and craft produced by non-Indians being marketed as genuine “Indian” products.

Act⁴⁸ to assure the authenticity of Indian artifacts. The law created the Indian Arts and Crafts Board⁴⁹ to “promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship.”⁵⁰ The Board was authorized to create “trademarks of genuineness and quality for Indian products”⁵¹ which could be registered with the Patent and Trademark Office and assigned to Native Indians without charge.⁵² Under the Act, it was an offense to counterfeit the Board’s marks⁵³ or misrepresent a good as Indian made by falsely suggesting that it is “Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization”⁵⁴ In addition to basic civil and criminal sanctions against persons caught making such misrepresentations,⁵⁵ the Act authorized suits for injunctive relief and damages⁵⁶ by native Indians or by the Attorney General on behalf of native

48. 25 U.S.C. § 305 (2000).

49. The Board consists of five commissioners appointed by the Secretary of the Interior. *Id.*

50. *Id.* § 305a.

51. *Id.*

52. *Id.*

53. The Act provides:

Whoever counterfeits or colorably imitates any Government trade mark used or devised by the Indian Arts and Crafts Board in the Department of the Interior as provided in section 305a of Title 25, or, except as authorized by the Board, affixes any such Government trade mark, or knowingly, willfully, and corruptly affixes any reproduction, counterfeit, copy, or colorable imitation thereof upon any products, or to any labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of such products; or

Whoever knowingly makes any false statement for the purpose of obtaining the use of any such Government trade mark—

Shall (1) in the case of a first violation, if an individual, be fined under this title or imprisoned not more than five years, or both, and, if a person other than an individual, be fined not more than \$1,000,000; and (2) in the case of subsequent violations, if an individual, be fined not more than \$1,000,000 or imprisoned not more than fifteen years, or both, and, if a person other than an individual, be fined not more than \$5,000,000; and (3) shall be enjoined from further carrying on the act or acts complained of.

18 U.S.C. § 1158 (2000).

54. *Id.* § 1159(a).

55. The Act provided:

(a) It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.

(b) Whoever knowingly violates subsection (a) shall—

(1) in the case of a first violation, if an individual, be fined not more than \$250,000 or imprisoned not more than five years, or both, and, if a person other than an individual, be fined not more than \$1,000,000; and (2) in the case of subsequent violations, if an individual, be fined not more than \$1,000,000 or imprisoned not more than fifteen years, or both, and, if a person other than an individual, be fined not more than \$5,000,000.

Id. § 1159(a)-(b).

56. 25 U.S.C. § 305e(a) (2000).

Indians.⁵⁷ Despite its laudable goals, the Native American Arts and Crafts Act has not been effective. So far, it appears no person has been prosecuted under the Act and the Department of the Interior has yet to adopt relevant implementing regulations.⁵⁸ In any event, the Act is unduly narrow in scope and would not apply in cases where indigenous crafts are copied but not represented as Indian craft.⁵⁹

Besides the measures on trade in Indian arts and craft, Congress has regulated the commercial exploitation of archaeological resources in an effort to prevent the destruction of a vital component of the national heritage.⁶⁰ Under the Archaeological Resources Protection Act⁶¹ (“ARPA”) of 1979, permission of the Native American community was required before objects could be excavated or removed from federal and Indian lands.⁶² ARPA also prohibited the sale, purchase, transport, exchange, or receipt of archaeological resources⁶³ excavated or removed from such lands without proper permission.⁶⁴

To facilitate the return of native property held in public institutions, Congress passed in 1990 the Native American Graves Protection and Repatriation Act⁶⁵ (“NAGPRA”) which provided that the ownership or control of Native American cultural items⁶⁶ excavated or discovered on

57. *Id.* § 305e(c).

58. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 51 (1997) (calling the act a “paper tiger” and saying “there has never been a single prosecution in the history of the Act.”).

59. *Id.* at 23, 51-52.

60. 16 U.S.C. § 470aa(a) (2000).

61. *Id.* § 470aa-mm.

62. *Id.* § 470ee(a).

63. The Archaeological Resources Protection Act defined an archaeological resource as: any material remains of past human life or activities which are of archaeological interest [including, but not limited to] pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials No item shall be treated as an archaeological resource . . . unless such item is at least 100 years of age.

Id. § 479bb(1).

64. *Id.* § 470ee(a).

65. 25 U.S.C. § 3001(1)-(13) (2000).

66. The term “cultural items” is used in the Act to refer to human remains, “associated” and “unassociated funerary objects,” “sacred objects” and “cultural patrimony.” *Id.* § 3001(3). The term “associated funerary objects” is defined as:

objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

federal or tribal lands remained with lineal descendants, Native American tribes or Hawaiian Organizations. When the cultural affiliation⁶⁷ of an inventoried item could not be established, an indigenous group could recover it merely by showing through a preponderance of the evidence based on “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion”⁶⁸ that it has a cultural affiliation with the human remains and cultural property. Failure to return cultural items upon proper request subjected offending museums to civil penalties⁶⁹ assessed according to the archaeological, historical or commercial value of the item involved, the damage suffered by the aggrieved party or the number of violations involved.⁷⁰

Criticisms of NAGPRA include its limitation to only cultural items found on federal or tribal land or held by federally funded agencies and museums,⁷¹ as well as its burden of proof, which has proved to be a hurdle in some cases.⁷² However, in *United States v. Carrow*,⁷³ the Court of Appeals for the Tenth Circuit rejected a void-for-vagueness challenge to NAGPRA, holding the Act not to be “infirm” by its failure “to list examples of cultural items.”⁷⁴ Predictably, NAGPRA has had a profound effect on the

Id. § 3001(3)(A).

The term “unassociated funerary objects” refers to objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.

Id. § 3001(3)(B).

67. The term “cultural affiliation” denotes “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” *Id.* § 3001(2).

68. *Id.* § 3005(a)(4).

69. *Id.* § 3007(a).

70. *Id.* § 3007(b).

71. Perhaps in order to avoid violating the Fifth Amendment’s proscription of the federal government taking property without due compensation, the Act was made inapplicable to items in institutions that do not receive federal money or to museums or archaeologists able to establish good-faith purchase of the items. Daniel J. Hurtado, *Native American Graves Protection and Repatriation Act: Does it Subject Museums to Unconstitutional “Taking”?*, 6 HOFSTRA PROP. L. J. 1, 7, 14 (1993); see also Michelle Hibbert, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 AM. INDIAN L. REV. 425 (1999).

72. The obligation to return items was not triggered where federal agencies demonstrated a legal right of possession and the tribe requesting them is unable to carry its burden of proving through a preponderance of the evidence that they are the closest living culturally affiliated group. See Hibbert, *supra* note 71, at 430.

73. 119 F.3d 796 (10th Cir. 1997).

74. *Id.* at 804.

debate about the rights of Indians to their cultural property and has emboldened them to seek return of numerous items, including those that may be perceived as falling beyond the scope of the Act.⁷⁵

An important milestone in the protection of Native American cultural heritage was reached in 1976 with the establishment of the American Folklife Center in the Library of Congress to “preserve and present American folklife.”⁷⁶ Under the American Folklife Preservation Act,⁷⁷ the Center is authorized to enter into contracts with individuals and groups for the promotion of folklife,⁷⁸ to maintain a national archive and center for American folklife⁷⁹ and to purchase for preservation purposes certain representations of American folklife.⁸⁰ The Center can also display and disseminate to the public folklife forms preserved by the Center or found in the national archive.⁸¹ Regrettably, despite these broad and laudable goals, the Center should not be expected to play a far reaching role in the protection of indigenous knowledge given the restriction of its authority to

75. For example, the Hopi tribe asked for the return of “notes, drawings, and photographs . . . dealing with religious matters” while the requests of the Apache tribe focused on “all images, text, ceremonies, music, songs, stories, symbols, beliefs, customs, ideas and other physical and spiritual objects and concepts.” Michael F. Brown, *Can Culture Be Copyrighted* 39(2) CURRENT ANTHROPOLOGY 193, 194 (1998).

76. 20 U.S.C. § 2101(b) (2000).

77. 20 U.S.C. §§ 2101-44 (2000).

78. The scope of the contracts is described to include the following:

- (A) initiation, encouragement, support, organization, and promotion of research, scholarship, and training in American folklife;
- (B) initiation, promotion, support, organization, and production of live performances, festivals, exhibits, and workshops related to American folklife;
- (C) purchase, receipt, production, arrangement for, and support of the production of exhibitions, displays, publications, and presentations (including presentations by still and motion picture films, and audio and visual magnetic tape recordings) which represent or illustrate some aspect of American folklife; and
- (D) purchase, production, arrangement for, and support of the production of exhibitions, projects, presentations, and materials specially designed for classroom use representing or illustrating some aspect of American folklife.

Id. § 2104(1).

79. *Id.* § 2104(2).

80. Under the Act, the Center may procure, receive, purchase, and collect for preservation or retention in an appropriate archive creative works, exhibitions, presentations, objects, materials, artifacts, manuscripts, publications, and audio and visual records (including still and motion picture film records, audio and visual magnetic tape recordings, written records, and manuscripts) which represent or illustrate some aspect of American folklife.

Id. § 2104(3).

81. *Id.* § 2104(5). In discharging its obligations, the Center was given the discretion to “develop and implement other appropriate programs to preserve, support, revitalize, and disseminate American folklife.” *Id.* § 2104(7).

the relatively limited number of items that may come within the Center's control. Indeed, Native American interests may not even be a priority to the extent the American Folklife Preservation Act makes no mention of the rights of indigenous communities.

Besides these legislative measures focused mainly on Native American cultural property, there are other initiatives which could apply to the protection of traditional knowledge of foreign origin. Under the Pre-Columbian Art Act⁸² of 1972, for example, Congress prohibited the import into the United States of any pre-Columbian monumental or architectural sculpture or mural⁸³ without a certificate from the country of origin stating that the exported antiquity was not removed in violation of its laws.⁸⁴ Protected items include any immobile structures or parts of a structure which are subject to export control of the country of origin.⁸⁵ Complementing the Pre-Columbian Art Act is the National Stolen Property Act⁸⁶ which provides criminal penalties for trafficking in stolen cultural property.⁸⁷ The National Stolen Property Act makes it a felony to knowingly sell or receive stolen goods worth five thousand dollars or more in interstate or foreign commerce.⁸⁸

C. Tribal Courts' Control of Indigenous Heritage

Historically, United States relations with tribes and bands of Indians were governed through various treaties providing for limited federal prosecution of crimes involving non-Indians. However, beginning with the Indian Appropriation Act of 1871,⁸⁹ the U.S. government progressively expanded its jurisdiction over the Indian communities and sought to maintain order through the system of tribal courts established by the federal government's Bureau of Indian Affairs ("BIA"). The tribal courts were

82. 19 U.S.C. § 2092 (2000).

83. The term "pre-Columbian monumental or architectural sculpture or mural" is defined to include "any stone carving or wall or art which is the product of a pre-Columbian Indian culture of Mexico, Central America, South America or the Caribbean Islands, was an immobile monument or architectural structure or was part of, or affixed to, any such monument or structure." *Id.* § 2095(3).

84. *Id.* § 2092(a).

85. See *id.* § 2095(3).

86. 18 U.S.C. §§ 2314-15 (2000).

87. *Id.* § 2314.

88. *Id.* § 2315.

89. The Indian Appropriation Act of 1871 effectively ended the treaty arrangements by providing that:

[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; Provided . . . [t]hat nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

Indian Department Appropriations Act of March 3, 1871, ch. 120, 16 Stat. 544, 566.

created as part of an effort to assimilate Indians under a detribalization process⁹⁰ also pursued through the government's land tenure policy⁹¹ and system of education.⁹²

In the early part of the twentieth century, however, the federal government began to move away from its policy of assimilation and passed the Indian Reorganization Act of 1934 ("IRA") to allow tribal groups to set up their own systems of governance.⁹³ The BIA was authorized to draft standard constitutions for the tribes which could be changed only with the approval of the Secretary of the Interior. A Code of Indian Offenses was published the following year by the BIA allowing the tribes to create their own courts and enact their own laws.⁹⁴ At first, the government controlled the courts that were set up under the IRA process.⁹⁵ But not every tribe chose to go with the IRA scheme, some preferring to rely on traditional systems. Even for those utilizing the IRA procedures, a conscious effort was made to encourage the use of traditional systems as well.⁹⁶ Tribes that did not have traditional adjudication systems and did not want to operate under the IRA framework went on to develop new systems of tribal courts and laws.⁹⁷

90. Thus, the federal government created the Courts of Indian Offenses in 1883 "to civilize the Indians" by compelling them "to desist from the savage and barbarous practices that are calculated to continue them in savagery, no matter what exterior influences are brought to bear on them." Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1033 (1995). Prohibited acts included participating in dances or feasts, entering into plural or polygamous marriages, acting as medicine men, destroying property of other Indians, and engaging in immorality, intoxication, and misdemeanors and vagrancy. Presiding over the courts were Indians selected by the BIA for demonstrating an affinity to Euro-American practices such as hairstyle, clothing, monogamy, and individual holdings of land. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 484 (1998).

91. Separate land allotments in favor of individuals were authorized as an encroachment upon traditional ideas of communal land ownership.

92. According to one commentator,

[e]ducation of children was also seen as a sure way to create a generation of assimilated Indians. Congress entrusted various Christian denominations with control over education on specific reservations; conversion of Indian children to Christianity was seen as a first step to assimilation Toward the end of the nineteenth century, Indian boarding schools were preferred. Youngsters would be taken by force, if necessary, and sent away to schools, such as the Carlisle Indian School in Pennsylvania, founded in 1879, whose headmaster, Richard Pratt, promised to "Kill the Indian in him, and save the man."

Newton, *supra* note 90, at 1033 (1995).

93. Indian Reorganization Act (Wheeler-Howard Act), 25 U.S.C. §§ 461-79 (2000).

94. 25 C.F.R. § 11.100(c).

95. Newton, *supra* note 90, at 1035. See generally Fredric Brandfon, Comment, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 991-1018.

96. Newton, *supra* note 90, at 1035.

97. For example, the Pueblos have settled on procedures that involve the governor and the council in the dispute resolution process.

Affirming the significance of tribal courts,⁹⁸ the United States Supreme Court has referred to tribal courts as “appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”⁹⁹ It has also acknowledged the wide jurisdiction of the tribal courts, emphasizing for instance, that “[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.”¹⁰⁰

Generally, Indian tribal courts are required to apply tribal law first,¹⁰¹ and to resort to federal and state law only to fill in the gaps.¹⁰² However, perhaps due to lack of resources¹⁰³ or in deference to hints from federal courts, a disturbing pattern has been reported where some courts seem to apply state law regardless of its relevance to tribal culture.¹⁰⁴ Reflecting the nature of their historical development, the tribal courts tend to be preoccupied with criminal matters although there is a noticeable trend in their use for civil litigation.¹⁰⁵ Although subject to review by federal courts, tribal court decisions are given deference¹⁰⁶ especially as to the tribal courts’ findings on what constitutes tribal law.¹⁰⁷

The authorization to apply indigenous laws has emboldened tribal courts to enforce tribal values even where that may amount to adoption of concepts uncommon to the basic English system, such as the notion of group property

98. Tribal courts have become popular among, and are resorted to in an unprecedented manner by, Native Americans. The wide appeal of tribal courts has been attributed to “[t]he pan-Indian movement, the struggles of other racial minorities in changing the boundaries of the acceptable, the increasing number of Native-American attorneys, . . . the critical legal jurisprudence that has questioned the foundations of Federal Indian law, and the concomitant flowering of tribal court systems.” Newton, *supra* note 90, at 1036.

99. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

100. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

101. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1611 (2004).

102. Newton, *supra* note 90, at 1038.

103. The courts are said to be constrained financially, operate with inadequate staff and can barely afford more than the tribal code and some state reporters. *Id.*

104. The Supreme Court’s tough approach to jurisdictional matters involving tribal courts may have forced some of the tribal courts resort to notions of state law as way of preserving a respectable degree of jurisdiction. See Robert A. Williams, *The Algebra of the Federal Indian: the Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 274, 288 (1986); see also Brandfon, *supra* note 95, at 1006-09; Porter, *supra* note 101, at 1610-12.

105. Newton, *supra* note 90, at 1037.

106. Such deference is based on the notion of full faith and credit generally extended by a court to a judgment made by another court from a different state. See generally Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of Eberhard v. Eberhard*, 28 N. M. L. REV. 19, 19-57 (1998).

107. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 509, 558-61 (1998); Lona N. Laymon, Note, *Valid-Where-Consummated: The Intersection of Customary Law Marriages and Formal Adjudication*, 10 S. CAL. INTERDISC. L.J. 353, 365 (2001).

rights. Thus, in *Chilkat Indian Village v. Johnson*,¹⁰⁸ a tribal court ordered the return of artifacts and carvings on grounds that they constituted the property of an Alaskan village. The tribal court's claim was based, in part, on an ordinance adopted by the Indian tribe (the Chilkat Indian Village) pursuant to the tribe's IRA-authorized constitution prohibiting the removal of artifacts from the village.¹⁰⁹ In an action by the tribe seeking return of the artifacts and monetary damages, the Ninth Circuit upheld the power of tribal courts to act pursuant to local authority conferred on them, especially as it related to members of the tribe. As the Court noted, "[i]n the overwhelming majority of instances, a tribe's enforcement of its ordinances against its members will raise no federal questions at all. Such cases primarily raise issues of tribal law, and they are the staple of the tribal courts."¹¹⁰

However, this should not be taken as an indication that the tribal court's ability to apply tribal law is unlimited. While its authority over local matters is respected by the state and federal courts, its jurisdictional bases continue to be scrutinized by the superior courts, especially where non-Indians are involved.¹¹¹ Some commentators suggest that the degree to which tribal decisions are immune from interference by the federal courts should depend on a balancing approach implicating individual rights, on the one hand, and tribal sovereignty on the other.¹¹²

108. 870 F.2d 1469 (9th Cir. 1989).

109. As quoted in the Court's decision, the ordinance provided:

No person shall enter on to the property of the Chilkat Indian Village for the purpose of buying, trading for, soliciting the purchase of, or otherwise seeking to arrange the removal of artifacts, clan crests, or other traditional Indian art work owned or held by members of the Chilkat Indian Village or kept within the boundaries of the real property owned by the Chilkat Indian Village, without first requesting and obtaining permission to do so from the Chilkat Indian Village Council.

No traditional Indian artifacts, clan crests, or other Indian art works of any kind may be removed from the Chilkat Indian Village without the prior notification of and approval by, the Chilkat Indian Village Council.

Id. at 1471 (quoting Chilkat Indian Village Ordinance of May 12, 1976).

110. *Id.* at 1475-76 (citations omitted).

111. For example, in *Chilkat*, the Ninth Circuit determined that federal questions implicated in actions of tribal authorities against non-Indians apparently warranted closer scrutiny of such actions. *Id.* at 1476.

112. As one commentator notes,

[T]ribal court jurisprudence takes place against a field of potential federal court interference. The Supreme Court's decisions stripping authority from tribal courts have been impelled by a stated concern for individual rights. Decisions upholding tribal court authority have been premised on the overriding importance of tribal sovereignty in the particular case. In short, the weight given to tribal sovereignty can be expected to be a decisive factor in federal court review of a tribal decision involving a non-Indian. Acknowledging the existence of some measure of sovereignty is simple, however; the real issue is the extent of sovereign powers. On this issue, policymakers, including

III. PART TWO: CONSTITUTIONAL ISSUES IN THE QUEST FOR BETTER PROTECTION OF NATIVE AMERICAN CULTURAL HERITAGE

A. *Traditional Knowledge as Part of the Public Domain*

1. Free Access to Information

The perceived relegation of traditional knowledge to the public domain is frequently cited as justification for opposing Native American demands for exclusive rights to their traditional knowledge.¹¹³ Used in this context, the term “public domain” would include “the body of knowledge and innovation (especially creative works such as writing, art, music, and inventions) in relation to which no person or other legal entity can establish or maintain proprietary interests.”¹¹⁴ Thus, public domain has come to be viewed as “part of the common cultural and intellectual heritage of humanity, which in general anyone may use or exploit.”¹¹⁵

Although works protected by proprietary rights, such as copyright or patents, are not in the public domain, upon the expiration of the intellectual property rights, the works become part of the public domain and may be freely used by any one for any purpose.¹¹⁶ Thus, the concept of public domain furthers an important societal objective of facilitating access to creative ideas in aid of national development.¹¹⁷ Indeed, the objective is

members of the Supreme Court, have very different positions.

The most frequently stated rationale for tribal sovereignty has been the role of tribal sovereignty as preservative of tribal cultures. Although this rationale may seem to hold great promise . . . , the meaning of the phrase “tribal culture” is highly contested, though rarely acknowledged. For example, whether a particular tribal practice has been traditionally followed by a tribe has been treated as nearly dispositive by some Court members in deciding the level of protection accorded to tribal sovereignty. The extent to which a reviewing court claims the power to decide what is or is not tribal culture is itself an intrusion into tribal sovereignty, even if this privileged position is claimed in the context of a decision protecting tribal authority. Although I agree that tribal sovereignty is essential to protecting tribes’ cultures, I would not require a tribe either to demonstrate that any aspect of its cultural practice is unique, traditional, or unchanged, in order to give credence to its sovereignty. The fact that a tribal system has appropriated elements of a system originally imposed upon it is a sign of the vitality of Indian tribes, not an excuse for diluting their authority.

Newton, *supra* note 90, at 1044.

113. See, e.g., Brown, *supra* note 75, at 206.

114. Wikipedia: The Free Encyclopedia, *Public Domain*, http://en.wikipedia.org/wiki/Public_domain (last visited Mar. 12, 2006).

115. *Id.* See generally Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV 389 (2002); Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC’Y 137, 137 (1993).

116. Wikipedia: The Free Encyclopedia, *Public Domain*, http://en.wikipedia.org/wiki/Public_domain (last visited Mar. 12, 2006).

117. According to WIPO,

recognized in relation to copyright under a constitutional provision granting the U.S. Congress power to “promote the progress of Science and useful Arts by securing for limited Times to Authors. . . the exclusive Right to their Writings”¹¹⁸ Significantly, this Copyright Clause has been held to promote society’s interest in the “free flow of ideas, information and commerce.”¹¹⁹

At a general level, the desire to preserve public access to information in the public domain has figured prominently in the debate regarding the protection of cultural rights of indigenous people.¹²⁰ Allowing indigenous communities to maintain a shroud of secrecy with regard to the use of certain cultural items, it has been argued, would be an affront to the cherished “political ideals of liberal democracy.”¹²¹ There is also a concern that enabling those communities to recover items already in the possession

[t]he primary purpose of most branches of the IP system (excluding trademarks and geographical indications) is to promote and protect human intellectual creativity and innovation. IP law and policy does so by striking a careful balance between the rights and interests of innovators and creators, on the one hand, and of the public at large, on the other. Thus, by granting exclusive rights in an invention, for example, the IP system encourages further innovation, rewards creative effort, and protects the (often substantial) investment necessary to make and commercialize the invention. The patent system also encourages people to disclose inventions, rather than retain them as trade secrets, thus enriching the store of publicly-available knowledge and promoting further innovation by other inventors. Thus, public dissemination of information is an important IP objective.

INTELLECTUAL PROPERTY NEEDS, *supra* note 1, at 32.

118. U.S. CONST. art. I.

119. *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984).

120. *Brown*, *supra* note 75, at 195.

121. As *Brown* explains,

In the United States, secrecy has long been regarded as inherently inimical to democratic process and to personal freedom. There are, of course, circumstances in which secrecy is warranted: in matters of national security, in deliberations on sensitive administrative or legislative matters, in certain kinds of law-enforcement activities, and so forth. We also recognize that institutionalized secrecy nearly always leads to abuses of power. For this reason, we have implemented a wide range of “sunshine laws” that require government officials to conduct deliberations in public and to make administrative documents available to citizens on demand. There is also a strong presumption that once information enters the public domain, it should stay there. Secrecy, in other words, is inherently threatening to democratic process and to the public good except in a sharply circumscribed range of situations. We demand that our educational, religious, and political institutions practice openness whenever possible. Although archives routinely impose restrictions on access-when, for instance, they abide by a donor’s request that documents be closed to researchers for a stated period, usually to protect the privacy of living individuals-I know of no cases in which U.S. public repositories deny access to archived materials on the basis of a potential user’s ethnicity, gender, age, or religious affiliation. Such selective restrictions would surely qualify as a form of illegal discrimination.

Id. at 198.

of museums would impede use of material now subject to general exploitation. As one commentator has put it, "removal of information from the public domain in response to the demands of third parties asserting a right to determine when, where, and by whom this information is accessed. . . conflict[s] directly with the majority's commitment to the sacredness of public knowledge."¹²²

However, these arguments appear to overlook the significant role secrecy plays in traditional societies, especially in maintaining the integrity of traditional institutions¹²³ and protecting "rituals and customs from external forces."¹²⁴ With reference to western practices, it has been argued that liberal democratic societies should "be able in good conscience to acknowledge the appropriateness of secrecy in certain limited contexts without undermining their basic governing principles."¹²⁵ The accepted justification for secrecy in the context of national security,¹²⁶ it is contended, is equally applicable to traditional knowledge since "secrecy is also essential in maintaining a certain structure within indigenous societies, and thus some semblance of continuity and stability in the evolution of an indigenous culture, [and therefore, is] a security measure."¹²⁷ Moreover, situating the debate regarding the protection of traditional knowledge in terms of rights of private property and absolute rights of access may be subject to challenge as being unduly narrow in scope and reflective of an essentially Eurocentric perspective without regard to equally important relationships that traditional communities have in their traditional knowledge such as trust and obligations to relatives and ancestors.¹²⁸ In any event, a rigid dichotomy

122. *Id.*

123. Elizabeth A. Brandt, *On Secrecy and the Control of Knowledge: Taos Pueblo*, in *SECRECY: A CROSS-CULTURAL PERSPECTIVE* 123-146 (Stanton K. Tefft ed., 1980).

124. According to Harding,

Many indigenous peoples consider certain objects, as well as certain knowledge, limited goods that cannot be shared and disseminated without a corresponding loss in power, significance, and meaning. Thus, certain objects and information must remain concealed from the uninitiated either within or outside the cultural group. In this sense, secrecy is an integral part of the sacredness of certain objects, stories, songs or rituals, and as such, instrumental in maintaining a certain social structure within the cultural group. Additionally, secrecy helps protect rituals and customs from destructive external forces. It is a defensive tactic aimed at preventing such things as the "Smoki snake dance," a New Age parody of a Hopi ritual.

Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 *ARIZ. ST. L.J.* 291, 313-14 (1999).

125. *Id.* at 314.

126. See Brown, *supra* note 75, at 198.

127. Harding, *supra* note 124, at 314-15.

128. As Professor Coombe explains, "[p]eoples have other relationships to cultural forms-trust, secrecy, guardianship, stewardship, initiation, sacralization-and obligations to relatives, ancestors, spirits, and future generations which make models of access and ownership appear extremely impoverished. Such knowledge is not adequately understood as information, nor may its circulation be properly understood as speech." Rosemary J. Coombe, *Michael F. Brown's Can Culture be Copyrighted?*, 39 *CURRENT ANTHROPOLOGY* 207, 208 (1998).

between rights of property and right of access may be unwarranted even under western norms.¹²⁹

2. Intellectual Property Rights

Besides the expiration of intellectual property rights, another reason why a work would fall in the public domain is the author's failure to satisfy the statutory formalities to protect the work in the first place.¹³⁰ U.S. law does not provide specifically for proprietary rights in traditional knowledge. Although the similarities between intellectual property rights ("IPRs") and traditional knowledge suggest the relevance of intellectual property for tackling the misappropriation of traditional knowledge, as a practical matter, it may be difficult to protect traditional knowledge through IPRs due to problems with fitting traditional knowledge into "certain accepted notions of intellectual property relating to ownership, originality, duration, fixation, inventiveness and uniqueness,"¹³¹ among others. This section elaborates on some of the difficulties with the use in relation to traditional knowledge of U.S. copyright, patent, and trademark law.

a. Copyright

In order to qualify for copyright protection under US. law, a work must satisfy the requirements of originality, authorship and tangibility.¹³² The Supreme Court held that to satisfy the test of originality, the work must have been independently created and not copied from other works.¹³³ Although

129. Professor Coombe further notes that "Western notions of property are themselves not nearly as narrow as this dichotomy between exclusivity of possession and an unrestricted public commons would suggest. Western juridical traditions recognize relations of trust (express and constructive), fiduciary obligation, implicit license, breach of confidence, stewardship, and local observances of negotiated customs and ethics." *Id.*

130. Lolly Gasaway, *When U.S. Works Pass Into the Public Domain*, <http://www.unc.edu/~unclng/public-d.htm> (last visited Mar. 12, 2006).

131. See Kuruk, *supra* note 29, at 793.

132. As provided in the Copyright Act, "[c]opyright protection subsists, in accordance with this title, in *original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*" 17 U.S.C. § 102(a) (2000) (emphasis added).

133. In the opinion of the Court,

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author . . . Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity.

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

absolute novelty is not required,¹³⁴ the work must demonstrate the unique thought, skill or labor of the artist.¹³⁵ Significantly, works based on pre-existing work do not necessarily fall out of the ambit of the copyright law, as they may qualify for protection as derivative works¹³⁶ to the extent they demonstrate substantial but not trivial improvements.¹³⁷

Regarding the authorship requirement, the Copyright Act provides that copyright in a work “vests initially in the author or authors of the work” and that “the authors of a joint work are coowners of copyright in the work.”¹³⁸ The term “author” has been defined as “he to whom anything owes its origin; originator; maker”¹³⁹ and except for joint applications, is taken to refer to individuals but not groups.¹⁴⁰ As to the third requirement concerning tangibility, protected works must be “fixed in any tangible medium of expression”¹⁴¹ which for practical purposes, involves recording or reducing works to writing.¹⁴²

The manner in which traditional knowledge is developed prevents it from satisfying these copyright criteria. Because traditional knowledge has evolved slowly through many generations of people who have continually modified it as they adapted it to suit their needs, it will be difficult to establish the “independent efforts” of a creator to justify copyright protection since a work of traditional knowledge invariably would have been built upon and be substantially similar to existing works of traditional

134. *Alfred v. Bell & Co.*, 191 F.2d 99, 102 (1951).

135. *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (2d Cir. 1976) (en banc).

136. Under the Copyright Act, a derivative work is defined as:

A work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

17 USC § 101 (2000).

137. *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34 (2d Cir. 1982); *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945).

138. Copyright Act, 17 U.S.C. § 201(a) (2000).

139. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

140. As one commentator observes, “our laws of intellectual property are rooted in the century-long reconceptualization of the creative process which culminated in high Romantic pronouncements like Wordsworth’s to the effect that this process *ought* to be solitary, or individual, and introduce ‘a new element into the intellectual universe.’” Martha Woodmanse, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 291 (1992).

141. 17 U.S.C. § 102(a) (2000).

142. Apparently, this condition for copyright protection is derived from the constitutional requirement that Congress protect only “writings.” Under the Constitution, Congress is authorized to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Generally, the courts have taken the position that for a work to constitute a “writing,” it must be embodied in some tangible form. 1 NIMMER ON COPYRIGHT § 1.08.

knowledge.¹⁴³ In addition, the copyright statute's emphasis on individual rights is equally problematic since traditional knowledge focuses on communal rather than individual rights.¹⁴⁴ Furthermore, given the passage of traditional knowledge through generations of people in the community, identifying an author of the work for purposes of copyright protection can prove to be a daunting task. While an item of traditional knowledge may have resulted from the creative efforts of one individual, it eventually would have been acquired and used by the society at large¹⁴⁵ and gradually, with the passage of time, lost its individualistic traits.¹⁴⁶

Although the concept of "joint work" assures copyright protection to co-owners, it is not amenable to the protection of works of indigenous groups. Under the copyright statute, the term "joint work" refers to "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."¹⁴⁷ As applied to items of traditional knowledge, there is the obvious problem of identifying *all* indigenous people who may have contributed over the years to those forms of traditional knowledge. Moreover, since these indigenous contributors lived at various times during the development, modification and adaptation of the relevant item of traditional knowledge, it is clearly absurd to talk of them having an intent at one fixed point in time to create a joint product as required by the Copyright Act. Finally, to the extent the fixation requirement protects the form of the expression rather than the expression itself, it disqualifies categories of traditional knowledge¹⁴⁸ which for the

143. See Farley, *supra* note 58, at 22.

144. For instance, Ghanaian legislation defines folklore as "all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore." Copyright Law (Ghana) § 53 (Mar. 21, 1985), reprinted in 21 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 423, 435 (1985).

145. See Mamie Harmon, *Definitions of Folklore*, in FUNK AND WAGNALL'S STANDARD DICTIONARY OF FOLKLORE, 258-59 (Maria Leach ed., 1959) [hereinafter DICTIONARY OF FOLKLORE].

146. As has been noted, "all aspects of [traditional knowledge], probably originally the product of individuals, [we]re taken by the folk and put through a process of re-creation, which through constant variations and repetition become a group product." MacEdward Leach, *Definitions of Folklore*, in DICTIONARY OF FOLKLORE, *supra* note 145, at 261.

147. 17 U.S.C. § 101 (2000).

148. Although technically indigenous groups could seek to protect traditional knowledge by recording or otherwise reducing it into writing, that would constitute a marked departure from oral tradition as the principal method of transmitting knowledge and also as "the very essence of Native life." Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 195 (2000). For some forms of traditional knowledge such as languages, it would prove a daunting task to reduce them to writing. Even where this is possible in other cases, fixation could be fraught with undesirable consequences of translation,

most part are expressed orally and rarely are reduced to writing by traditional groups.

b. Patents

Under the Patent Act, inventions are patentable if they are novel, useful¹⁴⁹ and nonobvious.¹⁵⁰ The Act exempts from patent protection all products of nature, printed matter, mathematical formulae and business methods.¹⁵¹ Regarding the first requirement of novelty, it is provided that an invention must not have been “known or used by others”¹⁵² or “patented or described in a printed publication . . . more than one year prior to the date of the application for patent in the United States.”¹⁵³ Furthermore, a patent application is to be rejected where before the applicant’s “invention thereof, the invention was made in [the United States] by another inventor who had not abandoned, suppressed, or concealed it.”¹⁵⁴ The utility criterion requires the invention to be of some benefit qualitatively although no particular quantum of benefit is required.¹⁵⁵ Thus, knowledge itself is not patentable, but useful products and processes are.

With respect to the third requirement of nonobviousness, a patent application is to be rejected

if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.¹⁵⁶

interpretation and distortion. As Riley notes:

[M]any indigenous languages have never been recorded in print. This was often done to maintain the secrecy of the language’s vibrance as a means of insulating the group from increased prejudice and violence. Thus, unwritten Indian languages would have to be transcribed in a written form, then most likely, translated into the language of the colonizer.

In reality, many Native peoples reject the written model altogether, contending that the written form simply cannot capture the nuances of a spoken text. These stories often defy being “captured” in one form. Leaders in the American Indian Movement (“AIM”) have spoken out against the discrimination and “mainstreaming” of Indian cultures, arguing such practices diffuse and weaken ancient traditions.

Id. at 196-97.

149. Patent Act, 35 U.S.C. § 101 (1984).

150. *Id.* § 103.

151. *Id.* § 101.

152. *Id.* § 102.

153. *Id.*

154. *Id.*

155. See *Anderson v. Atah*, 480 F. 2d 1392, 1395 (C.C.P.A. 1973).

156. 35 U.S.C. § 103 (2000). In *Graham v. Deere Co.*, 383 U.S. 1, 17-18 (1966), the United States Supreme Court explained the standard for determining non-obviousness with reference to the

In addition, the exclusion based on the product of nature doctrine prohibits patents for discoveries except for new processes developed following such discovery.¹⁵⁷ Under the doctrine, unless “a product which is the subject of a patent application is substantially different from the product as found in nature, that is, unless it is in a form not found in nature and thus the product of human invention, the product is unpatentable.”¹⁵⁸

As they relate to the novelty requirement and for reasons noted earlier, the collective nature of traditional knowledge and its mode of transmission will frustrate efforts to identify an individual inventor who can claim to have first invented a particular indigenous product or process. Besides, the mere common knowledge and use of the invention by members of the indigenous group will invalidate it as a patent on grounds of “prior publication” and “public use.”¹⁵⁹ Furthermore, many types of traditional knowledge may not

prior art as follows:

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others [to make the invention], etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.

157. For example, in *Dennis v. Pitner*, 106 F.2d 142, 146 (7th Cir. 1939), the Court of Appeals for the Seventh Circuit held an insecticide not to be barred from protection as a product of nature where the insecticide was produced by grinding certain roots, dissolving the powdered matter in a solvent, and then filtering the solvent to remove the fibrous parts of the root, leaving a concentrated powdered extract. In that case, the court noted that the “discovery in the field of science of a new quality or phenomenon of an old product may be . . . the proper subject of a patent.”

In *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (1948), the United States Supreme Court denied patent protection for mixtures of several strains of *Rhizobia* on grounds that they constituted works of nature. At that time the strains were generally recognized as having an inoculant effect on certain plants but could only be packaged separately to avoid the inhibitory effect they had on each other. Discovering that certain strains were mutually non-inhibitive, the patentee mixed them together and sought patent protection for the mixtures. However, the Supreme Court disallowed the patent on the grounds that “patents cannot issue for the discovery of the phenomena of nature. . . . The qualities of these bacteria . . . are part of the storehouse of knowledge of all men.” *Id.* at 130 (citation omitted). While the Court observed that patent protection would be granted for new uses of products of nature, it held that the mixtures were not patentable because they had no new use beyond the prior art other than providing more convenient packaging.

158. LIBRARY OF CONGRESS, BIOTECHNOLOGY, INDIGENOUS PEOPLES, AND INTELLECTUAL PROPERTY RIGHTS 48 (1993).

159. Interestingly, while the requirement of novelty operates to bar patent protection of traditional knowledge, it could be used by the indigenous communities to bar others from obtaining patents in aspects of traditional knowledge. Thus, in the *Dennis v. Pitner* case, the court invalidated a patent for the use of powdered root because of prior study of the root by scientists, and its use by Chinese gardeners as an insecticide, and by the inhabitants of Peru for fishing. See generally *Dennis v. Pitner*, 106 F.2d 142.

pass muster under the tests of utility that incorporate western, but not traditional, standards.¹⁶⁰ Moreover, the product of nature doctrine is also problematic to the extent it suggests that the use by indigenous people of items of traditional knowledge in their natural state alone is not sufficient for purposes of patent protection.¹⁶¹ Since indigenous people may find it difficult to come up with new uses for aspects of traditional knowledge, they are not likely to be given patents for much of their traditional knowledge which as products of nature will continue to fall outside the realm of patentable inventions.

c. Trademarks

The Lanham Act provides that “[n]o trademark by which the goods of the applicant *may be distinguished* from the goods of others shall be refused registration.”¹⁶² In this context, a trademark must be distinctive to serve its function of identifying the origin of goods and thereby avoid confusion, deception or mistake. For some types of traditional knowledge, such as art and craft, it may be possible to label them with marks that qualify for registration under the trademark statute and thereby distinguish them as coming from a particular indigenous group. Indeed, the certification procedure established under the Native American Arts and Crafts Act¹⁶³ assumes the feasibility of distinguishing genuine and authentic creations of indigenous communities from other products that may be falsely represented as Indian made. In this sense, trademark protection for Native American goods could help solve problems of misrepresentation regarding indigenous products, although it may not be of practical economic benefit to indigenous communities in the absence of strong proof that consumers will refuse to buy fake products in preference for trademarked indigenous goods.

160. To the extent they are commercially useful, biological resources of traditional communities could satisfy the utility requirement under U.S. law. Gelvina Rodriguez Stevenson, Note, *Trade Secrets: The Secret to Protecting Indigenous Ethnobiological (Medicinal) Knowledge*, 32 N.Y.U. J. INT'L L. & POL. 1119, 1143 (2000). For instance, traditional knowledge used in the development of pharmaceutical products and processes later patented could be said to have proven utility. *Id.* at 1144. But this may not be true for other types of traditional knowledge, such as rituals and potions which may not have captured the same degree of interest from biotechnology companies and scientists. *Id.* at 1143. While indigenous peoples no doubt consider traditional knowledge to be very useful, their views are generally not taken into account to the extent the determination of utility by the patent office is guided by western standards. *Id.*

161. Under the doctrine, alterations of the plant by boiling or other processing to produce a medicinal substance could improve its chances of protection, as the resulting product could then be recognized as a new composition obtained from a product of nature using knowledge of the laws of nature.

162. 15 U.S.C. § 1052 (2000) (emphasis added).

163. 35 U.S.C. § 305 (2000).

d. Duration and Costs

In addition to the specific problems discussed above, the following more general problems regarding duration and costs should be noted. To begin with, intellectual property law offers protection for limited periods only. The general copyright term is seventy years after the death of the author,¹⁶⁴ and twenty years for patents,¹⁶⁵ while trademarks are subject to renewable ten year terms.¹⁶⁶ It will be difficult to protect traditional knowledge under these statutory periods not only because of the problem of identifying an author by whose life the relevant term would be measured, but, more fundamentally, the reality that such finite periods are ill-suited for traditional knowledge. As a rule, this knowledge has been passed down for centuries through generations, and is therefore of unlimited duration. Moreover, intellectual property rights are expensive to obtain and the costs of enforcement are high as well. Long and costly administrative and judicial procedures would render the intellectual property rights option unattractive for many indigenous people.¹⁶⁷

B. Freedom of Religion and Free Speech

1. Free Exercise Clause

The First Amendment of the U.S. Constitution forbids Congress from making laws “respecting an establishment of religion, or *prohibiting the free exercise thereof*.”¹⁶⁸ The latter part of this provision, often referred to as the Free Exercise Clause, has been invoked frequently by Native Americans in an effort to protect various cultural interests¹⁶⁹ including access to sacred sites,¹⁷⁰ use of peyote,¹⁷¹ use of protected species for religious purposes,¹⁷²

164. 17 U.S.C. § 302(a) (2000).

165. 35 U.S.C. § 154(a)(2) (2000).

166. *Id.* § 1059.

167. For example, the average cost of about \$20,000 in the U.S. to prepare and prosecute a patent application, including legal and filing fees, is well beyond the means of many local communities. UNCTAD/ICTSD, INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT: POLICY DISCUSSION PAPER 53 (2001) [hereinafter INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT].

168. U.S. CONST. amend. I (emphasis added).

169. *See generally* Sharon L. O'Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451 (1995).

170. *See, e.g.*, *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (refusing to protect sacred site from adverse effects of dam construction because the court found the government's compelling interest in the federal land construction to be superior to Native Americans' interests).

171. *See, e.g.*, *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir.

and prisoners' rights to engage in religious practices.¹⁷³ To succeed in an action based on the Free Exercise Clause of the First Amendment, however, Native American plaintiffs must establish: first, that the restricted practice is religious in nature; second, that the challenged government action burdens the practice; and third, that there is no compelling government interest justifying the action.¹⁷⁴ The need to demonstrate that the practice allegedly burdened is central or indispensable to their religion¹⁷⁵ has proven to be particularly troubling for the Native American litigants to the extent the courts tended to apply the test in a discriminatory manner¹⁷⁶ and ignored the holistic philosophy of native practices where religion, culture, spirituality, history, and tradition are all intertwined.

One area where this disconnect is readily apparent has been the failure of the courts to appreciate the inextricable link between land and native religion.¹⁷⁷ For example, in *Sequoyah v. Tennessee Valley Authority*,¹⁷⁸ the

1991). See generally Ann E. Beeson, *Dances with Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121 (1992); John Thomas Bannon, Jr., *The Legality of the Religious Use of Peyote by the Native American Church: A Commentary on the Free exercise, Equal Protection, and Establishment Issues Raised by the Peyote Way Church of God Case*, 22 AM. INDIAN L. REV. 475 (1998).

172. See, e.g., *United States v. Dion*, 762 F.2d 674, 679-80 (8th Cir. 1985); *United States v. Top Sky*, 547 F.2d 483, 488 (9th Cir. 1976) (per curiam); *United States v. Abeyta*, 632 F. Supp. 1301, 1307 (D.N.M. 1986).

173. See *Pollock v. Marshall*, 845 F.2d 656 (6th Cir. 1988).

174. See *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

175. See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 208 (1995).

176. Regarding inconsistent application of the standards, it has been noted that:

In the sacred-site cases however, the substantial burden standard was heightened. Courts required Native Americans to come forward with factual proof that the sites were *central* and *indispensable* to their religions, that is, that their religions would not be practiced without them. However, as applied to Western religions, the centrality test had been rejected and claimants were protected from even indirect burdens on their religious practices.

Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1313 (1996).

177. One commentator explains the significance of land to the religious concepts of tribal communities as follows:

Traditional Native American religious practices are inseparably bound to natural land formations. According to Native Americans, spirits, which function as the medium between Native Americans and the Great Spirit, dwell within natural resources. Native Americans consider sites where spirits most often reveal themselves to be sacred and, for this reason, utilize the sites for religious ceremonies.

The efficacy of Native American worship depends on the physical conditions of a sacred site's natural environment. Acts such as logging trees, altering the terrain, building new roads, and the presence of tourists and vandals damage the sacred nature of a site and negatively impact the Native American religion. Accordingly, the destruction or degrading of sacred ground is believed to cause the death and disappearance of spirits.

Once the sacred site is destroyed, there is no alternate place of worship because a different sacred site cannot be substituted.

Shawna Lee, Note, *Government Managed Shrines: Protection of Native American Sacred Site*

Sixth Circuit rejected a First Amendment claim by members of the Cherokee Indian Nation¹⁷⁹ to enjoin completion of the Tellico Dam on the Little Tennessee River on grounds that the dam would flood their “sacred homeland” and destroy “sacred sites, medicine gathering sites, holy places and cemeteries, [and] will disturb the sacred balance of the land.”¹⁸⁰ The Sixth Circuit determined the claims not to be protected under the First Amendment because they related to “cultural history and tradition” rather than religion.¹⁸¹ Similarly, in *Lyng v. Northwest Indian Cemetery Protective Ass’n*,¹⁸² after noting that the First Amendment only protected against government actions which coerce an individual into violating religious beliefs, the Supreme Court went on to hold that a Forest Service timber harvest project, which damaged tribal sacred sites and would “virtually destroy the . . . Indians’ ability to practice their religion,” could go forward because it did not punish the Indians for practicing their religion.¹⁸³

Worship, 35 VAL. U. L. REV. 265, 267-68 (2000).

178. 620 F.2d 1159 (6th Cir. 1980).

179. The plaintiffs stated their claim of a constitutional violation based on the Free Exercise clause as follows: “[T]he individual named Plaintiffs will suffer injury by the infringement of their right to worship the religion of their choice in the manner of their choosing by the destruction of sites which they hold in reverence and in denial of access to such sites by the Defendant.” *Id.* at 1160.

180. *Id.*

181. In the words of the court,

When the affidavits are . . . “indulgently treated” . . . at most they establish a feeling by the individual affiants that the general location of the dam and impoundment has a religious significance which will be destroyed by the flooding. The claim of centrality of the Valley to the practice of the traditional Cherokee religion, as required by *Yoder*, *Woody* and *Frank*, is missing from this case. The overwhelming concern of the affiants appears to be related to the historical beginnings of the Cherokees and their cultural development. It is damage to tribal and family folklore and traditions, more than particular religious observances, which appears to be at stake. The complaint asserts an “irreversible loss to the culture and history of the plaintiffs.” Though cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment.

Id. at 1164-65 (citation omitted).

182. 485 U.S. 439 (1988).

183. In that case, various organizations and individuals had contested the Forest Service’s plans to permit timber harvesting and road construction in part of a national forest that traditionally was used by Native Americans for religious rituals that depend upon privacy, silence, and an undisturbed natural setting. The plaintiffs had argued that

disruption of the natural environment caused by the [road construction would] diminish the sacredness of the area in question and create distractions that will interfere with “training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . as integrated parts of a system of religious belie[f]s and practice which correlates ascending degrees of personal power with a geographic hierarchy of power.”

Id. at 448.

2. The Establishment Clause

The First Amendment of the U.S. Constitution also contains the Establishment Clause,¹⁸⁴ which prohibits the government from designating a national or state church or giving preference to a particular religion or to religion in general. Although aimed at ensuring the equality of all religions and the freedom of each citizen from government imposed religion, the Establishment Clause does not require total separation of the government and permits governmental action designed to accommodate the public religious needs of citizens.¹⁸⁵ Under the test articulated in *Lemon v. Kurtzman*,¹⁸⁶ “a government action violates the Establishment Clause unless (1) it has a secular purpose; (2) its principal effect neither advances nor inhibits religion; and (3) it does not foster an ‘excessive government entanglement with religion.’”¹⁸⁷

However, despite acknowledging the harmful effects of the timber harvest and road construction, the Supreme Court went on to hold that the relief sought was unavailable under the Constitution:

Even if we assume that [road construction] will “virtually destroy the . . . Indians’ ability to practice their religion,” the Constitution simply does not provide a principle that could justify upholding respondents’ legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.

Id. at 451-52 (citations omitted).

184. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend I.

185. Thus, in the early case of *Zorach v. Clauson*, 343 U.S. 306 (1952), it was held that the government had to respect the religious nature of citizens and to accommodate their public needs. More recently, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O’Connor, J., concurring), the Supreme Court mandated the accommodation of religious practices so long as it did not impose an undue hardship.

186. 403 U.S. 602 (1971).

187. Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV’T L 19, 21 (1997) (quoting *Lemon*, 403 U.S. at 613). The requirement of a “secular purpose” under the first prong can be satisfied by government policies which seek to serve the goal of accommodation. The second prong, the so-called “coercion test,” is concerned with “whether or not the accommodation [of religion] has the effect of coercing persons into conforming their practices with those of a particular religion.” *Id.* Applying the coercion test, the Supreme Court has found a prayer read by a chaplain at the beginning of a state legislature session not to violate the Establishment Clause, *Marsh v. Chambers*, 463 U.S. 783, 786-95 (1983), but found a violation in connection with prayer read at a state-sponsored high school graduation ceremony. *Lee v. Weisman*, 505 U.S. 577, 596-99 (1992).

The third approach, the so-called “endorsement test,” is said to proscribe government actions

Native Americans have invoked the Establishment Clause to defend governmental policies that positively impact indigenous religious practices. This use of the Establishment Clause is illustrated by the procedural history in *Bear Lodge Multiple Use Ass'n v. Babbitt*,¹⁸⁸ where a federal district court rejected a challenge by professional climbers of a June voluntary ban imposed under a National Park Service Final Climbing Management Plan ("FCMP") out of deference to Native American religious practices.¹⁸⁹ However, like the Exercise Clause, reliance by Native Americans on the Establishment Clause to protect their religious practices has also proved to be quite a challenge, particularly with respect to the standard of neutrality which is noted to be "difficult . . . to adhere to when the accommodation is for specific Indian sacred sites and practices on federal land."¹⁹⁰

which send messages "to nonadherents that they are outsiders," and "to adherents that they are insiders." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). Aimed at limiting government support of religions, the third prong has been interpreted to invalidate "only those governmental acts that actively promote or advantage particular religious organizations or politically privilege a particular set of religious beliefs." *Cross & Brenneman*, *supra* note 36, at 33 (1997).

188. 2 F. Supp. 2d 1448 (D. Wyo. 1998).

189. The district court determined the ban to be an accommodation with a secular purpose. *Id.* at 1455. Although the court found the objective of the FCMP to be the removal of barriers to the Native Americans' right to worship given that their sacred land was on government property, and that the purpose of the plan was therefore related to religion, it held nevertheless that the real purpose of the ban was to accommodate rather than advance or promote religion. *Id.* at 1454-55.

On appeal, the Tenth Circuit dismissed the professional climbers' challenge on grounds that the appellants suffered no injury in fact and therefore lacked standing. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F. 3d 814, 822 (10th Cir. 1999). The Tenth Circuit case is very important because it recognized the significance of native sacred sites and endorsed the application of the accommodation principle to Native American claims. For example, at the beginning of its opinion, the Circuit Court referred to Devil Tower as "the place of creation and religious practice for many American Indians." *Id.* at 815. It noted further that the Tower was a "'sacred site' to indigenous peoples of the northern plains who travel to the monument to perform 'traditional cultural activities' [However in] recent years, the Tower has been increasingly used by recreational and commercial rock climbers. Devils' Tower, therefore, implicates interests of several American Indian tribes" *Id.* at 816. Later, the court also referred to the Tower as "central to [the Indians'] etiological explanation of the universe" and its prominence "in other religiously relevant traditional stories of the Sioux [Indian tribe], as well in the cosmology of numerous other northern plains tribes." *Id.* Furthermore, the court noted the importance of the Tower as a pilgrimage site where important liturgical functions are performed, including Sun Dances and Vision Quests. It pointed out that:

The Sun Dance is a group ceremony of fasting and sacrifice which leads to spiritual renewal of the individual and group as a whole. Sun Dances are performed around the summer solstice. Vision Quests are intense periods of prayer, fasting, sweat lodge purification, and solitude designed to connect with the spiritual world and gain insight. Sun Dances and Vision Quests, as well as individualized prayer offerings and sweat lodge ceremonies, require solemnity and solitude.

Id.

Significantly, certiorari to the Supreme Court was denied in March 2000, further enhancing the precedential value of the case. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 529 U.S. 1037 (2000).

190. Grimm, *supra* note 187, at 21.

3. Freedom of Religion

To clarify the scope of the constitutional right of Native Americans to practice their religion, Congress passed the American Indian Religious Freedom Act¹⁹¹ (“AIRFA”) in 1978 to

protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.¹⁹²

Hoping to use the statute to improve their religious interests in land and related resources, Native Americans have brought lawsuits under AIRFA to tackle matters as diverse as water quality standards,¹⁹³ access to religious sites,¹⁹⁴ mining of uranium on sacred lands,¹⁹⁵ development of ski resorts on sacred lands,¹⁹⁶ and restrictions of tourist traffic levels on sacred lands.¹⁹⁷

These efforts, for the most part, failed, with courts frequently taking the position that the AIRFA created no independent cause of action, but merely recommended consultations between Indian leaders and federal agencies where proposed government projects could impact religious practices.¹⁹⁸ For example, affirming the view of the lower courts, the Supreme Court in 1988 stated quite categorically in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, that “[n]owhere in [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.”¹⁹⁹ As further noted in *Conservation Law Foundation v. Federal Energy Regulatory Commission*,²⁰⁰ under AIRFA, “[f]ederal agencies are to consider, ‘but not necessarily to defer to, Indian religious values.’”²⁰¹ Thus, contrary to stated broad policy, AIRFA has not been applied in a manner conducive to an effective protection of Indian religious practices.

191. 42 U.S.C. § 1996 (1978).

192. *Id.*

193. *See City of Albuquerque v. Browner*, 97 F.3d 415, 428 (10th Cir. 1996).

194. *Attakai v. United States*, 746 F. Supp. 1395, 1403-05 (D. Ariz. 1990).

195. *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1487 (D. Ariz. 1990).

196. *Wilson v. Block*, 708 F.2d 735, 745 (D.C. Cir. 1983).

197. *Badoni v. Higginson*, 638 F.2d 172, 180 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

198. *See, e.g., Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir. 1991).

199. 485 U.S. 439, 455 (1988).

200. 216 F.3d 41, 50 (D.C. Cir. 2000). It was held in this case that the Federal Energy Regulatory Commission (FERC) did not violate AIRFA when it chose not to increase stream flows that may have enabled tribal members of the Penobscot Indian Nation to access religious sites by canoe. *Id.*

201. *Id.* at 50 (citing *Wilson v. Block*, 708 F.2d 735, 747 (D.C. Cir. 1983)).

4. Trademark Law and Free Speech

Section 2(a) of the Lanham Act provides that a mark is to be refused registration if it “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute”²⁰² In their bid to curb the widespread commercial use of Indian imagery,²⁰³ Native Americans have filed lawsuits under this provision seeking to revoke registration of marks considered to be offensive, derogatory, and racially discriminatory.²⁰⁴ Typically, the defendants in these trademark actions opposed the relief sought on the ground, *inter alia*, that trademarks are constitutionally protected free speech²⁰⁵ which could not be revoked as urged by the Native American activists.²⁰⁶ While the U.S. Supreme Court has held trademarks to constitute commercial speech²⁰⁷ entitled only to limited protection under the First Amendment,²⁰⁸ no court has addressed substantively the constitutionality of Section 2(a) of the Lanham Act.²⁰⁹ In trademark actions

202. 15 U.S.C. § 1052(a) (2000).

203. Paul E. Loving, *Native American Team Names in Athletics: It's Time to Trade These Marks*, 13 LOY. L.A. ENT. L. REV. 1, 14-16 (1992); Kristin E. Berendt, *Cancellation of the Washington Redskins' Federal Trademark Registrations: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism?*, 10 SETON HALL J. SPORT L. 389, 392-98 (2000).

204. For example, in 1992 a group of Native Americans filed a petition before the Trademark Trial and Appeal Board of the Patent and Trademark Office to cancel the federal registration of the Washington Redskins trademark, and related trademarks registered in favor of Pro Football, Inc. The group argued that the term “Redskins” is a “pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for a Native American person.” *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999), *rev'd by Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 145 (D.D.C. 2003), *aff'd*, 415 F.3d 44 (D.C. Cir. 2005).

205. The First Amendment provides in relevant part, “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

206. *Harjo*, 50 U.S.P.Q.2d 1705.

207. *Friedman v. Rogers*, 440 U.S. 1, 11-13 (1979), *reh'g denied*, 441 U.S. 917 (1979).

208. *Id.* at 12-13.

209. In *Harjo*, because the Board declined on jurisdictional grounds to rule on the issue, an opportunity was lost to pronounce on the constitutionality of the section. The only case known to have tackled the issue regarding the constitutionality of Section 2(a) was *In re McGinley*, 660 F.2d 481, 482 (C.C.P.A. 1981), where the Trademark Board refused registration of a mark comprised of a photograph of a nude man and woman kissing and embracing in a manner appearing to expose the male genitalia. On appeal, the Court of Customs and Patent Appeals rejected the applicant's argument that his First Amendment rights had been violated. *Id.* at 484. In the words of the court:

With respect to appellant's First Amendment rights, it is clear that the PTO's refusal to register appellant's mark does not affect his right to use it. No conduct is proscribed and no tangible form of expression is suppressed. Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark.

Id. at 484 (citations omitted).

involving use of Native American indigenous knowledge the courts have tended to sidestep the constitutional arguments and ruled against Native Americans on alternate grounds of laches and failure to prove disparagement.²¹⁰

However, there are two general approaches against which scholars have examined the constitutionality of Section 2(a): the commercial speech balancing test and the unconstitutional conditions test. The commercial speech balancing approach requires *inter alia*, that the government establish a substantial interest in regulating free speech to survive a constitutional challenge.²¹¹ In support of Native American claims, some commentators have argued that the denial of trademark registration reflects a substantial interest of the government in not stamping its approval or providing for funding for the registration of trademarks deemed to be disparaging of

The *McGinley* decision has been criticized by commentators who have decried the court's omission to "expound upon its conclusion." Bruce C. Kelber, "Scalping the Redskins:" *Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?*, 17 *HAMLIN L. REV.* 533, 556 (1994). Such omission, it is argued, relegates the decision to a blind precedent that does little to establish conclusively that discouraging owners from using scandalous, immoral, or disparaging trademarks impinges upon First Amendment guarantees. Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 *TRADEMARK REP.* 661, 684-87 (1993). On a more substantive note, it is also observed:

The court in *McGinley* held that because the denial of registration of the applicant's mark will not affect its use there could be no First Amendment violation. However, it is a well-established principle of First Amendment jurisprudence that speech does not have to be proscribed, but merely abridged, or sufficiently chilled, in order for there to be a violation. "[A]n 'abridgment' may result from regulations that do not 'ban,' 'forbid,' or 'prohibit.' Instead, an 'abridgment' may result from regulations that merely 'restrict,' 'limit,' 'impinge, or burden.' Therefore, the analysis in *McGinley* is flawed, and cannot be determinative of whether section 2(a) of the Lanham Act violates the First Amendment."

Michelle B. Lee, *Section 2(A) of the Lanham Act as a Restriction on Sports Team Names: Has Political Correctness Gone Too Far?*, 4 *SPORTS L.J.* 65, 66-67 (1997). Therefore, the *McGinley* case does not provide a clear authoritative ruling on the constitutionality of Section 2(a).

210. After considering the evidence presented at trial, the Trademark and Trial Appeal Board on April 2, 1999 ordered the cancellation of the Redskin trademark on the grounds that it disparaged Native Americans. *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705, 1749 (T.T.A.B. 1999). However, the Board's decision was reversed four years later by the U.S. District Court which held the Board's finding of disparagement not to be supported by the evidence and further, that the suit was barred by laches. *Pro-Football Inc. v. Harjo*, 284 F. Supp. 2d 96, 145 (D.D.C. 2003). On appeal by the petitioners, the Court of Appeal in April 2005 remanded the case back to the District Court on the issue of laches. *Pro-Football Inc. v. Harjo*, 415 F.3d 44, 50 (D.C. Cir. 2005). In its ruling the Court of Appeal noted that the defense of laches had to be assessed to one individual petitioner, and could not be assessed from time that first mark was registered where petitioner had not yet reached the age of majority at time of registration. *Id.*

211. The courts have developed a four-part balancing test for determining when commercial speech would generally be protected under the First Amendment. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). First, the speech must concern lawful activity and not be misleading. *Id.* Second, the government must establish a substantial interest in regulating the speech. *Id.* Third, the regulation must directly advance the governmental interest asserted and fourth, the regulation must be no more extensive than necessary to serve the interest asserted. *Id.*

certain groups.²¹² Substantial interests can also be found in the government's desire to avoid encouraging offensive speech by granting exclusive ownership rights,²¹³ or in the government's duty to protect health, safety and the welfare of the public.²¹⁴ A variant of the public health and welfare interest in denying registration is related to the government's interest in ensuring the cultural survival of Native Americans to the extent that the undue exploitation of Native American symbols and mythology for products and sports teams would relegate Native Americans to the status of vanquished people and a vanished culture.²¹⁵

Opponents discount these alleged governmental interests, pointing to explicit statements by the courts that granting registration of a trademark is not the same as the government's stamp of approval.²¹⁶ On the matter of funding, it is also pointed out that registration is not funded by the government but rather by trademark holders.²¹⁷ Besides, to the extent every government administrative action involves spending of funds, an interest in prohibiting the use of public funds becomes unconvincing since it could be used as justification for nearly every type of government regulation.²¹⁸ Similarly, the concerns about encouraging exclusive ownership and also of protecting the public health and welfare have been dismissed as circular²¹⁹ and weak,²²⁰ respectively.

212. Baird, *supra* note 209, at 674.

213. Stephen R. Baird, *Review of the 1999 Trademark Decisions of the United States Court of Appeals for the Federal Circuit*, 49 AM. U. L. REV. 1321, 1334 (2000).

214. *Id.*

215. Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols* 29 COLUM. HUM. RTS L. REV. 355, 372 (1988).

216. *See, e.g., In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d 1216, 1220 n.3 (T.T.A.B. 1993).

217. *See* 37 C.F.R. § 2.206 (2005).

218. Jeffrey Lefstin, *Does the First Amendment Bar Cancellation of Redskins?*, 52 STAN. L. REV. 665 (2000).

219. Lefstin notes:

[The government interest in] prohibiting offensive marks from being the subject of exclusive ownership, is obscure. There is no apparent reason why offensive marks are less suitable for exclusive ownership than others; to the extent that exclusive ownership restricts use of the mark in commerce, government might want to promote exclusive ownership. Moreover, denial of exclusive ownership is merely the effect of the challenged statute, section 2(a) of the Lanham Act. A statute cannot be justified solely by asserting its effect as an important government interest. As the Supreme Court noted in *Simon & Schuster*: . . .

If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored. . . . [S]uch an argument "eliminates the entire inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech. . . . Allowing the government to assert "denial of exclusive ownership" as an interest supporting section 2(a) would

With respect to the unconstitutional conditions approach, the second basis for attacking the Lanham Act, “the federal government may not make the granting of a benefit contingent on the waiving of a constitutional privilege.”²²¹ With reference to free speech, the Supreme Court has offered the following guideline as to when the doctrine is applicable:

[E]ven though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”²²²

Proponents of the view that Section 2(a) of the Lanham Act does not violate the unconstitutional conditions doctrine point out that while the statutory provision places restrictions on a potential applicant from registering certain marks, federal registration is not a required condition for use of the marks in commerce. They argue for instance, that trademark use is not conditional upon registration, noting that by enacting Section 2(a), Congress merely placed conditions “on a governmental program (system of trademark registration), not the would-be recipient (trademark applicant) of the program benefit (trademark registration)” who is “free to engage in the protected conduct (adopting and using scandalous, immoral, and disparaging trademarks).”²²³ In contrast, others have argued that while the denial of registration of a trademark does not preclude use outright, such denial “interferes with and discourages use of a mark to such an extent that it is

similarly eviscerate meaningful review under *Central Hudson*’s second and third prongs. *Id.* at 685 (citing *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 785 (2d Cir. 1990) (Newman, J., dissenting)).

220. Lefstin finds this to be a “noble goal,” but reiterates that “something more specific is required to survive First Amendment scrutiny.” *Id.* at 686.

221. Dougherty, *supra* note 215, at 384.

222. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Elaborating on this doctrine in *Rust v. Sullivan*, the Supreme Court noted the test to involve situations where the “[g]overnment has placed a condition on the recipient of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.” 500 U.S. 173, 197 (1991).

223. Baird, *supra* note 209, at 695.

clearly a violation of the First Amendment.”²²⁴ These negative consequences, evident even from the intent of parties seeking to cancel the registration of trademarks,²²⁵ are said to include the loss of significant federal benefits.²²⁶

Therefore, it emerges from the above analysis of the pertinent constitutional issues that plausible arguments could be made under either the unconstitutional conditions or commercial speech balancing tests to either support or reject the free speech arguments raised in the context of the Lanham Act. Given these mixed reviews, it is still unclear how far constitutional arguments based on free speech may limit the usefulness of Section 2(a) as an ally in the battle against unauthorized uses of Native American names.

IV. PART THREE: UNITED STATES INTERNATIONAL POLICY ON TRADITIONAL KNOWLEDGE

A. *International Obligations*

The United States has ratified the Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Diversity of Cultural Property of 1970 (“Illicit Trade Convention”),²²⁷ the Convention Concerning the Protection of the World Cultural and Natural Heritage²²⁸

224. Lee, *supra* note 209, at 70.

225. As Lee notes,

The individuals who argue for the cancellation of the registration of team names have said they want the registrations canceled so that the value of the trademarks will be so dramatically reduced that the owners will voluntarily cancel the marks. Their own statements blatantly recognize that even though cancellation of the registration of these marks does not directly prohibit use, the cancellation is specifically intended to discourage use, and that is an infringement.

Id. at 68-69.

226. The relevant federal benefits

include nationwide constructive notice, which allows a mark owner to enforce his mark anywhere in the country regardless of how extensive or limited his use has been. It also provides original jurisdiction in federal courts, prima facie evidence of the validity of a mark, and incontestability of the mark once it has been registered for five years, but only under particular circumstances.

Id. at 69.

227. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Apr. 24, 1972, 823 U.N.T.S. 231 [hereinafter *Illicit Trade Convention*].

228. UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), available at http://whc.unesco.org/world_he.htm.

("World Heritage Convention"), as well as the World Intellectual Property Organization's ("WIPO's") Performances and Phonograms Treaty ("WPPT"). However, it has not ratified other important international instruments relevant to the protection of traditional knowledge, including the Convention on Biological Diversity ("CBD"),²²⁹ the International Treaty on Plant Genetic Resources for Food and Agriculture ("FAO Treaty"),²³⁰ and the Convention for the Safeguarding of Intangible Cultural Heritage.²³¹ Neither is the U.S. a party to the main regional instrument for the protection of cultural heritage adopted by the Organization of American States, the Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations.²³²

229. Convention on Biological Diversity art. 16(2), June 5, 1992, 1993 U.N.T.S. 143 [hereinafter CBD]. The CBD, which was adopted under the auspices of the United Nations Environmental Programme in 1992, requires signatory parties to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Id. art. 8(j). Article 15 recognizes "the sovereign right of States over their natural resources," and provides that "the authority to determine access to genetic resources rests with the national governments." *Id.* art. 15. Furthermore, it stipulates that access be on "mutually agreed terms" and "subject to the prior informed consent of the party providing the resource, unless otherwise determined by that party." *Id.* The CBD also calls upon parties to share, in a fair and equitable way, the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the party providing the resources. *Id.*

230. International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, <http://www.fao.org/Legal/treaties/033t-e.htm> [hereinafter FAO Treaty]. The FAO Treaty, adopted by the Food and Agriculture Organization in November 2001, is concerned with the conservation and sustainable use of plant genetic resources for food and agriculture and calls on signatories to support farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources. *Id.* art. 5. The FAO Treaty provides for the promotion of farmers rights in recognition of the enormous contribution of farmers to the conservation and development of plant genetic resources and in particular, affirms the rights of farmers to save, use, exchange and sell farm-saved seed/propagating material. *Id.* Regrettably, responsibility for realizing Farmers' Rights is imposed solely on national governments who are to protect such rights "in accordance with their needs and priorities" and subject to national legislation. *Id.* art. 9.

The FAO Treaty establishes a multilateral system to facilitate access to plant genetic resources under clearly specified conditions with benefits accruing from such access to be shared fairly and equitably through "exchange of information, access to and transfer of technology, capacity-building, and the sharing of [the monetary benefits] and . . . other benefits arising from commercialization." *Id.* art. 13-14. Resources subject to the multilateral system are identified in a list annexed to the Convention which is subject to periodic review. *See id.* art 12.

231. *See* Convention for the Safeguarding of Intangible Cultural Heritage, Oct. 16, 2003, <http://unesdoc.unesco.org/images/0013/001321/132141e.pdf#page=16> (last visited March 30, 2006).

232. Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, O.A.S.T.S. No. 47 [hereinafter San Salvador Convention]. In June 16, 1976, the Organization of American States adopted the San Salvador Convention "to prevent illegal exports or imports of cultural property; and promote cooperation among the American states for mutual awareness and appreciation of their cultural heritage." *Id.* art 1. It is illegal under the San Salvador Convention to import or export cultural property except where

The Illicit Trade Convention was adopted in 1970 in recognition of the importance of cultural property as “one of the basic elements of civilization and national culture,” which makes it “incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export.”²³³ Cultural property is defined under the convention as “property which on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to [certain] categories.”²³⁴ To ensure the protection of such property against

authorized by the state for the purpose of promoting national culture. *Id.* art. 3. Measures to curb unlawful trade in cultural property at the domestic level include registration of collections, transfers, and transactions involving cultural property, as well as the banning of imported cultural property with regards to which proper certificate or authorization has not been issued or authorized. *Id.* art. 7.

The San Salvador Convention also provides procedures for the return of illegally exported cultural objects. *Id.* art. 11. Significantly, the costs of returning the items are borne initially by the state petitioned without prejudice to its right to seek reimbursement. *Id.* art. 12. In general, states are prohibited from assessing taxes or charges on returned items, but where necessary, can seek the extradition of persons responsible for crimes arising from illegal imports or exports or for crimes against the integrity of cultural property. *Id.* art. 13-14.

To fulfill their treaty obligations, member states are urged to adopt suitable legislation, create inventories, establish museums, and protect archaeological sites. *Id.* art. 8. In addition, they are required to cooperate in the promotion of their cultural values by exchanging information on cultural property, archeological excavations and discoveries. *Id.* art. 15. Furthermore, they are to refrain from seizing as part of legal proceedings “[a]rticles on loan to museums, exhibitions, or scientific institutions that are outside the state to whose cultural heritage they belong.” *Id.* art. 16.

233. Illicit Trade Convention, *supra* note 227, at pmb1.

234. *Id.* art. 1. These categories include:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as: . . . pictures, paintings and drawings produced entirely by hand . . . , works of statuary art and sculpture . . . , engravings, prints and lithographs . . . ; original artistic assemblages and montages . . . ;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

Id.

illicit import, export and transfer of ownership, contracting states are obligated to set up appropriate national services,²³⁵ require export certificates,²³⁶ and prevent the acquisition by museums of illegally imported property.²³⁷ They are also to prohibit the importation of stolen property,²³⁸ and at the request of the country from which the property was removed, “take appropriate steps to recover and return” the property.²³⁹ The convention envisages international cooperation in tackling the problems posed by illicit trade in cultural property.²⁴⁰

Although the U.S. has ratified the Illicit Trade Convention, it has not fully implemented Article 6 of the convention requiring signatories to enforce restrictions on cultural property imposed by the other signatories.²⁴¹ The U.S. has limited its application of the article to cases where there were bilateral agreements to enforce such restrictions, and also “to cases of emergency where looting had reached crisis proportions.”²⁴² Besides the narrow scope of its implementation in the U.S., other more general criticisms of the domestic application of the Illicit Trade Convention include its narrow definition of cultural property,²⁴³ and disregard for ethnic origins in making or evaluating restitution claims.²⁴⁴

235. *Id.* art. 5. The functions of the national services include:

- (a) contributing to the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property;
- (b) establishing and keeping up to date, on the basis of a national inventory of protected property, a list of important public and private cultural property whose export would constitute an appreciable impoverishment of the national cultural heritage;
- (c) promoting the development or the establishment of scientific and technical institutions (museums, Libraries, archives, laboratories, workshops . . .) required to ensure the preservation and presentation of cultural property;
- (d) organizing the supervision of archaeological excavations, ensuring the preservation “in situ” of certain cultural property, and protecting certain areas reserved for future archaeological research;
- (e) establishing, for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention; and taking steps to ensure the observance of those rules;
- (f) taking educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention;
- (g) seeing that appropriate publicity is given to the disappearance of any items of cultural property.

Id.

236. *Id.* art. 6.

237. *Id.* art. 7(a).

238. *Id.* art. 7(b)(i).

239. *Id.* art. 7(b)(ii).

240. *Id.* art. 9.

241. These restrictions include the denial of entry of cultural property exported from signatory nations without proof of certificates permitting such exportation. *See id.* art. 6.

242. Andrea Cuning, *U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property and Destructive Aspects of Retention Schemes*, 26 HOUS. J. INT’L L. 449, 452-53 (2004).

243. *Id.* at 464. The definition of cultural property in the Convention includes objects valuable for

The World Heritage Convention, the other major United Nations Educational, Scientific and Cultural Organization (“UNESCO”) convention ratified by the U.S., was adopted in 1972 to encourage international cooperation for the protection of the cultural and natural heritage of mankind.²⁴⁵ Subject matter included within the scope of the World Heritage Convention as *cultural heritage* are monuments,²⁴⁶ groups of buildings²⁴⁷ and sites,²⁴⁸ and as *natural heritage*, certain natural features,²⁴⁹ geological and physiographical formations areas²⁵⁰ and natural sites.²⁵¹ Under the World Heritage Convention, each contracting state is primarily responsible for identifying, protecting, conserving and transmitting to future generations the cultural and natural heritage found within its territory.²⁵² To this end, the state must apply “the utmost of its own resources and, where appropriate, [seek] international assistance and co-operation, [including] financial, artistic, scientific and technical [assistance]”²⁵³ The state is also

several reasons (most frequently their antiquity), but not for their direct relevance to present-day lives. Illicit Trade Convention, *supra* note 227, art. 1.

244. While the geographical origins and locations of cultural properties are of great importance, there is no requirement that ethnic origins be taken into account when making or considering restitution claims. See DARRELL POSEY, TRADITIONAL RESOURCE RIGHTS: INTERNATIONAL INSTRUMENTS FOR PROTECTION AND COMPENSATION FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 82 (1996).

245. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, pmbl. [hereinafter World Heritage Convention]. This was necessitated by concerns that cultural heritage and the natural heritage were “increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction” and that “the deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.” *Id.*

246. The World Heritage Convention describes monuments as “architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science.” *Id.* art 1.

247. The World Heritage Convention refers to groups of buildings as “groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science.” *Id.*

248. Sites are described to include “works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.” *Id.*

249. Natural features consist of “physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view.” *Id.* art. 2.

250. Geological and physiographical formations areas are those “which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation.” *Id.*

251. Natural sites are those determined to be “of outstanding universal value from the point of view of science, conservation or natural beauty.” *Id.*

252. *Id.* art. 4.

253. *Id.*

required to identify and delineate matter eligible for protection,²⁵⁴ and adopt policies and programs for the “protection, conservation and presentation of cultural and natural heritage.”²⁵⁵

To facilitate international cooperation in the protection of cultural heritage, the convention established a World Heritage Committee²⁵⁶ charged with preparing and publishing a World Heritage List²⁵⁷ comprising properties it considers to have “outstanding universal value.”²⁵⁸ However, the World Heritage Convention’s endorsement of the principle of state consent to the preparation of the World Heritage List²⁵⁹ may adversely affect indigenous interests where a government is reluctant to recommend the inclusion of a site in the list despite pressure from indigenous groups.²⁶⁰

254. *Id.* art. 3.

255. *Id.* art. 5. Under Article 5, each state was required:

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes; (b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions; (c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage; (d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and (e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Id.

256. *Id.* art. 8(1).

257. *Id.* art. 11(1). The list is compiled from information on local natural and cultural heritage that each state is required to submit to the Heritage Committee.

258. *Id.* art. 11(2).

259. *Id.* art. 11(3) (“The inclusion of a property in the World Heritage List requires the consent of the State concerned.”).

260. The World Heritage Convention could enable states to refuse to protect otherwise eligible cultural heritage purely for improper reasons:

Of concern is the Convention’s definition of cultural property which provides that host states alone determine which property is important to the cultural heritage. The Convention goes on to give an extensive, yet not exhaustive, list of categories of objects that are covered by the treaty. The generality in the category descriptions allows each state to subjectively specify the content and scope of which cultural objects are to be subject to the Convention’s protective terms. As a result, there is great diversity among the various national legal systems in establishing their respective criteria for determining which objects, if any, are to be protected.

While this theory might recognize the unique contribution of each state to the cultural heritage of mankind, granting each state the right to subjectively specify the scope and content of cultural property includes the right to exclude property from protection that others outside the state might find more culturally valuable. It also permits an exclusion from protection on grounds of domestic budget concerns—i.e. if not designated, no funds need be allocated to that artifact for protective efforts. A nationally controlled, self-designated cultural property framework cannot truly promote common outside cultural property interests.

M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*,

Provision in the instrument for significant indigenous group initiative in the development of the list of protected sites could have bolstered the efforts of Native Americans for better protection of their sacred lands, the commercial development of which they have been relatively powerless to prevent in the courts.²⁶¹

The WPPT, which the U.S. ratified in 2002, extends neighboring rights to “actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works *or expressions of folklore*.”²⁶² Because folk tales, poetry, songs, instrumental music, dance and plays actually live in regular performances of such expressions, the rights recognized for performers of expressions of folklore potentially could be used to protect the associated expressions of traditional knowledge. However, the significance of the instrument appears to be rather limited to the extent neighboring rights are recognized under the WPPT only for a period of only fifty years and do not prohibit what is not performed, broadcast, or contained in phonograms.²⁶³

Another relevant international instrument is the Recommendation on the Safeguarding of Traditional Culture and Folklore adopted by the General Conference of UNESCO in 1989, and which called upon member states to take the necessary legislative steps to give effect to various identification, conservation, preservation, dissemination, protection and international cooperation measures outlined therein.²⁶⁴ As a recommendation, however,

26 CASE W. RES. J. INT’L L. 435, 466-67 (1994).

261. See, e.g., *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983) (unsuccessful attempt of Native Americans to enjoin the development of their most sacred mountain, Bear Butte in South Dakota, as a public park on grounds that it could desecrate the site and lead to the exploitation of their religious practices as a tourist attraction).

262. WIPO Performances and Phonograms Treaty, Dec. 20 1996, http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

263. The WPPT came into force only on May 6, 2002, and its impact on the protection of traditional knowledge is yet to be determined.

264. Recommendation on the Safeguarding of Traditional Culture and Folklore. Nov. 15 1989, http://portal.unesco.org/en/ev.phpURL_ID=13141&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html. For example, the Recommendation suggests as identification methods the creation of national inventories of institutions concerned with folklore, and the development of recording systems and comprehensive registries. Conservation measures could center on the establishment of national archives and museums, harmonization of collection and archiving methods, duplication of folklore materials and training of specialists in conservation work while preservation measures include the teaching and study of folklore, guarantees of access of cultural communities to their folklore, and establishment of a national coordination bodies and promotion of scientific research on folklore. Dissemination of folklore could be ensured through such events as fairs, festivals, films, exhibitions and workshops, coverage of folklore in the media, creation of job opportunities for folklorists, and exchanges of persons and groups concerned with folklore. Mindful of the complementary nature of the intellectual property related aspects of protection available under the WIPO framework, the Recommendation urges enhanced privacy and confidentiality rights for

the instrument does not impose binding obligations on any UNESCO member and therefore, was not binding on the United States after it rejoined UNESCO in 2003.²⁶⁵

The human rights instruments to which the United States adheres or has ratified have implications for the protection of traditional knowledge. For example, the Universal Declaration of Human Rights provides for the protection of the moral and material interests resulting from any scientific, literary or artistic production and for the right to own collective property and not to be deprived of that property.²⁶⁶ In addition, the Declaration guarantees the right to just and favorable remuneration for work and mandates equal protection for all under the law.²⁶⁷ Similarly, both the International Covenant on Economic, Social and Cultural Rights²⁶⁸ and the International Covenant on Civil and Political Rights²⁶⁹ establish the right of self-determination. All these provisions would be relevant to the claims of indigenous communities inasmuch as the provisions recognize collective rights to property, could be used to require compensation for work relating to traditional knowledge, and prohibit discriminatory tendencies reflected in the deliberate failure to protect traditional knowledge. Nevertheless, human rights provisions in general remain of limited utility in the protection of traditional knowledge to the extent they are directed mainly toward state governments and establish no clear basis for application to corporations and individuals engaged in the unauthorized use of traditional knowledge.

B. Agenda of International Organizations

1. UNESCO

Since the 1970s, the U.S. has participated in various UNESCO sponsored initiatives relevant to folklore including the preparation of the Tunis Model Law, and the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other

informants as the transmitters of tradition, and also for collectors through proper archiving and safeguarding of materials against misuse.

265. The terms of the Recommendation may not even be applicable to the United States given that the United States had withdrawn from UNESCO five years prior to the adoption of the Recommendation. American Library Association, *United States Withdrawal from UNESCO* (2006), <http://www.ala.org/ala/godort/godortresolutions/19850109125.htm>.

266. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

267. *Id.*

268. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4. The United States has signed but not ratified this Convention.

269. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172.

Prejudicial Actions.²⁷⁰ When UNESCO again took up the issue of folklore by co-sponsoring with WIPO a World Forum for the Protection of Folklore in Phuket, Thailand, the U.S. participated in its capacity as a WIPO member.²⁷¹ However, it dissented from the Plan of Action adopted at the conference which called *inter alia*, for the drafting of a new international agreement on the *sui generis* protection of folklore.²⁷²

With regards to UNESCO's work program on cultural heritage, the United States took part in the negotiation of both the World Heritage Convention and the Illicit Trade Convention, eventually ratifying both though drastically reducing the scope of implementation of the latter in the U.S. Although it had withdrawn from UNESCO membership when formal deliberations on the Intangible Cultural Heritage Convention began in 2002, the U.S. was still able to influence the process indirectly through pressures exerted on UNESCO officials. For example, in response to subtle hints from the U.S. government that the development of an instrument with strong protections for indigenous communities could jeopardize U.S. plans to return to the organization, the Director General of UNESCO requested that the Committee of Experts convened to work on a preliminary draft instrument on intangible cultural heritage not make direct references to indigenous peoples in the proposed instrument.²⁷³ When a significantly toned down instrument was presented to the UNESCO General Assembly for adoption in September 2003, the U.S. neither voted for, nor opposed, its adoption as the Convention on the Safeguarding of Intangible Cultural Heritage.

270. See Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, Model Provisions on National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions *reprinted* in 16 COPYRIGHT BULL 62 (1982) [hereinafter Draft Model Provisions].

271. UNESCO/WIPO World Forum on the Protection of Folklore (1997).

272. This fact was noted poignantly in the plan itself as follows: "The participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with the Plan of Action." *Id.* at 235.

273. This is a personal observation. The author was a member of the Committee of Experts appointed by the Director General of UNESCO. For a discussion of the evolution of the Convention for the Safeguarding of Intangible Cultural Heritage, see Paul Kuruk, *Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage*, 1 MACQUARIE J. INT'L & COMP. L. 111 (2004).

2. UNEP

The history surrounding the negotiations and subsequent adoption of the CBD²⁷⁴ under the auspices of the United Nations Environmental Program (“UNEP”) does not reveal much enthusiasm by the U.S. government for matters of interest to indigenous communities. The CBD’s chief significance for the protection of traditional knowledge is Article 8(j), which requires member states to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Despite good-faith efforts by other nations to accommodate U.S. objections to various drafts of the CBD during the negotiating process,²⁷⁵ the U.S. refused to sign it when it was adopted in 1992. Even though President Clinton subsequently signed it in 1993, Congress has yet to accede to it.²⁷⁶

The official reasons for the initial refusal of the U.S. to sign the CBD were cited as U.S. objections to certain patent provisions in the CBD,²⁷⁷ its concern that “the article on funding of conservation projects in developing countries would not leave sufficient control in the hands of donors,” and its conviction that there was “scientific uncertainty surrounding loss of diversity.”²⁷⁸

As to the latter objection about scientific uncertainty, some critics have viewed it simply as a pretext used by the U.S. to derail the convention by creating an unnecessary obstacle in the form of discord about the scope of

274. United Nations Conference on Environment & Development, Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

275. Kal Raustiala & David G. Victor, *Biodiversity Since Rio: The Future of the Convention on Biological Diversity*, ENVIRONMENT, May 1996, at 16, 19.

276. *Id.* at 19-20. For a discussion of the politics surrounding the scuttling of the Senate vote on ratification, see Sovereignty International Inc., *How the Biodiversity Convention Was Defeated* (1998), <http://sovereignty.net/p/land/biotreatystop.htm>.

277. Curtis M. Horton, *Protecting Biodiversity and Cultural Diversity Under Intellectual Property Law: Toward a New International System*, 10 J. ENVTL. L. & LITIG. 1, 21-24 (1995); see also, Gary D. Meyers, *The UN Biodiversity Convention, Biotechnology, and Intellectual Property Rights*, 3 BIO-SCIENCE L. REV. 131, 142-144 (1999-2000).

278. Kristin Rosendal, *Implications of the US “No” in Rio*, in BIODIPLOMACY: GENETIC RESOURCES AND INTERNATIONAL RELATIONS 87, 89 (Vicente Sanchez & Calestous Juma eds., 1994).

the problem.²⁷⁹ The concern for high-contributing donors has also been dismissed as insufficient justification for withdrawal from a treaty because donors always retain “the option of withholding funds until they are satisfied with the way things are running.”²⁸⁰

However, the objection regarding intellectual property is far more substantive. Significantly, the provisions in the CBD dealing with patents require that the access to genetic resources and transfer of associated technology involving patents and other intellectual property rights be provided on terms which “recognize and are consistent with the adequate and effective protection of intellectual property rights.”²⁸¹ From the U.S. perspective, this provision potentially conflicts with another provision calling on Contracting States to “cooperate . . . subject to national legislation and international law in order to ensure that [patents and other intellectual property] *rights are supportive of and do not run counter to [the Convention’s] objectives.*”²⁸² Conceivably, a State could rely on the latter provision to limit patent rights deemed to contradict local rules governing access to genetic resources. Having fought so hard both at bilateral and multilateral levels to promote intellectual property rights worldwide, the U.S. fears that such restrictions on the patent rights would constitute a serious drawback and it therefore refrained from ratifying an instrument that it believes endorses limitations on patent rights.

Even as a non-party to the CBD, the U.S. has participated in international meetings where various provisions of the CBD were discussed. At such meetings, the U.S. has not hesitated to caution against the attempts of the international community to transform the principles endorsed in the

279. As one commentator pointed out:

Even though scientists are obviously at a loss in estimating the exact number of species and the exact rates of species extinction on the planet, the fact that extinction is taking place at an alarming rate is hardly controversial. Moreover the recourse to a scientific uncertainty did not prevent the Bush Administration from once again trying to advocate the establishment of a forest convention It is also clear that the U.S. authorities intend to come up with their own suggestions for biodiversity conservation projects. The United States Agency for International Development (USAID) has increased spending on biodiversity projects by 400 per cent since 1989; to the sum of US\$79 million in 1991. This leads to the assumption that to the extent that the U.S. used the uncertainty argument, it was mainly as a way of strengthening their reason for turning down the Treaty.

Id. at 89.

280. *Id.* It is a standard feature of U.S. foreign policy to threaten to withhold funds from international organizations as a way of securing desired reforms or the adoption of certain programs.

281. CBD, *supra* note 229, art. 16(2).

282. *Id.* art. 16(5) (emphasis added).

convention into “legally binding” obligations.²⁸³ In light of these warnings, it is hard to take seriously continuing U.S. assurances to the global community of the plans of Congress to take up the issue of ratification of the CBD.²⁸⁴

3. WIPO

The U.S. has also not warmed up to the current work of WIPO on traditional knowledge and has even made known its opposition to the development by WIPO of a new instrument on the subject. Indeed, as one commentator has noted, American support for WIPO’s new program on traditional knowledge was provided after assurances from WIPO that it was “not ‘on a norm setting track’; that is to say, that its work is not intended to feed into a process which would end with the creation of a treaty or recommendations.”²⁸⁵

At the very first session of WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“IGC”), the U.S. delegation released a statement which left no doubts about the U.S. position on the WIPO agenda. Referring to the

283. See, e.g., Herbert Traub, Advisor, U.S. Mission to the United Nations, Statement During the Fifty-seventh Session of the U.N. General Assembly, in the Second Committee (Dec. 10, 2002), available at <http://www.state.gov/p/io/rls/rm/2002/15914.htm>.

The U.S. joins consensus on this resolution, but must take a reservation on OP 8. These are the same concerns we expressed in Johannesburg and we would like to state these reservations here for the record.

While joining the consensus on the Plan of Implementation, the United States reserves its position with respect to paragraph 44(o). This paragraph envisages the negotiation “within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources.” In the context of the final negotiations on this paragraph, the words “legally binding” were deleted before the word “regime” at the request of numerous delegations.

In the light of this negotiating history, the United States understands that the undertaking envisaged in this paragraph would not entail the development of a legally binding instrument.

Id.

284. Jeffrey Burnam, the Deputy Assistant Secretary of State for the Environment made the following observation at a CBD meeting at The Hague in 2002:

We appreciate the opportunity to participate in this Conference of the Parties, as we have in previous CBD deliberations, with the aim of furthering our shared goals related to biological diversity. As you may remember, the U.S. signed the Convention in 1993 and it was sent to the United States Senate for its advice and consent. The Senate has not yet acted upon the CBD. In this regard, I wish to note that the Department of State informed members of the Senate in February of this year that U.S. ratification of the Convention is being reviewed by this Administration.

Jeffrey Burnam, Statement to the Ministerial Roundtable, Sixth Conference of the Parties to the Convention on Biological Diversity (Apr. 17, 2002), available at <http://www.state.gov/g/oes/rls/rm/2002/9577.htm>.

285. Michael Halewood, *Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection*, 44 MCGILL L.J. 953, 986 (1999).

complex and diverse nature of,²⁸⁶ as well as the lack of national experience with traditional knowledge, the U.S. questioned the feasibility of an international treaty on the subject.²⁸⁷ It also pointed to the apparent absence of “an incentive mechanism for innovation” in traditional knowledge as another reason why such knowledge, in contrast to the newer generation of intellectual property laws such as integrated circuits, plant varieties, and databases, could not be accommodated within the older generation of intellectual property laws of copyright, patents and trademarks.²⁸⁸ However,

286. The U.S. Statement noted:

[T]here are vast differences among indigenous communities across valleys, let alone across continents, in the types of folklore and traditional knowledge developed over the generations. There are also diverse interests in ownership/exclusion on the one hand and openness to all on the other hand, the local rules concerning rights to use/own traditional knowledge, and the differing desires to commercialize versus maintain secrecy of such knowledge.

General Declaration of the United States of America to the First Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, May 1, 2001 para. 2 [hereinafter U.S. Statement].

287. The U.S. Statement noted:

All these facts lead to one question: [Is] it possible, or even desirable, to establish a comprehensive, uniform set of rules at the international level to govern the use of genetic resources, traditional knowledge and folklore? At the very least, we wonder whether it is advisable to undertake such activity before individual countries have, in conjunction with the communities within their borders, established their own regimes for protection within their own territories and have gained experience in the application of that protection and its effect on the communities involved.

. . . . Moreover, there are so many different expectations, goals and native systems, for approaching ownership and the transgression of ownership that a useful, enforceable global system would be virtually impossible to create. Indeed a “one size fits all” approach might be interpreted as demonstrating a lack of respect for local customs and traditions. Questions have been raised as to the definitions of beneficiaries, economic valuation and other critical terms of reference. We also note with interest the variety of local rules and procedures that have developed within certain indigenous communities. Clearly these local rules must be respected and care must be taken to avoid their preemption.

Id. at para. 3, 6.

288. The U.S. Statement provided:

[I]t must be noted that the newer generation of intellectual property laws all share a certain characteristic with the older generation of intellectual property laws of copyright, patents, trademarks: namely that of an incentive mechanism for innovation. As forward-looking systems that seek to encourage the development of new forms of expression and invention, the newer types of intellectual property still are based on this basic principle and share characteristics such as a date of creation, the known identity of one more creators, defined parameters of the relevant product and limited duration of protection.

A regime to protect traditional knowledge, as many of the participants in WIPO’s Fact Finding Missions pointed out, cannot by definition adhere to these principles. Thus, developing a new intellectual property-type regime in this area does not appear to be the best fit even for the holders of such knowledge.

Id. at para. 4-5.

a more revealing, and perhaps most significant reason for U.S. discomfort with international initiatives on traditional knowledge is found in another part of the U.S. submission:

All in all, as the United States has noted on various occasions, many of the goals of indigenous and local communities in “protecting” their traditional knowledge, medicine, folklore, etc., stems from their concern for self-determination, health, justice, cultural heritage and land issues. These are serious interests that must be examined fully within the appropriate national contexts; but these are not issues with which WIPO or intellectual property offices have competence. While important in and of themselves, the answers do not involve intellectual property questions.²⁸⁹

Presumably, the U.S. considers traditional knowledge to implicate political rights of indigenous peoples and sees any attempts to deal with them in international fora as unacceptable intrusions on the prerogative of the U.S. to address these issues at a national level. Thus, it cautions WIPO and national intellectual property offices to be concerned instead with “the provision of technical and legal assistance . . . to holders of commercially-valuable traditional knowledge [to enable them to] develop means of exploiting traditional knowledge through applying current intellectual property tools such as certification marks, collective marks, licensing, . . . and the law of copyright”²⁹⁰

4. WTO

Within the Trade-Related Intellectual Property Rights (“TRIPS”) Council of the World Trade Organization (“WTO”), the U.S. initially opposed efforts by developing countries to use the review mechanism contained in Article 27.3(b) of the TRIPS Agreement as an opportunity to revise it²⁹¹ to provide for the protection of traditional knowledge.²⁹² However, beginning with its session in July 1999, the Council demonstrated

289. *Id.* at para. 7.

290. *Id.* at para. 8.

291. General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81.

292. As early as December 1998, when the Council met to draw up the agenda for review of the TRIPS Agreement the U.S. urged that the review focus only on how State parties were actually implementing Article 27.3(b), and not on how to conduct a substantive review of the Article as advocated by India and the African Group. During the next two meetings of the Council in February 1999 and April 1999, the U.S. view held sway and the Council on both occasions requested member states to provide information regarding implementation to assist in the review. GRAIN, *For a Full Review of TRIPS 27.3(b): An Update on Where Developing Countries Stand with the Push to Patent Life at the WTO*, at 3 (2000), <http://www.grain.org/briefings/?id=139>.

an openness to a substantive review of Article 27.3(b) by entertaining a proposal submitted by India.²⁹³ Immediately preceding the 1999 Seattle Ministerial Conference, the Council discussed, but due to U.S. opposition did not act on, a proposal of the African Group to amend Article 27.3(b) to provide for “the protection of the innovations of indigenous and local farming communities in developing countries”²⁹⁴ and “the continuation of the traditional farming practices including the right to save, exchange and save seeds, and sell their harvest.”²⁹⁵

The Doha Ministerial Conference breathed new life into efforts to protect traditional knowledge when it adopted a declaration authorizing the TRIPS Council to examine such issues.²⁹⁶ To assist the TRIPS Council in the discharge of its new mandate, the Africa Group at the WTO again submitted a proposal on traditional knowledge which stressed the need for international mechanisms within the framework of the TRIPS Agreement. The proposal provided for, *inter alia*, “an obligation on Members collectively and individually to prohibit, and to take measures to prevent, the misappropriation of genetic resources and traditional knowledge.”²⁹⁷ Similarly, another group of countries, including Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela, called for the TRIPS Agreement to be amended to provide that an applicant for a patent relating to biological materials or to traditional knowledge provide, as a condition of patent rights, “(i) disclosure of the source and country of origin of the biological resource and of the traditional knowledge used in the invention; (ii) evidence of prior informed consent through approval of authorities under the relevant national

293. *Id.*

294. Council for Trade-Related Aspects of Intellectual Property Rights, *Taking Forward the Review of Article 27.3(b) of the TRIPS Agreement*, IP/C/W404 (June 26, 2003), available at <http://docsonline.wto.org/DDFDocuments/IP/C/W404.doc> [hereinafter Proposal of the African Group].

295. *Id.*

296. As the noted in the Doha Declaration:

[I]n pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, [the TRIPS Council should] examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

World Trade Organization, Ministerial Declaration of November 14, 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, 749 (2002) [hereinafter Doha Declaration].

297. Proposal of the African Group, *supra* note 294, at 2.

regime; and (iii) evidence of fair and equitable benefit sharing under the relevant national regime.”²⁹⁸

Proponents of the disclosure requirement²⁹⁹ contend that such disclosure would promote the objectives of the patent system by “reducing instances of bad patents,” enabling patent examiners to “ascertain more effectively the ‘inventive’ step claimed in a particular patent application,” and enhancing the ability of countries to track down and challenge instances of bad patents.³⁰⁰ However, these claims are strenuously opposed by the U.S., which argues that the “most effective means” to achieving the international community’s goals regarding access, benefit sharing and the prevention of the issuance of erroneously issued patents is rather “through tailored, national solutions to meet practical concerns and actual needs . . . [and that the] introduction of new patent disclosure requirements will not achieve those important objectives and may have significant negative consequences.”³⁰¹

Specifically, the U.S. points out that a new disclosure requirement would not, per se, ensure that benefits are equitably shared, as “such a requirement would merely convey the information requested but would have no mechanism to transfer benefits between parties.”³⁰² On the matter of preventing erroneously granted patents, the U.S. notes as well that “[i]nformation indicating country of origin, *ex situ* collection sites, etc., would do little to ensure ascertainment of appropriate inventorship, novelty or inventive step, because such information does not generally address the considerations underlying these requirements, such as acts of invention or the state of the relevant art.”³⁰³ A negative consequence of the disclosure requirement, “particularly where the sanctions for non-compliance include invalidation of a patent,” the U.S. argues, would be the creation of “a ‘cloud’ of uncertainty over the patent right by opening a new avenue for litigation and other uncertainties that would undermine the role of the patent system in promoting innovation and technological development.”³⁰⁴ Moreover, the

298. Council for Trade-Related Aspects of Intellectual Property Rights, *The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge*, IP/C/W/403 (June 24, 2003), ¶ 1, available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/W403.doc> [hereinafter *TRIPS Agreement and the CBD*].

299. For an analysis of the debate surrounding the disclosure requirement, see generally Nuno Pires Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing the TRIPS Agreement: The Problem and the Solution*, 2 WASH. U. J.L. & POL’Y 371 (2000).

300. *TRIPS Agreement and the CBD*, *supra* note 298, ¶ 7.

301. Council for Trade-Related Aspects of Intellectual Property Rights, *Article 27.3(b), Relationship Between the TRIPS Agreement and the CBD, and the Protection of Traditional Knowledge and Folklore*, IP/C/W/434 (Nov. 26, 2004), ¶ 6, available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/W434.doc> [hereinafter *Communication from the U.S.*].

302. *Id.* ¶ 9.

303. *Id.* ¶ 13.

304. *Id.* ¶ 14.

patent disclosure requirement would impose “significant administrative burdens for the patent offices of members that would in turn create additional costs, particularly with respect to those requirements that would demand compliance with foreign laws.”³⁰⁵

Developing countries have countered the arguments of the United States regarding uncertainties,³⁰⁶ administrative costs,³⁰⁷ monitoring difficulties³⁰⁸ and relevance to patent protection.³⁰⁹ While recognizing the usefulness of well-functioning national systems, the developing countries stress that an international solution is desirable to complement the national systems.³¹⁰ Both national and international mechanisms, in their opinion, are critical to provide the cooperation required to tackle cases of biopiracy that have significant international dimension and need international solutions and

305. *Id.* ¶ 15.

306. Brazil and India argue that rather than creating uncertainties regarding patent rights, the establishment of clear international rules on disclosure, prior informed consent and benefit sharing would create certainties and facilitate access by researchers to biological resources and/or traditional knowledge which the United States has identified to be of significance to researchers and bioprospectors that use the patent system. Council for Trade-Related Aspects of Intellectual Property Rights, *The Relationship Between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge: Technical Observations on Issues Raised in a Communication by the United States (IP/C/W/434)*, IP/C/W/443 (Mar. 18, 2005), ¶ 18, available at <http://docsonline.wto.org/DDFDocuments/t/IP/C/443.doc>.

307. As to the fear of increased administrative costs, the two countries deny that the requirement to employ all reasonable measures to determine the country of origin and source of the material “would be in any way burdensome . . . [S]uch a burden would generally be subsumed in, or at least not be more burdensome than, the usual burden befalling the patent applicant to make out a case for his claims under current patent procedures and practices.” *Id.* ¶ 19.

308. On the issue of monitoring, the two countries respond that given the enormous number of patents granted worldwide, the disclosure requirement will facilitate the monitoring of these patents by the owners of the biological material and/or associated traditional knowledge with a view to check whether prior informed consent and benefit sharing arrangements are being adhered to by the patent owners upon commercialization.

Id. ¶ 13.

309. Contrary to the assertions of the United States, developing countries contend that the disclosure requirement would be relevant in determining the existence of prior art, inventorship or scope of the patent

to the extent that the disclosed information will help determine whether the biological resources and/or traditional knowledge was used: to form part of the claimed invention; during the process of developing the claimed inventions; as a necessary prerequisite for the development of the invention; to facilitate the development of the invention; and/or as necessary background material and/or information for the development of the invention . . .

Id. ¶ 17.

310. They note that “[s]uch an approach would be akin to arguing that in order to ensure the effective operation of the patent system, for example, only national patent laws are needed and not international agreements such as the TRIPS Agreement.” *Id.* ¶ 6.

enforcement. They also note that the disclosure requirement is not unique, but is similar to disclosure requirements in patent laws, “including disclosure of best mode, and in other jurisdictions, such as the United States, a requirement to disclose all information material to patentability.”³¹¹ In this sense, therefore, “the proposed requirement is no different from these obligations the fulfillment of which has not been shown to impose any unnecessary burden on applicants.”³¹²

5. FAO

In 1983, the Food and Agricultural Organization (“FAO”) adopted a non-binding International Undertaking on Plant Genetic Resources (“Undertaking”)³¹³ to promote the conservation of genetic resources and provide for better rights for farmers.³¹⁴ Early on, the FAO also set up an intergovernmental Commission on Plant Genetic Resources (“CPGR”) to monitor the implementation of the Undertaking. As it turned out, the Undertaking was a much scaled down version of a more ambitious project, authorized by the FAO in 1981 but against strong opposition from the United States, to draft a binding legal convention on the subject of genetic resources and farmers’ rights.³¹⁵

In 1985, the U.S. failed in its efforts to discredit the CPGR, which soon developed into an influential body within the FAO.³¹⁶ Subsequently, in 1993, the CPGR called for a revision of the Undertaking to realize farmers’ rights,³¹⁷ harmonize it with the CBD,³¹⁸ and provide for access on mutually

311. *Id.* ¶ 20.

312. *Id.*

313. UNEP, *Note by the Interim Secretariat: Ownership of, and Access to, Ex-Situ Genetic Resources Farmer’s Rights and Rights of Similar Groups: Progress Report on Resolution 3 of the Nairobi Final Act. Ex-Situ Collections and Farmers Rights*, UNEP Doc. CBD/IC/2/13 (May 1994).

314. Commission on Genetic Resources for Food and Agriculture, *International Undertaking on Plant Genetic Resources for Food and Agriculture*, <http://www.fao.org/ag/cgrfa/IU.htm>.

315. Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 265 (2001).

316. *Id.*

317. The concept of Farmers’ Rights was introduced in the Undertaking to acknowledge “the enormous contribution that farmers of all regions have made to the conservation and development of plant genetic resources, which constitute the basis of plant production throughout the world” UNEP, *Note by the Interim Secretariat: Progress Report on Resolution 3 of the Nairobi Final Act: Ex Situ Collections and Farmers’ Rights*, UNEP/CBD/IC/2/13 (May 3, 1994), available at <http://www.biodiv.org/doc/meetings/iccbd/iccbd-02-13-en.pdf>. As defined in FAO Resolution 5/89, Farmers’ Rights are:

rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in the centres of origin/diversity. These rights are vested in the international community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well [sic] as the attainment of the overall purposes of the International Undertaking [on Plant Genetic Resources].

agreed terms to plant genetic resources, including *ex situ* collections not addressed by the CBD. Since then, the CPGR, later renamed Commission on Genetic Resources for Food and Agriculture (“CGRFA”), worked closely with the CBD to revise the Undertaking to conform to the CBD.

In November 2001, after a period of difficult negotiations, the CGRFA adopted the FAO Treaty as a binding convention to replace the Undertaking. The FAO Treaty establishes a multilateral system to facilitate access to plant genetic resources with benefits accruing from such access to be shared fairly and equitably through “exchange of information, access to and transfer of technology, capacity-building, and the sharing of [monetary benefits and other] benefits from commercialization.”³¹⁹ Resources subject to the multilateral system are identified in a list annexed to the convention which is subject to periodic review.³²⁰

Largely through U.S. pressure, many of the strong proposals originally tabled by developing countries have been effectively watered down in the Treaty. For example, while the FAO Treaty provides for Farmers’ Rights, the responsibility for realizing Farmers’ Rights is imposed solely on national governments who are to protect such rights “in accordance with their needs and priorities” and subject to national legislation.³²¹ Significantly, the U.S. has signed, but not ratified the FAO Treaty, a move seen by commentators as calculated to enable the U.S. participate in further talks concerning the implementation of the Treaty’s provisions while avoiding obligations imposed on contracting State parties.³²²

C. *An Invitation to the Bargaining Table*

The preceding discussion has revealed the reluctance of the United States, eloquently expressed in all major international fora tackling traditional knowledge issues, to accede to a binding international regime for

Food and Agricultural Organization, *Farmers’ Right*, Res. 5/89, at 1-2 (Nov. 29, 1989), available at <ftp://ftp.fao.org/ag/cgrfa/ResC5-89E.pdf>.

318. One of the difficulties with such harmonization is the apparent conflict in the International Undertaking on Plant Genetic Resources’ position that genetic resources constitute the “common heritage of mankind,” UNEP, *Note by the Interim Secretariat*, *supra* note 313, at 5, with that of the CBD acknowledging that States have the “sovereign rights of States over their natural resources.” *Id.* at 2.

319. International Treaty on Plant and Genetic Resources for Food and Agriculture art. 13, *open for signature* Nov. 3, 2001–Nov. 4, 2002, <ftp://ftp.fao.org.ag.cgrfa.it.ITPGRe.pdf>.

320. *Id.* art. 12.

321. *Id.* art. 9.

322. See ETC Group, News Release, *The United States and the Law of Seed: Political “About-Face” or “Two-Faced” Policy?*, Nov. 8, 2002, http://www.etcgroup.org/upload/publication/179/01/nr_us_treaty.pdf.

the protection of traditional knowledge. Even if the international community were to adopt a binding arrangement over U.S. objections, there is no doubt that as a sovereign, the U.S. will simply refuse to ratify it and, as a result, will not be bound by the terms of the adopted instrument. Consequently, the prospects for enhancing the protection of traditional knowledge in the U.S. through an international legal instrument remain rather bleak.

However, given the U.S. role as a major user of traditional knowledge, maintaining the status quo is an unattractive proposition and options must be found to improve the protective environment in the U.S. while being sensitive to legitimate U.S. concerns. One possible strategy is to persuade the U.S. to agree to some form of protection for traditional knowledge on the basis of reciprocity.³²³ The principle of reciprocity in this context would call for a commitment by the U.S. to protect the creative works of traditional communities in developing countries as an appropriate response to the enhanced intellectual property regimes that such countries have now implemented largely through U.S. pressures in the WTO and which are viewed to disproportionately benefit firms in developed countries.³²⁴ In this section, we elaborate on the reciprocity argument and the extent to which it would be accepted as a principle for protecting traditional knowledge in the U.S.

1. U.S. Experience with Reciprocity

The term reciprocity may be defined as “a mutual exchange of privileges.”³²⁵ As a concept, it is rooted in fundamental moral values. According to Lawrence C. Becker, “[r]eciprocity is a moral virtue. We ought to be disposed, as a matter of moral obligation, to return good in proportion to the good we receive, and to make reparation for the harm we have done.”³²⁶ Underpinning the concept of reciprocity are several arguments: first, that good received should be returned with good;³²⁷ second, that restitution be made for wrongs committed;³²⁸ third, that returns and

323. Kuruk, *supra* note 29, at 774.

324. According to the British Government appointed Commission on Intellectual Property Rights, “because developing countries are large net importers of technology from the developed world, the globalisation of IP protection will result in very substantial additional net transfers from developing to developed countries.” COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, EXECUTIVE SUMMARY: INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 11 (3d ed. 2003), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPR_Exec_Sumfinal.pdf [hereinafter CIPR EXECUTIVE SUMMARY].

325. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 983 (1988).

326. LAWRENCE C. BECKER, RECIPROCITY 3 (1986).

327. This requires that “we . . . be disposed to return good for the good we get from agents who are trying to produce benefits for us.” *Id.* at 89.

328. This may be justified as on the grounds that

reparations should be fitting and proportional;³²⁹ and finally, that the returns be made by the one who has received the good or done the evil.³³⁰ For purposes of this Article, the core moral arguments of reciprocity may be summarized as requiring that good be returned in proportion to good received and that reparations be due for harms caused.³³¹

Prior to the adoption of the TRIPS Agreement, the reciprocity argument was used successfully by the United States to redress perceived imbalances in its terms of trade.³³² In 1985, the United States adopted a controversial trade tactic termed “aggressive unilateralism”³³³ pursuant to which it demanded that its trading partners reduce real or imagined barriers to United States exports and investment. The new trade stance was aggressive because United States demands were often backed by highly publicized threats of retaliation.³³⁴ It was also unilateral because the United States frequently on its own decided when a foreign trade practice was unfair, and also often

[t]he wrongs we do to others typically undermine their dispositions to deal with us freely and reciprocally. Unrequited love is rare, and beyond a certain point, pathological. Given the importance of reciprocal exchanges, it is unjustifiable, *ceteris paribus*, to make them less likely. It is therefore unjustifiable to undermine people’s dispositions to make them. If a wrong has already been done, however, the problem is to find a way of repairing, or if possible, avoiding, damage to the victim’s reciprocity disposition.

Id. at 101.

329. This requires that “we . . . be disposed to make returns and reparations that are appropriate as to type and quantity.” *Id.* at 106. In this case, what counts as appropriate is “any return or reparation sufficient . . . for satisfying the ends of the practice of reciprocating.” *Id.*

330. *Id.* at 103.

331. The reciprocity argument has been accepted by economists as an important motive for social conduct that ought not to be excluded from economic analyses. As pointed out,

[m]ost economic models are based on the self-interest hypothesis that assumes that all people are exclusively motivated by their material self-interest. In recent years, experimental economists have gathered overwhelming evidence that systematically refutes the self-interest hypothesis and suggests that many people are strongly motivated by concerns for fairness and reciprocity.

See Ernst Fehr & Klaus M. Schmidt, *Theories of Fairness and Reciprocity—Evidence and Economic Applications*, summary page (Institute for Empirical Research in Economics, University of Zurich, Working Paper No. 75, 2001), available at <http://www.lew.unizh.ch/wp/iewwp075.pdf>. Therefore, to the extent arguments of developing countries for the protection of traditional knowledge are based on fairness, they ought not to be dismissed as being out of touch with reality nor subject to refutation on the ground that they are not based on sound economics.

332. See generally THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, *RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY* (1994).

333. The term was first coined by an Indian author, Jagdish Bhagwati. See Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM: AMERICA’S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

334. *Id.*

required that its partners unilaterally liberalize without any corresponding concessions from the United States.³³⁵

Pointing to inequities in the terms of market access,³³⁶ the U.S. administration insisted on reciprocal arrangements in its trade relations.³³⁷ Advocates of unilateral aggression argued that as long as trading partners continued to refuse to give American firms reciprocal access to their markets, the United States could retaliate by restricting foreign opportunities in United States markets.³³⁸ Because past efforts to address these inequities through General Agreement on Tariffs and Trade (“GATT”) negotiations and dispute settlement procedures had failed, they contended, the United States had no other alternative in enforcing its rights under trade agreements than to act unilaterally outside the multilateral trade talks framework.³³⁹

The Trade Act of 1974 was the main statute used in making the reciprocity argument.³⁴⁰ Section 301 of the Act authorized the President to “take all appropriate and feasible steps within his power to obtain the elimination of” restrictive practices of its trading partners that adversely affected United States trade.³⁴¹ Under the Act, a foreign country engages in a prohibited trade practice if in the opinion of the President it:

[1] maintains unjustifiable or unreasonable tariff or other import restrictions which impair the value of trade commitments made to the United States . . .

335. *Id.*

336. Several factors were responsible for this change in United States’ attitude to trade. Traditionally, the postwar United States approach to opening foreign markets had been to encourage multilateral negotiations in which many countries exchanged reciprocal commitments to lower trade barriers under the auspices of the General Agreement on Tariffs and Trade. However, notwithstanding significant tariff liberalization under GATT, there was concern in the United States that past trade negotiations had not resulted in a fair and balanced outcome. Many foreign markets were seen as substantially more protected than the United States market, with foreign governments relying relatively more heavily on subsidies, administrative practices, and other nontariff barriers. Critics of United States trade policy alleged that foreign producers and investors enjoyed easy access to the relatively open United States market while United States firms were denied equivalent opportunities abroad. Supporters of aggressive unilateralism demanded the elimination of foreign trade barriers because they contributed to the trade deficit, undermined American competitiveness, and cost Americans their jobs. They also pointed out that GATT rules—by ignoring foreign investment and services—failed to cover an increasing share of world trade that was especially important to American firms. BAYARD & ELLIOTT, *supra* note 332, at 2.

337. William R. Cline, *Reciprocity: A New Approach to World Trade Policy?*, in 2 POLICY ANALYSES IN INTERNATIONAL ECONOMICS (1982).

338. *Id.*

339. BAYARD & ELLIOTT, *supra* note 332, at 10-16.

340. *Id.*

341. Trade Act of 1974, ch. 1, § 301, 88 Stat. 1978, 2042 (1975) (codified as amended at 19 U.S.C. § 2411 (1988)). For a general discussion on Section 301, see Judith H. Bello and Alan F. Holmer, *Special 301: Its Requirements, Implementation, and Significance*, 13 FORDHAM INT’L L.J. 259 (1989-90).

[2] engages in discriminatory or other acts or policies which are unjustifiable or unreasonable . . .

[3] provides subsidies . . . on its exports to the United States or to other foreign markets which have the effect of substantially reducing sales of the competitive United States product or products in the United States or in those other foreign markets or

[4] imposes unjustifiable or unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semimanufactured products that burden or restrict United States commerce.³⁴²

Measures that could be imposed to secure the elimination of the prohibited trade practices include the suspension or withdrawal of previous trade concessions, the imposition of duties or other import restrictions only against the exports of the targeted foreign country, or the imposition of fees or restrictions only on the services of that country.³⁴³ The Act was subsequently amended to facilitate its use in intellectual property cases.³⁴⁴

342. 19 U.S.C. § 2411(a)(1)-(4) (2000).

343. *Id.* § 2411.

344. As a major producer and exporter of intellectual property, the United States was motivated to strengthen the international legal protective regime to curb rampant piracy and other infringement of intellectual property rights of its citizens flourished abroad. See Theodore H. Davis, *Combatting Piracy of Intellectual Property in International Markets: A Proposed Modification of the Special 301 Action*, 24 VAND. J. TRANSNAT'L L. 505, 506 & n.1, 508 (1991). However, its efforts to do so at a multilateral level met with stiff resistance from a number of developing countries including Brazil and India. Congress and the business community encouraged the President to seek stronger intellectual property protection abroad by arming the United States Trade Representative (USTR) for the first time with a number of retaliatory weapons. See *id.* at 511. For Example, under the provisions of the 1983 Caribbean Basin Economic Recovery Act, the President was given discretion to consider whether participating countries provided adequate protection of intellectual property rights as a condition for receiving United States tariff preferences. 19 U.S.C. § 2702(c) (2000); see Davis, *supra*, at 513. Similarly, the Trade and Tariff Act of 1984 amended the criteria for access to the Generalized System of Preferences to give the president discretion to deny GSP to countries that had inadequate protection for intellectual property rights. Thomas Mesevage, *The Carrot and Stick: Protecting United States Intellectual Property in Developing Countries*, 17 RUTGERS COMPUTER & TECH. L.J. 421, 423-25 (1991).

Section 301 was amended under the 1984 Trade Act to give the President legal authority for the first time to retaliate in cases where target countries failed to provide "adequate and effective protection of intellectual property rights." 19 U.S.C. §2242(1)(A)-(B) (2000). The "special 301" provisions of the Omnibus Trade and Competitiveness Act of 1988 gave further teeth to the unilateral pursuit of intellectual property protection, by requiring the USTR to identify, within 30 days of issuing the National Trade Estimates Report, "those foreign countries that deny adequate and effective protection of intellectual property rights, or deny fair and equitable market access to United States persons that rely upon intellectual property rights." *Id.* § 2242(1)(A). Policy makers saw

On numerous occasions, the United States applied Section 301 sanctions or threats to secure desired reforms in the intellectual property laws and policies of its trading partners, including Argentina,³⁴⁵ South Korea,³⁴⁶ Brazil,³⁴⁷ China,³⁴⁸ Taiwan³⁴⁹ and Thailand.³⁵⁰ The pre-TRIPS Section 301 actions brought by the United States demonstrated the determination of the United States to invoke the principle of reciprocity to resolve difficult intellectual property issues not satisfactorily dealt with under the existing legal regime of target states.³⁵¹ United States demands for reciprocity in trade were always supported by the notion of fairness.³⁵² Because the United States had opened its market to foreign products, fairness demanded that the target countries also open their markets to United States goods and services.³⁵³ Significantly, all the Section 301 cases resulted in the adoption of flexible arrangements and there was no form agreement imposed on the target countries. Each arrangement was unique and was specifically tailored to address the distinct problems perceived by the United States to exist in each target country. For example, in China the arrangement took the form of a memorandum of understanding outlining remedial steps China proposed to

these unilateral initiatives as complementing United States efforts to put intellectual property rights on the GATT agenda because they demonstrated United States preparedness to act aggressively on its own if target countries refused to negotiate in a multilateral forum.

345. Assurances by Argentina to improve protection of patents for pharmaceuticals led to the withdrawal of a Section 301 petition that had been filed by the Pharmaceutical Manufacturers Association. BAYARD & ELLIOTT, *supra* note 332, at 443-44.

346. South Korea on its part agreed to enact comprehensive copyright laws, to protect pharmaceutical and agricultural products under its copyright laws, and to remove performance for trademarked goods. *Id.* at 426-27.

347. With respect to Brazil, the United States was concerned about that country's denial of product and process patent protection for pharmaceuticals and terminated its Section 301 action only after Brazil adopted legislation that satisfactorily addressed United States concerns. *Id.* at 196-200.

348. The Section 301 action against China led to an agreement by China to accede to the Berne and Geneva Conventions, thereby strengthening that country's copyright regime. *Id.* at 458-59.

349. Taiwan responded to United States concerns by cracking down on piracy and revising its copyright and patent laws for an improved protection of intellectual property rights. *Id.* at 462-64.

350. Similarly, Thailand adopted legislation providing patent protection for pharmaceuticals, food and drinks, biotechnology, and agricultural machinery. *Id.* at 454-56.

351. As the world's leading exporter of goods and services embodying intellectual property, the United States could not afford to sit idly by in the face of reports of the weak enforcement of the intellectual property rights of United States citizens in the target countries. For example, in 1989, U.S. exports of intellectual property goods amounted to nearly \$60 billion, while net receipts from foreigners of royalties and license fees for technology, patents, and trademarks totaled nearly \$9 billion. Keith Maskus, *Intellectual Property Rights and the Uruguay Round*, 78 *ECON. R.* 10, 16 (1993). While the United States continued to be involved in efforts at the Uruguay Round to resolve this issue multilaterally, it nevertheless was prepared to act unilaterally, pending the conclusion of a satisfactory arrangement at the GATT negotiations. BAYARD & ELLIOTT, *supra* note 332, at 3.

352. See *supra* note 336 and accompanying text.

353. For example, the United States found Brazil's denial of product and process patents to be an unreasonable policy which enabled Brazilian competitors to infringe United States patents. Because the Brazilians did not incur research and development costs, they could afford to sell their products at significantly lower prices than United States patent holders who thereby were unfairly denied their share of the Brazilian market. See Maskus, *supra* note 354, at 18.

take,³⁵⁴ while simple assurances in Argentina to address the issue of patent protection for pharmaceuticals and drug registration procedures were sufficient for the termination of Section 301 actions.³⁵⁵ Similarly, in Brazil no formal document was signed, but the United States was satisfied with public announcements by the Brazilian government to amend its patent law and then carrying out its promises.³⁵⁶

2. Reciprocity and the International Protection of Traditional Knowledge

Similar to the arguments once made by the United States with respect to intellectual property, traditional knowledge (“TK”) source countries have insisted on the protection of important national rights like traditional knowledge on the basis of reciprocity. Consistent with the contours of the principle of reciprocity outlined earlier,³⁵⁷ the developing countries have argued on grounds of fairness for the protection of traditional knowledge. A proposal by the African Group before the TRIPS Council for an amendment of the TRIPS Agreement echoes this concern by calling for the protection of genetic resources and traditional knowledge as a matter of “equity and due recognition for the custodians of the genetic resources and traditional knowledge.”³⁵⁸

The position of the developing countries clearly bears strong overtones of the reciprocity principle that good be returned in proportion to good received. To a degree, the good received by the developed countries under the TRIPS Agreement has included a commitment by the developing countries to an intellectual property regime premised on the disclosure of relevant material facts in any patent application. For example, under the TRIPS Agreement, WTO members are obligated to “require that an applicant for a patent . . . disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art”³⁵⁹ A material fact specifically mentioned as worthy of disclosure in this context is an indication of “the best mode for carrying out the invention known to the inventor.”³⁶⁰ In addition to this requirement of

354. BAYARD & ELLIOTT, *supra* note 332, at 459.

355. *Id.* at 444.

356. *Id.* at 199-200.

357. *See supra* notes 325-31 and accompanying text.

358. Proposal of the African Group, *supra* note 294, at 1.

359. Agreement on Trade Related Aspects of Intellectual Property Rights art. 29(1), Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter TRIPS Agreement].

360. *Id.*

disclosure to enable use of the invention, the Agreement imposes a second condition on patent applicants to provide “information concerning the applicant’s corresponding foreign applications and grants.”³⁶¹

In general, the developing countries’ submissions also affirm the general duty of disclosure incorporated in the TRIPS Agreement, and do not deviate from it except to highlight for emphasis (as done in the TRIPS Agreement itself) selected material facts regarding source and country of origin frequently omitted from applications for patents derived from traditional knowledge. Therefore, the developing countries could be seen as seeking for traditional knowledge *the same* beneficial terms currently extended to western creations.

The developing country demands also reflect sentiments based on the need for reparations for harms caused, another important element in the concept of reciprocity. The African Proposal alludes to this by emphasizing that

for purposes of the review of Article 27.3(b) the issue raised is that the TRIPS Agreement at the moment has gaps in the sense that it has not provided adequate and equitable means to prevent patents mainly in developed Members that have amounted to and resulted in the misappropriation of genetic resources and traditional knowledge mainly from the developing Members.³⁶²

According to the African Group, this has occurred “inconsistently with the will of the custodian communities and the countries that have sovereignty over the resources.”³⁶³ As a remedial solution, it is contended that “[n]otions of equity and good faith mandate that the international community create an equitable system for the acquisition, maintenance, and enforcement of intellectual property rights which does not *a priori* exclude any section of society.”³⁶⁴

These concerns about inequities in the TRIPS Agreement appear to have been borne out by the impact of the TRIPS Agreement on developing countries so far. Compliance with the TRIPS Agreement has required them to make radical changes in their laws to provide intellectual property rights not previously recognized or to eliminate provisions inconsistent with the Agreement.³⁶⁵ It also has meant the creation of the necessary, but

361. *Id.* art. 29(2).

362. *Id.* at 2.

363. *Id.* at 6.

364. *TRIPS Agreement and the CBD*, *supra* note 298, ¶ 8.

365. The TRIPS Agreement imposes on member states of the WTO minimum requirements for the protection of intellectual property rights, many of which appear to benefit disproportionately the interests of the developed countries. Under the TRIPS Agreement, copyright protection extends to computer programs and compilations of data, rental rights and rights of performers, producers, and broadcasting organizations. TRIPS Agreement, *supra* note 359, art. 14. Trademarks are protected

expensive, administrative machinery to assure the enforcement of the rights. Furthermore, as the report of the Commission on Intellectual Property Rights makes clear, a harmonized strong IPR environment as envisioned under the TRIPS Agreement may not be good for all developing countries given their differences in scientific and technical capabilities, social and economic structures and inequalities of income and wealth.³⁶⁶ Costs to developing countries adopting a strong intellectual property rights regime have been shown to include increased prices for medicines, etc.³⁶⁷ Moreover, benefits promised developing countries under the TRIPS Agreement have not materialized. Stronger IPR protection for developing countries was expected to lead to increased technology transfers and technological diffusion, which would result in increased developing country-productivity and reduced costs.³⁶⁸ However, the available evidence indicates this has not occurred.³⁶⁹ Similarly, the expectation that increased IPR protection would enhance the efforts of pharmaceutical companies to develop drugs that are endemic to developing countries is yet to be realized.³⁷⁰

In a sense, therefore, the “acceptance” of the TRIPS Agreement by developing countries largely out of U.S. pressure represents a significant sacrifice made by those countries for the benefit of the developed countries. Fairness requires that this sacrifice be reciprocated by the voluntary

indefinitely for renewable seven year terms and the compulsory licensing of trademarks is prohibited. *Id.* arts. 14, 16(1), 18. Patents are to be granted for “any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.” *Id.* art. 27. The TRIPS Agreement requires member states to provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof.” *Id.* art. 27(3)(b). To permit effective action against infringement of intellectual property, the agreement specifies certain minimum procedures to be made available under national law including rights to notice, competent legal representation, presentation of evidence and the protection of confidential information. *Id.* art. 42. Special procedures are also to be set up to enable right holders, who suspect the importation of counterfeit trademark or pirated copyright goods, to apply in writing to the relevant authorities for the suspension by the customs authorities of the release into free circulation of such goods. *Id.* art. 51-60.

To ensure transparency, each member is required to publish all laws, regulations and judicial decisions relating to the availability, scope, acquisition, enforcement and prevention of abuse of intellectual property. *Id.* art. 63(1). In addition, the member is required to notify the Council of TRIPS about such laws and regulations to assist the Council in its review of the operation of the Agreement. *Id.* art. 61(2). Disputes among member states concerning the rights recognized under the Agreement are to be resolved following the procedures outlined in the Dispute Settlement Understanding. *Id.* art. 64(1).

366. CIPR EXECUTIVE SUMMARY, *supra* note 324, at 7.

367. *Id.* at 8.

368. *Id.* at 9-10.

369. *Id.* at 9.

370. *Id.* at 11.

agreement of the United States to protect the related interests of the developing countries like traditional knowledge which are not adequately protected in the developed nations.

3. Need for Special Concessions

As noted earlier, the form of the reciprocity argument advocated by developing countries involving a demand by one party on another to respond after the fact to a benefit the latter enjoys from the former is not new. It was used successfully by the U.S. in the pre-TRIPS era to address inequities in trade relations that the then existing international legal framework did not appear to regulate.³⁷¹ But to the extent the U.S. reciprocity arguments succeeded due to the ability of the government to back up its demands with threats or actual application of sanctions, the traditional knowledge source countries cannot expect to succeed in their demands by arguments based simply on moral grounds of fairness without credible threats of sanctions. However, because the WTO system, which the traditional knowledge source countries are now a part of, discourages unilateral application of trade sanctions, it is doubtful whether a threatened suspension or withdrawal of trade concessions as part of a negotiating posture by traditional knowledge source countries would even be taken seriously. The fact that such unilateral actions may not be permitted under WTO standards weakens the potential use of trade sanctions by TK source countries as a negotiating strategy.

In any event, sanctions, even if legal, would be impractical given the generally weak economic position of many developing countries. For example, the imposition of sanctions by a traditional knowledge source country on the world's only superpower might provoke unpleasant retaliatory action that the developing country would prefer to avoid. Besides, such sanctions, either through increased duties on imports or quantitative restrictions on exports from the United States, would always entail an economic cost in the developing country since the prices of affected imports would invariably rise.

Perhaps, rather than look to sanctions, the traditional knowledge source countries would need to evaluate carefully the demands of the United States at the international level as explained below and be prepared to make reasonable concessions on those matters in exchange for enhanced protection of traditional knowledge. If the matter of traditional knowledge had been brought up during the Uruguay Round negotiations leading up to the adoption of TRIPS, the developing country arguments for reciprocity would have been stronger as reflecting a straight forward exchange of intellectual property protection for traditional knowledge protection. However, given that the issue of traditional knowledge did not feature in the

371. See *supra* notes 345-56 and accompanying text.

negotiations, the opportunity for a reciprocal arrangement under the TRIPS Agreement was effectively lost. Under these circumstances, and as a reflection of its current superior bargaining position, the U.S. is less likely to accede to the request to protect traditional knowledge on reciprocity grounds without being offered concessions entirely different from those found in the TRIPS Agreement.

In this context, general matters on which the United States has concentrated its international negotiating efforts as being important for its national interests would be useful starting points to identify concessions that could be offered as incentives to persuade the United States to commit to improve on the protection of traditional knowledge. Significantly, with negotiations on intellectual property rights virtually at a stalemate at the WTO, and developing countries opposed to launching negotiations on an international treaty on foreign investments, the U.S. has turned to bilateral trade agreements with other countries to advance its economic interests.³⁷² Thus, it has been pushing developing countries to enter into bilateral investment agreements that include explicit obligations for the protection of intellectual property rights as investments. In agreements with Cambodia, Ecuador, Jordan, Korea, Nicaragua, Singapore, Sri Lanka, Trinidad & Tobago, Vietnam, and the Andean, Caribbean, and Sub-Saharan African countries, the U.S. has insisted on implementation of the International Convention for the Protection of New Varieties of Plants (“UPOV”)³⁷³ and Budapest³⁷⁴ treaties, sought guarantees against exclusions for plants and animals under patent law, and linked trade benefits to the provision of intellectual property rights.³⁷⁵ The agreements go beyond international norms to the extent they provide for intellectual property rights not covered by the TRIPS Agreement and incorporate “national treatment” without the exception provided for under international treaties.³⁷⁶

Such bilateral trade talks constitute logical and appropriate opportunities to broach the subject of traditional knowledge protection given the importance the U.S. appears to attach to them. Thus, it would be in the interest of developing countries to examine further the implications of

372. See United States Trade Representative, *Bilateral Trade Agreements*, http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html.

373. International Convention for the Protection of New Varieties of Plants, Dec. 2, 1961, S. Treaty Doc. No. 104-17 (1995), 1861 U.N.T.S. 281 [hereinafter UPOV].

374. Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Apr. 28, 1977, 32 U.S.T. 1241, 1861 U.N.T.S. 361.

375. INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT, *supra* note 167, at 58-60.

376. CARLOS CORREA, *BILATERAL INVESTMENT AGREEMENTS: AGENTS OF NEW GLOBAL STANDARDS FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS 2* (2004).

acceding to the terms requested by the U.S. in bilateral trade talks, and if the risks are acceptable, offer suitable concessions to the U.S. in exchange for the protection of traditional knowledge.

The history of U.S. participation in bilateral agreements with other countries concerning the protection of various cultural interests offers some hope that the U.S. could be persuaded to commit specifically to the protection of traditional knowledge under terms reasonably calculated to tackle egregious cases of misappropriation of foreign traditional knowledge. The policy statement issued in connection with U.S. participation in UNESCO's Illicit Trade Convention is quite instructive:

The legislation is important to our foreign relations, including our international cultural relations. The expanding worldwide trade in objects of archaeological and ethnological interest has led to wholesale depredations in some countries, resulting in the mutilation of archaeological complexes of ancient civilizations . . . In addition, art objects have been stolen in increasing quantities from museums, churches, and collections . . . the appearance in the United States of [illicitly exported or stolen] objects has often given rise to outcries and urgent requests for return by other countries. The United States considers that *on grounds of principle, good relations and concern for the preservation of the cultural heritage of mankind, it should render assistance in these situations.*³⁷⁷

Clearly, the statement underscores important U.S. foreign policy interests in cooperating with other nations to prevent gross abuses of their cultural property. In furtherance of this objective, Congress has authorized the use of bilateral and multilateral agreements to restrict the import into the U.S. of cultural property illegally exported from countries that are parties to the agreements.³⁷⁸ Pursuant to this authorization, the U.S. concluded bilateral agreements with Bolivia,³⁷⁹ Ecuador,³⁸⁰ El Salvador,³⁸¹ Guatemala,³⁸² Mexico³⁸³ and Peru.³⁸⁴ These precedents confirm that in

377. S. REP. NO. 97-564, at 23 (1982) (emphasis added).

378. See Convention on Cultural Property Implementation Act, 19 U.S.C. § 2602 (2000).

379. See Import Restrictions on Cultural Textile Artifacts from Bolivia, 54 Fed. Reg. 10,618-19 (1989).

380. See Agreement Between the United States of America and the Republic of Ecuador for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, Nov. 17, 1983, U.S.-Ecuador, T.I.A.S. No. 11,075, 1983.

381. See Import Restrictions on Archaeological Material from El-Salvador, 52 Fed. Reg. 34,614 (1987).

382. See Agreement Between the United States of America and Guatemala for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, May 21, 1984, U.S.-Guat., T.I.A.S. No. 11,075, 1983.

383. See Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural

principle, the U.S. would not be opposed to bilateral agreements on traditional knowledge, although the narrow scope of protection in the existing agreements suggests that the U.S. would likely seek to limit the nature of traditional knowledge it may undertake to protect.

V. PART FOUR: MUTUAL RECOGNITION AGREEMENTS AS A POLICY RESPONSE

A. *Mutual Recognition Agreements*

From the previous discussion, it has emerged that the prospects of regulating the use of traditional knowledge in the U.S. under the terms of an internationally binding instrument are rather remote, and that bilateral agreements reflecting cooperation between the United States and traditional knowledge source countries probably offer the best solutions for now. Indeed, bilateralism has been the U.S.'s preferred approach in resolving unsatisfactory relations with other countries under the existing international legal framework. In the context of traditional knowledge, this would entail the adoption of separate and flexible mechanisms between interested traditional knowledge source countries and the United States, focusing on the particular types of traditional knowledge for which protection is required, as well as the form of protection that makes sense from the perspective of the participating countries. Such bilateral agreements, unlike international treaties, are more flexible mechanisms to address specific U.S. concerns about the protection of traditional knowledge. They can also accommodate safeguards to satisfy the U.S. and provide incentives to assure U.S. commitment to the terms of the agreements. In this section we examine the nature and scope of such bilateral arrangements.

1. Recognition of Foreign Rights

Assuming that the United States is persuaded to enter into negotiations with a country (or regional group of countries)³⁸⁵ over the terms of protection for traditional knowledge originating from that country in

Properties, July 17, 1970, U.S.-Mex., 22 U.S.T. 494, 1970.

384. See Agreement Between the United States of America and Peru for the Recovery and Return of stolen Archaeological, Historical, and Cultural Properties, Sep. 15, 1981, U.S.-Peru, 33 U.S.T. 1607, 1981.

385. Although the preferred approach is for a regional group of countries negotiating with the U.S., for stylistic reasons, the rest of the paper unless otherwise specified, will use the term "country" to include the plural.

exchange for some concessions, an issue that must be addressed from the outset is the appropriate method for recognizing foreign rights in any bilateral agreement that is eventually reached. The approaches commonly employed in various international law instruments to recognize the rights of foreigners are reciprocity, national treatment and most favored treatment.

National treatment, which is a principle of non-discrimination, holds that an eligible foreign right holder should enjoy the same rights as domestic nationals. For example, Article 2 of the Paris Convention provides: "Nationals of any country of the [Paris] Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals"³⁸⁶ Similarly, Article 5 of the Berne Convention provides:

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.³⁸⁷

Protection of foreign traditional knowledge on the basis of national treatment may not necessarily resolve the enforcement problem noted at the beginning of this Article.³⁸⁸ Assume Countries A and B have both ratified an international instrument on traditional knowledge that incorporates the principle of national treatment for foreign right holders. To the extent that Country A provides traditional knowledge rights to eligible nationals under its laws, it must make the same traditional knowledge rights available to eligible foreigners from Country B residing in Country A. Where Country A already has an effective national law on traditional knowledge, national treatment should be an adequate basis for foreigners to protect their rights in that country. Note, however, that what is protected in Country A is not the set of rights the foreigners from Country B would be entitled to in Country B, but rather what Country A provides to its nationals under its law. It follows that if Country A does not extend rights to traditional knowledge,

386. Paris Convention for the Protection of Industrial Property art. 2, Mar. 20, 1883, 25 Stat. 1372, 21 U.S.T. 1583.

387. Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886, 828 U.N.T.S. 221, 249.

388. *Supra* note 9 and accompanying text.

the foreigners from Country B in Country A cannot claim rights under a non-existent national law and their rights in their home country will not be applicable. Thus, guarantees in any bilateral agreement to protect traditional knowledge on the basis of national treatment would be meaningless.

Of greater relevance to the protection of traditional knowledge is the reciprocity principle. "Under reciprocity or reciprocal recognition, whether a country grants protection to nationals of a foreign country depends on whether that country in turn extends protection to nationals of the first country; the duration or nature of protection may also be determined by the same principle."³⁸⁹ Reciprocity requires Country A to recognize the rights of nationals from Country B residing in Country A only where Country B also recognizes the rights of nationals of Country A residing in Country B. Clearly, the reciprocity principle makes sense where both countries are interested in protecting the same subject-matter. However, if Country A does not protect traditional knowledge and has no interest in doing so, the reciprocity principle cannot be used for the protection of traditional knowledge unless an incentive is offered in exchange for its commitment to protect traditional knowledge.

Protection of traditional knowledge on the basis of reciprocity offers the possibility of fuller protection for TK rights holders in the U.S. than protection on the basis of national treatment. Under the principle of reciprocity, Country A may recognize and enforce the traditional knowledge rights of a person from Country B even where Country A does not recognize such rights under its domestic (national) laws. This flexibility of the reciprocity approach makes it suitable for the protection of traditional knowledge in the U.S., which has been reluctant to sign on to a broad and binding international scheme that might require changes in its domestic laws. Under the reciprocity principle, the U.S. could still commit to protecting foreign traditional knowledge without making such changes.

An implicit endorsement of the principle, one of the early model intellectual property instruments advocated by both WIPO and UNESCO emphasized the need to protect traditional knowledge on the basis of reciprocity. Specifically, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions required that "[e]xpressions of folklore developed and maintained in a foreign country [be] protected . . . subject to reciprocity."³⁹⁰ Similarly, the principle of reciprocity is incorporated in UNESCO's Illicit

389. WIPO, *Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: The International Dimension*, ¶ 11, WIPO/GRTKF/IC/6/6 (Nov. 30, 2003).

390. See Draft Model Provisions, *supra* note 270, § 14.

Trade Convention, which enables an aggrieved signatory party to file claims, based on its domestic cultural property laws, in another signatory state to recover cultural property illegally removed from the complainant's jurisdiction.³⁹¹ Thus, incorporation of the principle of reciprocity in a bilateral agreement would be consistent with international practice.

2. Mutual Recognition Agreements as Reciprocal Arrangements

An increasingly popular application of the reciprocity principle is found in MRAs.³⁹² As defined in relation to consumer goods, MRAs are "agreements between countries to recognize and accept the results of conformity assessments performed by conformity assessment bodies ("CABs") of the countries that are parties to the agreement."³⁹³ In this context, the term "conformity assessment" refers to:

the process by which products are measured against the various technical, safety, purity, and quality standards that governments impose on products. Such MRAs allow an exporting country's CABs to use the tests and standards of the importing country in evaluating products, thereby potentially reducing the number of CABs that must evaluate a product destined for multiple markets.³⁹⁴

Prominent examples of MRAs include arrangements concluded in 1997 between the U.S. and the European Union covering trade in telecommunications equipment, electromagnetic compatibility, electrical safety, recreational craft, oil, pharmaceutical good manufacturing practices, and medical devices.³⁹⁵

Many advocates of MRAs assume that the standards of the importing country would always form the basis of the MRAs.³⁹⁶ However, that view is not unanimous. According to Linda Horton,

391. See *Illicit Trade Convention*, *supra* note 227, art. 13.

392. Mutual recognition agreements.

393. Public Citizen, *Mutual Recognition Agreements*, <http://www.citizen.org/trade/harmonization/MRA/index.cfm>.

394. *Id.*

395. *Id.*

396. Linda R. Horton & Kathleen E. Hastings, *A Plan that Establishes a Framework for Achieving Mutual Recognition of Good Manufacturing Practices Inspections*, 53 *FOOD & DRUG L.J.* 527, 530 (1998). The following comment illustrates this view:

I view [MRAs] as contracts for service. The United States enters into an agreement with a trading partner under the expectation that the trading partner will take steps to help FDA perform its primary function of applying domestic legal standards to products imported into the United States. The service contracted for may be the provision of information, such as the sharing the report of an inspection, or it may be the evaluation of a medical device by a body recognized by the partner's regulatory authorities. In both cases, the assumption is that U.S. law provides the standards that ultimately determine the acceptability of an inspected facility or an imported product. In such an agreement, the

those who use the term [MRA] do not always use it the same way. A fundamental question is always: whose requirements are being met? Is it the 'customer's' requirements that are being met, i.e., the importing country? . . . The international analogue is that the conformity assessment be done in accordance with the laws of the importing country. Or, conversely, is it the supplier's requirements that are being met, i.e. those of the exporting country's? There is a widespread desire in industry to be able to export if the requirements of the *exporting* country have been met.³⁹⁷

Although by definition an MRA "provides for reciprocal reliance upon facets of the regulatory systems" in the participating countries,³⁹⁸ which are recognized as "equivalent, entirely or in part,"³⁹⁹ it is not a requirement of MRAs that the standards be the same in both countries. As one commentator observes,

when two or more countries pledge to accept each other's standards as equivalent, a mutual recognition agreement is formed [E]quivalent does not mean 'the same'—it only means functionally equivalent, or functionally substitutable. In forming an MRA, each country in essence says that the other's standards and regulatory system are close enough to its own that it can entrust the protection of its citizens in that matter to the other country.⁴⁰⁰

Implementation of MRAs often results in significant savings in administrative and other costs of enforcement, a factor that partly explains the appeal of MRAs to the Food and Drug Administration in the U.S.⁴⁰¹

role of the trading partner is not that of law *maker* but rather that of information source or service provider.

Richard A. Merrill, *The Importance and Challenges of "Mutual Recognition"*, 29 SETON HALL L. REV. 736, 740 (1998).

397. Linda Horton, *Mutual Recognition Agreements and Harmonization*, 29 SETON HALL L. REV. 692, 724 (1998) (emphasis added).

398. Horton & Hastings, *supra* note 396, at 529-30.

399. Arvin P. Shroff, *FDA Enforcement Initiatives in the United States and Abroad*, 49 FOOD & DRUG L.J. 575, 578 (1994).

400. Alexander M. Donahue, *Equivalence: Not Quite Close Enough for the International Harmonization of Environmental Standards*, 30 ENVTL. L. 363, 370 (2000); see also James McIlroy, *Commonality of Standards—Implications for Sovereignty—A Canadian Perspective*, 24 CAN.-U.S. L.J. 245, 247 (1998) ("The mutual recognition approach does not require Canada and the United States to adopt the same standards. We must merely agree to recognize each other's standards, even if they are quite different.").

401. Shroff, *supra* note 399, at 578 ("The FDA recognizes that it cannot increase its foreign inspections at the same pace as it has over the past few years. There is a finite amount of resources

“[MRAs] also address transparency concerns since an MRA would forbid domestic regulatory regimes from erecting or applying regulatory barriers to imported products”⁴⁰² and therefore promote bilateral trade.⁴⁰³

MRAs have become a useful popular alternative, particularly where harmonization of different trade international standards have proved difficult. In general, mutual recognition agreements are easier to negotiate than efforts to harmonize regulatory regimes.⁴⁰⁴ Unlike harmonization, which requires jurisdictions to make their regulations identical or at least more similar, MRAs “can permit entry and sale of products or services without requiring fundamental regulatory convergence.”⁴⁰⁵ A potential benefit of MRAs is that principles agreed upon under MRAs could form the basis of an international agreement open to other countries. As has been noted in the context of trade-related MRAs between the U.S. and the European Union, “an element-by-element approach [involved in an MRA] could advance liberal multilateralism . . . to the extent that the elements chosen for negotiation could be embodied in preferential agreements which could be opened for accession to third countries willing to assume the agreement’s obligations.”⁴⁰⁶ Thus, “the transatlantic powers could negotiate agreements on important topics not yet fully covered by the WTO and try to use those agreements as a basis for further liberalization of world trade and investment.”⁴⁰⁷

3. Relevance of Mutual Recognition Agreements to Traditional Knowledge

The African Group at WIPO has advocated the use of mutual recognition agreements in relation to traditional knowledge.⁴⁰⁸ Certain features of the MRA make it worth pursuing as a mechanism for the protection of traditional knowledge. Unlike an agreement based on national treatment, an MRA can be negotiated and implemented where the regulatory

and foreign inspections are costly, time consuming and resource intensive. As a result the agency has been looking into [MRAs] with foreign countries.”).

402. Merit E. Janow, *Assessing APEC's Role in Economic Integration in the Asia-Pacific Region*, 17 NW. J. INT'L L. & BUS. 947, 994 (1997).

403. George A. Bermann, *Regulatory Cooperation between the European Commission and U.S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933, 972 (1996).

404. Janow, *supra* note 402, at 994.

405. *Id.*

406. Richard H. Steinberg, *Great Power Management of the World Trading System: A Transatlantic Strategy for Liberal Multilateralism*, 29 LAW & POL'Y INT'L BUS. 205, 249 (1998).

407. *Id.* at 249-50.

408. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Submission by the African Group: Objectives, Principles and Elements of an International Instrument, or Instruments, on Intellectual Property in Relation to Genetic Resources and on the Protection of Traditional Knowledge and Folklore*, Annex 2, WIPO/GRTKF/IC/16/12 (March 15, 2004).

systems differ, as when one country provides for rights not recognized in the other. Thus, Country A could agree to recognize and protect traditional knowledge rights from Country B on the basis of an agreement reached between the two countries, even though the former does not have laws respecting traditional knowledge.

An MRA between traditional knowledge source countries should be relatively easy to negotiate because such countries are likely to have well-developed national regimes which the MRAs would simply incorporate. However, for MRAs involving traditional knowledge user countries without such domestic laws, the negotiations are likely to be protracted and would require the provision of incentives in return for a commitment to protect traditional knowledge originating from traditional knowledge source countries. Concerns of traditional knowledge user countries that have discouraged them from committing to the protection of traditional knowledge under their laws may also have to be dealt with. Thus, the reluctance of the U.S. to commit to an international arrangement out of fears of its possible use to support national claims for self-determination⁴⁰⁹ could be addressed by limiting the scope of the MRA to foreign traditional knowledge.

Although many of the MRAs in the trade area incorporate standards of the importing countries, plausible arguments could be made for applying the standards of the exporting countries, where appropriate. In the context of the protection of foreign traditional knowledge (i.e. traditional knowledge from a traditional knowledge source country that is being misappropriated in a traditional knowledge user country) one could analogize and consider the traditional knowledge source countries and the traditional knowledge user countries as the exporting and importing countries, respectively. With that view, the misappropriation of traditional knowledge could be treated in the same manner as other types of trade discrepancies. An MRA setting forth a commitment by the traditional knowledge user country to protect foreign traditional knowledge under the standards of the traditional knowledge source country would provide an effective means of redressing the imbalance, especially where the traditional knowledge user country like the U.S., does not provide for the protection of traditional knowledge under its own laws. In the next section we elaborate on the scope of a mutual recognition agreement that could be concluded between the United States and interested traditional knowledge provider countries.

409. See *supra* notes 24-28 and accompanying text.

B. Scope of Mutual Recognition Agreements on Traditional Knowledge

The principal objective of an MRA with the U.S. on traditional knowledge would be to create a suitable environment in the United States to facilitate access to, as well as prevent the misappropriation of, traditional knowledge originating from the source country or source countries party to the MRA. To assuage U.S. concerns about difficulties in identifying traditional knowledge and the appropriate methods of regulating it, the MRA should carefully delineate the scope of protectible matter and clarify the general customary law principles that govern access, including prior informed consent and benefit sharing requirements and other obligations that could be imposed on users by indigenous rights holders. It will also be necessary to specify the prohibited acts of misappropriation with respect to which sanctions would be sought in the United States.

To ensure the effectiveness of the MRA, it is of vital importance that a central agency is established in the United States to administer the MRA's provisions. For want of a better term, the agency is referred to in this Article as the United States Traditional Knowledge Authority ("USTKA"). A principal role of the USTKA would be to articulate, assert and defend the traditional knowledge rights of the traditional knowledge source country subject to exploitation in the United States.⁴¹⁰ A second role of the agency would be to act as the conduit either for processing requests to use traditional knowledge received from interested persons in United States, or passing to the TK source country benefits received from uses of TK in the United States.

The MRA should provide a general definition as well as an illustrative list of categories of traditional knowledge to be regulated under the agreement.⁴¹¹ It is equally important to qualify the definition with a

410. In this sense, the USTKA would play a role similar to that played by the Council of Scientific and Industrial Research (CSIR) from India and the Coordinating Body for the Indigenous Organizations of the Amazon Basin (COICA) Amazon countries when they worked successfully for the revocation of illegally issued patents involving the neem tree and ayahuasca, respectively. See CARLOS M. CORREA, *TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY* 7, 18 (2001).

411. The Revised Bangui Agreement, which is applicable to some African francophone countries, generally follows this approach. It defines traditional knowledge as "the literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation" in Article 68(1)) and then goes on to provide numerous examples of the term as follows:

- (a) literary works of all kinds, whether in oral or written form, stories, legends, proverbs, epics, chronicles, myths, riddles;
- (b) artistic styles and productions [such as] (i) dances, (ii) musical productions of all kinds, (iii) dramatic, dramatico-musical, choreographic and pantomime productions, (iv) styles and productions of fine art and decorative art by any process, (v) architectural styles;
- (c) religious traditions and celebrations [such as] (i) rites and rituals, (ii) objects, vestments and places of worship, (iii) initiations;
- (d) educational traditions [such as] (i) sports, games, (ii) codes of manners and social

provision that the determination whether a particular item or practice of traditional knowledge was covered by the MRA for purposes of authorizing access or enforcing traditional knowledge rights in the United States would be made by the USTKA in consultation with the TK source country. To minimize definitional problems in the protection of traditional knowledge and simplify the process of obtaining prior authorization for use of protected works, the traditional knowledge source country should, to the extent possible, specify in an appendix to the MRA information on where particular types of protected works of traditional knowledge are found in the TK source country and any restrictions that may exist regarding their commercial exploitation.

Regarding the principles of protection, there should be a recognition in the MRA that indigenous groups own or have rights of custodianship over indigenous resources originating in the traditional knowledge source countries,⁴¹² which they exercise in accordance with customary practices.⁴¹³ Given the diversity of indigenous groups in those countries, it may not be feasible to identify specific indigenous groups as rights holders in the MRA. Instead, as proposed in relation to the definition of covered matter, the identity of such holders for purposes of obtaining access to traditional knowledge or providing benefits or enforcing rights would be determined by USTKA in consultation with the traditional knowledge source country.

Furthermore, it should be clarified in the MRA that the right to use traditional knowledge is not automatic and that access to traditional knowledge could be denied on account of the sacred nature of an item or simply out of a desire of the indigenous group not to commercialize it. Existing regional model laws on traditional knowledge not only recognize the right to refuse such access, but provide elaborate rules on prior informed

conventions;

(e) scientific knowledge and works [such as] (i) practices and products of medicine and of the pharmacopoeia, (ii) theoretical and practical attainments in the fields of natural science, physics, mathematics and astronomy;

(f) technical knowledge and productions:[such as] (i) metallurgical and textile industries, (ii) agricultural techniques, (iii) hunting and fishing techniques.

Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization art. 68, http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf.

412. In this context, for example, the African Model Law recognizes the rights of communities over “their innovations, practices, knowledge and technologies acquired through generations.” African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and Regulation of Access to Biological Resources art. 16, http://www.opbw.org/nat_imp/model_laws/oa-u-model-law.pdf [hereinafter African Model Legislation].

413. On this point the African Model Law notes, for example, that rights of indigenous groups in traditional knowledge “are to be protected under the norms [and] practices [of] the concerned local and indigenous communities” *Id.* art. 17.

consent to ensure that indigenous groups have sufficient information about proposed uses of traditional knowledge to make an informed decision whether or not to grant access.⁴¹⁴ Information required to be disclosed under the African Model law, for example, includes the identity of the applicant, types and reasons for the resources requested, risks in the use of resources, benefits to the local communities, and proposed benefit sharing arrangements.⁴¹⁵

It would be useful to require in the MRA that applications in the United States for access to traditional knowledge be directed to the USTKA to be forwarded to the traditional knowledge source country or source countries unless the USTKA is also authorized to provide consent for the particular type of traditional knowledge. Typical uses of the traditional knowledge requiring prior approval may be spelled out as including but not limited to: (a) “any publication, reproduction and any distribution of copies” of forms or practices of traditional knowledge; (b) “any public recitation or performance, any transmission by wireless means or by wire;” and (c) “any other form of communication to the public,” of forms or practices of traditional knowledge.⁴¹⁶

Because exploiters of traditional knowledge have often taken undue advantage of indigenous groups by not rewarding them appropriately for uses of traditional knowledge,⁴¹⁷ it is imperative that the MRA incorporate some form of benefit-sharing arrangement requiring that a portion of the benefit obtained in the U.S. from access to traditional knowledge be allocated to indigenous groups.⁴¹⁸ As has been recommended in relation to access, benefits due for use of traditional knowledge should be collected by the USTKA for transmission to the traditional knowledge source country.

The MRA should recognize the right of the traditional knowledge source countries or the USTKA to impose reasonable obligations or conditions on applicants for access to traditional knowledge. Such obligations may include the disclosure to the USTKA of significant commercial uses of traditional knowledge and any intellectual property sought or obtained in connection therewith. To help enforce these obligations as they relate to intellectual property rights, the U.S. could require patent offices to reject applications for patents derived from

414. *See, e.g., id.* art. 5.

415. *See id.* art. 4.

416. Draft Model Provisions, *supra* note 270, § 3.

417. CORREA, *supra* note 410, at 5-6.

418. It is instructive in this context that the Pacific Model provides for equitable monetary or non-monetary compensation. Model Law for the Protection of Traditional Knowledge and Expressions of Culture art. 12, *reprinted in* SECRETARIAT OF THE PACIFIC COMMUNITY, PACIFIC REGIONAL FRAMEWORK FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE 3-15 (2002). On its part, the African Model law guarantees indigenous groups at least 50 percent of the benefits gained from the utilization of indigenous resources. African Model Legislation, *supra* note 412, art. 22(2).

traditional knowledge, the transfer of which to the U.S. has not been certified by the USTKA or traditional knowledge source country as being in compliance with national requirements governing access and benefit sharing.

The description of prohibited acts of misappropriation of traditional knowledge should include the unauthorized acquisition and use of traditional knowledge or obtaining commercial benefits from the acquisition and use of traditional knowledge, when the person has reason to know or ought to have known that it was improperly acquired. As an illustration, the MRA might refer to the following as acts of misappropriation: (a) the acquisition of protected traditional knowledge by theft, fraud, or other illegal and unfair means; (b) failure to comply with prior informed consent procedures governing acquisition and use of traditional knowledge; (c) failure to comply with benefit sharing arrangements or provide appropriate compensation to the relevant holders for commercial uses of traditional knowledge, especially where benefits were realized from such utilization; (d) use of traditional knowledge in violation of the terms of any contract governing access to traditional knowledge, executed either in the United States or the source countries; (e) misrepresentations that a product or service is authentic traditional knowledge; and (f) distortion or use of an item of traditional knowledge in a way prejudicial to the honor, dignity or cultural interests of the community in which it originates.

Effective enforcement systems would be critical to the use of the MRA for the protection of traditional knowledge. At a minimum, the MRA should permit rights holders in the traditional knowledge source countries through the USTKA to file lawsuits in the U.S. to protect their rights. This type of right is not novel and is found in several cultural heritage instruments.⁴¹⁹ Considering the general unfamiliarity of the vast number of American judges with the concept of traditional knowledge, it may be necessary to create a special court to handle litigation involving traditional knowledge. Sanctions for unauthorized uses of traditional knowledge whether imposed by the general courts or the special traditional knowledge court, may include injunctive relief, seizure and forfeiture of infringing material, accounting for profits, damages, attorneys' fees, and costs. Criminal penalties such as jail terms should also be considered for very egregious cases.

419. See, e.g., *Illicit Trade Convention*, *supra* note 227, art. 13.

C. U.S. and the Proposed MRA

In this section an attempt is made to gauge the likely reaction of the United States to the proposed MRA. On the basis of evidence drawn mainly from the official stance of the U.S. on related issues, it is concluded that there is a good chance of the U.S. signing to the MRA if care is taken to avoid in the agreement provisions that could be construed as “political” to the extent the United States may consider such matters as exclusively domestic issues not susceptible to intrusion by foreign governments or institutions.

As a general matter, the United States has always advocated national solutions to the problem of unauthorized uses of traditional knowledge. For example, in opposing the disclosure requirement proposals before the TRIPS Council, the U.S. has emphasized that the most effective means of “(1) ensuring authorized access to genetic resources, i.e., that prior informed consent is obtained; (2) achieving equitable sharing of the benefits arising from the use of traditional knowledge and genetic resources; and (3) preventing the issuance of erroneously issued patents” is “through tailored *national* solutions to meet practical concerns and actual needs”⁴²⁰ Under this logic, the most appropriate response to the serious problem of unauthorized use of foreign traditional knowledge in the United States would appear to be a carefully crafted domestic solution implemented *within* the United States. The MRA reflects such a strategy.

As to the specific provisions of the proposed MRA, the United States has gone on record as expressing a commitment to “repress[ing] the misappropriation of traditional knowledge”⁴²¹ and is therefore not likely to oppose that as a legitimate goal of the MRA. However, agreeing on what should be protected would be a different matter with traditional knowledge source countries probably favoring a broader definition of covered matter than the U.S. One expects agreement to be easily reached to protect relatively uncontroversial matters such as handicrafts, textiles, paintings, drawings, carvings, pottery, sculptures, woodwork, metal ware, etc. In contrast, for other types of traditional knowledge, such as indigenous genetic resources in which American biotechnology companies have shown a keen interest, the negotiations could be complicated and more drawn out as discussed below.⁴²² However, if the negotiations are conducted in good faith, with a genuine commitment by the United States to enhance the protection of traditional knowledge, the scope of protected matter eventually agreed upon would be adequate to tackle the most rampant and egregious

420. Communication from the U.S., *supra* note 301, ¶¶ 5-6 (emphasis added).

421. WIPO, *The Protection of Traditional Knowledge: Revised Objectives and Principles*, Annex 14, WIPO/GRTKF/IC/8/5 (April 8, 2005) [hereinafter *Revised Objectives and Principles*].

422. See *infra* notes 428-36 and accompanying text.

unauthorized uses of traditional knowledge-related genetic resources in the United States.

Defining indigenous groups as rights holders under the MRA is unlikely to generate concern on the part of the United States, given its own practice of identifying Native American beneficiaries of various statutory rights in federal legislation.⁴²³ In light of the U.S. experience with the Native American Graves Protection and Repatriation Act⁴²⁴ under which parties requesting repatriation of human remains or objects are required to substantiate direct descent or prior ownership,⁴²⁵ the imposition of a similar burden of proof under the MRA for traditional knowledge should prove acceptable to the U.S. Thus, the MRA may be qualified by language indicating that determinations by either the USTKA or the national competent authority in the traditional knowledge source country be taken as conclusive proof of ownership. Such deference to traditional community groups would not be unusual, as U.S. courts have regularly deferred to the decisions of foreign institutions on some customary law issues⁴²⁶ and to tribal courts' findings on "tribal law."⁴²⁷

The United States is not likely to oppose the principle of prior informed consent, which it has viewed favorably as a "valuable practice,"⁴²⁸ nor the principle of benefit sharing, given its professed support for arrangements that "effectively control the collection of resources and ensure the sharing of benefits from their use."⁴²⁹ Indeed, the practice of benefit sharing is certainly not unknown in the United States, evidenced by the fact that "[m]any U.S. government agencies have established policies that embody the principles of appropriate access and equitable benefit-sharing."⁴³⁰

The proposed disclosure's typical obligations to be imposed on recipients of traditional knowledge under the MRA should not raise serious concerns either, as the United States tends to find them to be reasonable. In

423. For example, the Indian Arts and Crafts Act defines the term "Indian" to include: any Indian tribe, band, nation, Alaska Native village, or any other organized group or community which is recognized as eligible . . . by the United States. . . ; or (2) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority.

25 U.S.C. § 305 (2000).

424. 25 U.S.C. § 3005 (2000).

425. *Id.* § 3005(a)(4).

426. Kuruk, *supra* note 29, at 843.

427. Cooter & Fikentscher, *supra* note 107, at 558-61; Laymon, *supra* note 107, at 363.

428. Revised Objectives and Principles, *supra* note 421, at Annex 32.

429. Communication from the U.S., *supra* note 301, ¶ 20.

430. *Id.* ¶ 23.

the context of access and benefit sharing arrangements involving traditional knowledge, the U.S. has emphasized that such contracts “can also require mandatory disclosure to appropriate authorities of any future commercial application utilizing the relevant traditional knowledge or genetic resource, whether patented or not.”⁴³¹ This is justified because “[t]his type of mandatory disclosure requirement can provide for an effective monitoring system by ensuring specific type of disclosure of the particular commercial application involved.”⁴³² The acts of misappropriation listed in the proposed MRA should also not present any difficulties to the extent they are already prohibited under the general laws of the United States dealing with theft, misrepresentation and unfair competition. It is worth noting in this context that the U.S. has expressed “support [for] the protection of TK through the suppression of unfair competition.”⁴³³

What may prove to be controversial, however, are acts of misappropriation defined in relation to the acquisition of intellectual property rights in traditional knowledge resources.

As a leading advocate for global intellectual property rights, the U.S. has consistently opposed the efforts of developing countries to revise the international patent regime to enable its use in curbing unauthorized uses of traditional knowledge, including the issuance of patents for inventions derived from traditional knowledge.⁴³⁴ It has favored the acquisition of intellectual property rights in traditional knowledge, and even showcased U.S. material transfer contracts providing intellectual rights as appropriate models for the international community.⁴³⁵ Thus, the U.S. is unlikely to support broad language in the MRA suggesting that any acquisition of intellectual property rights in traditional knowledge-related genetic resources necessarily constitutes an act of misappropriation. However, if more qualified language is adopted as where the act prohibited is the acquisition of intellectual property rights in a TK resource *in contravention of an express clause in an access and benefit sharing contract*,⁴³⁶ the U.S. would

431. *Id.* ¶ 20.

432. *Id.*

433. Revised Objectives and Principles, *supra* note 421, at Annex 37 (quoting United States of America (WIPO/GRTKF/IC/6/14, para. 76)).

434. *See supra* notes 299-312 and accompanying text.

435. For example, during the second meeting of the WIPO’s IGC on Traditional Knowledge, the U.S. delegation professed its support for the development of contractual guides governing concerning access to genetic resources and benefit-sharing to the extent “they were for guidance only and were not binding.” WIPO, *Report of the Second Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, ¶ 74, WIPO/GRTKF/IC/2/16 (Dec. 10-14, 2001). As examples of such agreements, the U.S. delegation furnished a compilation titled “Memoranda of Understanding and Letters of Collection of the National Cancer Institute” to be made available to the general public by the WIPO Secretariat. *Id.*

436. The African Model Law, for example, requires applicants to undertake as a condition for access to traditional knowledge, “not to apply for any form of intellectual property protection over

probably consent to enforce the prohibition as a reflection of its public policy favoring the enforcement of legal contracts freely negotiated by the parties. To enforce the provision as qualified, it would then be necessary to provide evidence linking the relevant foreign traditional knowledge transferred under the contract with the intellectual property rights subsequently acquired in the U.S. Outside these parameters, as where the intellectual property rights cannot be traced to a traditional knowledge resource transferred under a particular access contract and the traditional knowledge resource is therefore alleged to have been obtained without the consent of the appropriate indigenous rights holders, the U.S. may insist that the issues concerning intellectual property rights not clearly linked to contractual arrangements be dealt with instead under its general intellectual property laws and not under the MRA.

A method of arriving at a compromise on the scope of protectible traditional knowledge-related genetic resources may involve incorporating aspects of the certification scheme proposed by the Like-Minded Group of Megadiverse Countries.⁴³⁷ Under the group's proposal, the transfer of a genetic resource from a country that is a signatory to the CBD would need to be accompanied by a certificate which establishes that access and benefit sharing and other national requirements had been satisfied prior to the transfer.⁴³⁸ The certificate could then be used to aid in the acquisition of a patent abroad relating to the genetic resource. Without such certificate, the application for a patent relating to the resource would be expected to be turned down. The proposal would achieve the same effect as the disclosure of origin requirement advocated at the WTO⁴³⁹ without imposing additional burdens on patent offices,⁴⁴⁰ thereby satisfying a key U.S. objection to the disclosure requirement. Applying the proposal in the context of the MRA,

the biological resource or parts or derivatives thereof and not to apply for intellectual property rights protection over a community innovation, practice, knowledge or technology without the prior informed consent of the original providers." African Model Legislation, *supra* note 412, art. 8(v).

437. This is a group of the world's most diverse countries, including Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, Philippines, South Africa and Venezuela. The group was formed in 2002 at the WTO Ministerial meeting in Cancun to strengthen the bargaining position of biodiversity countries at international fora. GRAIN, *Re-situating the Benefits from Biodiversity: a Perspective on the CBD Regime on Access and Benefit Sharing*, SEEDLING, April 2005, at 5, 8.

438. *Id.* at 7-8.

439. It would assist in the rejection of patents concerning genetic resources obtained in source countries without complying with the access and benefit rules and other national requirements for access.

440. Thus, patent offices would not be involved in investigating whether foreign regulations governing access and benefit sharing had been complied. Their role would be limited to merely checking whether a valid certificate existed.

as indicated above, the U.S. patent office would be required to reject applications for patents relating to transferred resources unaccompanied by the requisite certificates from the traditional knowledge source countries.

Conditioning protection of cultural interests in the U.S. on certification of compliance with foreign national laws is not a novel concept. It has been a key component of U.S. cultural heritage legislation for many decades. For example, under the Pre-Columbian Art Act of 1972, certain antiquities could not be imported into the U.S. without a certificate of compliance. In addition, the Convention on Cultural Property Implementation Act authorizes the President to enter into bilateral or multilateral agreements with other nations under which “no designated archaeological or ethnological material exported from the requesting nation could be imported into the United States, unless the requesting nation issued a certificate that exportation was not in violation of its laws.”⁴⁴¹ To date, at least six bilateral agreements have been concluded by the U.S. with other countries on that basis.⁴⁴²

Regarding the proposal on civil and criminal penalties for misappropriation of traditional knowledge, the official pronouncements of the U.S. on the subject appear favorable. For example, it has declared that “countries could establish permit systems that impose civil and/or criminal penalties for extracting genetic resources without a permit”⁴⁴³ Similarly, it has observed that “effective enforcement regimes for access and benefit-sharing should be part of civil and criminal codes specifically designed to enforce access and benefit-sharing laws.”⁴⁴⁴ Moreover, from this standpoint, “criminal provisions and/or civil liability for failure to comply [could] be included in the country’s laws for those few who might take genetic resources without entering into an access agreement with the required party.”⁴⁴⁵ As examples of appropriate sanctions, the U.S. has noted that “[c]ontracts can be specifically enforceable [or] . . . damages for breach of contract can also be specified, including punitive damages.”⁴⁴⁶

However, in sharp contrast to the expected generally positive reception of the U.S. to parts of the MRA as discussed above, the U.S. would probably not agree to an MRA on matters it views to be politically sensitive, such as covering claims of indigenous and local communities for “self-determination, health, justice, cultural heritage and land”⁴⁴⁷ As it has emphasized at international fora, it considers such matters to be “serious

441. Phelan, *supra* note 40, at 98; *see also* 19 U.S.C. § 2606 (2000).

442. They include Bolivia, Ecuador, El Salvador, Guatemala, Mexico and Peru. Roberts, *supra* note 37, at 337.

443. Communication from the U.S., *supra* note 301, ¶ 19.

444. *Id.* ¶ 25.

445. *Id.* ¶ 26.

446. *Id.* ¶ 20.

447. U.S. Statement, *supra* note 286, at para. 7.

interests that must be examined fully within appropriate national contexts⁴⁴⁸ and over which international institutions do not have competence. Consequently, measures that raise these political issues will most certainly be objected to.

Fortunately, the measures proposed in the MRA do not have such political implications. First, to the extent the claims under the MRA would concern tangible or intangible material *brought into* the United States from the TK source country, they will not involve land claims which have been the main source of friction between the government and the Native Americans. Second, as community groups residing in the traditional knowledge source country, the parties seeking to protect their traditional knowledge rights in the United States under the MRA cannot possibly be viewed as a discriminated class in the United States arguing for self-determination.

However, while the scope of the MRA in this sense would clearly be limited to foreign traditional knowledge and, therefore, exclude traditional knowledge of Native Americans, the long term experience gained from the successful implementation of the MRA by the U.S. should prove beneficial to Native American interests. If the USTKA is able to maintain a good track record, with demonstrable benefits to participants in the MRA process, the mandate of the USTKA could be extended to include the protection of Native American traditional knowledge as well. At such future time, negotiations could be opened under the auspices of the USTKA between Indian representatives and the U.S. government regarding compromise approaches for the protection of Native American heritage.

VI. CONCLUSION

The first part of this Article traced the regulation of Indian cultural heritage under various legislative initiatives and examined some constitutional arguments frequently raised in the context of traditional knowledge protection such as public domain, intellectual property rights, free speech and freedom of religion. Reflecting the deep suspicions of the U.S. government that a stronger recognition of traditional knowledge could be used politically by Indian groups to press for rights of self-determination and greater autonomy from the federal government, no provision is made under domestic law for protecting traditional knowledge outside the limited parameters of cultural heritage legislation and the limited jurisdiction of

448. *Id.*

Indian tribal courts.⁴⁴⁹ This suspicion has also colored the government's definition of the issues and its preparedness to commit to international solutions regarding the protection of traditional knowledge. The U.S. has eloquently defended its position at the international level, and judging from its current stance, the prospects are rather remote that a binding international treaty on traditional knowledge would be adopted in the very near future with the support of the U.S.

In the meantime, and as an alternative, this Article has proposed the use of mutual recognition agreements between the U.S. and traditional knowledge source countries to tackle persistent problems regarding the misappropriation of traditional knowledge in the United States. However, for the U.S. to commit to improving the protection of traditional knowledge, this Article has pointed out that purely moral arguments are not likely to be persuasive and that significant concessions would be required from traditional knowledge source countries. In addition, the agreements must address U.S. concerns, whether well-founded or not, about potential use of MRAs for domestic politics, by limiting the scope of protection to foreign traditional knowledge. The enforcement mechanisms envisaged under MRAs should not be too intrusive nor require radical changes to U.S. law. The agency proposed herein to oversee the protection of traditional knowledge would serve as an effective liaison and assist U.S. courts in deciding what items of traditional knowledge should be protected. While it may not be feasible to cover all cases of misappropriation, the MRA would, at a minimum, provide adequate remedies for biological resources used in the U.S. in a manner that violates the terms of an access and benefit sharing contract executed in a traditional knowledge source country. In addition, it could provide a less burdensome basis than the disclosure requirement⁴⁵⁰ for rejecting patent applications derived from traditional knowledge-related biological resources, where the applicant is unable to demonstrate certification by the traditional knowledge source country of compliance with the national requirements on access and benefit sharing applicable to such resources.

Under current circumstances, MRAs such as that proposed in relation to the U.S., should be considered as an alternative to the creation of a binding international instrument on traditional knowledge, as they allow for the conclusion of flexible arrangements to facilitate the enforcement of traditional knowledge rights in foreign countries, taking into account the specific interests and concerns of signatory parties. Although as a rule, MRAs do not apply to non-parties,⁴⁵¹ and thus will have no effect in traditional knowledge user countries that refuse to subscribe to them, the

449. *Supra* notes 31-112 and accompanying text.

450. *Supra* note 299 and accompanying text.

451. Steinberg, *supra* note 406, at 249.

common principles they reflect could eventually form the basis for and positively influence the development of a future international instrument for the protection of traditional knowledge.

