

4. INTELLECTUAL PROPERTY AND BIOLOGICAL DIVERSITY: INTERNATIONAL LAW AND DOMESTIC RESPONSES

4.1 GATT: TRIPS and Domestic Legislation

The focus of market liberalism and globalisation in international trade is the General Agreement on Tariffs and Trade (GATT) which, since the recent completion of the 'Uruguay Round', has evolved a new institutional structure in the form of the World Trade Organisation (WTO). Further new developments which are outcomes of the Uruguay Round multilateral negotiations include the extension of GATT principles from tariffs and trade in goods to trade in services – the General Agreement on Trade in Services (GATS) – and to trade aspects of intellectual property (IP) – the GATT agreement on Trade Related Aspects of Intellectual Property Rights (GATT:TRIPS). An understanding of this acronym strewn field of international law and international institutions, and its significance for the domestic law of New Zealand, is of the utmost importance to the Tribunal's consideration of the Wai 262 claim. The GATT:TRIPS convention is of particular relevance and the Government has already prevailed upon Parliament to enact a number of measures in implementation of that convention. The GATT (Uruguay Round) Bill 1994 ultimately led to the enactment of the Animal Remedies Amendment Act 1994, the Customs Amendment Acts 1994, the Dumping and Countervailing Duties Amendment Act 1994, the Medicines Amendment Act 1994, the Patents Amendment Act 1994, the Pesticides Amendment Act 1994, the Temporary Safeguard Authorities Amendment Act 1994, the Trade Marks Amendment Act 1994 and also the Geographical Indications Act 1994. As counsel for the claimants pointed out in submissions on urgency for hearing¹ none of these Acts safeguard Treaty of Waitangi rights, and the lack of any Treaty reference was a matter of deliberate omission in a close vote during the second reading debate on an amendment moved by the member for Northern Maori, T Henare. Since then the Hazardous Substances and New Organisms Act 1996 has been passed. It legislates upon a number of matters, including how to deal with genetically modified organisms (GMO), which are of vital concern to the Wai 262 claimants. The 1996 Act did contain a section (s8) relating to the Treaty of Waitangi but it was the weaker 'shall take into account the prin-

1. Wai 262 record of inquiry, 14 August 1995

ciples of the 'Treaty' formulation rather than the stronger formulation from the Stated Owned Enterprises Act 1986 refusing to permit the Crown 'to act in a manner that is inconsistent with the principles of the Treaty' which was proposed by T Henare in 1994. The weaker formulation, which also appears in the Resource Management Act 1991, has already been the subject of adverse findings by the Waitangi Tribunal in the *Ngawha Geothermal Resource Report* and the *Te Arawa Geothermal Resource Report* in 1993.² The Government has failed thus far to respond to those adverse findings – other than by repeating the criticised wording in this Hazardous Substances and New Organisms Act 1996.

It is evident that much GATT:TRIPS implementation has already occurred without scrutiny of the Treaty of Waitangi implications of the trade and intellectual property reforms in a manner satisfactory to the Wai 262 claimants. Because this is a matter of such importance to this claim, a report by M McNeill has been commissioned and was filed with this report. McNeill is a social anthropologist whose Master's thesis 'Intellectual Property Law Reform and the Marginalisation of Maori' focussed on GATT:TRIPS. In this associated report he argues that the GATT agreements and the WTO establishment are by no means uncontested and unproblematic for New Zealanders as a whole and Maori people in particular, although that impression is what government spokespersons would have us believe.

4.2 Non-congruity of International Law Developments

The literature reviewed indicates that recent international treaties and conventions and the norms of developing international law are not altogether congruent. There are trends towards a globalised economy with agreements which foster free trade and market liberalism. There are also conventions which seek international cooperation to maintain biological diversity and to impose controls in order to prevent further degradation of the planetary environment. There is an emphasis on the sovereign rights of nation states and yet at the same time there have been developments enhancing the rights of indigenous peoples within nation states to exercise rights of self-determination and autonomous development.

The universalist direction of intellectual property law reform being promoted by the WTO is described by McNeill. Yet even the WTO itself

2. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993; and Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993

recognises that there is a tension between its goals and the desirability of having regard for indigenous peoples' knowledge systems. The WTO Committee on Trade and Environment on 8 November 1996 adopted a Report to the WTO Ministerial Conference held in Singapore in December which contained the following paragraphs:

142. With regard to traditional and indigenous knowledge, one view is that this knowledge has been the basis for much of the development of modern agriculture and medicine, yet these communities have to pay for patented products that are derived from their knowledge and innovation. One suggestion in this regard is that the TRIPs Agreement should exclude the possibility of patenting processes and products derived from naturally occurring biological resources, since it is doubtful these can be considered 'novel' in terms of the criteria for patentability, but it should accord recognition to traditional interests and rights holders. New legislation and codes of conduct, including changes in the notion of trade secrets, may be needed to ensure that communities which are the source of traditional knowledge receive benefits from its exploitation. It has been suggested by those sharing this view that the review of Article 27 of the TRIP's Agreement should take account of the results of negotiations on 'farmer rights' under the FAO Global System for Plant Genetic Resources and other developments regarding protection of traditional knowledge, both in the realm of the CBD and at the domestic level.

143. Another view is that it is inappropriate to consider amending the TRIPs Agreement because traditional or indigenous knowledge is not an IP and involves subject matter that is widely known or in the public domain. Therefore, it cannot and should not be deemed to be an IPR. Pursuant to this view, unrestricted and unpaid access to plant genetic resources for food and agriculture needs to be maintained for it is to the advantage of all countries, and that an open exchange of such genetic material leads to better research, improved knowledge, more productive crop cultivars and more and better food. Free movement of plant genetic resources for research and breeding facilitates gene conservation, including the improvement of crop gene banks. Rather than seeking a solution in an IPR context, it was proposed that voluntary agreements involving firms, foreign governments and indigenous people could provide for benefit-sharing and technological cooperation to

information providers which would represent an effective means for compensating traditional knowledge not subject to IP protection; such private contractual arrangements do not require multilateral disciplines and remove the need for an international *sui generis* system in this area.³

It is suggested that the least the New Zealand government could do in the WTO context is to argue for the view that traditional interests and rights-holders should indeed be accorded due recognition. The problem with both views cited above, however, is that indigenous knowledge is considered of importance only if it might contribute to innovation and development along lines promoted by those who control and organise international trade as a mercantile activity. There is an entirely different approach, which also is receiving growing recognition in international law, that validates and seeks to promote the self-determination of indigenous peoples. D.A. Posey has been a particularly diligent scholar in seeking to highlight those international law developments which may be relied upon to support indigenous peoples' rights even if those developments are not congruent with the market liberalism touted by the WTO and others.

It is also suggested that it would be in line with Treaty of Waitangi jurisprudence if the Tribunal were to put emphasis on the rights of indigenous peoples when considering the Crown's international legal obligations. If one interpretation of intellectual property law reform required by GATT:TRIPS led to a significant diminution of the Treaty of Waitangi rights of iwi and hapu and another interpretation led to greater recognition of traditional resource rights and the kaitiakitanga of iwi and hapu, then the interpretation favourable to Treaty of Waitangi obligations should be preferred. The Tribunal is already well aware of this type of issue as the *Taranaki Report: Kaupapa Tuatahi 1996* clearly demonstrates:

In modern times, overseas countries have seen the indigenous component of a symbiotic relationship with the Government under the rubric of 'aboriginal autonomy'. Also called 'aboriginal self-government', it equates with 'tino rangatiratanga' and 'mana motuhake'.

Without examining detail, it may also be considered that, in recent times, the underlying issue of aboriginal autonomy has been addressed more thoroughly in places other than our own. Support for this view may be found in the position in the United States of America and developments in Canada and Australia. These suggest the recognition of

3. Information and Media Relations Division of WTO, 'Report of the WTO Committee on Trade and Environment', Press/TE014, 18 November 1996, p 25

aboriginal autonomy is not in fact a barrier to national unity but an aid. They go further to recognise that conciliation requires a process of empowerment, not suppression.

Some official opinions suggest the lack of a comprehensive definition of 'aboriginal autonomy' is actually appropriate at this stage: that it is better to focus on the problem and the options for relief than to argue word prescriptions too soon. Broadly, however, we understand 'aboriginal autonomy' to describe the right of indigenes to constitutional status as first peoples, and their rights to manage their own policies, resources, and affairs (within rules necessary for the operation of the State) and to enjoy cooperation and dialogue with the Government.

The autonomy approach posits two presumptions that seem to us to be true:

- ▶ that autonomy is the inherent right of all peoples in their native countries; and
- ▶ on the colonisation of inhabited countries, sovereignty, in the sense of absolute power, cannot be vested in only one of the parties.

In terms of the Treaty of Waitangi, in our view, from the day it was proclaimed, sovereignty was constrained in New Zealand by the need to respect Maori authority (or 'tino rangatiratanga', to use the Treaty's term).

State responsibility, not absolute power, is the more necessary prerequisite to governance in this context. So also is State responsibility of increasing importance in the current global environment, where international norms carry the objectives of world security, free trade, and peace. Thus, it is more apparent today that the legal paradigm of State sovereignty had necessarily to change when different peoples met and one colonised the lands of another, but at least it can be said that both Government authority and Maori authority were recognised in the Maori text of the Treaty of Waitangi.

The matter has new significance in the current climate of the International Decade of Indigenous Peoples and its focus on the associated Draft Declaration on the Rights of Indigenous Peoples, with its acknowledgement of autonomy. At this time, too, as inter-State tensions ease, ethnic conflict may be seen as taking pre-eminence in global concerns for peace. It is thus of concern that the decade has barely been acknowledged in New Zealand, the draft declaration is hardly known

here, and policies for the conciliation of peoples in New Zealand are comparatively undeveloped.⁴

Posey, a member of St Anthony's College, Oxford University, would be an ideal expert witness to give evidence in these proceedings if he should happen to be available to do so. Posey did in fact give evidence to the Tribunal at a special hearing in Rotorua.⁵

Meanwhile, having outlined the current position of the Ministry of Commerce, I will summarise briefly Posey's discussion of international law instruments which may be relied upon to support the general thrust of the Wai 262 claim.

4.3 Ministry of Commerce Perceptions

The nature of some of the difficulties the claimants have with intellectual property laws, as presently defined, are acknowledged by the Ministry of Commerce in its Maori Consultation Paper:

The Ministry understands that, in general terms, Maori consider that the current IPR system denies Maori:

- ▶ the right to define the nature and scope of their cultural and intellectual property; and
- ▶ the right to control and protect their taonga.

The Ministry further understands that Maori consider that the current system does not provide them with sufficient protection for their taonga. For example, intellectual property laws generally require individual (or joint) authorship to be clearly established before protection can be given. However, it can be difficult to determine who originally created Maori traditional knowledge and cultural work, as they have been developed over generations and are collectively owned. Moreover, Maori have indicated that they want the term of protection given to their cultural and intellectual property to be enduring. The existing intellectual property system generally provides for limited periods of protection (eg copyright generally lasts for the life of the author plus 50 years). As indicated above protection is limited under the existing system on the ground that it is in the public's interest to limit the scope and duration of monopolies.⁶

4. Waitangi Tribunal, *The Tarananaki Report: Kaupapa Tuatahi 1996*, Wellington, 1996, pp 19–20

5. See witness profile and statement of evidence of Darrell Addison Posey, November 1998 (Wai 262 record of inquiry, docs F1, F1(b))

6. Ministry of Commerce, *Intellectual Property Law Reform Bill: Maori Consultation Paper*, Wellington, Business Policy Division, Ministry of Commerce, 1994, p 9

The Ministry paper, having merely noted the Wai262 claim and the Mataatua Declaration, then identifies two 'key questions' that Maori have asked in relation to the existing Intellectual Property Rights system, and gives categorical assurances as follows:

Can the Plant Variety Rights (PVR) Act be used to prevent Maori from using native plants in traditional ways?

No. The PVR Act does not affect the rights of Maori to use native flora in traditional or new ways, as the Act only relates to new varieties.

Can the Patents Act be used to prevent Maori from using native plants in traditional ways?

No. A patent can only be obtained in respect of a new product or process (eg a genetically manipulated plant or a new process relating to a plant). Therefore, the Patents Act cannot prevent Maori from using native plants in traditional ways.⁷

Two points need to be made. First, neither of these 'key questions' nor their answers address the fundamental assertions of Wai 262 and the Mataatua Declaration concerning the enduring nature of Treaty of Waitangi guaranteed tino rangatiratanga rights and kaitiakitanga responsibilities of iwi and hapu. Secondly, there are good reasons to doubt the reliability of the assurances given in the answers. If the second view within WTO circles quoted above should prevail, then the New Zealand government may well be put under an obligation to ensure 'unrestricted and unpaid access to plant genetic resources' and the 'free movement of plant genetic resources'. Moreover it is apparent that scientists from developed countries are determined to expand the coverage of patent law in a manner which detrimentally affects developing countries, and (even more so) indigenous populations who have no direct say in nation-state controlled international institutions. As an example I instance the following item I obtained from an internet source recently:

The Indian Government have filed a case against an American patent granted in 1995 to two scientists to use a powder extracted from turmeric, (*Curcuma Longa*), for healing wounds.

The granting of these exclusive rights to foreign scientists has infuriated Indians, most of whom have strong emotional attachments to turmeric (*haldi*), because it has been used for centuries as a cure-all for the scrapes and cuts that are a part of childhood.

7. *Ibid*, p 10

In order for the appeal to be upheld, India will have to prove that turmeric has been previously used specifically to heal wounds, by producing an academic paper which predates the patent application.⁸

4.4 Beyond Intellectual Property

Various articles by Posey have now been incorporated into a book with a title and sub-title which clearly indicate the author's position: *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous*

Mechanism	Advantages	Disadvantages
Patents	Can safeguard knowledge legally Available in most countries	Limited term of protection Applications expensive and require legal advice Protect knowledge of individual investors, not collective knowledge or communities Difficult and expensive to defend
Petty patents	Can safeguard knowledge legally More traditional knowledge may be protected than under patent Compared with patents, less expensive application procedure and shorter and less stringent examination	Available only in a few countries No international agreements to facilitate application in different countries Shorter period of protection than patents
Copyright	Easy to obtain Long period of protection	Protects expression of ideas but not knowledge itself Protection period not indefinite Subject matter must be in a physical form
Trademarks	Inexpensive Indefinite protection period, although may have to be renewed periodically May attract more customers to products of indigenous traders and trading organisations	Does not protect knowledge per se
Trade secrets	Can protect traditional knowledge with commercial application Can protect more knowledge than the other IPR types Can be traded for economic benefits by contract Inexpensive to protect	Available in fewer countries than patents and copyrights
Breeders' rights	Less expensive than patents Many folk varieties (landraces) may be eligible	Only available in UPOV convention signatory countries, which are few in number Difficult to demonstrate eligibility criteria

8. A Agarwhal and S Narain, 'Pirates in the garden of India', *New Scientist*, 26 October, 1996 (internet precis)

Peoples and Local Communities.⁹ The advantages and disadvantages of current intellectual property right (IPR) mechanisms for indigenous peoples are fully discussed and the discussion is then summarised in a table format:¹⁰

The general conclusions reached by Posey include:

IPR laws are generally inappropriate and inadequate for defending the rights and resources of local communities. IPR protection is purely economic, whereas the interests of indigenous peoples are only partly economic and linked to self-determination. Furthermore, cultural incompatibilities exist in that traditional knowledge is generally shared and, even when it is not, the holders of restricted knowledge probably still do not have the right to commercialise it for personal gain.

Various indigenous communities and ethnic groups that have occupied similar environments may possess the same, or similar, technical knowledge regarding a specific resource and its use. Therefore, payments to one community could engender conflict between indigenous groups and result in protracted legal battles. This potential conflict between groups calls into question the wisdom of using IPR mechanisms in attempting to award retroactive payments for indigenous knowledge.

Furthermore, the lack of economic self-sufficiency of indigenous peoples and the unequal power relations between themselves and the corporate world would make it very difficult for communities to defend their IPR. Preventing companies from infringing their IPR, for example, by applying for patents based on knowledge derived from, but not identical to, that of the community, presents serious difficulties because of the potentially high cost of litigation.

Indigenous organisations, such as COICA, are becoming more aware of IPR issues and understand that although use of the IPR types described above may under certain circumstances be beneficial, it is necessary, as the title of this book suggests, to look beyond IPR and consider alternative systems of protection, compensation, and self-determination.¹¹

Consideration is then given to the question of whether indigenous peoples can develop their own system for protecting traditional resource rights (TRR) which are described in this way:

Knowledge and traditional resources are central to the maintenance of identity for indigenous peoples. Therefore, control over these re-

9. D A Posey and G Dutfield *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, Ottawa, International Development Research Centre 1996

10. *Ibid*, p 90

11. *Ibid*, p 92

source is of central concern in their struggle for self-determination. The term TRR has emerged to define the many 'bundles of rights' that can be used for protection, compensation, and conservation. The change in terminology from IPR to TRR reflects an attempt to build on the concept of IPR protection and compensation, while recognising that traditional resources – both tangible and intangible – are also covered under a significant number of international agreements that can be used to form the basis for a sui generis system. 'Traditional resources' include plants, animals, and other material objects that may have sacred, ceremonial, heritage, or aesthetic qualities. 'Property' for indigenous people frequently has intangible, spiritual manifestations, and, although worthy of protection, can belong to no human being. Privatisation or commoditization of their resources is not only foreign but incomprehensible or even unthinkable. Nonetheless, indigenous and traditional communities are increasingly involved in market economies and, like it or not, are seeing an ever-growing number of their resources traded in those markets.

TRR is an integrated rights concept that recognises the inextricable link between cultural and biological diversity and sees no contradiction between the human rights of indigenous and local communities, including the right to development and environmental conservation. Indeed, they are mutually supportive since the destiny of traditional peoples largely determines, and is determined by, the state of the world's biological diversity. TRR includes overlapping and mutually supporting bundles of rights.¹²

These 'bundles of rights' are supported by numerous international conventions and agreements which are already legally binding upon states, including New Zealand, as well as by 'soft law' in the form of non-binding international agreements which may be persuasive in developing customary international law so that new international obligations may emerge and impact on the New Zealand government's policies. In that much of this 'soft law' is consistent with already established obligations to be found in Treaty of Waitangi jurisprudence, it is submitted that Aotearoa/New Zealand has an opportunity to play a leading role in giving real substance to indigenous peoples rights to self-determination over their traditional resource rights.

12. *Ibid.*, p 95

Counsel for the claimants will no doubt fully discuss the relevant international law instruments in submissions to the Tribunal. For the purposes of this research report it should be sufficient to merely identify the most crucial instruments:

1. GATT: TRIPS itself, argues Posey, contains provisions in Article 27 which permit state parties to develop their own sui generis system as an alternative to patent laws.

A sui generis system for Aotearoa/New Zealand could well protect taonga and traditional resource rights much more effectively than the existing intellectual property rights law.

2. Convention on Biological Diversity (CBD), to which New Zealand is a party, has general objectives stated in article 1 to ensure conservation of biological diversity, the sustainable use of that diversity and the fair and equitable sharing of the benefits arising from utilisation of genetic resources. In addition to that, it contains a very specific obligation in Article 8 which requires all contracting parties as far as possible and as appropriate:

- (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices;

National legislation in this country does of course include the Treaty of Waitangi Act 1975 and the hearing of the Wai 262 claim will enable the Tribunal to assess the Crown's Treaty of Waitangi obligations in the light of article 8(j) in the CBD which is legally binding on the Crown. Posey also refers to a number of other articles in the CBD which may be relevant to the role of indigenous peoples in implementing the vitally important aims of this convention.

3. The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.
4. The UNESCO World Heritage Convention, pursuant to which, incidentally, the Tongariro National Park was the first designated 'cultural landscape'.

5. The Rome Convention with respect to artistic works, which may have a particular relevance to taonga which are physical cultural heritage objects.
6. The UNESCO convention on Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which is important in considering the Protection of Moveable Cultural Heritage Bill and the Taonga Maori Protection Bill presently under consideration by the New Zealand Parliament.
7. The ILO Convention Concerning Indigenous Peoples in Independent Countries (known as Convention 169).
8. Amongst the many examples of 'soft law' which may be relevant, are the Universal Declaration of Human Rights, the resolutions of the United Nations Working Group on Indigenous Populations – in particular the Draft Declaration on the Rights of Indigenous Peoples, a FAO code of conduct on plant germplasm collecting and transfer, and UNESCO cultural documents. Of especial importance for the Wai 262 claim is Article 29 of the Draft Declaration on the Rights of Indigenous Peoples:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

There has now been a substantial addition to the nonbinding international norms relevant to indigenous peoples in the documents approved at the 1992 Earth Summit in Brazil: the Rio Declaration on Environment and Development – especially principle 22 – and Agenda 21 – especially chapter 26. Principle 22 of the Rio Declaration reads:

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

Of course indigenous people are not merely passive observers of the actions of states and international organisations. Posey and Dutfield¹³ include texts of a number of examples of indigenous peoples' declarations in appendices to their book including:

- ▶ *Declaration of Principles of the World Council of Indigenous Peoples*, 1984
- ▶ *Kari-Oca Declaration and the Indigenous People's Earth Charter* from the Kari-Oca World Indigenous Conference, 1992
- ▶ *Charter of the Indigenous – Tribal Peoples of the Tropical Forests of the International Alliance of Indigenous – Tribal Peoples of the Tropical Forests*, 1992
- ▶ *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* from the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, 1993
- ▶ Recommendations from the congress 'Voices of the Earth: Indigenous Peoples, New Partners, the Right to Self-determination in Practice', 1993
- ▶ Statements from the Julayinabul Conference on Intellectual and Cultural Property (1993)
- ▶ Statement and basic points of agreement from the COICA/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity, 1994
- ▶ Final statement from the UNDP Consultation on the Protection and Conservation of Indigenous Knowledge, Sabah, Malaysia, 1995
- ▶ Final statement from the UNDP Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights, Suva, Fiji, 1995
- ▶ *Declaration of the Indigenous Peoples of the Western Hemisphere Regarding the Human Genome Diversity Project*

They also refer to a model community intellectual rights act which has been drafted by the Third World Network.¹⁴

4.5 Comment on 'Non-binding' International Norms

The usual focus of government officials and lawyers on formal nation state law generally leads to an implicit discounting of non-binding international norms. In the context of the jurisdiction of the Waitangi Tribu-

13. A Posey and G Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, Ottawa, International Development Research Centre 1996

14. G S Nijar, *In Defence of Indigenous Knowledge and Biodiversity: A Conceptual Framework and Essential Elements of a Rights Regime*, Penang, Third World Network, 1995

nal, however, many of the non-binding norms concerning indigenous peoples are highly relevant to recommendations of the Tribunal and they have been cited in Tribunal reports with approval. In any case, international law does not assume that nation states will always and only adhere to the minimum standards of binding international norms. Non-binding agreements are intended to be hortatory. States are exhorted to move towards the requirements of those agreements and may choose to do considerably more than abide by the lowest common denominator of state practice. In the light of the Treaty of Waitangi guarantees of taonga treasured by iwi and hapu, there are excellent domestic law reasons for the Government to be urged to fully meet the aspirations of Maori as the indigenous people of this land to exercise rights of self-determination over traditional resource rights.

If the Earth Summit is to have meaning for the reality of indigenous peoples lives, and for future generations, then the CBD needs urgent implementation – not mere rhetoric. It appears that Brazil, the host country – which does not have a particularly good reputation with respect to the treatment of its many indigenous populations – has already made some legislative progress towards the CBD goals:

Recently, a Special Committee of the Chamber of Deputies approved a legislative Bill, PL 2057/91, which aims to update national legislation regulating indigenous rights. The most important efforts of this Bill are the provisions of Chapters 3, 4 and 5.

Chapter 3 establishes general rules regulating the intellectual property rights of indigenous societies. Article 11 of PL 2057/91, for instance, states that the indigenous communities, societies or organisations have the right to apply for 0a patent, as well as utility model, industrial model and industrial design, directly or indirectly, for the indigenous knowledge or model they possess. Further, Article 13 rules that when the knowledge of an indigenous community, society or organisation has led to the development of an invention, utility model, industrial model or industrial design, they will be considered automatically co-proprietor of the patent.

Chapter 4 sets up provisions governing the rights of indigenous communities, societies or organisations over their intellectual property which is not patentable. Article 17 says that from the publication of this law, all the intellectual production of the indigenous communities, soci-

eties or organisations, shall be protected. Furthermore, Article 17 defines intellectual production as 'all useful knowledge, in particular the pharmaceutical products and natural essences, known by the Indians and which will be used for research and industrial or commercial use'. Lastly, Article 19 (Chapter 5) entitles the indigenous communities to authors' rights over their intellectual production and collective spiritual creations, in particular their music, fables and folk tales.

PL 2057/91 is a remarkable development of the Brazilian national law. Perhaps one may suggest that the discussions which have arisen out of the Special Committee of the Chamber of Deputies, established to analyse and negotiate this legislative Bill, concluded that the Brazilian legal framework should be made compatible with its constitution principles and with the provisions of the Convention on Biological Diversity.¹⁵

Consideration of the Wai 262 claim ought to be welcomed as an opportunity for a thoroughgoing reassessment of national legislation affecting tangata whenua rights in this country.

15. E D Costa E Silva, 'The Protection of Intellectual Property for Local and Indigenous Communities', *European Intellectual Property Reports*, vol 11, 1995, p 549

