

UNDERSTANDING INDIGENOUS DISPUTE RESOLUTION PROCESSES AND WESTERN ALTERNATIVE DISPUTE RESOLUTION

CULTIVATING CULTURALLY APPROPRIATE METHODS IN LIEU OF LITIGATION

*Carlo Osi**

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* LL.M. (University of Pennsylvania Law School, 2008); Certificate in Business (Wharton School, 2008); LL.M. (Kyushu University, 2006); LL.B./J.D. (University of the Philippines, 2002); Executive Editor, East Asia Law Review (University of Pennsylvania); Commercial Litigator, Angara Abello Law Firm (Philippines); Contributor/Features Writer, Philippine Daily Inquirer (Inquirer.net).

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1. INTRODUCTION

Alternative Dispute Resolution (ADR) has been touted as one of the greatest developments of the modern legal system. Instead of engaging in protracted and fraught-laden litigation, former litigants can simply take the more expedient, cheaper, creative, less complicated, less cumbersome, more participative and more effective route of dispute resolution — the “alternative” form. These alternatives are more commonly known as mediation, conciliation, negotiation, and arbitration, among others. Erstwhile litigants can pursue, in case of court-annexed ADR mechanisms, these popular procedures in the hope of settling the case while it is being tried. The presiding judge often stays the trial and judgment until such time that the parties have emerged from an unsuccessful ADR. Parties freely negotiate with each other, but upon failure to reach a settlement, the litigants have the right to assert for a trial *de novo* — a trial as if no court-annexed arbitration ever took place. Private tribunals or rent-a-judge is also allowed, the decision of which can be entered as an appealable judgment. Other less common forms of ADR include early neutral evaluation, Mediation-Recommendation, Mediation-Arbitration, Mini-Trial before expert neutral facilitators and Summary Jury Trial before advisory juries.¹

¹ Consortium for Appropriate Dispute Resolution (CADRE), *ADR Options: A Spectrum of Processes* (undated), <http://www.directionservice.org/cadre/other.cfm> (last visited Jan. 11, 2008).

The basic yet preeminent question surrounding ADR is this: what is it an alternative to?² The answer, particularly in the Western hemisphere, is that it is the alternative to the often tedious, strictly formal legal proceedings in court that is presided over by a state-appointed judge, with counsel representing the parties, and, in some cases or jurisdictions, the presence of juries. The problem with this alternative approach is that there are numerous cultures and communities in other parts of world, even within North America and the Western hemisphere, where litigation is not the norm and is actually the alternative. The norms for these people are their own community dispute resolution procedures. Hence, the word “alternative” in ADR seems to be a misnomer as applied to some cultures, be they situated in the developed or still developing world.

As a result of this, some have advocated that the letter “A” in ADR should instead stand for “Appropriate,”³ since the most suited or apt dispute resolution mechanism will differ from nation to nation, culture to culture, and community to community. Despite the overwhelming and sustained popularity of ADR with the “Alternative” connotation in the world today, and despite its relative success in resolving various types of disputes, there are several critiques of it. Whether the rights of the parties are not fully protected or the fact that its facilitators may not understand the context and culture of both the dispute itself and the parties, ADR is not and has never been the perfect solution to conflicts worldwide. ADR techniques have also been largely based on “co-existential justice,” even if, for example, “[t]his form of justice has . . . always been part of African and Asian traditions where conciliatory solutions were seen to be to the advantage of all and often as a *sine qua non* for survival.”⁴

Entering public consciousness in the 1970s, ADR has similarly been criticized as attempting to be something new and novel when, in fact, ADR-like forms of dispute resolution have been practiced by peoples and communities for centuries. The older forms of dispute resolution, particularly those practiced by the Indigenous or

² See Steven H. Goldberg, “Wait a minute. This is where I came in.” *A trial lawyer’s search for alternative dispute resolution* (1997), available at http://findarticles.com/p/articles/mi_qa3736/is_199701/ai_n8752883.

³ See Consortium for Appropriate Dispute Resolution (CADRE), *supra* note 1, at 2.

⁴ SAFLII, *South African Law Commission – Issue Paper 8 (Project 94): Alternative Dispute Resolution – Chapter 2: The Problem* (undated), available at <http://www.saflii.org/za/other/zalc/ip/8/8-CHAPTER-2.html>.

Aboriginal peoples⁵ around the world, challenge the novelty of present-day ADR. Under the umbrella of “Indigenous Dispute Resolution processes,” are intuitive, time-tested and pre-colonial forms and systems of dealing with community problems by coming up with a consensual, communal solution. From the continent of Africa to the shores of North America to the islands in South Asia, Indigenous or Aboriginal communities have practiced their localized way of problem-solving long before the first European settlers attempted to make contact with them.

But the current age of ADR and its strong presence in many judicial and societal systems cannot be denied. Whether the “A” in ADR should stand for “Appropriate” rather than “Alternative,” ADR has fastidiously been championed as a new and better way of amicably settling disputes. The persistent practice of Indigenous Dispute Resolution processes notwithstanding, ADR has captured immense attention⁶ and has changed the legal landscape of many countries. Thus, in the spirit of traditional dispute resolution, a system has emerged which capitalizes on the cultural affinity of the Indigenous Dispute Resolution processes and the successes of present-day ADR systems. Denominated as “Indigenized Western ADR,” it has simultaneously attracted both immeasurable acceptance and a degree of criticism.

Indigenous or Aboriginal communities⁷ in the present day practice three forms of dispute resolution: their own Indigenous processes, Western forms of ADR, and the Indigenized Western ADR systems. They very seldom resort to court litigation, whether because it is expensive, time-consuming, highly complicated, and judge and counsel-dependent, or simply because it is not innate for them to do so. Of course, certain exceptions have to be made for a

⁵ “Indigenous peoples,” “Indigenous groups,” “traditional peoples,” “traditional communities,” and “Aboriginal peoples” shall be used interchangeably throughout the text of this article.

⁶ Mediation has reportedly been resorted to by Venezuelan President Hugo Chavez in seeking the release of two female Colombians, a former Congresswoman and the other a former aide to then Colombian presidential candidate Ingrid Betancourt, who were captured and detained by the Revolutionary Armed Forces of Colombia or FARC. See Ian James, *Colombian Rebels Free 2 Hostages*, EXPRESS, Jan. 11, 2008, at 8. See also Elizabeth A. Kennedy, *Former UN chief Kofi Annan to lead Kenya mediation efforts in disputed election*, NORTH COUNTY TIMES, Jan. 10, 2008, at 9. This states that former United Nations Secretary-General Kofi Annan will also turn to mediation with the aspiration of ending the political turmoil in Kenya.

⁷ See Sarah K. Kam, *Biopiracy in Paradise? Fulfilling the Legal Duty to Regulate Bioprospecting in Hawai'i*, 28 HAW. L. REV. 387, 397 (2006) (noting, “descendants of the original inhabitants of many countries and their cultures, religions and a distinct mode of socio-economic organizations” who “are generally thought to share a ‘holistic view of nature and society where the well-being of both go hand in hand.’”).

few communities, notably some well-organized Native American tribes, which have arranged themselves into corporate entities and engaged in the profitable world of casino operations. These groups can certainly pursue litigation, but the rest of the Indigenous peoples of the world may not have the capacity, temerity and boldness to sue in court, and would rather continue to resolve disputes the way their ancestors have in the past.

One of the critical problems plaguing some of these Indigenous or Aboriginal peoples has to do with intellectual property rights issues. These may range from the alleged pilfering of their ancient or traditional knowledge on plant-based medicine; their intangible cultural heritage comprising of songs, chants, dances, craftsmanship and skills; their pre-colonial artworks, designs and other tangible cultural manifestations; or their cultural expressions and folklore. Some of these communities have claimed that they were not consulted nor compensated when groups took, used or marketed their knowledge systems. It is assumed that many of these communities will not have the means nor the intention to pursue litigation to achieve their goals of either retaking physical possession of their tangible objects; seeking acknowledgment of the origin of contemporary medicines, logos or indigenous names; or demanding royalties for, if not compulsorily licensing, the appropriated use of their knowledge or processes. They will most likely opt for the appropriate Indigenous Dispute Resolution processes.

1.1 Focus of the Paper

This article specifically focuses on Indigenous Dispute Resolution, Western-inspired ADR mechanisms, and Indigenized Western ADR as culturally appropriate methods to resolve disputes in lieu of litigation. This article will also focus on how these processes are able to help solve intellectual property rights disputes involving Indigenous communities. Generally, this article will describe how successful all three modes of dispute resolution have been in Indigenous conflict resolution, in the quest for benefit-sharing agreements, and the potential for their use in other controversies. This article proposes the adoption of an Indigenized Western ADR approach on issues surrounding intellectual property rights regimes.

This paper also addresses the efforts of Indigenous peoples and their representatives in commencing and undergoing Indige-

nous Dispute Resolution and ADR, such as mediation and negotiation against those who allegedly appropriate their traditional knowledge, practices and cultural expressions. Relatedly, it will explain why Indigenous communities should generally avoid court suits, despite a few noted litigation successes. This article cautions that if communities are compelled to seek court recourse as the very last option, they ought to be adequately prepared, subsidized by government agencies, and allowed unfettered access to meaningful representation of counsel.

Section two briefly provides a description of Indigenous or Aboriginal peoples,⁸ the difficulties they regularly face, their right to participate in dispute resolution and litigation, and why certain interests are attractive to them. Section three deals with the compounding international problem faced by Indigenous communities. This section describes where Indigenous or Aboriginal peoples currently stand amidst the sweeping trend towards globalization and commercial use of traditional knowledge. It will contextualize the problem of biopiracy vis-à-vis Indigenous peoples; emphasize the differences between the Agreement of Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Convention of Biological Diversity (CBD); and explore the distinctions between patents and traditional knowledge. The efforts of the World Intellectual Property Organization (WIPO) in bridging this gap will then be discussed.

Section four identifies the proposed solutions to the international problem, some of which take the form of intellectual property rights regimes, and the challenges they are facing. Section five will discuss the modes of dispute resolution more closely. The three basic modes of dispute resolution will be compared, presenting their important features and challenges. Likewise, current ADR models will be highlighted in the hope of providing an ideal of what can be done in terms of developing quasi-judicial ADR bodies. Integrating Indigenous processes and Western ADR models will be critical in the search for culturally appropriate mecha-

⁸ Also known as peoples of the "Fourth World," Indigenous peoples encompass those groups who live in Third World countries as well as those who live in Third World conditions in highly developed First World countries (Canada, US, Australia and New Zealand, for example). They are generally marginalized, relatively poor peoples who have either been dominated by descendants of European settlers or other newcomers. See PETER H. RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM* (Univ. of Toronto Press 2005). To a large extent, they are peoples who have maintained a collective identity through their time immemorial connectedness with specific land areas.

nisms that will address intellectual property claims of Indigenous communities.

Section six will state why appropriate, non-court dispute resolution should be utilized while avoiding litigation at all costs. Expensive, time-consuming and impractical litigation will not serve the ends of the Indigenous agenda. Though some Indigenous groups have sued entities in the past and succeeded, most of these suits centered on land and exerted tremendous emotional and material pressures on them. Although litigation (or the settlement value of suits) plays an important role for corporations or partnerships in patent challenges, it is not aligned with Indigenous culture. However, in extreme cases where Indigenous communities are compelled by circumstances to sue, they will need the assistance of the government, lawyers and non-conflicted advocacy groups.

Section seven concludes that Indigenous Dispute Resolution and ADR, as well as an integrated approach, all play major roles in empowering Indigenous communities around the world. It provides them with a venue and platform by which they can fully express their views, unobstructed by the restrictions created by legal processes totally alien to them. These procedures may also lead the way in bridging the asymmetrical gap between these communities and the entities they are complaining about. Assuming there is a conflict, an empowered Indigenous community will be able to gather (or be provided with) information and data on the proposals by researchers or entities. There will be transparency and mutual recognition of each side's position and arguments. In the end, a reasoned and enforceable settlement may potentially be reached. In case of breach of settlement terms, Indigenous Dispute Resolution and ADR processes may again be used as efficient procedures for resolving newer, or other, grievances.

2. INDIGENOUS COMMUNITIES: WEAK, ISOLATED, VULNERABLE

Who composes Indigenous or Aboriginal communities? What characterizes them? More importantly, what essentially differentiates them from the rest of humankind? If it is justified to refer to them in general as weak, isolated and vulnerable communities, what causes them to be this way? These questions must be answered before describing Indigenous Dispute Resolution processes. It has been said that:

Indigenous peoples have existed for countless generations without any influence from European cultures, and the indigenous worldviews that resulted from indigenous-indigenous dialogues have evolved over long periods into distinctly indigenous ways of understanding the world. Indigenous peoples' focus respecting life and the profound relationships between things in the world lies at the foundation of traditional philosophies.⁹

Known as Indigenous peoples,¹⁰ Aboriginal groups, mountain peoples, tribal clans, cultural minorities, hill tribes, and highland dwellers, Indigenous communities represent almost six percent (370 million) of the total world population with representation in over seventy countries.¹¹ Numerous as they may be, they are often neglected, abandoned or forgotten. Generally, due to poverty and a certain sense of helplessness, Indigenous communities are ineluctably considered weak, isolated and extremely vulnerable communities. David Kahane has stated that "from Locke to Kant to Tocqueville, liberals have defined Aboriginal peoples as beyond the scope of liberal justice — too savage, insufficiently settled, unreasonable."¹² Many Indigenous communities live in traditional villages with no electricity, running water, or modern appliances and with limited contact with the outside world. Situated in remote areas and in the highlands, they are said to be groups of people whom time forgot.

However, this seeming "backwardness" is deceiving as Indigenous communities are the repositories of a considerable amount of the world's medical cures that modern science has yet to discover. They have also been practicing intangible cultural heritage and keeping in their possession tangible cultural manifestations that have been passed on from their forefathers. This heritage and culture may be perpetuated in the form of songs, dances, potteries, paintings or crafts. Unfortunately, they possess very limited re-

⁹ Dale Turner, *Perceiving the World Differently*, in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 57, 59 (Catherine Bell & David Kahane eds., 2004).

¹⁰ Indigenous peoples are weak, isolated and vulnerable. These characteristics, however, do not portray the fact that they are groups of people distinctly blessed with an astonishing cornucopia of knowledge in science and health.

¹¹ U.N. Econ. & Soc. Council [ECOSOC], Permanent Forum on Indigenous Issues, *Summary Report on the 6th Session of the Permanent Forum on Indigenous Issues*, at 4 (May 2007) available at <http://www.unep.org/indigenous/pdfs/Report-on-6th-Session-PFIL.pdf> [hereinafter *ECOSOC Summary Report*].

¹² David Kahane, *What is Culture*, in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 30 (Catherine Bell & David Kahane eds., 2004).

sources to screen, if not fend off, so-called “second comers”¹³ seeking to usurp that which Indigenous communities have known and practiced for ages. Lacking capital, know-how, technology or access to key decision-makers,¹⁴ they are claimed to have become easy targets of exploitation.

In the developed world, Indigenous or Aboriginal communities are mainly comprised of the remnants of the native peoples who the first European settlers subjugated during the colonial enterprise’s expansion into the then undiscovered lands of the Americas (once known as Turtle Island) and Australia. However, some of these Indigenous or Aboriginal communities in North America — which are known as First Nations¹⁵ comprised of Native Indians — are admittedly no longer marginalized and are, in fact, comfortably situated in the mainstream. They own vast properties and even extremely large and highly profitable casinos. They have their own business structures and board meetings. Hence, there is a need for further classification of Indigenous or Aboriginal peoples in the developed world, as they cannot universally be described as isolated and deprived communities.

In developing countries, Indigenous peoples have retained much of their social identity amidst the incessant waves of migration of non-natives. In general, they are referred to as Native Americans, First Peoples, Maoris, Aborigine, Bushmen, Pygmies, Kalingas, Bontocs, Inuits — the list goes on.¹⁶ The United Nations has developed five criteria in defining the term “Indigenous”: (1)

¹³ See Emanuela Arrezo, *Struggling Around the “Natural” Divide: The Protection of Tangible and Intangible Indigenous Property*, 25 CARDOZO ARTS & ENT. L.J. 367, 391 (2007).

¹⁴ Certainly, this is not always the case as there have been notable organized attempts at recognition in international forums by Indigenous groups from the developing world, as well as the relatively strong, sometimes profitable, presence of such communities in North America, Australia and New Zealand.

¹⁵ See George Erasmus, *Introduction: Twenty Years of Disappointed Hopes*, in DRUMBEAT: ANGER AND RENEWAL IN INDIAN COUNTRY 1–2 (Boyce Richardson ed., 1989).

[A]ll across North America today First Nations share a common perception of what was then agreed: we would allow Europeans to stay among us and use a certain amount of our land, while in our own lands we would continue to exercise our own laws and maintain our own institutions and systems of government. We all believe that that vision is still very possible today, that as First Nations we should have our own governments with jurisdiction over our own lands and people.

Id.

¹⁶ Indigenous peoples in the developed countries are not restricted only to those located in the US, Canada, New Zealand and Australia, though they seem to be the most vocal. There are many Indigenous populations as well in certain areas of Europe such as the Saami Peoples in Norway, Sweden, Finland and Russia. See Helen Corbett, *The Rights of Indigenous Peoples: A Comparison of the Rights of Saami and Aboriginal Peoples in Australia*, in ESSAYS ON INDIGENOUS IDENTIFY AND RIGHTS 40–55 (1996).

self-identification; (2) historical continuity with preinvasion or precolonial societies; (3) nondominance; (4) ancestral territories; and (5) ethnic identity. Moreover, these Indigenous communities share the same history of domination¹⁷ and territorial subjugation by states formed and controlled by non-natives.¹⁸ Renowned German researcher Wolfgang S. Heinz described an “indigenous population,” referring to people who have lived in a specific and recognizable geographical area throughout their history, and have a unique cultural identity, with a distinct cultural appearance which is different from the vast majority of the population of later settlers.¹⁹

Indigenous peoples and communities, as bearers of cultural heritage and traditional knowledge,²⁰ have in certain situations, been exploited, discriminated against and severely persecuted.²¹ Distinguished Indian Professor Anil Gupta has noted that their voices have been stifled, their thoughts distorted, and their outlook misrepresented.²² They have worldviews that are different from the rest of the world, have different languages, power structures and very distinct cultures. They are also generally poor, in the material sense.

Yet, despite all of this, their cultural heritage has been commercialized and recorded/reproduced without consent. In the case

¹⁷ UN Sub-Com. on Prevention of Discrimination & Prot. of Minorities, *Study on the Problem of Discrimination Against Indigenous Populations*, Vol. V, ¶ 379, UN Doc. E/CN.4/Sub.2/1986/Add.4 (1986) (prepared by Jose Martinez Cobo) (describing “Indigenous peoples” to include those groups that have: (1) a close historical continuity with pre-invasion and pre-colonial societies whose existence pre-date present-day groups which are now the dominant peoples who live either on the same land area or in markedly close proximity; (2) unique ethnic and cultural identity that is heavily conjoined with ancestral domain; and (3) the desire, and in some cases the obligation, to transmit such identity, native culture and intangible practices to future generations. These Indigenous peoples must also possess self-identification as an Indigenous group) [hereinafter *Cobo Report*].

¹⁸ See Kent Mathewson, *Drugs, Moral Geographies, and Indigenous Peoples: Some Initial Mappings and Central Issues*, in DANGEROUS HARVEST: DRUG PLANTS AND THE TRANSFORMATION OF INDIGENOUS LANDSCAPES 11–14 (Michael K. Steinberg et al. eds., 2004).

¹⁹ See Wolfgang S. Heinz, *Indigenous Populations*, ETHNIC MINORITIES AND HUMAN RIGHTS 2–8 (1998).

²⁰ See UNDRIP, G.A. Res. 61/295, U.N. GA, 61st Sess., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter *UNDRIP*, G.A. Res. 61/295].

²¹ See Erik B. Bluemel, *Separating Instrumental From Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making*, 30 AM. INDIAN L. REV. 55, 62–71 (2005).

²² See Anil Gupta, *Rewarding Traditional Knowledge and Contemporary Grassroots Creativity: The Role of Intellectual Property Protection*, in PAPER PRESENTED AT A SEMINAR AT KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, BOSTON (May 2000), at 11, available at <http://www.sristi.org/pub.html> .

of their traditional medicine, it has been bottled, encapsulated, powdered, liquefied, processed, and extracted — to the extent that it has been drunk, eaten, prescribed by doctors, manufactured and marketed by companies, and served as new marketing hooks or tools. Their cultural heritage has been appropriated for trademarks, brand names, shirt prints, company logos and commercial designs. The explosion of traditional knowledge into mainstream use — be it through Hoodia²³ (the appetite suppressant used for centuries by the San people in the South African Kalahari Desert); Kava²⁴ (the erstwhile “plant of the gods” in Oceania but now a commercialized root crop); or something as common as Erythromycin (the antibiotic whose biological properties were first discovered in 1949 in Iloilo, Philippines; was then patented by Eli Lilly and Company; but whose source-country never received any benefit),²⁵ have netted companies huge returns but left traditional communities, and the countries in which they originated, with little or no benefits. The former Chief Economist of the World Bank once remarked:

What we were not fully aware of was another danger — what has come to be called “biopiracy,” which involves international drug companies patenting traditional medicines. Not only do they seek to make money from ‘resources’ and knowledge that rightfully belong to the developing countries, but in doing so they squelch domestic firms who long provided these traditional medicines. While it is not clear whether these patents would hold up in court if they were effectively challenged, it is clear that the less developed countries may not have the legal and financial resources required to mount such a challenge. The issue has become the source of enormous emotional, and potentially economic, concern throughout the developing world.²⁶

²³ See Rebecca M. Bratspies, *The New Discovery Doctrine: Some Thoughts on Property Rights and Traditional Knowledge*, 31 AM. INDIAN L. REV. 315 (2006); see also Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing*, 11 CARDOZO J. INT’L & COMP. L.J. 785, 795–97 (2003); see also Nisha Narayanan, AAAS Website Seeks to Protect Traditional Knowledge of Plant (2002), <http://www.aaas.org/news/releases/2002/0508tek.shtml> (last visited Nov. 30, 2007).

²⁴ See Mark Merlin and William Raynor, *Modern Use and Environmental Impact of the Kava Plant in Remote Oceania*, in DANGEROUS HARVEST: DRUG PLANTS AND THE TRANSFORMATION OF INDIGENOUS LANDSCAPES 286–92 (Michael K. Steinberg et al. eds., 2004).

²⁵ See Adrian S. Cristobal Jr., *Traditional Knowledge*, BUSINESS MIRROR, Jun. 15, 2006, available at <http://www.ipophil.gov.ph/DGsRoom/TraditionalKnowledge.pdf>.

²⁶ Joseph E. Stiglitz, *Globalism’s Discontents*, THE AMERICAN PROSPECT (Jan. 1, 2002), http://www.prospect.org/cs/articles?article=globalisms_discontents (last visited Nov. 30, 2007). Professor Stiglitz is a renowned American economist who currently teaches Economics at Co-

As likely targets of biopirates and bioprospectors, as well as being subjected to abuses,²⁷ Indigenous peoples are somewhat singled out by the patenting race. Typically isolated from the cultural mainstream,²⁸ they and their ethnic systems and cultures are misunderstood. In fact, early colonizers have treated them as outside

lumbia University. Despite being the former Senior Vice President and Chief Economist of the World Bank, he has critical views on globalization and on certain international institutions. *Id.*

²⁷ First, as stated earlier, the use of traditional healers of psychoactive plants to communicate with the spiritual or the other world has been used against them. Those who have nothing to do with Indigenous peoples wanted to emulate this heightened level of consciousness and have adapted to taking psychoactive plants themselves. From poppies to opium leaves to heroin to coca to fast-acting mushrooms, non-Indigenous people have corrupted age-old rituals for their own self-interest. Indigenous farmers and communities were subsequently lured to partake in illegal drug trade, leading to the destruction of their native culture. Driven by need, poverty and pressures from governments, Indigenous communities have become unwitting actors in the global illegal drug industry. See Michael K. Steinberg, *Introduction*, in *DANGEROUS HARVEST: DRUG PLANTS AND THE TRANSFORMATION OF INDIGENOUS LANDSCAPES* 1–8 (Michael K. Steinberg et al. eds., 2004). Second, some segments of their native cultures have been severely altered to reflect the culture of the predominant peoples. Such dramatic alterations have reached the point of states deliberately arming Indigenous peoples and using them to fight their local wars. See Heinz, *supra* note 19, at 13. Third, human rights violations were committed and are still being committed against them, particularly by military, para-military and police forces. See U.N. Econ. & Soc. Council [ECOSOC], Permanent Forum on Indigenous Issues, *Oral statement by Mr. Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people on the 6th Session of the Permanent Forum on Indigenous Issues 3 (May 2007)*, available at http://www.un.org/esa/socdev/unpfi/documents/6session_SR_statement_asia_en.doc [hereinafter *ECOSOC Stavenhagen Statement*]. Fourth would be political and social discrimination and persecution, as well as marginalization and displacement from their natural territories. *Ibid.*, at 3–4. Fifth is the forced assimilation of these “savage people” into mainstream civilization or the hegemonic religion. See Heinz, *supra* note 19, at 73. Sixth, the brutal effects of certain entities’ policies on the health of some Indigenous peoples such as mass sterilization, malnutrition and medical experimentation. See Heinz, *supra* note 19, at 91. There are certainly more past and present abuses on the rights and lives of Indigenous peoples, i.e. land grabbing, mineral depletion, illegal logging, militarization and utter disregard for tribal culture. In 1993, Australian Prime Minister Keating directly admitted that:

We took the traditional lands and smashed the traditional way of life. We brought the diseases and the alcohol. We committed the murders. We took the children from their mothers. We practiced discrimination and exclusion. It was our ignorance and our prejudice and our failure to image these things being done to us.

Corbett, *supra* note 16, at 44; see also JOE ISAAC & STUART MACINTYRE, *THE NEW PROVINCE FOR LAW AND ORDER: 100 YEARS OF AUSTRALIAN INDUSTRIAL CONCILIATION AND ARBITRATION* 215 (Cambridge Univ. Press 2004).

Private sector employment accounts for a lower proportion of Indigenous than non-Indigenous employment, and even industries such as mining, which often operate in close proximity to remote Aboriginal communities, have provided limited and mainly low-skilled employment opportunities The median personal income for Indigenous Australians in 2001 was only 72 percent of that of all Australians

Id.

²⁸ Generally ostracized from mainstream society, Indigenous peoples are one of the most dejected and impoverished lots in the world. Once strong, healthy and formidable, Indigenous peoples around the world are “now socially and economically on the lowest step of the ladder in

their “blessed circle (and were) . . . exploited, displaced, or exterminated.”²⁹ In some cases, their own governments have abandoned them³⁰ or have occasionally evicted them from their ancestral lands.³¹ This increases their vulnerability since it is difficult for them to shout for help when threatened. Thus, relative to the intellectual property era, it is claimed that “the absence of financial and organizational competences of the indigenous and local people to monitor and enforce patents in modern economic space will inevitably lead to the use of their knowledge without due compensation.”³²

2.1 Right to Participate

Surviving all of these millennia of displacement, Indigenous or Aboriginal peoples have been known to be of sturdy character. They are so sturdy that it has been reported that a lone survivor of an unknown tribe in the Amazon forest is still keeping alive the people and culture he represents, even keeping human contact at bay as conservationists are trying to save both his land and heritage.³³

Beyond the right to survive and sustain their kind, Indigenous or Aboriginal peoples also have the right to participate in both do-

virtually every country that is dominated by transnational corporations.” See Heinz, *supra* note 19, at 90–91.

²⁹ See Kahane, *supra* note 12.

³⁰ See, e.g., Eduardo C. Tadem, *Philippine Rural Development and Indigenous Communities: Aytas and the Sacobia Project*, in CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA-PACIFIC CASES 220–38 (Fred E. Jandt & Paul B. Pedersen eds., 1996). This article illustrates that the Ayta tribe, the first peoples/Indigenous community in the Philippines, was largely marginalized and abandoned by the government who are predominantly of Indo-Malay descent. The presence of the US bases on their ancestral land, the acts of the Marcos dictatorship, the catastrophic Mount Pinatubo eruption, and the subsequent actions of latter governments further burdened the Aytas. Their circumstances remain the same today.

³¹ See *Bushmen Win Landmark Legal Case*, SURVIVAL INTERNATIONAL, Dec. 13, 2006, <http://www.survival-international.org/news/2128> (last visited Nov. 30 2007); see also *Government Crackdown on Bushman Hunters*, SURVIVAL INTERNATIONAL, Oct. 9, 2007, <http://www.survival-international.org/news/2511> (last visited Nov. 30, 2007); see also *Torture of Bushmen - Shocking Details*, SURVIVAL INTERNATIONAL, Oct. 30, 2007, <http://www.survival-international.org/news/2572> (last visited Nov. 30, 2007); see also *Survival Advert Condemns Torture of Bushmen*, SURVIVAL INTERNATIONAL, Nov. 5 2007, <http://www.survival-international.org/news/2577> (last visited Nov. 30, 2007).

³² Willem Pretorius, *TRIPS and Developing Countries: How Level is the Playing Field*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 187 (Peter Drahos & Ruth Mayne eds., 2002).

³³ *A Tribe of One*, THE WASHINGTON POST, Jan.11, 2008, at 13.

mestic and international decision-making processes. They have the right to effectively contribute to the formulation of laws and policies, to receive adequate information, and to play an important role in problem-solving mechanisms on lands, territories and natural resources.³⁴ As social participants and co-equal stakeholders,³⁵ they are crucial to cultural diversity and human creativity.³⁶ In the process of participating in economic, political and social activities, problems and complications may arise.

Consequently, they have the right to pursue Indigenous Dispute Resolution or ADR processes³⁷ as the primary means to redress grievances in these circumstances. Indigenous Dispute Resolution processes will allow community members to pursue remedies and resolve disputes outside of the courtroom and still within their own cultural confines. Practiced in Indigenous communities since time immemorial, they are culturally more appropri-

³⁴ See U.N. Econ. & Soc. Council [ECOSOC], Permanent Forum on Indigenous Issues, *Permanent Forum on Indigenous Issues, Report on the Sixth Session*, at 3, ¶ 7, 9 (a), (b), (c), (d) and (e), U.N. Doc. E/2007/43 E/C.19/2007/12 (May 2007), available at http://www.tebtebba.org/tebtebba_files/unpf/pf6/N0737675.pdf [hereinafter "*ECOSOC Sixth Session Report*"].

³⁵ G.A. Res. 61/295, ¶ 2-5, 15, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter *UNDRIP*]. The Preamble of the UNDRIP states, in part, that:

Affirming that Indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that Indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind . . .

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples

. . . .

Id.

³⁶ See [UNESCO] General Conference, *Convention for the Safeguarding of Intangible Cultural Heritage* (Oct. 17, 2003) [hereinafter *ICH Convention*]. The Preamble of the Convention states, in part, "Recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity." *Id.*

³⁷ See UNDRIP, *supra* note 20, Art. 5, to wit, "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." *Id.*, at Art 31(1).

ate than litigation because they are based on the customs and traditions of the group concerned. They may also pursue remedies through state-formalized ADR.

As part of the ongoing efforts to acknowledge and promote the rights of Indigenous or Aboriginal peoples — one of which is to seek culturally sensitive and appropriate avenues for redress of their grievances — a new international document specifically addressing these concerns was adopted by the United Nations (UN). For decades, there has been a strong lobby for the UN to confront these issues. On September 13, 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples³⁸ (hereinafter UNDRIP). This is an important cornerstone document for Indigenous peoples around the world. Approved with 143 countries in favor, eleven abstentions and notably four against,³⁹ the UNDRIP is the culmination of these efforts to acknowledge the rights of Indigenous peoples. Although non-binding, it seeks the protection of the human, land and resources rights of the world's estimated 370 million Indigenous peoples, and acknowledges their right to self-determination while setting the minimum standards for their survival.

2.2 Adherence to Indigenously Appropriate Dispute Resolution

Globally, there is a need for Indigenous peoples to rely on Indigenous Dispute Resolution processes, ADR and Indigenized Western ADR systems rather than court litigation. Whether they relate to intra-communal or inter-communal problems as well as to concerns as elaborate as intellectual property rights protection, this need is easy to discern. Litigating in court is normally prohibitive;

³⁸ See UNDRIP, *supra* note 35, at 13–14.

³⁹ The countries which voted against the UNDRIP are the nations which were once populated by Indigenous peoples who are now considered minorities: Australia, Canada, New Zealand and the United States. This vote is quite perplexing considering that these countries are the ones which have long passed Indigenous or Aboriginal laws, have well-developed ADR mechanisms catering to Indigenous peoples, provide indigenous curricula in their schools, have strong judicial precedence such as *Mabo v. Queensland No. 2*, have lawyers and entire firms for the indigenous, and have recognized and provided rights to their indigenous population. Australia provides subsidies for indigenous litigation while Canada is the home of a number of lawyers who deal almost exclusively on indigenous claims. The United States has traditionally espoused indigenous cultural rights in schools and in its legal system, while New Zealand has long been practicing ADR systems such as Restorative Justice and Aboriginal Circles, and which considers face-to-face conferences as the norm and the courts merely as the alternative. Hence, it is somewhat puzzling as to why they, as indigenously sensitive countries, voted against it.

with long case queues, intermittent delay in the resolution of motions or claims is quite common. More importantly, litigation — with its basic rudiments of confrontation, fault-finding and judge-made resolutions, coupled with its adversarial nature — does not conform to the disposition of Indigenous peoples. Generally docile and unassuming, if not typically invisible to mainstream society, Indigenous peoples would rather rely on their tried and tested ways of peacefully and amicably resolving conflicts. This involves traditional conflict resolution processes involving face-to-face dialogue and calm, if not subdued, discussion and resolution of issues.

There are several problems with using Indigenous Dispute Resolution, ADR or Indigenized Western ADR, for more advanced cases such as patent challenges concerning Indigenous communities. For one, Indigenous populations have different fundamental conceptions from mainstream society, resulting in only a handful of people who actually understand the culture indigenous to them. This led to misunderstanding, mistrust, abuses and marginalization. The result was a bleak past and, arguably, a projected bleaker future for Indigenous peoples. Governments may hesitate to organize ADR or uphold Indigenous Dispute Resolution infrastructures, whether in traditional conflict areas such as land disputes and employment discrimination to newer conflict-prone subjects such as patenting of traditional knowledge, nonconsensual commercial use of indigenous symbols or art, and the unauthorized recording/reproduction of ancient chants, songs, movements and dances.

3. PLACING THE INTERNATIONAL PROBLEM IN CONTEXT

3.1 Cultural Appropriation and Indigeneity

For decades, research organizations and companies have ventured deep into the jungles, high into the mountains and far into the deserts in search of plant varieties that can provide cures or maintain health. They may also have been in search of cultural artifacts or ancient processes that can be commercialized or mass marketed to the public. They have indicia of where to look, what they hope to find, and whom to ask for help. The sources they look to for cultural heritage and traditional knowledge are Indigenous or Aboriginal communities which have long been recognized as the shepherds of health-preserving plants, agricultural products, bio-

logical resources and animal produce — herding knowledge from centuries of discovery, conservation, and practice.

However, due to the communities' indigeneity,⁴⁰ ignorance, innocent generosity,⁴¹ sheer intransigence, purported trick, one-time dole-out payments, or sham promises, Indigenous communities have, on the whole, allowed the uninvited incursions of researchers to remain unabated and unchallenged. More often than not, the researchers whom the companies have sent as agents⁴² did not seek the express permission of the Indigenous communities when they engaged — to borrow from copyright scholarship — in the “harvest of knowledge.”⁴³ Receiving responses to queries or demonstrations from these peoples does not give rise to an educated, free consent. The mere fact that a traditional healer answered a researcher's question as to the best cure for a minor ailment does not imply that implied consent for the appropriation of this cure has been sufficiently and freely given.

However, Indigenous peoples in recent memory are slowly realizing that their ancestral knowledge and culture have been appropriated and used elsewhere without their consent for no compensation. This awakening comes with a sense of empowerment. But this matter is unsettled and still being debated by scholars — some of whom argue that native cultures do not have

⁴⁰ A term that, although not found in the Oxford English Dictionary, is synonymous to aboriginality which is the presence or existence in, or naturally belonging to, a certain land at the earliest stage of history. See Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 N.Z. J. PUB. & INT'L L. 55 (2003), available at http://www2.law.columbia.edu/faculty_franke/Thursday%20Lunch/Waldron.facultylunch.indigeneity.pdf (last visited Nov. 30, 2007)

[A] people may be described as ‘indigenous’ in relation to a certain land or territory, meaning that they are its original inhabitants. Sometimes it is treated as doubly relative, so that a people is called indigenous, first in relation to a certain land or territory, and secondly, in relation to some other people, who arrived in the land at a time subsequent to the people now called Indigenous. So one might say the Maori are the indigenous inhabitants of Aotearoa because they were its first human inhabitants. Or, we may say they are its indigenous inhabitants relative to the Europeans who attempted to settle there as part of the colonial enterprise.

Id.

⁴¹ See Anil Gupta et al., *Mobilizing Grassroots' Technological Innovations and Traditional Knowledge, Values and Institutions: Articulating Social and Ethical Capital*, 35 FUTURES 975, 978 (2003), available at http://www.sristi.org/papers/new/Gupta_Co_Futures.pdf.

⁴² Pharmaceutical research typically involves university researchers, governments and private research institutions.

⁴³ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[C]opyright is intended to increase and not to impede the harvest of knowledge.”).

exclusivity over their creations and therefore cannot complain when others use them,⁴⁴ to the sharp rebuke by others.⁴⁵

3.2 TRIPS and CBD

In recent years, there has been increasing public interest and debate about the presence of intellectual property rights regimes and their interrelationship with traditional knowledge and Indigenous communities. These issues have generated intense debates within intergovernmental organizations such as the World Trade Organization (WTO) and the Food and Agricultural Organization (FAO). An integral issue to this debate is TRIPS.

TRIPS' inclusion in the WTO in 1994 meant that relatively high standards of intellectual property rights were required to provide incentives for corporations and their agents to continue to innovate, and that protection is mandatory for the resulting innovations. Innovations improve national economies and help lead to economic efficiency. Intellectual property rights ensure that the investments made will reap rewards; inventors are acknowledged, companies get their returns, and knowledge is dispersed.

This familiar set-up, however, does not necessarily sit well with many developing countries and Indigenous populations.⁴⁶ Protection provided by TRIPS is said to be confined to technological areas, i.e., pharmaceuticals, software and biotechnology. In the meantime, traditional knowledge is completely excluded from such protection. The view espoused by certain developing countries and

⁴⁴ See generally MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (Harvard Univ. Press 2003); see also Interview by Marren Sanders with Michael F. Brown, Author, *Who Owns Native Culture?*, available at http://jhtl.org/book_reviews/2003_2004/sanders.pdf.

But I'm uncomfortable with the idea that the government should regulate and protect culture. The history of government intervention in indigenous culture doesn't make me sanguine for the potential about getting the government heavily involved in policing and defending, protecting and defining what constitutes native culture. I think we should encourage legalistic forms of heritage protection only with great caution.

Id. (quoting Michael F. Brown).

⁴⁵ See Carol M. Rose, *Book Review: Property in All the Wrong Places?*, 114 *YALE L.J.* 991, 992–1006 (2005) [reviewing MICHAEL F. BROWN, *WHO OWNS NATIVE CULTURE?* (Harvard Univ. Press 2003), and KAREN R. MERRILL, *PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM*, (Univ. of Cal. Press 2002), available at <http://www.yalelawjournal.org/pdf/114-5/rose.pdf>.]

⁴⁶ See MEIR PEREZ PUGATCH, *THE INTERNATIONAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS* 158–66 (Edward Elgar Publishing 2004).

Indigenous peoples⁴⁷ is that intellectual property rights and TRIPS seem to be advantageous only for developed countries in that they may very well be new forms of colonization. For example, a UK Commission doubted that poor countries and poor peoples are the target beneficiaries of TRIPS.⁴⁸ Renowned Indian scientist and environmentalist Vandana Shiva even likened Christopher Columbus' marching orders from Queen Isabel and King Ferdinand to discover and conquer new lands to modern-day patenting and intellectual property rights which supposedly result in the same subjugation and monopolization some five hundred years later.⁴⁹

As a grant by a state of exclusive rights over the products of intellectual creativity, thereby inducing monopoly,⁵⁰ it has been argued that an intellectual property rights regime is an "artificially created scarcity (which) is in many ways inappropriate for knowledge-based assets, since they do not deplete when shared."⁵¹ Traditional knowledge, on the other hand, is a collection of sagacious information and practices which are generally unrecorded and passed on orally from one generation to another. Thus, it continues to regenerate itself and theoretically does not contract. Boxed in a small, peculiar dimension under the auspices of a patent holder, traditional knowledge loses its customary regenerative quality, only to be replaced by the research and development programming of a particular private entity. Modern technology, it is argued, is taking enhanced precedence through intellectual property rights developed under TRIPS, to the detriment of traditional knowledge holders such local communities, tribal leaders, shamans, farmers, fisherfolk, and faith-based healers.⁵²

⁴⁷ See TEBTEBBA, TEBTEBBA BRIEFING PAPER NO. 8: INDIGENOUS PEOPLES AND THE WSSD 10–12 (2001), http://www.tebtebba.org/about_us/publications/bp/bp8.pdf (last visited Nov. 28, 2007).

⁴⁸ See UK COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 33, (2002), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.

⁴⁹ See VANDANA SHIVA, BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE 1–2 (South End Press 1997).

⁵⁰ Intellectual property rights regimes implemented through TRIPS provide monopoly rights to holders. They have a hold on economic power and pricing control.

⁵¹ Sol Picciotto, *Defending the Public Interest in TRIPS and the WTO*, in GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 224 (Peter Drahos & Ruth Mayne eds., Palgrave MacMillan 2002).

⁵² If a country like India challenges this monopoly, it is met with immediate and calculated protests or grand-scale litigation. Still, it has periodically challenged the dominion of the developed countries in relation to patenting and the marketing of medicines. See Bodeker, *supra* note 23, at 803 ("While India has clearly demonstrated its ability and determination to pursue IP

Potentially exacerbating the problem is the concern raised that TRIPS, arguably, facilitates opportunities for biopiracy. Article 27.3(b), by allowing the patenting of seeds, plants and genetic materials, may unwittingly lead to the appropriation of traditional knowledge of Indigenous or Aboriginal peoples.⁵³ Thus, in permitting countries wide latitude in patenting biological matters and plant varieties, TRIPS may be sidelining poorer countries. Its assumption is that the value of any product is derived not from the origins of its component parts (particularly from traditional knowledge), but from the innovation in developing the product.⁵⁴

Another important international convention that has ramifications to the problem at hand is the CBD. As a convention, it deals with biodiversity and traditional knowledge from a more grounded and progressive perspective. Borne out of the global response to accelerated destruction of natural habitat and biodiversity, the CBD promotes sustainable conservation of ecological systems,⁵⁵ the right of traditional knowledge holders and local communities to lead conservationist efforts, and the institutionalization of fair and equitable benefit-sharing agreements between various stakeholders.

While TRIPS is claimed to have a “demonstrable” commercial nature,⁵⁶ the CBD essentially seeks the conservation of the earth’s

violations with respect to the national storehouse of Indian TK, the resources required to pursue such a response are generally unavailable to communities and traditional knowledge holders themselves.”).

In 2001, Cipla, an Indian company, announced that it was preparing to market three anti-HIV drugs for a cheap cost of \$600 a year, a far cry from the tens of thousands of dollars an ordinary HIV-positive patient spends per year for medicine. A very large U.S.-based pharmaceutical company reacted by offering to cut the prices for two of the medicines involved to very manageable prices that approximated Cipla’s. The offer was given to developing countries for as long as these drugs are not re-exported. A chain reaction ensued, prompting other entities to offer the same terms. In another study, generic drug producers in developing countries have now shrunk the cost of generic medicines to just \$100-150 per patient per year, or \$300 per patient per year at the most. See Martin Khor, *Patents, Compulsory License and Access to Medicines: Some Recent Experiences*, 2-3 (Third World Network Working Draft, 2007), available at <http://www.twinside.org.sg/title2/par/TRIPS.flexibilities.30jan07.with.cover.doc>.

⁵³ The key area for TRIPS, it is argued, is not the fact that a community has been utilizing the medical properties of a root crop for centuries but rather the persistence and creativity of laboratory work such as compound isolation, testing and laborious practice of science.

⁵⁴ See RENEE MARLIN-BENNETT, *KNOWLEDGE POWER: INTELLECTUAL PROPERTY, INFORMATION & PRIVACY* 78-79 (Lynne Rienner Publishers 2004).

⁵⁵ It proceeds from the fundamental notion that the environment should be protected, emphasizing on the interests of Indigenous peoples and local communities whose traditional knowledge encompasses this conservation.

⁵⁶ See Biswajit Dhar, *The Convention on Biological Diversity and the TRIPS Agreement: Compatibility or Conflict?*, in *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON*

few remaining wildernesses and forests, while promoting systems designed to sustain them. Article 8(j) of the CBD requires the signatories to respect and preserve the knowledge and practices of Indigenous and local communities who are the guardians of sustainability and biodiversity conservation. It argues for the formalization of benefit-sharing as a result of the use of such knowledge or practices. Article 15 of the CBD recognizes states' sovereign rights over their natural resources and their right to restrict access to them, subject to prior informed consent.

Thus, there seems to be an asymmetry between the interest of Indigenous or Aboriginal peoples, as contained in the CBD,⁵⁷ and the purposes of TRIPS. This perceived incompatibility between TRIPS and the CBD, and between aggressive "life sciences industries"⁵⁸ and Indigenous peoples, is a complicated international problem.

Because of TRIPS and its commercial implications, Indigenous communities have been exposed to notions of individual ownership and propertization, to the extent that the entire fabric of their existence is being challenged. They are made to rethink whether they should change their solitary existence.⁵⁹ Concerns about other people using portions of their native culture abound, as well as questions about whether they, too, should utilize intellectual property protection.⁶⁰

TRIPS, TRADE AND SUSTAINABILITY 75, 85–87 (Christophe Bellmann, Graham Dutfield & Ricardo Melendez-Ortiz eds., 2003).

⁵⁷ The UNDRIP mirrors many of the attributes of the CBD particularly those concerning prior informed consent, benefit-sharing, biodiversity conservation and sustainable development.

⁵⁸ See GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES: A TWENTIETH CENTURY HISTORY* 144–52 (Ashgate 2003); see also Ann Bartow, *Intellectual Property Rights and the Life Science Industries: A Twentieth Century History* by Graham Dutfield, 13 *LAW & POLITICS BOOK REVIEW* 11 (2003), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Dutfield1103.htm>.

⁵⁹ Some Indigenous tribes, as part of their culture, use psychoactive drugs in their rituals to allow them to communicate with spirits and ancestors. Psychoactive drugs, however, caught the attention of unscrupulous groups decades ago and which then bastardized its traditional use. It was developed into a temporary escape from human problems and despair. Despite the innocence of their use, Indigenous peoples are lured into the drug distribution system as certain groups ask them to be planters or sowers. This inevitably changes their ways of living and leads to monetization of their resources and knowledge. See Steinberg, *supra* note 27.

⁶⁰ These notions push Indigenous peoples to become suspicious of sharing any knowledge or information, even to the organizations which are assisting them. They can eventually become greedy towards fellow community members as they may be convinced that knowledge sharing can be equated with remuneration — matters which are totally at odds with communal living.

3.3 Patents and Traditional Knowledge

The aforementioned perceived incompatibility spills over into patents and traditional knowledge. Patents allow the holder, be it an individual or a firm, to exercise and exploit the intellectual property rights associated with the invention for a specific number of years. As such, patenting is a mechanism instituted to cultivate ingenuity and protect newfound knowledge. Patents identify a sole inventor or creator, and require novelty and originality. Traditional knowledge, on the other hand, is the cumulative, incremental breadth of knowledge, processes, practices, skills and arts of a community that have been passed on from generation to generation, usually by oral tradition.⁶¹ Traditional knowledge presupposes a direct opposite to patenting: ownership rights are not bound by any number of years due to its constant evolution and group inventiveness and there is no identifiable author or novelty requirement.

The supposed disconnect between patents and traditional knowledge has spawned claims of misappropriation of traditional or “shamanic knowledge”⁶² and the return of the same knowledge to Indigenous communities through bottled or repackaged forms of prohibitively expensive drugs. There is also the negative externality imposed upon the environment due to rampant access to biodiversity (which shelters traditional knowledge) propelled by a global patent race. Since only select developed countries participate in this race, it leads to the failure of many developing countries and Indigenous communities therein to profit from their own resources, thus further driving them to poverty. The United Nations Development Program’s estimate that “medicinal knowledge is worth approximately \$60 [billion]”⁶³ further intensifies this race.

3.3.1 WIPO’s Role in Bridging the Gap

The creation of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowl-

⁶¹ See ICH Convention, *supra* note 36, Art. 2.2. (stating Intangible Cultural Heritage, of which Traditional Knowledge is a main subset, is manifested “in (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; and (e) traditional craftsmanship; . . .”). See also UNDRIP, *supra* note 35, at 2 (recognizing that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.”).

⁶² See Arrezo, *supra* note 13, at 368–74.

⁶³ See *ECOSOC Summary Report*, *supra* note 11, at 3.

edge and Folklore (WIPO-GRTKF) in 2001, after extensive research and consultation with various governmental and non-governmental stakeholders in 1998 and 1999, is fast changing the perceived disconnect between patents and traditional knowledge. WIPO supplies the venue necessary “for international policy debate and development of legal mechanisms and practical tools concerning the protection of traditional knowledge (TK) and traditional cultural expressions (folklore) against misappropriation and misuse, and the intellectual property (IP) aspects of access to and benefit-sharing in genetic resources.”⁶⁴

WIPO’s direct consultations with Non-Governmental Organizations (NGO’s) and Indigenous peoples and their participation in WIPO-GRTKF Sessions, one of the recent ones being held in Geneva on July 3-12, 2007, is critically bridging the once formidable gap between those who practice traditional knowledge and the interests that promote intellectual property. The meaningful and substantive debates between the participants are illustrative of this development.⁶⁵ As will be discussed later, the creation of WIPO’s Arbitration and Mediation Office further bridges the gap by providing a potential forum whereby holders of traditional knowledge, assuming they qualify as private parties in an intellectual property conflict, may mediate disputes with the patent holder.

4. INTELLECTUAL PROPERTY RIGHTS REGIMES: PROPOSED SOLUTIONS AND THEIR CHALLENGES

There is an assumption that intellectual property rights regimes tend to do more harm than good to Indigenous or Aboriginal communities. There have been several major solutions to this problem proposed over the years by international bodies, governments, interest groups and Indigenous peoples themselves. These proposals were spurred by allegations that current intellectual property laws tend to harm those whom they are supposed to benefit “by fencing off the intellectual commons to future creators,

⁶⁴ See WIPO, *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*, <http://www.wipo.int/tk/en/> (last visited Nov. 30, 2007).

⁶⁵ See WIPO, INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, *Draft Report: Eleventh Session Geneva, WIPO/GRTKF/IC/11/15 Prov. (July 3-12, 2007)*, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_15_prov.pdf [hereinafter WIPO/GRTKF July 2007 Draft Report].

transferring wealth from poor to rich states, and denying affordable access to such critical products as life-saving drugs and seeds.”⁶⁶

Prior Informed Consent. Outside researchers often fail to seek the consent of Indigenous peoples and communities when utilizing their biological knowledge.⁶⁷ The most obvious of these would be the distinct Indian cases of neem, turmeric and basmati as these have been tried in courts or patent offices, resulting in the revocation of all previous patents except three basmati patents.

It is unclear under the TRIPS Agreement if obtaining prior informed consent from the source community is mandatory. Empowerment of Indigenous communities may come in the form of consultation as to whether they approve of the taking and whether there is an accompanying, fair benefit-sharing agreement. This means that Article 15.5⁶⁸ of the CBD, which essentially states that access to genetic resources needs to be subject to prior informed consent, has to be incorporated into TRIPS by way of an amendment of Article 29,⁶⁹ which enumerates certain conditions to patent applications.⁷⁰ The prior informed consent of both the country of

⁶⁶ See Bradford S. Simon, *Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law*, 20 *BERKELEY TECH. L.J.* 1613, 1616 (2005) (citing several authors who think that the current intellectual property regime makes a wide range of creative work illegal; and that some economists believe that intellectual property protection transfers wealth from poor to richer nations. He illustrates the conflict between the United States and South Africa over the latter's law allowing for the abolition of patent rights on pharmaceuticals, parallel imports, and compulsory licenses in order to fight the AIDS crisis).

⁶⁷ Asking a healer his favored treatment of mild rheumatism is not equivalent to a prior informed consent by the community itself. The act of answering a query by such healer is not an approval of the researchers' uprooting of several samples of the plant the healer has identified for commercial testing purposes. Most likely, it may have been borne out of politeness or respect.

⁶⁸ "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party." Article 15.5, Convention on Biological Diversity, <http://www.cbd.int/convention/articles.shtml?a=cbd-15> (last visited Dec. 12, 2007).

⁶⁹ Conditions on Patent Applicants:

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.
2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

Article 29, TRIPS Agreement, <http://www.worldtradelaw.net/uragreements/tripsagreement.pdf> (last visited Dec. 12, 2007).

⁷⁰ See Dhar, *supra* note 56, at 87.

origin and that of the community ought to be secured.⁷¹ Though the CBD generally stresses⁷² that national governments shall determine access to genetic resources, the need for prior informed consent of communities may further be explained by the UNDRIP which states that:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.⁷³

Despite the ambiguity of TRIPS on this subject area, the Bonn Guidelines that were drafted by the Conference of the Parties of the CBD are clear. Prior informed consent is a precondition for access. The Bonn Guidelines' elements include:

[C]onsent of the national authority (including provincial and local authorities) and of Indigenous and local communities; mechanisms for the involvement of relevant stake holders; reasonable timing and deadlines; specification of the type of uses; direct linkage with mutually agreed terms; detailed procedures for obtaining the consent; and a description of the general process for access.⁷⁴

However, the Bonn Guidelines, like the UNDRIP, are purely voluntary. This voluntariness is a major obstacle, as countries can easily dodge responsibility or liability by arguing that it is not obligated to follow mere guidelines.

The challenges to prior informed consent are numerous. These include: (1) the possible divergence of position between na-

⁷¹ See UNDRIP, G.A. Res. 61/295, *supra* note 20, at Art. 11 (2) ("States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.").

⁷² "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation." CBD, Art. 15, Sec. 1 (Dec. 29, 1993), *available at* <http://www.cbd.int/convention/articles.shtml?a=cbd15>.

⁷³ See UNDRIP, G.A. Res. 61/295, *supra* note 20, at Art. 31(1).

⁷⁴ Pub. Interest Int. Prop. Advisors (PIIPA), Resource Manual for Bioprospecting § 2.1.2(b) (2004), http://www.piipa.or/RersourceManual_Oct14_2004.doc (last visited Nov. 28, 2007).

tional and community leaders;⁷⁵ (2) the breadth or extent of the given consent; (3) the availability of remedial Indigenous Dispute Resolution or ADR measures in case consent is not secured or if the limitations of the consent are transgressed; and (4) the lack of certainty that benefits (e.g. royalties) shall be forthcoming.⁷⁶ Assuming that prior informed consent was conditioned upon annual or periodic royalties, Indigenous communities will face severe constraints in enforcing any agreement, written or oral, in case of delayed payments or non-payment. The best and cheapest resolution to a problem like this is to summon the purported erring entity to the negotiation or mediation table. To this end, the non-indigenous party's refusal or avoidance of negotiation or mediation is of grave concern, as litigation is traditionally and culturally not an option for indigenous peoples.

Community as Patent Holders. This may, at first glance, be one of the novel solutions to the problem. Instead of protesting in the streets during WTO conferences, why not just join them? Pragmatically, is it not a better approach to encourage Indigenous communities to apply for patents themselves so they can be integrated into the intellectual property system rather than remaining as skeptical, disgruntled outsiders? While this is an attractive though simplistic solution, it is the wrong prescription for the problem. It does not preserve traditional knowledge and potentially leads to the breakdown of Indigenous societies.⁷⁷ Even if Indigenous communities "win" by being able to frame their claims using intellectual property systems, such victory will often be Pyrrhic, as their ways of living and communing would have been altered forever.⁷⁸ Communities, which previously co-owned this knowledge, systems and practices, may end up competing with each other as to

⁷⁵ There can be structured coordination and dialogue between the national government and the Indigenous communities to prevent any outside group from playing these groups against each other. Government agencies and/or non-governmental organizations should closely and regularly be in touch with the indigenous communities. Indigenous representation in policy-making bodies of local and national governments can also be explored.

⁷⁶ See Bodeker, *supra* note 23, at 796.

⁷⁷ To go into the system means that the communities will be claiming to be inventors themselves. This is contrary to what generations of Indigenous people have long believed. No one is the inventor of any form of knowledge, and it is impossible to even peg a date and person to whom such inventiveness can be ascribed to. If a community possesses a patent with tremendous potential, many suitors will try to woe it. In the process of commercial bargaining, the community may transform into a business entity and the leaders as its business managers or auctioneers. Greed, animosity, self-interest and individuality may eventually creep into their otherwise peaceful and esoteric existence.

⁷⁸ See Simon, *supra* note 66, at 1619–20.

who will be granted a patent first. This may result in inter-communal opportunism, as individuals within a community (or various communities as competing groups) will be patent rivals. The first to file is the patent holder, despite any historical evidence to the contrary.

This proposal also does not account for the fact that patent application is an expensive process.⁷⁹ It will take at least \$10,000 to obtain a patent, not including the cost of any ADR processes or patent suits in cases of infringement. The process also does not end with securing a patent. Companies spend millions upon millions of dollars for research, development and related activities to create new products out of patents. The communities' funds would be better spent for their own basic needs than investing in these patenting, research or development processes. Assuming they are funded by a foundation, sponsor or similar organization, there is a danger that strings might be attached. The process is also not as simple as providing a list of what the community knows. A patent application is concerned with explicitly worded patent specifications and other highly technical information. The application must specify the details of an invention.⁸⁰ Patenting will involve the hiring of patent lawyers or patent consultants who will draft and file the necessary application and supporting documentation. The government approval process will take time and will likewise involve fees and other costs. The arcane language used in the process is beyond the normal capabilities of Indigenous communities.⁸¹ Product research, development, marketing and innovation simi-

⁷⁹ Graham Dutfield, *Indigenous Peoples, Bioprospecting and the TRIPS Agreement: Threats and Opportunities*, African Center for Technology Studies, <http://www.acts.or.ke/prog/biodiversity/trips/dutfield.doc> (last visited Nov. 30, 2007).

⁸⁰ See WILLIAM CORNISH, *INTELLECTUAL PROPERTY: OMNIPRESENT, DISTRACTING, IRRELEVANT?* 7–10 (Oxford Univ. Press 2004).

Patents are granted for inventions in the sense of technological improvements which are not already known and have some inventiveness about them Patents are limited to a maximum of 20 years from application, being renewed year after year at an increasing fee . . . [t]he exclusive right they give is inherently strong Patent races raise issues of 'internal fairness' of the system that are of greater moment than they tend to be accorded Patents give an exclusive right in law . . . (and) give an economic monopoly, at least for a time This fulfills the economic motivation behind the system. First and foremost, patents are meant to offer the stimulus of marketing free of competing versions of the invention; it is this opportunity which induces investment in research and then development.

Id.

⁸¹ For additional points against patenting of traditional knowledge directly by Indigenous communities, see Muria Kruger, *Harmonizing TRIPs and the CBD: A Proposal from India*, 10 MINN. J. GLOBAL TRADE 169, 203–07 (2001).

larly call for knowledge and skills not typically available to Indigenous peoples.

Joint Patenting. If it is inconceivable for traditional communities to be the sole holders of patents to their own knowledge, is it any more feasible for them to partner with a research institution or corporate entity as joint patent owners? This solution presumes a level playing field for both partners. Both are presumed to be active participants during the application and to likewise share in the costs. The problem is that Indigenous communities will not be able to share in the costs, nor can they actively participate in the science and development. Traditional communities have only the knowledge base for these patents. To ask them to participate any further would bring them to an area far beyond their abilities.

There is also the likelihood that communities will not be able to monitor the active patent partner. They will not have the built-in abilities to see how much a corporate or institutional partner has gone insofar as the patent is concerned. In case of suspicions of anomaly or unfair dealing, where will they turn? From what government agency can they seek help? Unless there are stable Indigenous Dispute Resolution, ADR or Indigenized Western ADR systems in place through which the community can address its grievances, they may be left in the dark. Inevitably, the community will not be able to play an active role in the partnership and will merely serve as a provider of knowledge. This fundamental unevenness in the partnership relations may not be in the best interest of the communities.

Compulsory Licensing Scheme. Since it may not be in traditional communities' best interest to hold patents or to partner up with a corporate entity, the scheme from which they may benefit most is compulsory licensing. In this model, assuming that the pre-scheme and post-scheme dealings are fair, the communities act as sources of traditional knowledge whose use is maximized by researchers and consequently, their principals will be entitled to compensation. Assuming a patent unduly incorporates an Indigenous community's traditional knowledge, the model proposes that the community issues a compulsory license of the traditional knowledge in question to the patent holder, rather than challenging the patent which will involve a significant amount of effort and time. In return, they will be compensated. The communities will thus be compulsorily licensing what they inherently know in return for resources they badly need.

The Hoodia plant case⁸² is a good example of this. The San People, the Indigenous community who originally discovered and used this plant, was initially excluded from the benefits that an organization was deriving from its licensing of a patent based on the plant's properties. Rather than challenging the patent and seeking its revocation, the San People compulsorily licensed their traditional knowledge (or an adaptation thereof) to the organization and received a generous benefit-sharing agreement in return.

In general, this model implies that royalties will be flowing back to Indigenous communities based on a fixed yearly amount or on a per-product-sold basis. However, communities should not simply be treated as the source of the resources and paid on a per-pound or per-ton basis, as this will effectively treat them as mere crop growers. In this situation, the Indigenous community is compensated only for the biological resources that are literally harvested and not for the "intellectual resources they provide."⁸³

Of course, some of the disadvantages stated earlier will still apply, such as fraud in the valuation of their knowledge, deception in the procurement of the license, and the lack of Indigenous or ADR avenues to seek redress in case of questionable acts. This proposal, however, still bears much promise. The Indigenous or Aboriginal communities do not lose themselves in the system, and at the same time may derive actual benefits. Moreover, with the community as licensor and the entity or organization as licensee, conflicts between them may be allowed to be raised before WIPO's Arbitration and Mediation Center if this is provided for in the contract.

Digital Documentation. In the world of high technology and digital advancements, traditional knowledge, intangible cultural heritage and cultural expressions can be digitized as part of ongoing documentation efforts. Digitization and documentation, in general, assist in the safeguarding of knowledge and heritage⁸⁴ under the Convention for the Safeguarding of Intangible Cultural Heritage adopted in 2003 ("ICH Convention"). There are, however, merits and demerits.

⁸² See discussion *infra* at 51.

⁸³ See Arrezo, *supra* note 13, at 374.

⁸⁴ See ICH Convention, *supra* note 36 (stating, in Article 12, that "[t]o ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated.").

The demerits of digital documentation are numerous. It can backfire on Indigenous communities, since it may end up publicly revealing what were once community secrets which ought to remain undisclosed. It may act as a sand trap as well as a double-edged sword. Although it assists in the recreation of traditional knowledge and heritage, it can also lead to unintended global exposure, the leaking out of community knowledge, and, eventually, to the illicit transfer of knowledge. It can cause division between Indigenous peoples. It can freeze traditional knowledge, lead to its erosion, and unwittingly assist in its transfer from the Indigenous localities to elsewhere in the world.

In the 1980s, the government of Ethiopia required traditional healers to register as practitioners. Failing to register meant ineligibility to legally practice traditional medicine. An important component of this government regulation was that those who chose to register as traditional healers had to disclose the traditional formulations of their medicines so as to generate a national database. Protective of their traditional knowledge, possibly suspicious of the publication consequences, and yet needing to practice their craft to earn a living, many traditional healers submitted inaccurate formulations and related information to the national database. This seeming “mockery” of the data-collecting and documentation process, as a possible form of protest against the imposition, led to a collection of traditional medicine that was not taken seriously.⁸⁵

The merits include serving as a salvage tool for Indigenous cultures that are fast ebbing away. Children from some Indigenous communities may not be interested in the practices of their parents or forefathers simply because they do not earn anything from them and may opt to go to city centers in search of work. Documentation, digital or otherwise, may facilitate the passing on by traditional practitioners of their knowledge and intangible cultural heritage to new bearers. Moreover, digital documentation serves the purpose of evincing prior art. It is an incessant reminder of who Indigenous or Aboriginal peoples are and why they and their knowledge should be protected.⁸⁶

Disclosure of Source of Origin. Disclosure of Source of Origin ensures the transparency of the patent application process. With the advent of globalization and allegations of biopiracy, it is not surprising that developing countries are taking defensive steps to

⁸⁵ See Bodeker, *supra* note 23, at 804–05.

⁸⁶ Thus, Indigenous communities cannot close their eyes on this documentation option. It will have positive effects on, and positive externalities for, the communities in the long run.

stem this tide of genetic resource-taking without consent. This entails disclosure of both the originating country and specific community that provided the knowledge or shared the practice. Once disclosed, it is assumed that the patent examiner will have to scrutinize the application and (or at least it is hoped) will rule to deny it if it is not abundantly clear that the source-community *and* the source-country consented.⁸⁷ While there is some opposition to Disclosure of Source of Origin in patent applications,⁸⁸ it has a significant role in making sure that the derivative community and country are acknowledged, that fair benefit-sharing arrangements are established,⁸⁹ and that efficient monitoring exists.⁹⁰

5. INDIGENOUS DISPUTE RESOLUTION PROCESSES AND WESTERN ADR SYSTEMS

5.1 Modes of Dispute Resolution

Indigenous peoples have been explaining themselves to the European newcomers since the time of first contact. After five hundred years, indigenous peoples still maintain that their ways of understanding the world are distinct. Regardless of whether we fully understand the meaning of such a claim, indigenous ways of thinking about the world have left their indelible imprint on the Aboriginal-newcomer relationship . . . [O]ne brutal fact is deeply embedded in the legal and political

⁸⁷ Disclosure of the Source of Origin is thus emphatically connected with prior informed consent.

⁸⁸ Not all countries agree that there should be prior informed consent and disclosure of source of origin. Disclosure of source of origin is primarily opposed as being antithetical to the TRIPS Agreement. Some developed countries contend that unless TRIPS is revised, the supposed incompatibility between Disclosure of Source and the TRIPS Agreement subsists. If this disclosure system is pursued, it may cause havoc in national patenting systems worldwide.

⁸⁹ Disclosure of source of origin is advocating best practices in the sphere of patenting. It encourages good faith dealing by the applicant and it arguably deters potential suits or patent challenges later on.

⁹⁰ See Convention for Biological Diversity, Decision VI/24: Access and benefit-sharing as related to genetic resources (April 7-14, 2002), *available at* <http://www.cbd.int/decisions/?m=cop-06&id=7198&g=0> (last visited on Nov. 28, 2007). The Bonn Guidelines state:

the disclosure of the country of origin of genetic resources in applications for intellectual property rights, where the subject matter of the application concerns or makes use of genetic resources in its development, (is) a possible contribution to tracking compliance with prior informed consent and the mutually agreed terms on which access to those resources was granted.

Id.

relationship: by necessity, indigenous peoples have had to explain their beliefs — argue for their rights — in the political institutions and courts of law of the dominant culture.⁹¹

5.1.1 Indigenous Dispute Resolution Processes

Even before the advent of formal ADR bodies and procedures in mainstream society, Indigenous peoples have long used ADR-like mechanisms — also referred to as Indigenous Dispute Resolution — to resolve existing rows between their own membership, with other tribes or with newer settlers. These involve Indigenous paradigms, beliefs and “Aboriginal Wisdom.”⁹² Disputes are resolved based on the Indigenous community’s culture and custom. These include traditional teachings, respect, relationships, interconnectedness, spirituality, prayers, storytelling, “saving face,”⁹³ recounting of facts, and emotions. Group consensus is the goal to be achieved, as well as the maintenance of good relations with other community members, solidarity and reciprocal obligations — also known as *K’e* in the Navajo culture.⁹⁴ Indigenous Dispute Resolution processes are characterized by flexibility, utilization of cyclical time, qualitative measurement of success and people-orientation.⁹⁵ The person in the middle of the process is not just persuasive, but exemplifies the virtues of a teacher and planner, given his “reputation for wisdom and knowledge of traditional lore.”⁹⁶

Early History

Some authors trace the genealogy of what is now known as mediation to early Greek and Chinese cultures. Sri Lankan antecedence dates back to about 425 years before Christianity while Chinese mediation goes back to the Zhou Dynasty which

⁹¹ See Turner, *supra* note 9, at 57.

⁹² Elmer Ghostkeeper, *Weche Teachings: Aboriginal Wisdom and Dispute Resolution*, in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 162 (Catherine Bell & David Kahane eds., 2004) (“[T]he body of information, rules, beliefs, values, behavioural and learning experiences, which made existence possible and meaningful . . .”).

⁹³ Toni Bauman & Rhian Williams, *The Business of Process: Research Issues in Managing Indigenous Decision-Making and Disputes in Land*, AIATSIIS RESEARCH DISCUSSION PAPER No. 13 (2004), available at http://www.aiatsis.gov.au/_data/assets/pdf_file/4729/DPI13.pdf.

⁹⁴ See Robert Yazzie, *Navajo Peacemaking and Intercultural Dispute Resolution*, in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 108 (Catherine Bell & David Kahane eds., 2004).

⁹⁵ See Wenona Victor (Sto:lo Nation), *Alternative Dispute Resolution (ADR) in Aboriginal Contexts: A Critical Review* 11 (2007) (book review), available at http://www.chrc-ccdp.ca/pdf/adrred_en.pdf.

⁹⁶ See Yazzie, *supra* note 94, at 108.

predates the Christian era by 1,100 years.⁹⁷ Other scholars characterize pre-colonial forms of mediation as a familiar facet of early Jewish, Christian, Islamic, Hindu, Buddhist and Confucian religions as well as Indigenous cultures.⁹⁸ Ethnic groups and aboriginal tribespeople have been practicing these forms of mediation long before newer settlers arrived. Native American figure Pocahontas is depicted to have acted as a go-between, or a mediator, between her Algonquian Indian chieftain father, Powhatan, and the early colonial English settlers at Jamestown (Chesapeake Bay region, now part of Virginia). Peacemaking Circles, which is a dispute resolution system that incorporates family and community members in the face-to-face discussion of an alleged crime between the accused and the victim, as guided by elders, were also practiced by Native Americans since time immemorial.

While Western forms of ADR were generated as a response to the difficulties and deficiencies associated with court proceedings, Indigenous Dispute Resolution processes were not an “alternative” to anything. There were no courts or highly formalized procedures and institutions to speak of when they were first developed and practiced. Generally, Indigenous Dispute Resolution processes were all that the communities had. Although they seem very ADR-like, they were truly indigenous and unique to these peoples.

In fact, the first time the West recognized Indigenous laws was when the Holy Roman Emperor Charles V did so on August 9, 1555. After this, however, Indigenous Dispute Resolution seemed to have vanished, at least from the Eurocentric point of view.⁹⁹ These indigenous methods of dispute resolution became outlawed and were forcibly replaced, compelling them to go underground.

1872 Kitsegukla Incident

An example of Indigenous negotiation is the 1872 Kitsegukla Incident. For several months, Gitksan chiefs blockaded significant portions of the Skeena River in the British Columbia interior in Canada as a reaction to the accidental burning of the Gitksan village of Kitsegukla by white miners. This impasse ended only after a negotiation aboard a British navy gunboat between the chiefs

⁹⁷ See Fred E. Jandt & Paul B. Pedersen, *The Cultural Context of Mediation and Constructive Conflict Management*, in *CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA-PACIFIC CASES* 262 (Fred E. Jandt & Paul B. Pedersen eds., 1996).

⁹⁸ See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICTS* 20–22 (3d ed. 2003).

⁹⁹ See Yazzie, *supra* note 94, at 107.

and the lieutenant-governor of the former British Columbia colony. The negotiations took three days to finish. For the British, this meant three painstaking days of meeting with the Indians, listening to their long recitation of grievances that led to the blockade, listening to songs and stories from the Indian representatives, and providing them with a small sum as remuneration for the loss. On the part of the Indigenous Indians, the three-day negotiations symbolized a “feast” that included their traditional recitation of the British offense of village burning as the cause of the blockade, storytelling, which is inevitable in like situations, sharing of oral history, acceptance of gifts, which represent the British acknowledgment of wrongdoing and recognition of the chiefs’ jurisdiction, signing of a paper representing mutual agreement, and a celebration for being able to conclude the agreement.¹⁰⁰ The Gitksan chiefs did not demand that the offending white miners be brought to justice. Their blockade, its ramifications and the three-day feast were enough to make their point and for healing to occur.

This may have been seen differently by the British negotiators, who may have been under the impression that they were simply paying off Indian troublemakers or indirectly threatening them not to repeat such action by firing their canons, at the conclusion of the three days, as a symbolic show of force. They may have failed to appreciate that the three-day feast was a way for the Native Indians to make peace with them, to share their horizons and oral histories, and provide an opportunity for the British to better understand native culture. The British may even have viewed the three-day feast as too long, boring, frustrating or a waste of time. The truth is that such “Indian time” does not connote being late in arrival, delaying procedure or wasting time. Those three days were well spent in relationship building. “Indian time” essentially means just simply sitting together to know one another better.¹⁰¹

Preventing the Call to Arms

Pre-colonial forms of mediation have also historically been adhered to by Indigenous peoples, as they allow for voluntary face-to-face meeting and discussion with the other parties to the conflict. These discussions with competing tribesmen or foreign settlers were designed, among others things, to prevent resorting to

¹⁰⁰ See Natalie Oman, *Paths to Intercultural Understanding: Feasting, Shared Horizons, and Unforced Consensus*, in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 70–71 (Catherine Bell & David Kahane eds., 2004).

¹⁰¹ See Victor, *supra* note 94, at 29–30.

violence or a call to arms. Given their contrasting ethnicities, it is not unimaginable for two tribes, after failure of negotiation, to resort to fully violent conflict despite the relatively low number of their warriors.¹⁰² There is some form of win-lose struggle associated with ethnic superiority.¹⁰³ The combination of interpersonal, inter-village and interethnic dimensions of a conflict may lead to confrontation, both bloody and deadly.

Despite the typical genial and non-aggressive nature of Indigenous or Aboriginal peoples, they will, in general, defend their rights if need be, but only after a breakdown of talks and negotiations. This tends to make the resulting situation rather “explosive.”¹⁰⁴ Hence, it is imperative that talks do not break down, that each side is able to express their position well, and that a mutual understanding or a decision is reached by the parties. In modern societies, the failure to abide by the provisions of a contract may result in the payment of damages, penalties and restitutions. Such a failure may take a more physical quality in the context of tribal wars, ethnic conflicts or community misunderstandings. Beyond small tribes of kinsmen, Indigenous wars may escalate in larger groups of ethnic communities, such as the long-standing conflict between Sri Lanka’s Sinhalese majority and Tamil minority largely, caused by official language laws and the absence of institutional mechanisms for mediation.¹⁰⁵

Settling Other Forms of Conflict

As a result of ethnic and cultural differences, and further considering the possibility of warfare in the event of non-agreement, most Indigenous peoples dealt with inter-communal conflict with their proven dispute resolution processes. Certainly, pre-colonial forms of mediation were not only used during earlier times to settle potential outbursts between tribes or clans. They were most often used to settle smaller problems or miscommunications involving personal misunderstandings, debts, unintentional trespass, family conflict, boundary disputes, food or harvest allocation, among others. Indigenous peoples deferred to the decisions of their elders

¹⁰² See generally Julie Foster Smith, *The Effects of Tribal Wars on Personal and Family Disputes in Papua New Guinea*, in CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA-PACIFIC CASES 112–18 (Fred E. Jandt & Paul B. Pedersen eds., 1996).

¹⁰³ See Jandt & Pedersen, *supra* note 97, at 254.

¹⁰⁴ *Id.* at 254–56.

¹⁰⁵ See Jayadeva Uyangoda, *Recent Attempt at Ethnic Conflict Resolution in Sri Lanka*, in CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA-PACIFIC CASES 239–45 (Fred E. Jandt & Paul B. Pedersen eds., 1996).

or tribal chieftains who rationalized through the use of experience, wisdom and informal precedence. In fact, pre-colonial forms negotiation and mediation were used to convince Maori chiefs in New Zealand (formerly Aotearoa) to sign a treaty with the British Queen, whereby they ceded sovereignty to the Crown but still retained, in theory, exclusive and undisturbed possession of their lands, estates, forests and other properties.

Revivalist Trend in Canada

Indigenous Dispute Resolution processes are experiencing a revival of sorts in Canada. An important process experiencing re-birth is the Navajo Peacemaking or *Hozhooji Naat'aanii*. In 1982, judges of the Navajo Nation decided to revive, quite successfully, Navajo Peacemaking within their courts. They began with identifying their customary norms of doing things, their traditional institutions for dispute resolution, and the need for leadership. Judge-style decision making was not the intended leadership. What was sought was the resolution of conflicts by discussing things with the person complained of and other community members. Other important ingredients to this Peacemaking are prayers; peoples' commitment; discussion and recounting of perceived and actual facts; teachings of traditional approaches by the civil leader or *naat'aanii*; future action plans; and community consensus. Not only were people open to Peacemaking from the start, but some Navajo women have also expressed preference for it over the Navajo Nation's domestic violence code.¹⁰⁶

Serious impediments to this revivalist trend of Indigenous Dispute Resolution include internalized colonialism or colonial thinking. Indigenous or Aboriginal communities may fear that their own customary dispute resolution mechanisms are inferior to those of the so-called dominant society.¹⁰⁷ If confronted with a conflict between their own system of justice and the non-indigenous system, they may find it less complex to rationalize that the majority's system should be followed, thereby potentially creating disorder within their own community. Some might be willing to abide by Aboriginal values, processes and systems, but only if they do not conflict with Western modalities.¹⁰⁸ They may also fear that it

¹⁰⁶ See Yazzie, *supra* note 94, at 108.

¹⁰⁷ See Catherine Bell, *Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks*, in *INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS* 242 (Catherine Bell & David Kahane eds., 2004).

¹⁰⁸ *Id.* at 242–43.

would be very difficult to alter current power and legal structures so much that participation by their communities through Indigenous ways of resolving conflicts is almost nonexistent. The World Bank has also noted that the restoration of Indigenous Dispute Resolution procedures, such as in India, subjects women to the application of exceptionally discriminatory social norms¹⁰⁹ instead of the fair and equal justice of a rights-based legal system.

5.1.2 Western ADR Systems

Beginning in the 1970s in the United States, there has been a growing enthusiasm and popular interest in ADR systems such as mediation, conciliation, negotiation and arbitration. This was due to deficiencies and delays in the court-centered approach, among many other reasons. Litigants became weary of facing each other and the judge in court, people were looking for a less expensive venue for justice, or simply were in search of forums that were less formalistic than the conventional courts.¹¹⁰ Governments may have also discovered that experts, other than judges, were more suitable to resolve certain disputes. Through ADR, there was a lesser chance of creating a winner-loser dichotomy, the approach was less antagonistic and adversarial, and the relationships between the parties were normally kept intact. In Canada, during the last fifteen years, ADR has become so widespread that some quarters were questioning whether it is still appropriate to refer to it as “alternative” since the term may be misinterpreted to mean merely peripheral or inferior to judicial processes.¹¹¹ ADR has either replaced the courts as the first instance forum of a complaint or, in the case of facilitated mediation and negotiation, has been annexed to pre-existing judicial and administrative processes.¹¹²

Mediation

One of the most common forms of Western ADR systems is mediation, which has been described as:

[I]ntervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making

¹⁰⁹ See The World Bank, *Topic Brief on Alternative Dispute Resolution (ADR)* (2000), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20755904~menuPK:2035565~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Oct. 8, 2008).

¹¹⁰ See David Kahane and Catherine Bell, *Introduction to INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS 1* (Catherine Bell & David Kahane eds., 2004).

¹¹¹ See Bell, *supra* note 107, at 254–55.

¹¹² *Id.* at 254.

power, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issues in dispute. In addition to addressing substantive issues, mediation may also establish or strengthen relationships of trust and respect between the parties or terminate relationships in a manner that minimizes emotional costs and psychological harm.¹¹³

Mediators, for the most part, learned their craft informally through experience. Only at the start of the twentieth century did mediation become a part of the institution and acknowledged as a separate profession.¹¹⁴ Mediators are usually members of the local gentry who are respected by the townsfolk, appointed by local chieftains or town mayors, or “well-thought-of community members with knowledge of the local culture”¹¹⁵ who can negotiate deadlocks within the cultural context. They can also be religious or political nominees, village elders, and those who have established a reputation for handling conflicts. There are instances when the mediator, at least in older times, is a friend of both sides as such person is mutually trusted. In the context of present-day Western ADR, this may be less appropriate considering the emphasis on the detached neutrality expected from professional mediators.

Negotiation

Negotiation is another important procedure of Western ADR. Negotiation is a:

bargaining relationship between parties who have a perceived or actual conflict of interest. The participants voluntarily join in a temporary relationship designed to educate each other about their needs and interests, to exchange specific resources, or resolve less tangible issues such as the form their relationship will take in the future or the procedure by which problems are to be solved.¹¹⁶

As a voluntary process, negotiation presupposes that each side is coming to the negotiation table with certain demands and with the purview of resolving the dispute in good faith without needing judicial recourse. In negotiation, only the two parties are negotiating and trying to come up with a solution that will address both of their needs and agendas. This is different from mediation since there is

¹¹³ See MOORE, *supra* note 98, at 15.

¹¹⁴ *Id.* at 22–23.

¹¹⁵ See Jandt & Pedersen, *supra* note 97, at 257–58.

¹¹⁶ See MOORE, *supra* note 98, at 8.

no third party who will try to intervene and assist in resolving the dispute.

Arbitration

Another form of Western ADR is arbitration, though this is a more recent incarnation. Usually designated in contracts, arbitration allows for a pre-determined jurisdiction and arbitration tribunal to handle disputes between parties. Indigenous or Aboriginal communities will generally find it more difficult to be involved in arbitration due to its more exacting characteristics. Arbitration is another voluntary process, except if mandated by law or contract, whereby parties in conflict request the presence and assistance of a third party who is both neutral and impartial to make a decision relative to a disputed issue. The decision may, by agreement of the parties, be binding or merely advisory. The arbitrator(s) may either be one disinterested third party or a panel of impartial parties. Aboriginal parties may often prefer mediation and negotiation since they can better control the process and can ask that those who will try to settle the dispute are individuals who understand the cultural context of the problem. On the other hand, arbitration may involve arbitrators who might not be familiar with the context of the problem, or at least how it operates within the customs and practices of a specific culture.

Criticisms of Western ADR

Given the continued surge of interest in Western ADR systems, it is worth noting that there are prominent criticisms of it as well. Since the 1980s, there have been mounting criticisms of the use of “universal, generic templates.”¹¹⁷ The detached, third party neutral was, in some cases, derided as not knowing or respecting the culture and interests of a particular group, especially if the mediator or conciliator is from the dominant culture. As a result, the “perspectives of more marginalized parties to the dispute are systematically ignored or distorted . . . the supposedly neutral facilitation of compromises in some dispute resolution practice systematically favours more powerful parties.”¹¹⁸ “Neutralist models of adjudication”¹¹⁹ do not necessarily mean that all parties to a dispute, particularly Indigenous communities, will feel that there is no imbalance of power or misinterpretation of culture.

¹¹⁷ See Kahane, *supra* note 12, at 33.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 52.

It has also been said that despite the successes of ADR, it does not effectively address nor alleviate the concern of colonization or colonial assumptions, and it institutionalizes dependency by Indigenous or Aboriginal peoples on non-indigenous laws.¹²⁰ Moreover, in certain exceedingly litigious countries, such as the United States, doubts have been expressed if ADR can truly ease court congestion. Arbitration, specifically commercial arbitration, has also been criticized as suffering from the same symptoms associated with litigation, regarding its complexity, large costs, and dependence on legal representation.¹²¹

ADR in the United States has also been characterized as enjoying minimal efficiency gains, after the RAND Institute for Civil Justice studies on U.S. courts and of the U.S. Civil Justice Reform Act found no considerable effect in “the aggregate costs for the courts, and [that] average time to disposition of cases had not declined.”¹²² Lastly, due to the voluntary nature of most ADR systems, parties have little or no incentive to mediate or negotiate. Mediators and arbitrators often do not have the right to compel parties to a dispute to mediate or arbitrate the claims, which is unlike the authority of a judge. Ensuring compliance with the results of mediation or arbitration is another challenge facing ADR.

Prescribed with Caution

Thus, for some, the initial fervor in the 1970s and 1980s for ADR is losing steam. Though still viable worldwide, ADR is now being prescribed with caution. ADR may not be preferred in cases where there is a need for “public vindication, an interpretation of law, a precedent set to reform general practice, or where civil or constitutional rights issues are involved.”¹²³ In this regard, other proceedings or processes of law might be more helpful to the litigants and to society in general.

¹²⁰ *Id.*, at 51 (“[the] hierarchy of decision making promoted by these [ADR] processes, the dominant role of non-indigenous law, and the ability of non-indigenous government to alter many of these processes if they no longer have popular support, perpetuate Aboriginal dependency.”).

¹²¹ See generally Penny Brooker, *The ‘Juridification’ of Alternative Dispute Resolution*, 28 *ANGLO-AM. L. REV.* 1, 1–36 (1999).

¹²² See The World Bank, *supra* note 108.

¹²³ *Id.* See also Paul Mitchard, *A Summary of Dispute Resolution Options*, in *MARTINDALE-HUBBELL INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION DIRECTORY* 3–24 (1999).

5.1.3 Indigenized Western ADR Systems

As the term denotes, these are Western forms of ADR where “Indigenization”¹²⁴ has taken place. Put succinctly, Western ADR has adapted to include Indigenous processes of healing, interconnectedness, intercultural understanding, and discussing important matters among themselves. Indigenized Western ADR is also known as “community-based dispute resolution mechanisms” and is often designed to be outside of the formal court system.¹²⁵ Such mechanisms include community mediation circles, community sentencing groups, elders advisory groups, family group conferencing circles, and Canada’s Metis Mediation Healing Circle. Other community-based, Indigenized Western ADR systems include India’s *lok adalat* village-level people’s courts where trained mediators help resolve common problems, Bangladesh’s village-based *shalish* mediation, Sri Lanka’s nationally established mediation boards, and Latin America’s *juece de paz* who is a legal officer authorized to mediate or conciliate small claims.¹²⁶ These processes do not clamor for punishment or incarceration, and emphasize healing and forgiveness.

Criticisms of Indigenized Western ADR forms

Though these mechanisms locate and integrate pre-colonial Indigenous Dispute Resolution processes squarely within current-day ADR, they also suffer from criticisms. One of these is that “they do very little to substantially address systemic and societal issues of racism, discrimination, oppression and eurocentrism [and

¹²⁴ See Bell, *supra* note 107, at 241.

Increased awareness of the impact of cultural stress and pressure on Aboriginal communities has resulted in recent reforms designed to reduce the alienation Aboriginal people feel within the justice system . . . Often referred to as indigenization, these reforms rely on modifications to conventional litigation process before Canadian courts and administrative tribunals. Examples include modification of court-annexed mediation programs to incorporate indigenous values, processes, and expertise; the creation of administrative tribunals with cultural and community expertise; the appointment of Aboriginal people as judges, court staff, and prosecutors; Native court worker programs; Aboriginal law student programs; and Aboriginal-focused court information kits. These reforms do not require drastic institutional change, recognition of the inherent right of Aboriginal peoples to self-government, or new jurisdictional arrangements between Aboriginal and Canadian governments. In many ways, this is the strength of indigenization — structures, procedures, and decision makers that are culturally inappropriate can be altered and replaced quickly, and often effectively, as an alternative to the alienating adversarial system.

Id.

¹²⁵ See The World Bank, *supra* note 109.

¹²⁶ *Id.*

that] [m]any argue that simply ‘accommodating’ Aboriginal identity and culture is not enough.”¹²⁷ Convergence between Indigenous and Western ADR processes is argued to be counter-productive, since it is merely a collision of different cultures and may just be “a polite form of assimilation.”¹²⁸

Indisputable Successes

However, it is hard to dispute that most of today’s successful ADR systems that adapt to Indigenous culture, values and interests are the Indigenized Western ADR forms. Certainly, as stated earlier, there would be present-day practices that may almost be considered in the realm of Indigenous Dispute Resolution processes, such as Navajo Peacemaking.¹²⁹ But Aboriginal courts and tribunals in North America are clearly more on the side of the Indigenized Western form. So, too, are the Restorative Justice programs of New Zealand, the existence of Aboriginal or Indigenous lawyers, law firms and judges, as well as the advocacy of Indigenous interests by groups whose members are non-indigenous. These may be said to be very effective forums for Indigenous justice, despite the criticisms that abound. Indeed, cultural or Indigenous justice now includes a fusion of Western and Indigenous theories of law and conflict resolution.

It can be argued that these forums of Indigenous justice are merely borrowing from Western ADR systems, or vice versa. One form need not be seen as assimilating or co-opting into the other. Moreover, it is undeniable that there are points of convergence between these two forms that will benefit Indigenous and non-Indigenous peoples. If an Aboriginal member has done something totally repulsive to the community, he can be meted out with banishment or, at the extreme, incarceration, to prevent a repeat of the wrong.¹³⁰ In this sense, Indigenous justice may be said to have borrowed from the Western concept of incarceration to prevent further wrong or the endangerment of other people outside of the banishing community. It may even be said that integration or convergence does not necessarily lead to cultural appropriation or a newer form of cooptation.

¹²⁷ See Victor, *supra* note 94, at 33.

¹²⁸ Julie Macfarlane, *Commentary: When Cultures Collide, in* INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS 99 (Catherine Bell & David Kahane eds., 2004).

¹²⁹ See generally Yazzie, *supra* note 93, at 108–11.

¹³⁰ See Victor, *supra* note 95, at 35–37.

The best approach to Indigenize Western forms of ADR would be to study historical practices of Indigenous or Aboriginal communities, talk to their spiritual leaders, look at creation stories, rituals and ceremonies, and compare healing practices of other groups, both nearby and in other countries.

Parenthetically, mediation that incorporates Indigenous or Aboriginal conceptions and values is clearly within the domain of the Indigenized Western ADR forms. In this case, the mediators need to be familiar with the culture where the conflict occurs, and must not be short-term blame-fixers but, rather, long-term enhancers of reconciliation. A good example of an Indigenized mediation is found in the mediation between a New Zealand developer who proposed to build a hotel at the Mahia Peninsula in Aotearoa and the Indigenous Maori tribal folks living therein. In summing up the rejection by the community of the proposed hotel, the tribal mediator clearly stated that:

We live here, the land is us, the sea is us, but we are working toward a sustainable future but our people will do it our way, in our time, keeping in mind that we are a living embodiment of our living history, we are a part of the past and live in the present with those things that came from our past. We cannot accept doing what you want. We're not ready, and when we look to moving into such ventures it will be done with the consensus of the people. Here we are a community. We would like to retain this traditional and cultural mode of living. Maybe at some future time we can look to continuing a dialogue but for the present we cannot agree to this proposal.¹³¹

Nisga'a Treaty

Another illustrative example of the Indigenization of ADR forms in the context of a non-Indigenous framework is the *Nisga'a Treaty*, which is said to be "a form of dispute resolution in that it represents a reconciliation between the [Nisga'a] existence as an Aboriginal people and the arrival of the British Crown."¹³² This treaty is under the Canadian legal system. In general, the approach of the treaty is that of restitution, acknowledgment of wrong, harmony, cooperation, collaboration and reconciliation. There are three distinct stages of dispute resolution under the treaty. If no

¹³¹ Pauline Tangiora, *An Indigenous Perspective on One Aspect of Reconciliation*, in CONSTRUCTIVE CONFLICT MANAGEMENT: ASIA-PACIFIC CASES 218 (Fred E. Jandt & Paul B. Pedersen eds., 1996).

¹³² See Bell, *supra* note 107, at 257-60.

early consensus can be reached through informal discussion and deliberations, then conflicts will have to undergo these three stages. The first stage is that of Collaborative Negotiations. Parties undergoing this will try to reach a consensus that they failed to attain earlier with the help of non-parties. There is confidentiality in the negotiations, to encourage the free and undisturbed discussion of relevant matters. This stage is not open to the public, there are no transcripts involved, and any admission made or openness for settlement cannot be disclosed or used in any other proceeding. If the parties failed to reach a settlement or a consensus, the second stage of Facilitated Processes is invoked. These processes include mediation, technical advisory panel, neutral evaluation, and elders advisory council. All of these processes are geared towards reconciliation and consensual conflict resolution. In case the parties still hit a wall at this point, the third stage of Arbitration and Adjudication will be resorted to. There is more strictness and formality at this stage. The Arbitration process involves attention to procedural fairness, the presence of the opposing party in cases of oral presentations of information or arguments, and the certainty of receipt of a copy of the opposing party's written communications. Other features include travel costs, designated place of arbitration, translation of documents or presentations, and expert testimony. The final Adjudication shall be made by the arbitrator or arbitration tribunal based on provincial or federal Canadian law or *Nisga'a* law.¹³³ Clearly, the jump from either the first or second stage into the formalistic third stage is quite dramatic.

Metis Settlements Appeal Tribunal

One final example of a balanced Indigenized Western ADR form is the *Metis* Settlements Appeal Tribunal, or MSAT. As a healing mediation process, the MSAT is a bicultural administrative tribunal, the purpose of which is to interpret and enforce *Metis* (indigenous to Canada) settlement legislation and laws. Its role is analogous to a court and incorporates *Metis* laws and customs as well as Canadian common law into its decisions. It is composed, in large part, of *Metis* settlement members and has to comply with a code of ethics and other matters pertinent to administrative tribunals. It operates using *Metis* dispute resolution values and Western ADR concepts, but still sticks to traditional healing, consensus-building, respect for elders and reconciliation of parties. Its mediation process is based on the traditional *Cree* belief system of a

¹³³ *Id.*

medicine wheel/Mediation circle which includes: telling one's story (south quadrant), finding one's self (west quadrant), finding balance and understanding (north quadrant), and opening one's heart by creating a place where healing can occur (east quadrant).¹³⁴ Through this, the mediator and the parties are able to exercise more control over the process of healing.

5.2 Rwandan Gacaca Courts and WIPO's Arbitration and Mediation Center

As alluded to earlier, for the last thirty plus years, Western ADR systems such as mediation have grown rather exponentially around the world.¹³⁵ This phenomenal growth can be attributed, among other reasons, to the heightened awareness of people of their right to participate in all levels of decision-making and in their capacity to take control of matters affecting important aspects of their lives. Two present-day ADR models, i.e. the Rwandan *Gacaca* Courts and WIPO's Arbitration and Mediation Center, will be compared, as they both reflect some of the essential elements of effective dispute resolution: the grassroots orientation of the *Gacaca* Courts and the efficient ADR practices in the sphere of intellectual property of WIPO. The Rwandan *Gacaca* can be seen in the context of an Indigenous Dispute Resolution process as bordering on the Indigenized form, while the WIPO Arbitration and Mediation Center is a resoundingly Western ADR example.

The Rwandan Gacaca

The *Gacaca* Courts of Rwanda is an Indigenous mediation program promoting truth and reconciliation. Cultivated as a response to the brutal 1994 Rwandan genocide, the *Gacaca* grassroots courts are prime examples of how Indigenous forms of dispute settlement can take root in this new century. The so-called populist Rwandan genocide involving Hutus and Tutsis is distinguished from other ethnic genocides due to the alleged mass participation of Rwandans in the carnage, the spectacular number of deaths, the intensity of the murders, and the use of sexual abuse as a form of violence. Widespread as the genocide was, the country provided a similarly extensive response. In October 2001, the populace elected about a quarter of a million people to serve as judges

¹³⁴ *Id.* at 260–63.

¹³⁵ See MOORE, *supra* note 98, at 23–42.

in the newly established *Gacaca* (the *Kinyarwanda* word for grass) Courts. These Indigenous courts mirror traditional community “courts” in Rwanda, wherein the elders of the community would sit on the grass and deliberate on the conflict at hand. These traditional grass courts are good examples of the Rwandan Indigenous Dispute Resolution process that is being kept alive today.

The government’s creation of these *Gacaca* courts was also motivated by the general skepticism that conventional criminal courts would be unable to bring the genocide perpetrators to justice. Many of those who are capable of acting as judges either participated in the killings themselves, were murdered during the genocide, or had fled the country.¹³⁶ Even the physical structures of the courts were, for the most part, destroyed during the indiscriminate slaughter. This new form of participatory justice and communal enterprise is intended to speed up the wheels of justice while at the same time working within the traditional framework.¹³⁷

The advantages of institutionalizing unmistakably Indigenous grassroots courts are that it drastically cuts the backlog of cases filed in traditional Rwandan courts, it could help build unity among the people who were devastated by genocide and similar forms of violence, it may very well generate increased awareness of the effectiveness of ADR, and it will strengthen communities as members are expected to work together. However, there are certain problems as well. If the elected grassroots court judges are not trained well, there might be some deprivations of due process on the part of the defendants. Their arguments and positions may not be advocated or discussed well enough. Other due process concerns are the lack of representation by counsel and inconsistency of treatment.

WIPO’s Arbitration and Mediation Center

In October 1994, the Arbitration Center of the World Intellectual Property Organization (now known as the Arbitration and

¹³⁶ See Erin Daly, *Between Punitive and Reconstructive Justice: the Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355, 368 (2002).

There were five judges in the entire country, all without cars or proper offices. Only 50 practicing lawyers remained, about the number to be found in any medium-sized law firm in New York; most were not versed in criminal law, and of those who were, some refused to defend accused mass murderers and others feared for their own security if they did.

Id.

¹³⁷ *Id.* at 355–59.

Mediation Center; hereinafter, WIPO Center) began operations as an international forum offering mediation, arbitration and other related services with the aim of resolving international commercial disputes involving intellectual property. It provides various services for settling commercial disputes between private enterprises. In handling patent arbitration cases, the WIPO Center has administered a number of cases concerning patent infringement and validity, specifically with respect to American and European patents. Target parties of the WIPO Center are Small and Medium-scale Enterprises (SME),¹³⁸ though it similarly caters to larger forms of business associations. At present, however, it is not clear if it will provide ADR services to Indigenous or Aboriginal peoples involved in intellectual property rights challenges. An exception might be if the Indigenous community entered into a compulsory licensing agreement which may then make it a private party in an intellectual property controversy.

Parties shall adopt the WIPO Mediation Rules by agreement if they choose to submit a dispute to WIPO mediation, unless they make an alternative arrangement. The WIPO Mediation Rules perform the following functions: (a) establish the non-binding nature of the procedure; (b) define the manner in which the mediator will be appointed; (c) set out the manner of determination of the mediator's fees; (d) provide guidance on procedure and commencement of mediation; (e) provide for the confidentiality of the process and the disclosures made during the process; and (f) determine how the costs of the procedure will be borne by the parties.¹³⁹

One of the more innovative ideas developed by the WIPO Center is its electronic tool to facilitate the management of arbitration and mediation cases known as the WIPO Electronic Case Facility (WIPO ECAF).¹⁴⁰ This internet-based facility allows parties to submit voluminous case files and other documents directly to WIPO's secure online docket. This will cut the cost and time of sending hundreds of pages of documents and recorded witnesses' testimonies to Geneva. Once sent, an email will notify the other party or parties of the existence of the claim. The parties may then view the submissions online either through an abbreviated form

¹³⁸ See WIPO, Arbitration and Mediation, http://www.wipo.int/sme/en/ip_business/ip_dispute/arbitration.htm (last visited Nov. 30, 2007).

¹³⁹ Jernej Sekolec & Michael B. Getty, *An Emerging Consensus on Mediation and Conciliation*, 2003 J. DISP. RESOL. 175, 181 (2003).

¹⁴⁰ See WIPO, WIPO Launches New Tool to Facilitate Party Management of Arbitration and Mediation Cases, http://www.wipo.int/edocs/prdocs/en/2005/wipo_upd_2005_257.html (last visited Nov. 30, 2007).

(case summary, timelines, deadlines and contact information) or in full.

The Rwandan *Gacaca* Courts are mostly admired for their Indigenous grassroots approach to problem solving, particularly in as critical an area as genocide. Their strengths are that they capitalize on traditional practices, which the masses comfortably identify with, and contribute to the recreation of age-old procedures. They were able to implement in the present a practice that was used for hundreds of years in Rwandan history, and which could have been lost due the preeminence of newer forms of courts and rule making. Hence, they are a good example of an Indigenous Dispute Resolution process that borders on the Indigenized approach, despite the presence and denomination of “courts” in the system. For its part, the WIPO Arbitration and Mediation Center is a magnificent example of a technological approach to Western ADR involving contractual intellectual property (such as patent and software licenses, trademarks, distribution agreements for pharmaceutical products) and non-contractual disputes (e.g. patent infringement). The challenge is how to fuse the strengths of the *Gacaca* Courts with the advantages of WIPO’s Arbitration and Mediation Center.¹⁴¹

5.3 Formation of Quasi-Judicial Indigenized ADR Bodies

If an Indigenous or Aboriginal community discovers that its traditional knowledge or Aboriginal Wisdom has been illicitly used and patented by an entity, it may file the appropriate pleadings for the cancellation of the patent. However, the procedures involved in patent litigation are quite complex and cumbersome.

Challenging Patents

To challenge patents in the United States, a re-examination should first be performed by the patent examiner by searching published data. If he determines that there is interference between

¹⁴¹ There are, of course, other admirable ADR centers around the world, *i.e.* the Australian Aboriginal Alternative Dispute Resolution Service (AADR). The AADR is a government program that “aims to reduce the incidence of Aboriginal people’s involvement with the criminal justice system by providing an effective and culturally appropriate form of dispute resolution. This includes addressing complex and sometimes chronic inter and intra-family feuding affecting Aboriginal people”. See Supreme Court of Western Australia, Indigenous Services, <http://www.supremecourt.wa.gov.au/content/procedure/Indigenous.aspx> (last visited Nov. 30, 2007).

two patents or finds information that may disallow a previously issued patent, the patent office will do a Mini-Litigation. If the case is not resolved, litigation will soon follow. An infringement case may be filed with the district court, whose decision may be appealed to the Federal Circuit, and ultimately all the way to the United States Supreme Court. An injunction and damages are usually sought. In the European Union, for each and every state, there may be Opposition hearings to determine the reasons of the patent challenge. If it is unresolved, litigation may ensue. For the European Patent Office (EPO), cases must go through the Opposition Division and later on appeal to the EPO Technical Appeals Board. Cases do not usually go all the way up to the highest decision-making bodies as they are settled by the parties before this becomes necessary.¹⁴²

The difficulties in these procedures put Indigenous peoples at a severe disadvantage. As will be explained below, they most likely will not understand the procedures to be undertaken in challenging the patent, the documents to be filed, the expenses to be met, and the resources to be used.

Quasi-Judicial Indigenized ADR Bodies

On the domestic level, one possible solution would be the creation of quasi-judicial Indigenized ADR bodies that would specialize in intellectual property disputes. Once a patent challenge is filed with the patent office and the challenging party is an Indigenous or Aboriginal community (or its representative), the proposal is that this will trigger a modified Re-examination by the patent examiner. If proof submitted is sufficient to call for a Mini-Litigation, the patent examiner is expected to stay the case and assign the parties first to a quasi-judicial Indigenous ADR body. Hence, instead of directly and immediately participating in a Mini-Litigation, Indigenous peoples or their representatives will initially be directed to ADR.

The trained mediators in these ADR bodies are expected to know Indigenous culture, traditional knowledge, Aboriginal wisdom and intellectual property. They need not be lawyers, however, nor do they need to be members of Indigenous tribes. It is even more beneficial if they are members of Indigenous or Aboriginal

¹⁴² Out of the approximately 2,000 cases brought before the attention of EPO boards of appeals, 1,600 are usually settled. See EPO, Boards of appeal, <http://www.epo.org/about-us/boards-of-appeal.html> (last visited Nov. 20, 2007).

groups, as they will do better in using the “elicitive” approach.¹⁴³ An “elicitive” approach presupposes that the mediator not only takes the lead from the participants and recognizes the design of the process from political and functional angles, but is also receptive to indigenous models of conflict and conflict resolution.¹⁴⁴ One significant element of this process is that the mediator should be trusted both by the Indigenous peoples and the patent holder. The mediator, Indigenous or not, may informally collect and analyze evidence presented by both parties. She may receive oral testimony and other evidence from members of the Indigenous community, and documentary or oral testimony from the patent holder. She will have the prerogative to conduct site visits, interview processes, identification and reframing of issues, agenda setting and options for settlements.

It is envisioned that the controversy will be resolved at the level of the mediator, who is then bound to submit a settlement document to the patent examiner. The patent examiner is expected to take the settlement into consideration in her ruling. Based on the settlement document and/or her own findings, the patent examiner will either effectuate the cancellation of the patent or will allow the patent to stand. If she is unconvinced, she may seek additional evidence short of conducting a Mini-Litigation.

Unless the concerned patent law is revised accordingly, the patent examiner shall not be compelled to follow the settlement agreed to by the parties. The fact that the patent holder underwent mediation and that a settlement was arrived at is a strong indication that the holder is amenable to the contents of the settlement document. Ideally, this will convince the patent examiner to defer to the settlement reached by the parties, but no compulsion can be made. This will have a different outcome if a settlement is not reached.

This methodology will hopefully be a cheap, effective and transparent way for Indigenous or Aboriginal peoples to challenge patents using Indigenous Western ADR techniques. Though not necessarily mediating or negotiating on a grassroots level, such as the *Gacaca* Courts, this methodology will still involve a dispute resolution mechanism that is easier for, and culturally sensitive to, Indigenous peoples. One critical drawback of this system, however, is that full discovery procedures might not be exhausted.

¹⁴³ See Kahane, *supra* note 12, at 47.

¹⁴⁴ *Id.*

On the international front, the WIPO Center for Arbitration and Mediation and the WIPO ECAF can be emulated by the EPO,¹⁴⁵ the United States Patent and Trademark Office (USPTO), United Kingdom Intellectual Property Office (UKIPO), Japan Patent Office (JPO) and other relevant patent offices around the world. Lengthy documents need not be shipped and witnesses' statements can be submitted online. This cuts costs and the time necessary to put forward a patent challenge. Indigenous peoples will only need to coordinate with interest groups with technical and electronic know-how to facilitate their online submission of their complaint, petition or opposition. Although their representatives might still be required to personally present oral or written evidence of their prior use of the item at issue, at least there will be less burden on them. Finally, there is also a need for the institution of effective ADR mechanisms within relevant patent offices.

5.4 Effectiveness

Indigenous Dispute Resolution processes have proven meritorious and effective since before recorded time. They have served Indigenous peoples well and have allowed them to understand other people and the world better. Presently, Indigenous Western ADR systems may prove useful in the context of intellectual property rights regimes. Negotiation and mediation will be important in securing tangible benefits for the communities; the cases of Hoodia and the Zia Sun Symbol are illustrative of this. The case of Shaman Pharmaceutical is an example of what types of ADR an ideal pharmaceutical company can aspire to achieve when dealing with Indigenous peoples.

Hoodia: The Weight Loss Herb

An appropriate example would be the case of the Hoodia plant, a crunchy, cucumber-like succulent¹⁴⁶ which grows in the Kalahari Desert. The San people, who live in that area, used Hoodia as a food and water source. Specifically, it was used as an

¹⁴⁵ EPO is currently looking forward to a paperless application process for patents and other services. But it is still unclear if this will also cover paperless mediation and arbitration procedures. See EPO, EPO looks towards paperless future, <http://www.epo.org/topics/news/2007/20071123.html> (last visited Nov. 20, 2007).

¹⁴⁶ See WIPO, *PCT Notable Inventions: "Hoodia" appetite suppressant*, <http://www.wipo.int/pct/en/inventions/hoodia/> (last visited Nov. 30, 2007).

appetite suppressant and energy source for hunters during their hunting days. This practice was brought to the attention of the South African Council for Scientific and Industrial Research (CSIR), which conducted research on the desert plant. It was determined that it had appetite-suppressant and anti-obesity qualities. CSIR filed a PCT application on the various properties of the Hoodia plant in 1998. CSIR then licensed the patent to Phytopharm, a UK-based company, for further testing and marketing.¹⁴⁷

A Memorandum of Understanding was signed by the San People and the CSIR, followed by a Benefit-Sharing Agreement. These agreements allowed the San people to obtain 8% of all payments to CSIR during the clinical development stage, as well as 6% of the royalties to be received by CSIR on the final product. It is projected that this deal will net millions of dollars for the San people. These benefits come with a price though. Initially, the CSIR did not directly acknowledge the San people as the source of the Hoodia biological discovery. The San People were cut off from any and all benefits. Through intensive negotiations and mediation, however, the CSIR was persuaded to recognize the Indigenous community as the possessor and originator of this traditional knowledge.¹⁴⁸ This negotiation and mediation incorporated the cultural aspects of the affected community, thus benefiting them in the long run.

To preserve their gains, the 100,000-strong San population formed the San Hoodia Benefit Sharing Trust to ensure that the money to be earned shall be invested in the training and general development of the San community through the purchase of land, building of clinics and investment in education. The lawyer who represented the San community in the negotiations, Roger Chenells, stated that this is a breakthrough case that can serve as a model, in terms of its benefit-sharing agreement, for other Indigenous peoples who hold traditional knowledge that can be commercialized. A further benefit for the San people is job creation as Hoodia farmers.¹⁴⁹ Assuming that everything turns out well for the San people, patenting and intellectual property rights paved the way for genuine benefit-sharing. The importance of long negotiations and pressure, attention generated by international media, as-

¹⁴⁷ See *Intellectual Property as a Lever for Economic Growth: The African Experience, Part II*, WIPO MAGAZINE, Nov.–Dec. 2003, at 6.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 7–8.

sistance from South African NGOs,¹⁵⁰ and the need for committed members of the bar cannot be overemphasized.

Despite the San People's potential share in financial benefits of Hoodia commercialization, there are those who believe that pecuniary compensation is insufficient. For Hall, "[p]ecuniary compensation is not the only option available for northern corporations to compensate the contribution of traditional knowledge made by indigenous peoples" and that, in fact, "[n]o compensation can mend the wrongs of biopiracy."¹⁵¹

The Zia Sun Symbol

The U.S. Database of Official Insignia of Native American tribes, which compiles symbols and signs from Native Americans so as to protect them as prior art, offers another good example of how appropriate dispute resolution processes can aid Indigenous peoples. Although the U.S. Patent and Trademark Office (USPTO) claims that this database, which came into existence in 2001, was a direct result of its own initiative in response to Native American concerns about the preservation of their folklore, it appears that it had a longer history than a mere USPTO suggestion.

The Zia sun sign, which is a circle with lines radiating in four directions, is a well-known New Mexican image and has been used by the 850-member Zia pueblo since the year 1200 as part of their intangible cultural heritage. In 1925, the Zia pueblo allowed, by force or helplessness, the state of New Mexico to use the symbol as the centerpiece of state's flag. In 1999, the Zia tribe asked the state to pay it \$74 million for using its symbol without compensation since 1925, or \$1 million per year up to 1999. This was in part a result of the granting in 1998 to a tour company associated with Harley-Davidson motorcycles of a trademark incorporating the Zia sun sign. The Zia tribe, through its lawyer, protested against this trademark to no avail. However, the Zia tribe, through the tribe and its representatives' diplomacy and negotiations with a New Mexico Senator, was able to persuade Congress to order the USPTO to investigate the status of Native American symbols. The USPTO later recommended no changes in the trademark law, but

¹⁵⁰ VIVIANA MUNOZ TELLEZ, *RECOGNISING THE TRADITIONAL KNOWLEDGE OF THE SAN PEOPLE: THE HOODIA CASE OF BENEFIT-SHARING*, 1–3 (2006), available at <http://www.ipngos.org/NGO%20Briefings/Hoodia%20case%20of%20benefit%20sharing.pdf>.

¹⁵¹ See Susannah Hall, *Pirates in the Rainforests Stealing the Treasures of the Indigenous Peoples: Can Compensation Really Compensate?*, (2005/2006) (unpublished dissertation, Kent Law School) (on file with author), available at http://www.kent.ac.uk/law/ip/resources/ip_dissertations/2005-06/s_hall.doc.

that a list or database needed to be established to catalogue the symbols.¹⁵² This proves that using indigenously appropriate dispute resolution mechanisms — here in the U.S., through the use of the tribal negotiations, the legal system and Congressional inquiry — can help to protect the cultural heritage of an Indigenous community.

Shaman Pharmaceutical: A Different Kind of Pharmaceutical Company

Shaman Pharmaceutical was a Western pharmaceutical company that used to practice Indigenized Western ADR techniques in its dealings with Indigenous peoples. Shaman Pharmaceutical is a U.S.-based company which collected and developed the medicinal uses of plants. This San Francisco-based firm directly negotiated with Indigenous healers and watched them work. It focused on working with traditional peoples to conserve tropical forests and bridge the widening gap between the biomedical needs of Indigenous populations and the interests of the rest of the global populace.¹⁵³ It developed a novel approach to drug discovery which integrated a traditional plant's naturally produced chemistry, ethnobotany, medicine, and medicinal chemistry while maintaining its commitment to the Indigenous peoples.¹⁵⁴ Pragmatically, it used to compensate the Indigenous communities for the use of their knowledge even before the end product is commercially marketable. Unfortunately, after ten years in the business and spending more than \$90 million, Shaman Pharmaceuticals dissolved. It first remolded itself from a drug company to a mere herbal entity in 1999 and was delisted from Nasdaq in the same year, filed for bankruptcy in 2001, and is no longer in existence.¹⁵⁵ Its novel and idealistic approach proved to be unsustainable, despite being very effective.

¹⁵² See Phil Patton, *Design Notebook: Trademark Battle Over Pueblo Sign*, N.Y. TIMES, Jan. 13, 2000, at F1.

¹⁵³ See Donald E. Bierer, Thomas J. Carlson, & Steven R. King, *Shaman Pharmaceuticals: Integrating Indigenous Knowledge, Tropical Medicinal Plants, Medicine, Modern Science and Reciprocity into a Novel Drug Discovery Approach*, <http://www.netsci.org/Science/Special/feature11.html> (last visited May 11, 2008).

¹⁵⁴ *Id.*

¹⁵⁵ See generally Roger Clapp & C. Crook, *Drowning in the Magic Well: Shaman Pharmaceuticals and the Elusive Value of Traditional Knowledge*, 11 J. ENV'T. & DEV. 79, 79–102 (2002).

5.5 Universal Disadvantages of Non-Court Resolution Mechanisms

One reason why societies instituted courts, judges, adversarial systems, procedures, appeals, the legal profession and professional responsibilities is to ensure that claimants in criminal, civil and administrative disputes would be heard fairly and substantially. Certain rights are provided to the accuser and accused. Due process, both procedural and substantive, must be respected and provided. In this process, a studied and equitable resolution made by an impartial tribunal or judge is expected. Thus, the adjectives that can best describe court proceedings are adversarial, thorough, rigid, strict, evidentiary, rights-oriented, unbiased, impartial, and generally appealable.

Whether using Indigenous Dispute Resolution or Western ADR, or a hybrid thereof, some of the advantages of litigating in court may very well be the disadvantages to non-court resolution mechanisms. Not all of the evidence may be found or presented, there may be a lack of impartiality, a violation of basic rights of the accused may occur, or the absence of thorough examination may lead to injustice. There are also uncertainties as to how to properly incorporate the concepts of Indigenous Dispute Resolution into present-day Western ADR forms. If not properly framed, the integration of Indigenous concepts into ADR may only further the supposed “project of colonization by adopting only those aspects of indigenous knowledge, values and processes that do not conflict with Western values and laws.”¹⁵⁶

6. UPHOLDING ALTERNATIVE DISPUTE RESOLUTION WHILE AVOIDING LITIGATION

6.1 Antecedents of Indigenous Litigation

Indigenous litigation is not a new phenomenon. Throughout history, there have been many creative ways by which Indigenous or Aboriginal peoples were able to be heard in the courts of the people who dominated them. Beginning in the 1600s, native Mexicans brought forth numerous suits before officials and in the courts established by their Spanish colonizers. Litigants normally ap-

¹⁵⁶ See Kahane & Bell, *supra* note 110, at 2.

pealed decisions, particularly before the creation in 1591 of the *Juzgado General de los Indios* (General Indian Court).¹⁵⁷ There were also highly litigious Indian communities that exacerbated the conflict between the Spanish civil officials and the religious prelates who were jockeying for judicial power.¹⁵⁸ In mid-eighteenth century Peru, also at the time of the Spanish conquest, native peoples used the courts to seek justice in land grabbing cases and for the forced labor imposed against them. As litigation did not always suffice, Andean peasants started to rebel and thus insurgencies became commonplace.¹⁵⁹ In the late eighteenth century in Madras, India, the British colonial government sought to discourage its Indigenous subjects from using the judiciary, but the Indians were still able to devise ways to make use of the judicial processes of their colonizers.¹⁶⁰

Indigenous peoples have, in some sense, historically used these courts since they may have seen them as an opportunity to take advantage of the dominant legal system for their own interests. They may have, to a certain extent, realized that going forward with their claims in the very colonial systems they were resisting, or at least tolerating, benefited them in some way. They believed and trusted in the law, despite the fact that many countries with Indigenous communities perpetuate a colonial culture associated with the law.¹⁶¹ In the words of Australian authors Sharyn Anleu and Wilfrid Prest, “litigation can sometimes empower the weak and the disadvantaged against the powerful.”¹⁶² This is not always true of course, and resorting to the court was never considered as the general rule. Indigenous peoples had, in some cases,

¹⁵⁷ See SUSAN KELLOGG, *LEGAL DOCUMENTS AS A SOURCE FOR ETHNOHISTORY*, 3–7 (2007), available at <http://whp.uoregon.edu/Lockhart/Kellogg.pdf>.

¹⁵⁸ See Lauren Benton, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, 41 *COMP. STUD. IN SOC’Y & HIST.* 563, 576 (1999), available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=1962&jid=CSS&volumeId=41&issueId=03&aid=1961>.

¹⁵⁹ See Mongabay.com, *Peru—History*, http://www.mongabay.com/reference/country_studies/peru/HISTORY.html (last visited on Nov. 30, 2007).

¹⁶⁰ See Niels Brimnes, *Beyond Colonial Law: Indigenous Litigation and the Contestation of Property in the Mayor’s Court in Late Eighteenth Century Madras*, 37 *MOD. ASIAN STUD.* 513, 513–18 (2003), available at http://journals.cambridge.org/download.php?file=%2FASS%2FASS37_03%2FS0026749X03003019a.pdf&code=98d55a63e46f98034786cfc8f757c2.

¹⁶¹ See Karilyn Toovey, *Decolonizing or Recolonizing: Indigenous Peoples and the Law in Canada* (2005) (unpublished Master of Arts thesis, Univ. of Victoria) (on file with author) at 3–4, available at <http://web.uvic.ca/igov/research/pdfs/Kari%20Toovey.pdf>.

¹⁶² High Court of Australia, *Book Review: Litigation: Past and Present*, available at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_br03.html (2004) (reviewing WILFRID PREST & SHARYN ROACH ANLEUS, *LITIGATION: PAST AND PRESENT* (2004)) (last visited Nov. 30, 2007).

resorted to mutinies and rebellions as the avenues for their expressions of distrust and disgust if the courts failed to entertain their complaints or unjustly ruled against them. Hence, foreign-imposed court systems provided some relief in the past, but they also frequently disappointed Indigenous or Aboriginal peoples.

6.2 General Disincentives of Lawyers in Handling Indigenous Claims

Present-day law practice, specifically private practice in law firms, is an extremely lucrative profession. Akin to large business conglomerates, large law offices are populated by hundreds or thousands of lawyers throughout various practice areas in multi-jurisdictional offices. Generally located in city centers and other prime areas, these legal entities have top-tier corporate clientele belonging to important sectors of society. Such firms also represent high-ranking government officials, as well as local governments, in critical cases. Except for pro-bono work, they typically have a very limited number of clients who are tribesmen or who hail from Indigenous communities. Indigenous or Aboriginal peoples do not, on the whole, have sufficient resources to pay for the basic acceptance fee required by such a firm, let alone for subsequent billings.

Thus, there is a natural disincentive for lawyers and law firms to handle Indigenous peoples' cases. Beyond financial considerations, some firms might even think that these cases may be too risky in terms of the firm prestige and reputation, that they are not fully competent to handle them, that there are conflicts of interest with their clients, or that handling these cases might expose them to a backlash from the national government. This does not imply, however, that legal advocates promoting the causes of Indigenous or Aboriginal peoples are a mere small band of lawyers. In fact, in certain jurisdictions, such as Canada, there is increasing interest in Indigenous claims.¹⁶³ The same goes for Australia and New Zealand.

¹⁶³ See Toovey, *supra* note 161, at 36–37. In the United States, more lawyers belonging either to law firms or interest groups are engaging in Indigenous litigation. See, e.g., Symposium, (Indigenous Peoples in International Fora) Univ. of Mich. L. School, March 26, 2008., <http://students.law.umich.edu/ils/symposium/> (last visited Nov. 30, 2007). One of discussion panels therein being “*Indigenous Litigation Strategies in Tribal & International Courts.*”

This does not mean that there will always be fewer lawyers for the Indigenous or Aboriginal population. Relative to the effect on firm prestige, having a practice denominated as “Indigenous Litigation” or “Indigenous Defense” or “Aboriginal Claims” may eventually be beneficial to law firms, as these denote diversity in the cases they are handling. This may result in the hiring of new lawyers who are Indigenous or Aboriginal by blood. The government may also step in and provide subsidies to Aboriginal litigation such as is the case in Australia. Lack of competence in the field of Indigenous or Aboriginal law and practice is temporary and may easily be remedied by a studious approach by lawyers. In terms of the backlash from national governments, this is not the norm as there are governments which are fully supportive of their causes. Assuming these law firms incur the ire of the government due to their prosecution of Indigenous claims, it may be claimed that the legal profession has always been the bastion of advocates.¹⁶⁴ Fundamentally, the disincentives attached to the legal profession can be straightforwardly replaced by commitment, loyalty and full candor from lawyer groups.

6.3 Indigenous Peoples’ Natural Aversion to “Alien” Litigation

Indigenous litigation is not the best solution to the problems faced by Indigenous or Aboriginal peoples, even those concerning the alleged appropriation of their heritage and traditional knowledge. Litigating is not inherent in these communities,¹⁶⁵ even if they were exposed to litigation during colonization years, and it should be resorted to only in extreme cases.

One of the drawbacks of litigation is that Indigenous or Aboriginal communities may be perpetually locked in a litigation cy-

¹⁶⁴ See Kate Heneroty, *DOD official slams US law firms for defending Guantanamo detainees*, JURIST, Jan. 12, 2007, available at <http://jurist.law.pitt.edu/paperchase/2007/01/dod-official-slams-us-law-firms-for.php>. In several highly controversial Guantanamo cases, top-tier US law firms based in New York are defending individuals incarcerated therein. Even if the US government, particularly US Deputy Assistant Secretary of Defense for Detainee Affairs Charles “Cully” Stimson, is obviously piqued by these representations and demanding their withdrawal, these law firms fastidiously maintain their defiant stance by stating that it is their moral and professional responsibility to represent those accused.

¹⁶⁵ See Paul Chartrand, *Foreword in INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS ix* (Catherine Bell & David Kahane eds., UBC Press 2004) (“In the eyes of some critics, the courts are the government gizzard, which grinds up Aboriginal interests. Even the courts themselves have recently been at pains to emphasize that negotiation is better than adjudication to resolve disputes.”).

cle, where one suit leads to another, and litigation expenses result in further expenses.¹⁶⁶ Other criticisms associated with litigation are the existence of lawyers who are not fully competent in their craft, certain disloyal practitioners who may pocket the damages rightfully won by the community (this is *not* the general rule, however), insubstantial complaints that lead to immediate dismissals, years of delay,¹⁶⁷ unpredictable rulings and disproportionate weight given to oral testimony absent any supporting documentary evidence.

Kymlicka's Constraint

One important disincentive for Indigenous peoples to use national and international courts or adjudicatory bodies such as the EPO, instead of their own traditional courts or other forms of Indigenous justice, is the notion that they may be giving up their own communal or tribal sovereignty by subsuming themselves under the larger dominion. They will have to impliedly accept the dominant sovereignty, which will only be undone with difficulty.¹⁶⁸ This does not seem to be a problem for members of the non-indigenous majority, but may pose a problem for members of Indigenous communities. This is ironic, since they have to be adept in the majority's judicial system in order to voice these concerns. Dale Turner has labeled this phenomenon as the "Kymlicka's Constraint" which means — as a brutal reality check for Indigenous peoples — that if they want to exercise their rights or have claims against the state, they must articulate "their arguments in the already existing legal and political discourses of the dominant culture. The Aboriginal

¹⁶⁶ See Toovey, *supra* note 161, at 36–37.

¹⁶⁷ In the case of Eddie Koiki Mabo, the Torres Strait Islander who ferociously struggled to dispel the inaccurate belief that Australian Aboriginal peoples never had nor practiced a system of land ownership before the colonization of European settlers, it took a decade (1982–1992) of litigation to finally overcome this historical inaccuracy. In the landmark 1992 case of *Mabo v. Queensland II*, 175 C.L.R. 1, (1992) Australia's highest court ruled for the abrogation of the doctrine that Australia was a terra nullius land (a land owned by no one) when the first white settlers came more than 500 years ago. This effectively reversed the 1971 ruling on the Gove Land Rights Case that stressed on terra nullius. See Russell, *supra* note 8, at 17–18, 196–99. In the years after the *Mabo* decision, scholars derided the fact that the current system in Australia failed to adhere to the principles of the landmark decision. *Mabo* was more of a promise than a concretization of gains for the Indigenous. It has been stated that, "in the years since *Mabo*, 'far more has changed in our imaginations than on the ground.' This conclusion does not erase the historic gains which *Mabo* and *Wik* secured. Once those decisions were given, the caravan of the law moved on." See High Court of Australia, *supra* note 162.

¹⁶⁸ See Toovey, *supra* note 161, at 52 ("By agreeing to the litigation process to resolve a claim, Aboriginal Peoples agree implicitly to the terms on which the non-Aboriginal dispute resolution system is based, regardless of the consequences or biases that process affirms.").

voice may participate in the dialogue, but to do so intelligibly, it must be subsumed within the existing discourses of political liberalism, nationalism, constitutionalism, and sovereignty.”¹⁶⁹ Indigenous peoples must be prepared for this and should be prepared, when backed up against the wall and after the failure of ADR, to litigate.

The Difficulties of Litigating

An emphatic argument against Indigenous litigation is the mental and physical pressure that these Indigenous or Aboriginal communities will have to bear. This is the human side of litigation. Although almost everyone experiences pressure in litigation, the burden is heavier on Indigenous peoples, as the process is totally foreign to their cultures. They have to prepare well to successfully challenge the existing order in the courts or patent offices. Their representatives will have to be physically removed from their comfort zones and thrust into the concrete jungles of cities, where non-indigenous lawyers and courts are normally found. They will be forced to be away from their families, to ride public transport, to eat alien food and engage in a culture far divorced from their own. In sum, they will have to do their best to conform, albeit temporarily, to the so-called dominant way of living.

The Neem patent litigation (discussed below) was different since the three lead plaintiffs were an Indian environmental activist, an American organic agriculture advocate and a Belgian politician, all of whom had the resources to travel to the EPO in Germany for the duration of the case. They were sensible representatives of Indian farmers, shamans, healers and traditional communities, but it will not always be the case that organized groups, such as non-governmental organizations or committed lawyers, will represent the interests of Indigenous or Aboriginal peoples. There

¹⁶⁹ See Turner, *supra* note 9, at 60.

[W]ill Kymlicka characterizes . . . ‘For better or worse, it is the predominantly non-Aboriginal judges and politicians who have the ultimate power to protect and enforce Aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand. Aboriginal people have their own understanding of self-government drawn from their own experience . . . it is also important, politically, to know how non-Aboriginal Canadians — Supreme Court Justices, for example — will understand Aboriginal rights and relate them to their own experiences and traditions . . . Aboriginal rights are viewed as matters of discrimination and/or privilege, not of equality. They will always, therefore, be viewed with the kind of suspicion that led liberals like Trudeau to advocate their abolition.

Id.

are situations, admittedly, when Indigenous communities will be left to fend for themselves.

In the remote event that Indigenous peoples engage in litigation, they will have to explain to their lawyers what traditional knowledge is, what their claims are, how the community found themselves in this legal mess, what tactics were used against them (if any), how they were deceived (if they were), the amount paid to them (if any), and the promises made by these external researches, among many other concerns. Worse still, there might be some instances where unscrupulous barristers may hide potential or real conflicts of interest. Aboriginal peoples will have to put trust in these non-Indigenous strangers. In turn, the lawyers will have to trust that the Indigenous community's rights were truly infringed and that there is a cause of action worth pursuing. Building this trust relationship between an Indigenous or Aboriginal client and a non-Indigenous lawyer may be the most difficult of all the phases in the litigation.¹⁷⁰ If the lawyer is a member of an Indigenous community, then trust may effortlessly be granted.

Litigation will also entail much traveling on the part of the Indigenous peoples, or at least on the part of their representatives. They will have to physically move to city centers where district or appellate courts and patent offices are located. If the proceedings are held in a foreign country, this will present a larger problem. Part of physical pressure is the emotional stress that usually accompanies any litigation. Akin to a criminal case when the jury is about to determine guilt, Indigenous peoples will be anticipating if they will win in a non-Indigenous court or office. They will not be accustomed to the stress involved. The length of litigation, the amount of work involved, the complicated discovery procedures, the presentation of witnesses and exhibits, the right to appeal — these may tire their minds and resolve.

Presentation of evidence poses another challenge to Indigenous communities. Storytelling, as mentioned earlier, is part of their history and is an important way upon which they rule on local disputes. They cite past elders' resolutions of similar problems, much like a court is referring to *res judicata* or claim preclusion. But in the courtroom battle, particularly those very contentious ones, community elders may not be familiar with lawyers interrupt-

¹⁷⁰ See generally Chris Jochnick, *Ecuador & the Inter-American System: the Right to Water and Environmental Health*, in *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* 80–86 (Centre on Housing Rights & Evictions, 2003), available at <http://www.cohre.org/store/attachments/COHRE%20Litigating%20ESC%20Rights%202003.pdf>.

ing each other, challenging the judge's or panel's orders, or aggressively cross-examining witnesses. Once they begin their storytelling approach in explaining how their forbearers used the medicinal properties of a plant for example, or how they conceived of a peculiar Sun symbol, they may be confronted with intense scrutiny by attorneys who might try to distract them and questions their competence. Aboriginal elders, as witnesses, may then be viewed in a bad, awkward light.¹⁷¹

Money is another daunting problem. Litigation involves money, and lots of it.¹⁷² Indigenous or Aboriginal communities are some of the world's poorest groups. The only way they can litigate is through support or subsidy from the national government, representation by advocacy groups or volunteer lawyers.

It is not surprising that Indigenous communities nowadays (at least in developing countries) seldom use the courts.¹⁷³ In general, they either do not trust the system, the advocates, or both. It will be too complicated and tiresome for them. They will not have the resources for it. The old Spanish courts previously used by the Native Indians have given way to a plethora of international courts and administrative tribunals, a maze of domestic and international laws, intricate jurisprudence, voluminous doctrines, specialized lawyering, hefty fees, longer waiting periods, strategic and dilatory use of procedures, and newer creatures of law such as corporations and partnerships. Given all of these tangible and intangible challenges to Indigenous litigation, the better alternative is to use ADR systems tailored to address their conflicts relative to intellectual property rights regimes.¹⁷⁴

¹⁷¹ Elders may be challenged as to what they really know about the world they live in and the world outside theirs. This will add more stress to an already traumatic chapter in their history.

¹⁷² See Dutfield, *supra* note 79.

¹⁷³ Martin Scheinin, *UN Human Rights Committee: Protecting Indigenous Livelihoods and Cultural Rights*, in *LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS, CHALLENGES AND STRATEGIES* 146–48 (Centre on Housing Rights & Evictions, 2003), available at <http://www.cohre.org/store/attachments/COHRE%20Litigating%20ESC%20Rights%202003.pdf>. Scheinin describes the innate antipathy between Indigenous peoples and litigation as follows:

Why did the community choose to use a legal strategy?

This was an interesting development, because to some extent it's contrary to their traditional approach. The Sami are considered a reserved people who tend to remain passive when their rights are violated. Traditionally they have often kept silent and tried to find a way to survive. That has been their tradition over centuries during which time they were gradually pushed further to the north. It has not been usual for them to embrace in litigation.

Id.

¹⁷⁴ See UNDRIP, G.A. Res. 61/295, *supra* note 20, at Art. 28 (1):

6.4 The Few Advantages of Litigating Indigenous Claims

The few advantages that can be thought of in terms of advocating Indigenous litigation would be the creation of judicial precedent,¹⁷⁵ involvement of more diverse actors — such as advocacy groups, political leaders and media — in assisting the communities, and providing a chance for the institutions to correct their supposed mistakes or omissions in a jurisprudential manner. It may also be said that totally avoiding the court, even if there is no other option but to file suit (in other words, in case all ADR avenues have been exhausted or are not available), would be to give up an important arena for social, political and legal change. Such absolute abandonment of the legal recourse may allow only the unchallenged voice of the state, companies or institutions to be exclusively heard in court, akin to an *ex parte* proceeding.

Neem Patent Litigation

One important judicial precedent is the Neem patent challenge. The administrative system that had handled the litigation was the EPO. This ten-year long case is a classic epic struggle between protectors of indigeniety and promoters of misappropriation of biological resources. The Neem tree, which has been described as the Indian lilac, is the source of a host of medicinal and cosmetic uses; its bark and leaves have therapeutic benefits that have been practiced in India for centuries.¹⁷⁶ It is said that Neem has been mentioned in Indian texts for over two thousand years.¹⁷⁷

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Id.

¹⁷⁵ An example of judicial precedence, or what ought to be, is *Mabo v. Queensland II*, *supra* note 166. The High Court of Australia in 1992 recognized Native Title in Australian law. This ruling acknowledged that Native Title, *in rem*, existed for Indigenous peoples in Australia even before Cook's Instructions (declaration of possession) in 1770 and the subsequent establishment of the British Colony. In reaction to this ruling, Australia's Commonwealth Parliament passed into law the *Native Title Act* the following year, thus allowing Indigenous peoples throughout Australia to claim traditional rights to unalienated land. *Native Title Act 1993*, http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/ (last visited Dec. 15, 2007).

¹⁷⁶ See Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 76–77 (2003).

¹⁷⁷ See Sara Hasan, *The Neem Tree, Environment, Culture and Intellectual Property*, TRADE ENVIRONMENT DATABASE (TED), *Case Studies Number 665*, April 2002, <http://www.american.edu/ted/neemtree.htm> (last visited Nov. 29, 2007).

In December 1990, the infamous W.R. Grace & Co. of New York,¹⁷⁸ a diversified corporation heavily involved in agribusiness, chemicals and materials, and the United States of America represented by its Secretary of Agriculture, jointly filed a patent application before the EPO. This was in conjunction with the U.S. priority application dated December 26, 1989 that provided for a process for controlling fungi on certain plants through the application of a Neem oil extract. The EPO granted a European patent which was published on September 14, 1994. Less than a year after publication, the patent was formally opposed through a Legal Opposition filed by three lead plaintiffs: Magda Aelvoet, (then President of the Green Group in the European Parliament in Brussels), Dr. Vandana Shiva (representing the Research Foundation for Science, Technology and Natural Resource Policy based in New Delhi, India), and by Linda Bullard (then Vice President of the International Federation of Organic Agriculture Movements (IFOAM) based in Germany). These complainants about the Neem patent by W.R. Grace claimed unequivocal theft of traditional knowledge and resources. Particularly, they argued that the “fungicidal properties of the Neem tree had been public knowledge in India for many centuries and that this patent exemplified how international law was being misused to transfer biological wealth from the South into the hands of a few corporations, scientists, and countries of the North.”¹⁷⁹ The three lead plaintiffs initially filed the Legal Opposition without the assistance of counsel, demonstrating the difficulty in securing committed and competent counsel in large-

¹⁷⁸ See Michael Asimow, *In Toxic Tort Litigation, Truth Lies at the Bottom of a Bottomless Pit*, (1999), http://www.usfca.edu/pj/articles/Civil_Action-Asimow.htm (last visited on Nov. 30, 2007). W.R. Grace & Co., together with Beatrice Foods, firms which were then operating a tannery and a factory in Woburn, Mass., were accused of dumping toxic waste on the ground that seeped into water wells. Intake of the contaminated water allegedly led to the death of eight children due to leukemia. The lengthy and costly litigation between the families of the victims and the defendant corporations was depicted in a bestseller book and in a film entitled “A Civil Action.” W.R. Grace was also subjected to litigation due to allegedly exposing workers to asbestos contamination in Montana.

¹⁷⁹ Navdanya, *Landmark Victory in World’s First Case Against Biopiracy: European Patent Office Upholds Decision to Revoke Neem Patent*, NEWS, Mar. 8, 2005, <http://www.navdanya.org/news/05march8.htm> (last visited Nov. 30, 2007). Magda Aelvoet, one of the lead plaintiffs who was once the Belgian Minister of Public Health, Environment and Consumer Affairs as well as the EU President of the Environment and Public Health Councils stated:

[I]t is a victory for traditional knowledge and practices. This is the first time anybody has been able to have a patent rejected on these grounds. Second, it is a victory for solidarity: With the people of developing countries — who have definitively earned the sovereign rights to their natural resources — and with our colleagues in the NGOs, who fought with us against this patent for the last ten years.

Id.

scale challenges such as this. They eventually allowed Dr. Fritz Dolder, a Professor of Intellectual Property from the Faculty of Law of the University of Basel in Switzerland, to represent them. He would be the official counsel for the ten years that the case dragged on. After five grueling years, in May 2000, the case was brought before Opposition Division of the EPO where the lead plaintiffs were scheduled to present two expert witnesses from India. Despite being able to present only one witness, Indian agronomist Abhay Dattaray Phadke, the Opposition Division found for the plaintiffs and abrogated the patent due to lack of novelty. The patentees-defendants' subsequent auxiliary request that slightly varied their original Neem formulation was similarly dismissed due to lack of inventive step. The patent was thus revoked in its entirety. W.R. Grace and the United States did not surrender at this point and appealed the decision to EPO's Technical Appeals Board, seeking a reversal and presenting yet another reformulation. After another five long years of litigation and with Dr. Dolder as counsel — during which interregnum W.R. Grace filed for bankruptcy as a result of a criminal indictment for deaths due to asbestos poisoning — the EPO board resolved to dismiss the appeal and sustain the revocation of the Neem patent.¹⁸⁰

The three lead plaintiffs and Dr. Dolder did not achieve this legal victory alone. During the oral testimony, there were many supporters outside the hearing room who protested the unlawful grant of the patent. The Neem Campaign of India, founded in 1993, was also an important impetus to the litigation challenge. Similarly, cause-oriented and environmental groups¹⁸¹ networked to provide logistical and financial support to the litigation.¹⁸² This victory was made possible by the support of the larger community.

Despite this success, Indigenous or Aboriginal peoples in general still face an uphill battle against behemoth entities when it comes to litigation. This win will not necessarily translate to other

¹⁸⁰ See Linda Bullard, *Freeing the Free Tree: A Briefing Paper on the First Legal Defeat of a Biopiracy Patent — The Neem Case*, March 2005, http://www.ifoam.org/press/press/pdfs/Briefing_Neem.pdf (last visited Nov. 29, 2007).

¹⁸¹ See Jochnick, *supra* note 170, at 80–86.

¹⁸² See Bullard, *supra* note 180, at 7. These groups were the Karnataka Rajya Raitha Sangha (India); Third World Network (Malaysia); the Green Group in the European Parliament (EU); the European Coordination No Patents on Life! (Switzerland); Rural Advancement Fund, International (Canada); Cultural Survival Canada (Canada); the Cultural Conservancy (USA); the Edmonds Institute (USA); Institute for Agriculture and Trade Policy (USA); Washington Biotechnology Action Project (USA); Rio Grande Bioregions Project (USA); and HIVOS (the Netherlands).

victories by traditional groups when they challenge existing patents, logos, Indigenously-derived commercial names or recordings in courts or patent offices. Indigenized Western ADR would be a better, more consistent and less costly alternative. Given the lack of consistency of court rulings, this is “not a permanent victory but perhaps there is no such thing as a permanent victory in indigenous litigation.”¹⁸³

6.5 State Funding Subsidy

If an Indigenous or Aboriginal community decides to step into the judicial fray, their national government should support or subsidize their costs. This may be the only way they can mount a successful suit. Although not an intellectual property litigation, the Ecuadorian example is insightful. Its new leftist President Rafael Correa said that his administration would help about 30,000 Amazon Indians in suing Chevron Oil Company for \$6 billion for allegedly dumping 18 billion gallons of polluted water into their communities and onto the delicate Amazon rainforest from 1964 to 1992. The allegation is that the company did this to save on operations cost, and merely provided \$40 million as settlement to the previous Ecuadorian government to secure their unconditional release.¹⁸⁴

In Australia, the government has made it a policy to provide subsidies and legal assistance to the litigation efforts of Indigenous Australians primarily due to the “long-standing disadvantage and ongoing discrimination [which results in] Indigenous Australians experience[ing] much higher rates of adverse contact with the justice system than other Australians.”¹⁸⁵ Governments around the world may follow this example by providing allocations for indige-

¹⁸³ See Scheinin, *supra* note 173, at 150.

¹⁸⁴ See Dorothy Kosich, *Ecuador's President Correa to help Indigenous communities in Chevron pollution litigation*, MINEWEB, Mar. 23, 2007, <http://www.mineweb.net/mineweb/view/mineweb/en/page38?oid=18551&sn=detail> (last visited Nov. 30, 2007).

¹⁸⁵ The Australian Government, through its Attorney-General's Indigenous Justice and Legal Assistance Division, has instituted funding and legal aid services for Indigenous Australians. Program Guidelines for 2007–2008 aim to provide “high quality, culturally sensitive, equitable and accessible legal aid and legal aid related services for Indigenous Australians.” See AUSTRALIAN GOVERNMENT, *Program Guidelines 2007-2008: Legal Aid to Indigenous Australians* (2007), available at [http://209.85.165.104/search?q=cache:D-Dz40GYrpoJ:www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(1E76C1D5D1A37992F0B0C1C4DB87942E\)~LEGAL%2BProgram%2BGuidelines%2B2007-08.DOC/%2024file/LEGAL%2BProgram%2BGuidelines%2B200708.DOC+Indigenous+litigation&hl=en&ct=clnk&cd=46&gl=us](http://209.85.165.104/search?q=cache:D-Dz40GYrpoJ:www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1D5D1A37992F0B0C1C4DB87942E)~LEGAL%2BProgram%2BGuidelines%2B2007-08.DOC/%2024file/LEGAL%2BProgram%2BGuidelines%2B200708.DOC+Indigenous+litigation&hl=en&ct=clnk&cd=46&gl=us).

nous litigation, depending on the identity of the plaintiffs, the sufficiency of their causes of action, and the preponderance of evidence to ensure the existence of legitimate claims.

Beyond the help extended by national governments and interest groups, universities, bar associations and law journals have also been contributing to assist Indigenous or Aboriginal communities.¹⁸⁶ This kind of assistance should not only occur when communities sue,¹⁸⁷ but, more importantly, when they seek ADR mechanisms that are friendlier to their culture.

7. CONCLUSION

Due to the dual characteristics of Indigenous or Aboriginal peoples as having enormous cultural and traditional knowledge, and at the same time generally comprising segregated and poverty-stricken communities, they are said to be magnets of potential opportunism and greed, exploitation and harm. Their once isolated and tranquil lifestyle is being besieged by major interests. The deluge of attention is mostly from entities that see a lot of benefits and potential in what these communities know. With these as a given, Indigenous peoples ought to be cautious about who they deal with and continuously seek support and guidance either from the government or well-meaning interest groups.

Indigenous peoples will inevitably find themselves in a conflict situation because of voluntary acts or involuntary circumstances. They may intentionally enter into written or oral contracts with institutions or entities for tangible benefits in return for sharing their knowledge. Conflicts may result from these relationships. They may also discover that one of their traditional practices has been

¹⁸⁶ The Indigenous Law Journal of the University of Toronto; the publication of students at the University of Victoria's Environmental Law Centre of a New International Indigenous Law Resource which is an annotated bibliography of international law instrument; The University of Arizona Rogers College of Law's Indigenous Peoples Law Clinic; the Indian Legal Clinic (ILC) of Arizona State University College of Law; the Indigenous Law & Policy Center at the Michigan State University College of Law; the American Indian Law Clinic of the University of Colorado Law School; Native Peoples Law Caucus Newsletter of the University of Tulsa College of Law; the Indigenous Bar Association (IBA) which is a non-profit professional organization for Indian, Inuit and Métis persons trained in the field of law based in Victoria, British Columbia, Canada; to cite a few.

¹⁸⁷ An example of this would be the meeting between the Federal Court, the Indigenous Bar and the Aboriginal Law Bar in Ottawa, Canada on September 30, 2005. See Federal Court Indigenous Bar Aboriginal Law Bar Liaison Meeting Minutes (Sept. 30, 2005), <http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/pdf/Aboriginal-Bar-30-09-2005.pdf> (last visited Nov. 30, 2007).

used by groups without their consent and without providing them with beneficial returns. Either way, they have to pose a challenge. In the case of the San People and the Hoodia plant, some complications might arise later on in terms of the consistency and amount of royalties.

To file a suit in court would generally be too complicated for them unless they are well-represented, will cost too much, will take unpredictable time to be resolved, may cause physical and emotional harm, will displace their representatives, will unnecessarily expose them to vagaries of the world, will give control of the proceedings to persons who are entirely strangers to Indigeneity, and may unsuspectingly change the communities' cultural outlook. Despite the few benefits of litigation, *i.e.* several notable successes, involvement of diverse actors, and establishment of judicial precedent, there simply are too many disadvantages for Indigenous or Aboriginal communities to sue in court. They may still do so, but they litigate with tremendous risks.

The best option for them is to seek avenues of ADR, whether their own Indigenous Dispute Resolution processes, Western ADR systems, or the Indigenized form of Western ADR. They may seek facilitated mediation or negotiation in the process of challenging patent applications or seeking patent cancellations. They may also engage in arbitration with the assistance of international groups or organizations.

ADR involves less formal procedures than court litigation. Arbitral awards are easier to enforce internationally, and in mediation the parties are able to retain control of the proceedings. These dispute settlement mechanisms are more attuned to, and culturally appropriate for, the working dynamics of Indigenous communities, particularly with how their own elders resolve internal conflicts or conflicts with other groups. Sidestepping the notion of what non-Indigenous people do *to* these communities, non-Aboriginal people will be undergoing these ADR processes *with* these traditional communities.

With ADR mechanisms at hand, Indigenous communities will be empowered and less vulnerable. Certainly, the evolution of a stable and working set of Indigenized Western ADR systems in each country and on the international level will take some time and will involve a concerted effort from varied groups, international organizations and governments. Since the Indigenous or Aboriginal peoples of the world have survived worst adversities and harsher conditions in the past centuries and millennia, without a doubt they

can weather this wait. After all, it is not too late to form a *Weche* — a Woodland *Cree* (Canadian Aborigine) word meaning partnership¹⁸⁸ — between Aboriginal or traditional knowledge and Western scientific knowledge. Similarly, it is not too late to engender a “partnership”, otherwise known as *Wechewehowin*,¹⁸⁹ between traditional peoples and non-Indigenous peoples, all in the spirit of mutuality, respect, interconnectedness and acknowledgment, be it in the sphere of intellectual property rights concerns or other important facets of life.

¹⁸⁸ See Ghostkeeper, *supra* note 92, at 161.

¹⁸⁹ *Id.*

