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The Protection of Indigenous Peoples' Cultural Heritage:

Māori Intellectual Property Rights and Wai 262 Report

Supervisor

Ch. Prof. Sara De Vido

Assistant supervisor

Ch. Prof. Arianna Vettorel

Graduand

Rita Giacomini
857218

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AIM FOR THE HIGHEST CLOUD SO THAT IF YOU MISS IT, YOU WILL HIT A LOFTY MOUNTAIN.

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Abstract

È oramai innegabile la rilevanza delle popolazioni indigene non solo a livello nazionale, contribuendo all'identità odierna del Paese, ma anche, e aggiungerei soprattutto, in quella della comunità internazionale, creando al contempo sempre maggior sensibilità in tematiche che coinvolgono principalmente i diritti umani. Tuttavia, un aspetto meno conosciuto di queste popolazioni è che, come tutti, hanno a disposizione e possono godere dei diritti di proprietà intellettuale, e ancor meno conosciuti, sono gli strumenti a loro disposizione. Il mondo globalizzato odierno presenta due facce della stessa medaglia: se da una parte sopraggiunge l'omogeneità e il mainstream, soffocando le piccole etnie e minoranze standardizzandole all'interno di culture dominanti; dall'altra, soprattutto grazie al ruolo di organizzazioni non governative ed esperti, incrementa la sensibilizzazione e diffusione di queste culture che sembrano essere così lontane, ma che in realtà tutt'ora fanno parte dell'identità e popolazione nazionale, e di conseguenza, mondiale. Partendo appunto dal contesto internazionale attuale, verranno analizzati gli strumenti utili al fine di proteggere il patrimonio culturale delle comunità indigene, il loro riconoscimento come tali e il ruolo che queste hanno all'interno della comunità internazionale. In questo quadro l'UNESCO ne è protagonista, varando una serie di Convenzioni volte a proteggere queste comunità più fragili, le quali non dispongono di eguali strumenti per poter difendere la propria cultura, tradizioni e usanze. La Convenzione del 1970 al fine di proibire e prevenire il traffico illegale di beni di proprietà culturale segna uno dei primi obiettivi raggiunti nella tutela della proprietà culturale, che nel 2020 celebra il suo cinquantesimo anniversario, collezionando importanti risultati e restituendo intere collezioni ai legittimi Stati proprietari. Nei primi anni 2000 invece, vi si è concentrati maggiormente sulla diversità culturale, trattata nella Convenzione del 2001 e del 2005, mentre quella del 2003 si focalizza sull'aspetto intangibile della proprietà culturale, rendendo necessario il coinvolgimento delle popolazioni indigene nel preservare rituali, eventi e tradizioni orali, ma anche la loro conoscenza del territorio e le risorse che li circondano. Queste vere e proprie proprietà intellettuali vengono tramandate di generazione in generazione da secoli, ma spesso rischiano di cadere nella trappola di accademici, ricercatori, rappresentanti di multinazionali che non si fanno scrupolo, senza un esplicito e libero con-

senso, a trarre profitto da queste conoscenze, senza considerare che non si tratta solamente di valore spirituale, ma anche della sopravvivenza delle stesse comunità. Uno dei massimi traguardi fino ad ora raggiunto è avvenuto con la Dichiarazione dell'UNESCO dei diritti dei popoli indigeni nel 2007, seppur non essendo uno strumento legalmente vincolante, la quale prevede dei riconoscimenti importanti nei confronti delle popolazioni indigene, tra cui il diritto di poter usufruire dei territori e risorse tradizionalmente a loro appartenute, e il diritto di esser loro restituite qualora sottratte illegalmente, o di un compenso per il danno subito. L'influenza esercitata dall'UNESCO si allinea a quella dell'Organizzazione Mondiale per la Proprietà Intellettuale (WIPO), la quale si occupa della gestione e della corretta applicazione dei trattati da lei emessi nella protezione di copyright, brevetti, marchi e altre tipologie di diritti di proprietà intellettuale che, se letti con la giusta chiave, possono diventare risorse fondamentali nel garantire questi diritti alle popolazioni indigene (insieme ad altri strumenti internazionali, come l'accordo TRIPS e la Convenzione dell'Organizzazione Internazionale del Lavoro n. 169 sui diritti dei popoli indigeni e tribali). Successivamente, tra le varie popolazioni indigene esistenti, per interesse personale ci si concentrerà sulla popolazione Māori della Nuova Zelanda, introducendone la storia a partire dal periodo colonialista, affiancata da esempi di come la loro cultura venga spesso utilizzata in modo inappropriato per scopi commerciali: ad esempio, il famoso tatuaggio tribale, alla celebre danza praticata dall'altrettanta nota squadra di rugby, e altre simbologie meno conosciute ma altrettanto preziose. Il trattato di Waitangi è il simbolo per eccellenza dell'epoca imperialista, il documento che rese la Nuova Zelanda una colonia inglese sotto il regno della regina Vittoria, e che prese il nome dall'omonima cittadina in cui venne firmato il 6 maggio 1840. Questo documento è tutt'ora oggetto di studio, in quanto vi fu scritta una copia in lingua inglese, ed una in lingua Māori, ed è proprio la traduzione di quest'ultima che creò, e crea anche oggi, importanti complicazioni, "ovviamente" per la popolazione nativa, che vide portarsi via illegittimamente la loro terra, e spesso le loro stesse vite. Un punto di svolta si ebbe nel 1975, con la costituzione del Waitangi Tribunal, una commissione d'inchiesta che si occupa di raccogliere e analizzare reclami riguardanti ingiustizie conseguenti al trattato di Waitangi, per poi emanare delle raccomandazioni nei confronti del governo neozelandese. Si intende quindi, analizzare la situazione odierna e le misure adottate nel Paese per salvaguardare i diritti della popolazione Māori nell'ambito della proprietà intellettuale. Infine, verrà preso come caso studio il conosciuto *Wai 262 Fauna and Flora Claim*, il più complesso presentatosi al Waitangi Tribunal, coinvolgendo il lavoro di più di 20 dipartimenti e

agenzie del governo della Nuova Zelanda. Sei furono le tribù che si unirono per reclamare il loro diritto di essere “guardiani” della loro cultura, e di tutto ciò che loro considerano prezioso, o il termine da loro utilizzato “*taonga*”, per la sopravvivenza di questa, tra cui rientrano le loro tradizioni, la flora e la fauna. Con questo elaborato si intende dimostrare che i diritti di proprietà intellettuale delle popolazioni indigene spesso vengono confuse con la salvaguardia delle loro culture, quando invece, per quanto diverse, sono due sfere coesistenti e che si possono supportare l'un l'altra, ma la materia si dimostra spesso vaga e non precisa, risultando in legislazioni obsolete.

Abbreviations

ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANZTPA	Australia-New Zealand Therapeutic Products Agreement
ARIPO	African Regional Intellectual Property Organization
CBD	Convention on Biological Diversity
CCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant on Economic, Social and Political Rights
CGP	Conservation General Policy
CIPR	Cultural and Intellectual Property Right
CLIP	Conflict of Laws in Intellectual Property
CMRI	Crown-Māori Relationship Instrument
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DOC	Department of Conservation
ECHR	European Convention on Human Rights
ECtHR	Court of Human Rights
ERMA	Environmental Risk Management Authority
GATT	General Agreement on Tariffs and Trade
GI	Geographical Indication
GM	Genetically Modified
HCCH	Hague Conference on Private International Law
HR	Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICDP	Integrated Conservation-Development Project
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICH	Intangible Cultural Heritage
ICMR	Indigenous Communal Moral Rights
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
ILO	International Labour Organization
IP	Intellectual Property
IPONZ	Intellectual Property Office of New Zealand
IPR	Intellectual Property Right
LINKS	Local and Indigenous Knowledge System
MAC	Māori Advisory Committee
MERCOSUR	Southern Common Market
MBIE	New Zealand Ministry of Business, Innovation and Employment
NGO	Non-Governmental Organization
NPS	National Policy Statement on Indigenous Biodiversity
NZCPS	New Zealand Coastal Policy Statement
NZFTA	New Zealand Fair Trading Act

OAPI	African Intellectual Property Organization
PCT	Patent Cooperation Treaty
PIL	Private International Law
PVR	Plant Variety Right
SNAs	Significant Natural Areas
TCE	Traditional cultural expression
TK	Traditional knowledge
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV	International Union for the Protection of New Varieties of Plants
WCT	World Intellectual Property Organization Copyright Treaty
WIPO	World Intellectual Property Office
WPPT	World Intellectual Property Organization Performances and Phonograms Treaty
WTO	World Trade Organization

Glossary

Aotearoa	New Zealand
Atua	Gods
Haka	Māori posture dance
Hāpu	Sub-division of iwi made up of a number of <i>whānau</i>
Hui	Assembly or gathering
Iwi	Māori tribes
Kaitiaki	Guardian or keeper over <i>taonga</i>
Kaitiakitanga	Māori stewardship over their treasures and lands
Koru	Traditional shape in Māori culture and art, representing new unfurling silver fern frond, symbol of new life, growth, strength and peace
Mana	Authority, power. There are three types of <i>mana</i> : <i>Mana atua</i> God given power <i>Mana tūpuna</i> Power from ancestors <i>Mana tangata</i> Authority from personal attitudes
Marae	Meeting houses with both religious and political purposes
Mātauranga Māori	Māori traditional knowledge, cultural practice, worldview and perspective
Moko	Māori facial tattoo
Ngāi	Prefix for tribes' names, usually beginning with 'T'
Ngāti	Prefix for tribal group
Noa	Free of <i>tapu</i> . The <i>tapu</i> of <i>taonga</i> sometimes needs to be removed temporarily before people can make use of them. <i>Karakia</i> are important for the removal of <i>tapu</i> from <i>taonga</i> , rendering them <i>noa</i> .
Pākehā	Name used to refer to non-Māori people, usually of European origin
Pounamu	Green stone
Rongoā Māori	Traditional Māori healing encompassing herbal remedies, physical therapies and spiritual healing
Tāngata whenua	In its broader sense 'the people of the land', 'Indigenous peoples', used sometimes by Māori to self-identify
Taonga	Sacred, highly prized holdings, also abstracted treasures
Tapu	To be sacred (people, places and objects)
Te reo Māori	Māori language
Tikanga	The right way to do things, cultural protocols.
Tino rangatiratanga	Chieftainship, sovereignty
Toi iho	Registered and globally recognized mark of quality and authenticity of Māori art and artists
Tūrangawaewae	Lit. 'a place to stand', feeling a place (or person) like home, own place in the world
Whānau	Extended family connected by blood, no matter how distantly
Whanaungatanga	Kinship

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Introduction

Descendants of Polynesian people, the Māori people of the land of the long white cloud called *Aotearoa* made their way to New Zealand by 1300 AD. Their canoes landed on the Eastern coast of the North Island along the Bay of Plenty coastline, before sailing to the deep south, exploring the entire country by the end of the 14th century. The early settlements were close to the sea, near harbors or mouths of rivers, where they had easy access to fishing and hunting of seals and *moa*, a large flightless bird. Moving inland, surrounded by forests, Māori developed horticulture, especially the plantation of *kūmara* – sweet potato –, and started building their culture based on autonomous tribal or sub-tribal grouping, seeing individuals as the voice of the group, with a strong belief in a sacred relationship with the natural world, as part of nature¹. Māori people are still nowadays one of the most popular Indigenous populations worldwide, known especially for their tribal tattoos and the rugby team, but, as all the other Indigenous peoples, they had experienced the imperialism age, and the consequences related to it. It is however undeniable the relevant role that Indigenous peoples have in the contribution not only to the national identity, but also to the international one, raising awareness especially in human rights issues. Indigenous cultural heritage is part of Indigenous human rights issues and it is fundamental for the enjoyment of other human rights, such as the right to self-determination, the right to freely pursue their economic development and the right to dispose of natural resource. The Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights Erica-Irene Daes contributed to the issue of Indigenous heritage by setting ten principles for its protection: the first three for instance, recognize that an effective protection of Indigenous communities as guardians of their own heritage would have positive effects on worldwide population and its development; and the fourth identifies the relevance of respecting Indigenous values and their transmission generation by generation. These instruments have no legal binding value but stress the need of an international pattern with Indigenous peoples, where prior, free and informed consent must be essential. Nonetheless, it is less commonly known that these communities have intellectual property rights, and fur-

¹ Te Ahukaramū Charles Royal, *Māori*, Te Ara - the Encyclopedia of New Zealand, available at: <http://www.TeAra.govt.nz/en/maori/print>, pp.2-4.

ther less known are those instruments able to protect these rights. Especially after decolonization, a series of factors pushed communities to move to urban areas, such as poverty, alienation of lands, better access to health and education, putting them away from their ancestors. Here however, they were, and still are, victims of stereotypes and that is when States have to demonstrate to be able to fulfill their duty to provide for a harmonious environment to all its citizens, by adopting the necessary measures to allow the free exercise of different cultures. This is not the only difficulty that Indigenous communities have to face to: indeed, the biggest challenge could be considered to ensure their own legal recognition and their control over resources for communities' cultural, economic and social development². The main topic of this thesis will be introduced starting right from the recognition of Indigenous peoples in the international framework: thus, in the first chapter will be examined the main instruments at communities' disposal for safeguarding their cultural heritage and future development from those researchers, academics and other categories that take advantage of their traditional knowledge. 2020 is the 50th anniversary of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which reached important results in the safeguard of cultural property, returning entire collections to their legitimate owners. Then, in the 2000s, it has been focused on cultural diversity with the 2001 and 2005 Conventions, and on the intangible aspect of cultural heritage with the 2003 Convention, making essential the involvement of Indigenous communities for preserving their customs in the most effective way. The 2007 UN Declaration on the Rights of Indigenous Peoples however, is considered to be the highest aim that could be reached, and even if not legally binding, it had and still has a great impact worldwide, returning to communities their property rights on their lands and territories and other relevant rights.

In chapter 2, it will be analyzed the role of the World Intellectual Property Organization (WIPO), which administers the major part of the international agreements on intellectual property rights, namely: copyrights, trademarks, geographical indications, industrial designs, plant variety rights, patents and trade secrets. Both UNESCO and WIPO's systems will be compared: two separate actors, with different structures and purposes, but at the same time they are interconnected and influence one another. These instruments, if properly used together with other significant international agreements and conventions – as the TRIPS Agreement, the ILO Convention no. 169, the Rome Convention and the Conven-

² UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL-DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *State of the World's Indigenous People*, ST/ESA/328, New York, United Nations Publication, 2009, p. 42.

tion on Biological Diversity –, they could be used as powerful strategies in the safeguarding of Indigenous peoples' cultures.

My personal interest on Māori people of New Zealand began after having watched a rugby match between New Zealand and Italy when I was little, looking for the dance the All Blacks performed, why they did it, what did they say, what language it was. It did not take long time before this simple curiosity transformed into a deeper interest for everything that was related to New Zealand: its history, culture, nature and so on. I have included this fascinating country in every academic project of mine whenever possible, no matter the size or relevance they could have, because I considered them as opportunities to enrich my personal knowledge on Aotearoa New Zealand in every possible feature. Then, about two years ago I attended Professor De Vido's course on European Human Rights Policies and Instruments, thanks to which I discovered a different point of view of this branch of law and international relations; that is why I decided to look for a topic that would include both New Zealand and human rights, finding in Indigenous peoples' intellectual property rights not only the proper conclusion to the university journey, but also one of the most significant research I would do for my own interest.

The third chapter has thus the intention to resume briefly the history of Māori people since the arrival of Europeans in the country, the draft of the Treaty of Waitangi, the founding document of New Zealand, and the establishment of the Waitangi Tribunal. It will be further discussed the relevance of this population in contributing to the national identity of Aotearoa New Zealand and how its culture is often misused; this would create the basis for the analysis made in the following chapter, examining the modern framework of the country concerning the protection of intellectual property rights of Māori. Lastly, the Wai 262 case will be taken as case study: in the 1990s six Māori tribes claimed their role as guardians – *kaitiaki* – of *mātauranga Māori* and *taonga*, considered the most complex claim presented to the Waitangi Tribunal because of the variety of issues covered and having involved more than twenty governmental departments and agencies. Also known as Indigenous Flora and Fauna Claim, it took about twenty years before the release of the final report, with all the final recommendations on the safeguarding of Indigenous flora and fauna, *mātauranga Māori* and on increasing Māori involvement in the decision-making process. The Crown indeed, was mainly accused to have not properly protected Māori and their culture, disrespecting the contents of the Treaty of Waitangi. Although not binding, the claim has still nowadays not only a significant impact on the relations between New Zealand government

and Māori at the national level, but it could also be taken as model for other States, among whose citizens Indigenous people are included.

Chapter 1

International Recognition of Indigenous Cultures

He kākano ahau i ruia mai i Rangiatea.

I AM A SEED WHICH WAS SEWN IN THE HEAVENS OF RANGIATEA.

This Māori proverb refers to the importance of one's genealogy and culture, where the seed represents the personal growth and its connection with ancestors and generations that are yet to come, while Rangiatea is metaphorically the origin place of knowledge. In this chapter, it will be explained the international framework, together with the main Conventions and Declarations recognizing internationally Indigenous peoples and their cultural heritage: from the evolution of the term 'Indigenous', to the relation to human rights, as freedom of expression, right to non-discrimination and right to association, to the concept of 'cultural diversity', why and how it should be promoted.

1 Who Indigenous Peoples Are

The adjective 'Indigenous' has its origins from Latin word *indigena*, where '-genus' states for 'to be born from'. The term refers specifically to those culturally distinct populations affected by European colonialism, emerged in the 1970s as the internationalization of the issues and struggles of colonized areas of the world, where activists added the final 's' of 'Indigenous peoples' as symbol of self-determination, and proof of the real existence of differences among different peoples³.

Also known as *First Peoples*, one of the most relevant definitions of Indigenous peoples was given by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities José R. Martínez Cobo, accepted by the UN Working Group on Indigenous Populations in 1982. On 9th August of the same year the Working Group met for

³ TUHIWAI SMITH LINDA, *Decolonizing Methodologies Research and Indigenous Peoples* (Second Ed.), Dunedin Otago University Press, 2012, p. 7.

the first time, today recognized and celebrated as International Day of the World's Indigenous Peoples.

Indigenous communities, peoples, and nations are those that, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

In his popular Study on the Problem of Discrimination against Indigenous Populations, Cobo's definition is considered to be restricted, not taking into account other marginalized peoples, such as tribal groups, who are instead compared to Indigenous ones in the first article of the International Labor Organization Convention no. 169⁴, as known as the Indigenous and Tribal Peoples Convention adopted by ILO in 1989, today ratified by twenty countries and that would be discussed in the next chapter. Tribal peoples differ from Indigenous mainly in not being descents from the population that inhabited the territory, but circumstances are similar, for instance, an Afro-descendent tribal people living in Central America. Their ancient peoples' experienced centuries of violations and abuses, often murdered and isolated because of foreign occupation and colonization. Before the fall of the Berlin Wall, when Indigenous peoples issue gained momentum, there were two previous attempts to bring their issue to the international attention: in 1923, the representative of the Six Nations of the Iroquois Cayuga Chief Deskaheh was denied access to the League of Nations in Geneva, but found a receptive audience for his cause throughout Europe instead; in 1925, the Maori religious leader W.T. Ratana travelled first to London asking for audience with King George V, but his protest about the 1840 Treaty of Waitangi did not have been heard neither in Geneva. Few decades later, in the 1960s and 1970s, a number of Indigenous organizations were founded, given the decolonization era and the general growth of NGOs, facing arguments that ranged from the violations of treaties and human rights, to land loss and massacres. In the same period of Cobo's work, initiatives within the framework of the United Nations were established, such as the UN Voluntary Fund for Indigenous Populations (1985), the adoption of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989), the proclamation of the International Year of the World's Indigenous People (1993) and of two International Decades of the World's

⁴ Indigenous and Tribal Peoples Convention – ILO Convention no. 169 –, adopted in 1989 entered into force two years later and ratified by 23 countries.

Indigenous People (1995-2004 and 2005-2014). The UN Permanent Forum on Indigenous Issues – an advisory body of ECOSOC – and the Special Rapporteur on the Rights of Indigenous Peoples are two mechanisms to further develop Indigenous rights that are also worth to be mentioned⁵.

Even if they still defined as ‘peoples’ or ‘minorities’, nowadays it has been more and more often highlighted how meaningful Indigenous peoples are for the historical and cultural heritage of the single country. This has inevitably attracted the desire of not only anthropologists, archeologists and biologists, but also of those who identified Indigenous traditional knowledge a profitable resource, referring to *‘the complex bodies and systems of knowledge, know-how, practices and representations maintained and developed by indigenous people around the world, drawing on a wealth of experience and interaction with the natural environment and transmitted orally from one generation to the next’*⁶.

1.1 Who Benefits from Their Traditional Knowledge

Tourists, researchers, photographers, journalists and representatives of any kind are all part of those categories that try to build a contact with Indigenous communities. Purposes and activities are also various: from collecting plants and minerals, both with no commercial interests or in order to sell them to other people or companies; to scientific research; preserving protected areas; religious conversion and so forth, but all of them have possible implications on the culture, environment and survival of locals, even when there is no intention to take advantage of them. Tourism in particular has a deep impact on cultures, and not always Indigenous peoples have sufficient autonomy in order to manage tourists and related activities: large influxes of nature tourists or collectors slowly deteriorate ecosystems and biodiversity, mass production prevails over handcrafts, with a consequent devaluation in quality and decreasing sources of income for communities⁷.

Paradoxically, sometimes tourism is the only income, and for this reason, some aspects of their own lifestyle have to be readapted. I personally took part to a desert trip in Egypt, visit-

⁵ UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL-DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *State of the World's Indigenous People*, cit. pp. 2-3.

⁶ Ibid, p. 64.

⁷ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, International Development Research Centre Canada, 1996, p. 6.

ing a Bedouin family, where they explicitly admitted that they would omit determined part of stories they were telling in order to not upset our religious faith, and for lunch they cooked pasta and a typical plate, but less spicy for instance. Mainstreaming has also increased the urbanization of Indigenous communities, making them have little contact with their culture of origin in search for work and distancing descending generations. As suggested by Posey and Dutfield – possibly along with the increasing ecotourism –, a solution could be the community-based Integrated Conservation-Development Project (ICDP), whose aim is to develop and ensure a fair balance between economic development and conservation, such as the Annapurna Conservation Area Project in Nepal, the Amboseli National Park in Kenya and the Sian K'an Biosphere Reserve in Mexico⁸. Not only natural persons may interact with locals, but also legal ones in form of governments, corporations, non-governmental organizations (NGOs) and the so-called *pressure groups*, who aim at raising public awareness on certain issues, as the World Wide Fund for Nature (WWF) does with environment and endangered animal species. Medical teams, scientists or soldiers are usually sent into communities both with monitoring and safety tasks, while academics collect photos, recordings, samples of plants and soils and several details in order to enrich what is known about these populations, their culture and their history⁹. On the other hand, it may happen that dominant cultures exploit native lands, and the right of property peoples have on them, gaining more income from the tourist sector: this is what has been happening in Brazil, especially after Bolsonaro's election, and a sign of protest has been taken by Indigenous Brazilians through a march toward the congressional building in 2019, during Free Land Encampment celebrations¹⁰. Among all the kind of research, it has to be highlighted the so-called *biodiversity prospecting*, meaning the research '*for commercially valuable genetic and biochemical resources, with particular reference to the pharmaceutical, biotechnological, and agricultural industries*', often extended also to animals and microorganisms, with the purpose of improving health care and help farmers with their crops and harvest. However, more frequently pharmaceutical industries try to obtain as much information as possible on variety of plants and their benefits for instance, how they were and have been used, how to process them and possible combinations with other elements by

⁸ Ibid, p. 8.

⁹ Ibid, p. 10.

¹⁰ DW.COM, *Indigenous communities in Brazil protest threats to land and services*, available at: <https://www.dw.com/en/Indigenous-communities-in-brazil-protest-threats-to-land-and-services/a-48506378>

seeking a guidance and create a trust-relationship, not demanding any kind of authorization to use that information and making them more profitable¹¹.

1.2 The Role of the United Nations Educational, Scientific and Cultural Organization

The decision of building the new Aswan High Dam in Egypt, the world's largest embankment dam, was what originated the need of an international evolution in the protection of heritage. The dimensions of the dam were as significant as it would have flooded the nearby Nile valley and the treasures there preserved. In 1959 the Governments of Sudan and Egypt demanded UNESCO's assistance, who launched the International Safeguarding Campaign the next year and resulted in the relocation of Abu Simbel and Philae temples. This campaign gave the idea to the United States of calling for a *World Heritage Trust* in 1965, highlighting the need to preserve high valued cultural and natural sites. Similar proposals were presented by the International Union for Conservation of Nature in 1972 to United Nations conference on Human Environment in Stockholm, later improved in a single agreement known as the 1972 UNESCO World Heritage Convention¹². On the occasion of the 30th anniversary of the Convention, strategic objectives have been established during the Budapest Declaration on World Heritage, as known as the 'Five Cs':

- a) *strengthen the **CREDIBILITY** of the World Heritage List, as a representative and geographically balanced testimony of cultural and natural properties of outstanding universal value;*
- b) *ensure the effective **CONSERVATION** of World Heritage properties;*
- c) *promote the development of effective **CAPACITY-BUILDING** measures, including assistance for preparing the nomination of properties to the World Heritage List, for the understanding and implementation of the World Heritage Convention and related instruments;*
- d) *increase public awareness, involvement and support for World Heritage through **COMMUNICATION***¹³.

The fifth C, Communities, was later proposed to be added by New Zealand:

¹¹ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit. pp. 12-14.

¹² UNESCO World Heritage Convention, adopted in 1972, currently safeguarding 1,121 world heritage sites (869 cultural, 213 natural, and 39 mixed properties) across 167 countries. Entered into force in 1975 with 20 ratifications.

¹³ UNESCO Budapest Declaration on World Heritage, adopted in 2002 during the 26th session of the World Heritage Committee.

e) to enhance the role of the **COMMUNITIES** in the implementation of the World Heritage Convention.

Indigenous peoples' unique approach to natural and cultural heritage is the outcome of singular worldviews and feeling of synergy between communities and the environment. That is one of the main reasons why their involvement in the protection of heritage is fundamental. Local communities also result to have the proper awareness to preserve high valued sites in the most effective way, and making them the guardians of these areas, would only lead to a successful and active participation and cooperation of the parts¹⁴. A demonstration was given by Tongariro National Park in New Zealand, the first cultural landscape being listed – as symbol in Māori's mythology and the strict relation with nature of mountains –, and the first park to be ever donated to a State by an Indigenous people. *Cultural landscape* is another concept explained in the World Heritage Convention, with three different classifications: artificial places, such as parks and gardens; evolved landscapes, because of social and economic necessities; and associative cultural landscapes, where the abstract value is more relevant than the material one¹⁵.

In 2002, UNESCO also launched the Local and Indigenous Knowledge System (LINKS), with the purpose of empowering Indigenous peoples in environment management and contributing to the safeguard of their TK within their communities by promoting their transmission from one generation to the other and their recognition¹⁶. It is also remarkable Resolution no. 197 of the African Commission on Human and Peoples' Rights, when Lake Bogoria was designated as world heritage and the non-involvement in the decision-making process of the Kenyan Endorois population would have constituted a violation of Article 22 of African Charter, which recognizes that all peoples have the right to their economic, social and cultural development and that States have the duty to ensure the exercise of the right to development. Held in 2011 in Banjul – Gambia – in the context of the World Heritage Convention and the designation of Lake Bogoria as a World Heritage Site, the Resolution urged not only for the full participation of Endorois community, but it also urged UNESCO to revise the current procedures, so that the World Heritage Convention would comply UNDRIP and respect Indigenous peoples' human rights. While there might be a willingness to coop-

¹⁴ UNESCO, *Convention Concerning The Protection Of The World Cultural And Natural Heritage*, Thirty first Session, 2007.

¹⁵ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit., p. 113.

¹⁶ UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL-DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *State of the World's Indigenous People*, cit., p. 67.

erate on the part of the locals, it has not to be taken for granted that for governments is the same. That is why Conventions such as the World Heritage one has to provide for the necessary mechanisms for a proper cooperation. The World Heritage Convention was able to join the notion of cultural preservation – monuments, buildings, archeological sites, etc. – and natural conservation – geological and biological formations for instance – in a single agreement, aiming at maintaining the needed balance with individuals' interaction and being a global model, inspiring later conventions.

2.1 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

2020 marks the fiftieth anniversary of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, ratified by 140 countries and adopted in 1970 in response to the growing loss of cultural heritage of many member States due to illicit trafficking on the basis of prevention, restitution and international cooperation. The last pillar in particular, is highlighted in Article 7, where member States are required to assist each other in recovering stolen heritage and '*take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention*'¹⁷. Illicit flow of cultural goods is thought to be the third largest after drugs and arms, and because the Convention has no direct effect on domestic law, it is weakened by the territorial principles, applying the law where the property is situated – *lex rei sitae*¹⁸. Covid-19 pandemic represents the latest challenge, due to which thefts, illegal excavations at archeological sites and trafficking. For this reason, in June 2020 UNESCO arranged a meeting to recommend the establishment of an ad hoc police units to monitor online platforms and dismantle illegal sales and calling for use more systematically of instruments as the UNESCO List of National Cultural Heritage Laws, the International Council of Museums' Red Lists Database and Interpol's Stolen Works of Art Database¹⁹. Moreover, with the restrictions of people's movements, physical surveillance in institutes and mu-

¹⁷ RAMÍREZ ERNESTO OTTONE, *Photo Exhibition '50 Years in the Fight Against the Illicit Trafficking of Cultural Property'*, available at: <https://en.unesco.org/fighttrafficking/gallery>

¹⁸ NÉGRI VINCENT, *The 1970 Convention: Cultural diversity before the letter of the law*, available at: <https://en.unesco.org/courier/2020-4/1970-convention-cultural-diversity-letter-law>

¹⁹ BARDON AGNÈS, *Art traffickers: Pillaging peoples' identities*, available at: <https://en.unesco.org/courier/2020-4/art-traffickers-pillaging-peoples-identities>

seums decreased, leaving room for traffickers and enhancing online supply and demand. Il-legal trafficking indeed, also includes online instruments: social networks in particular, fur-ther lowered barriers to enter in these kinds of marketplaces. Facebook for instance, 'rec-ommend' those groups and sites dedicated to antiquities trafficking, basing on its algo-rithms and research made by the user before changing policy in June 2020. Mashberg de-scribed the social networks as the new El Dorado for traffickers, but they are followed by a variety of auction sites, as eBay, Invaluable, Catawiki and GoAntiques for instance²⁰. As written in Kaci's article, not only looters have to be punished, but also the buyers, who cre-ate demand, and only by doing so the bridge between demand and supply would be de-molished. Armed conflicts are another example of situations, from which looters and terror-ists may take advantage, being sites and museums deprived of protection and the political sphere destabilized. Terrorist groups as ISIS know the relevance of cultural heritage, and they often use abandoned sites as bases or training camps, as happened in 2015 with the Syrian city of Palmyra. In response to these increasing episodes in all Middle East region, UNESCO adopted the United Nations Resolution 2199²¹, prohibiting the '*cross-border trade in cultural property from conflict zones*'²².

On the other hand, the 1970 Convention was successfully used in the restitution of many elements representing cultural heritage. In 2010 bronze cannons were discovered in Mad-agascar, when the International Observatory on Illicit Traffic in Cultural Goods was asked to attend the opening of a container ready to be exported. They are assumed to come from underwater lootings and be part of a Portuguese ship sank in 1527, the Sao Ildefonso. In 2011, Geneva authorities identified the Heracles Sarcophagus, and thanks to the coopera-tion of Turkey and Switzerland, the sarcophagus returned to Turkey in 2017 and now it may be visited at Antalya Museum. Turkish authorities also cooperated with Germany in the res-titution of the Hippocampus brooch, stolen from Uşak museum and replaced by a forgery in 2006; or the most recent case of a bronze chariot with bulls returned in Turkey in early 2020, after being found in an auction. The Rettinger case is another significant demonstra-tion of the efficient work of the Convention: it involved 536 artefacts of the Manteña, Mil-agro-Quevedo, Bahía, Chorrera and Valdivia cultures that a German person had taken ille-

²⁰ MASHBERG TOM, *Social Networks: The new El Dorado for Traffickers*, available at: <https://en.unesco.org/courier/2020-4/social-networks-new-dorado-traffickers>

²¹ United Nations Security Council Resolution was unanimously approved on February 12, 2015, providing for economic sanctions that may be used by the fifteen members of the UN Security Council to fight terrorism.

²² KACI LAETITIA, '*We must punish the looters, but also the buyers*', available at: <https://en.unesco.org/courier/2020-4/we-must-punish-looters-also-buyers>

gally. Josef Rettinger inherited this collection from Ecuadorian uncle and asked Ecuadorian Embassy in Germany to be returned the several artefacts. In accordance to Article 5 of the Convention, after being returned in 2019, it was formulated an inventory and later and the collection was exhibited²³.

For what concerns Māori people, the case of the meeting house *Mataatua* was one of the best-known, because it took lengthy negotiations between New Zealand Government and Ngati Awa tribe. The *whareniui* – meeting house – was built by the *iwi* between 1872 and 1875 in Whakatane – North Island – and it was dismantled and reassembled multiple times for exhibitions in Sydney, London and Dunedin, where it stayed until 1996 but it was shortened, and some original carvings were replaced. It is believed that *Mataatua* removal in 1879 was done without the consent of Ngati Awa people, thus in 1983 a request to return the meeting house was send and – under New Zealand Minister of Internal Affairs' advice, *iwi* negotiated directly with representative of the Otago Museum in 1995. The following year, after Waitangi Tribunal's recommendation to return *Mataatua*, it was reached an agreement dated August 30, 1996 where it was stated that NZ Government would pay Otago Museum NZ\$ 2.75 million for the house meeting²⁴.

2.2 2001 Universal Declaration on Cultural Diversity

UNESCO General Conference was one of the very first meetings held after the attacks to the Twin Towers, reinforcing the idea that 'diversity is as necessary for humankind as biodiversity is for nature'²⁵ with a special call for respect of human rights. As quoted in the Universal Declaration on Cultural Diversity, it is my preference using terms as 'plurality' and 'pluralism' instead of 'diversity', which represents more the concept of cohesion and togetherness. Intercultural dialogue has a fundamental role not only in transmitting these concepts, but also in the effectiveness of inclusion policies and the comprehension of the uniqueness of various identities and their own heritage. Is interesting the subdivision made by Catherine Walsh of *interculturalidad*: relational interculturalism refers to contacts and

²³ RAMÍREZ ERNESTO OTTONE, *Photo Exhibition '50 Years in the Fight Against the Illicit Trafficking of Cultural Property'*.

²⁴ PATERSON ROBERT K., 'Protecting Taonga: the Cultural Heritage of the New Zealand Māori', in *International journal of cultural property International journal of cultural property*, Vol. 8, No. 1, p. 108-132, 1999, pp. 123-125.

²⁵ UNESCO, *Universal Declaration on Cultural Diversity*, 2001.

exchanges between cultures, expressing itself in mixing cultures and syncretism; functional interculturalism recognizes diversities in cultures and aims at including them in the social context; critical interculturalism is based on the idea that cultural diversities come from power-based colonial systems. The last one in particular counterposes to the functional interculturalism in order to sustain social relations and institutions' revolution²⁶. Pluralism is also an important factor in global development, meaning economic growth, and at the same time intellectual and cultural growth, as stated in the third article of the Declaration. An emblematic step has been taken by New Zealand Prime Minister Jacinda Ardern and Education Minister Chris Hipkins last year, announcing that New Zealand history will be taught in schools starting from 2022: from the first arrival of Māori population in Aotearoa, to contemporary issues and their strict relation to past events, as the Treaty of Waitangi and the establishment of the Waitangi Tribunal²⁷. This is the demonstration that through education positive aspects of cultural diversity can be promoted, in this case: multilingualism and multiculturalism.

2.3 2003 Convention for the Safeguarding of Intangible Cultural Heritage

The definition of *cultural heritage* given in the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage²⁸ differs from the one given in the previous described World Heritage Convention. While in the 1972 text monuments and cultural sites were taken into account, in the later Convention the five domains of ICH are represented, as stated by the second paragraph of Article 2: oral traditions and expressions; performing arts; social practices, rituals and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship²⁹. It is also known as *living heritage* because mutable in the long run, depending on historical and economical aspects and it is often used as driving aspect for own development in health, education and sustainability for instance. Given its fragile nature, in a globalized world there is even more need to promote

²⁶BALDIN S., DE VIDO S.; 'Strumenti di gestione della diversità culturale dei popoli indigeni in America Latina: note sull'interculturalità', in *DPCE Online*, Vol. 39, no. 2, p. 1308.

²⁷ GOVERNMENT OF NEW ZEALAND, *NZ History to Be Taught in All Schools*, available at: <https://www.beehive.govt.nz/release/nz-history-be-taught-all-schools>, 2019.

²⁸ Adopted on October 17, 2003 in Paris, it is currently ratified by 178 countries.

²⁹ UNESCO, *2003 Convention for the Safeguarding of the Intangible Cultural Heritage*, Sixth Session Sixth session of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage 22-29 November 2011, Bali, Indonesia Media Kit, p. 6.

ICH in order to promote the uniqueness of each community and maintain cultural diversity. It is remarkable the issue reported by Macmillan about the questionability of the 2003 Convention protecting ICH against misappropriation for two reasons: the statist nature of international law and that the Convention does not constitute the per se protection for ICH; two connected elements, sincere there are no specific measures against misappropriation, but only types of access are limited³⁰. Another key aspect is the different involvement level of communities in the two compared Conventions: while they are secondary actors in the World Heritage Convention, in the 2003 agreement communities are the main ones, responsible of the transmission from generation to generation of the values and practices, adapting them in the present historical context.

State parties are not only required to establish policies, monitoring entities and promote ICH, but also to demonstrate the full involvement of communities in the nomination of elements to be registered to the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and in the elaboration of safeguarding measures. As part of the UNESCO Lists of ICH established in 2008, it gathers those cultural elements needing urgent measures for their survival, according to communities and/or countries. In 2020 about 550 elements from 127 countries are inscribed. In particular, Indigenous languages can be nominated and registered to the List only as tool of communication of a given population or group to pass down ICH. Furthermore, every six years after the ratification, States have to present a report to the 24-member Intergovernmental Committee, where all the actions taken to implement the Convention and comply with it are described. The Committee is also accountable of the Fund for the Safeguarding of the Intangible Cultural Heritage, evaluating requests of international assistance made by countries too³¹.

2.4 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression

The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression is another milestone in the international cultural policy, aiming at protecting and

³⁰ MACMILLAN F., *The Problematic Relationship between Traditional Knowledge and the Commons*, in Cultural Heritage. Scenarios 2015-2017 edited by S. PINTON and L. ZAGATO, Venice, Edizioni Ca' Foscari, 2017, pp. 667-678.

³¹ Ibid, pp. 4-5.

promoting those expressions that represent individuals and groups' identity and including for the first time the term traditional knowledge. Firstly, even if the connection between human rights and cultural identity will be discussed in the following paragraphs, here it has to be highlighted the first clause of the Article 2, the principle of respect for human rights and fundamental freedoms: Parties have to recognize internationally human rights instruments, strengthening international cooperation and dialogue to achieve the objectives of the Convention³². In the third clause of the same article it has been stipulated the recognition of equal dignity and respect for all cultures, explicitly adding '*including the cultures of persons belonging to minorities and Indigenous peoples*'³³, giving them also the right to enjoy of the positive economic aspects deriving from their properly enhanced culture in the world. In order to benefit from this, States have to adopt appropriate national policies and public financial assistance, so that peoples might independently manage promotional activities of their own culture, nationally and internationally. Moreover, this support has to come also from the educational and cultural industries, creating and/or enforcing relationships with international and local organizations, with the purpose of creating domestic cultural activities and increase public awareness.

3 2007 United Nations Declaration on the Rights of Indigenous People

The Declaration is not a legally binding instruments, but although it recognizes Indigenous peoples as the beneficiaries of those rights, it does not provide for any definition of Indigenous people and any criteria to be identified as such³⁴. According to Cobo, there are two fundamental criteria for recognizing an individual as an Indigenous person: self-identification and acceptance by the community. The importance of self-identification has been underlined by UNDRIP in its Article 33:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

³² UNESCO, *The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, p. 16

³³Ibid, p. 8.

³⁴ HENRIKSEN J.B., *Key Principles in Implementing ILO Convention No. 169*, Programme to Promote ILO Convention No. 169, 2008, p. 5.

Passed in September 2007 in the General Assembly by 143 in the affirmative against United States, Canada, Australia and New Zealand and eleven abstaining states, the United Nations Declaration on the Rights of Indigenous People is the most important achievement in the safeguarding of Indigenous peoples' cultures. New Zealand adopted the Declaration only two years later, because '*fundamentally incompatible with New Zealand's constitutional and legal arrangements, the Treaty of Waitangi, and the principle of governing for the good of all our citizens*'³⁵, arguing about rights on self-determination and on lands and resources. Before being dropped, the first objection made by New Zealand Government was about Article 3's right to secede, but it was specified by UN that secession would be possible only with specific requirements. Articles 26 and 28 were then argued: the first grants '*the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired*', objected by New Zealand because it would be required the recognition of lands now owned by other citizens; while the second one is the right to redress – or compensation when restitution is not possible – of lands, territories and resource that were '*confiscated, taken, occupied, used or damaged without their [Indigenous peoples] free, prior and informed consent*'. States must have the *free* – with no coercion, intimidation or manipulation –, *prior* – any authorization or commencement of activities has been sought sufficiently in advance –, and *informed* – provided by nature, size, pace, reversibility and purpose of the project – consent before adopting legislations or administrative policies affecting Indigenous peoples or undertaking projects affecting Indigenous peoples' land, territory and resources. It has to be undertaken through procedures determined by Indigenous peoples themselves, who have also to specify who is entitled to express consent³⁶. This went in contrast with the principle of respecting human rights and fundamental freedoms, as in the International Covenant on Civil and Political Rights and the United Nations Declaration on Human Rights – ratified by Aotearoa New Zealand – being enforceable in the domestic law³⁷.

³⁵ NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE (MFAT), Strategy for Engagement with Māori on International Treaties, available at: <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>

³⁶ PILLAY N., Free, Prior and Informed Consent of Indigenous Peoples, United Nations Human Rights, 2013.

³⁷ SOLOMON NAOMI, 'Was The New Zealand Government Justified In Voting Against The Declaration On The Rights Of Indigenous Peoples?', in *Te Kāhui Kura Māori*, Vol. 0, Issue 1, available at: <http://nzetc.victoria.ac.nz/tm/scholarly/tei-Bid001Kahu-t1-g1-t4.html>

3.1 The Interrelationship Between Individual and Collective Rights

The *actio popularis*³⁸ tension between individual and group rights has always been present in human rights legislation, adopting frequently measures that would affect a whole community by aiming at solving an individual case. This approach is also used in the jurisprudence on reparations of Inter-American Court of Human Rights (IACtHR), when other forms of reparations are needed to be determined³⁹. In this case too, the UNDRIP has distinguished itself from the previous one, since the first article, stating that: '*Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms*'. Instead of the 2003 UNESCO Convention, where there is a clear predilection to group rights by defining ICH as the practices '*that communities, groups and, in some cases, individuals recognize as part of their cultural heritage*', in the UNDRIP it has been highlighted the relevance of individual rights because of the vulnerability of individuals and the need to protect them⁴⁰. Individual cultural rights may be limited when *duly justified* and only for the time strictly necessary; limitations that could be only imposed in case of persisting threat to the survival and welfare of the community⁴¹. Even if obligations owed by States may have collective nature, the purpose here is protecting individual rights and interests, such as in Article 15 of UNDRIP, the right to have

'their cultures, traditions, histories and aspirations (...) appropriately reflected in education and public information', together with the following Article, where the '*right to right to establish their own media in their own languages and to have access to all forms of non-Indigenous media without discrimination*' shall be granted'.

This is particularly important for self-determination, the fundamental prerequisite for exercising all the other human rights: it entails the free determination of each individual's political status and pursue their economic, social and cultural development⁴². For this reason, States have the active duty to promote non-discrimination, tolerance and harmony among all the segments of society, as expressed in Article 27 of the International Covenant on Civil

³⁸ Originating from Roman law, it indicates the action to obtain remedy by a person or group in the name of collective interest.

³⁹ LIXINSKI LUCAS, *Intangible Cultural Heritage in International Law*, Oxford University Press, 2014, p. 148.

⁴⁰ Ibid, p. 147.

⁴¹ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, Springer, 2014, p. 39.

⁴² POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit., p. 53.

and Political Rights (ICCPR), and in Article 15 of the International Covenant on Economic and Social Rights (ICESCR), where the '*right of everyone to take part in cultural life*' is recognized⁴³.

3.2 Cultural Identity in International Human Rights Law

Since the end of World War II, it has been witnessed an increase in agreements in order to protect human rights and the emergence of an international human rights regime. On the other hand, lack of compliance of these agreements increased too, showing the counterproductive characteristics of human rights. It results useful to highlight the *paradox of empty promises* explained by Hafner Burton and Tsutsui when countries often use human rights agreements as shields and hiding their violating practices. The paradox they are referring to is that even if States do not respect the treaties they signed, these treaties are still useful for increasing the emergence of international human rights regimes, contributing to the empowerment of NGOs, who may exercise pressure to governments that violate human rights. In other words, there might not be compliance of the agreement, but its existence creates the necessary climate to encourage the respect of human rights⁴⁴.

It could be affirmed that most, if not all, of the rights of Indigenous peoples are culture-related, and to be effectively respected, equality principle is crucial. First of all, the right to the full enjoyment of culture, use of language and practice of religion: freedom of religion in particular – being religion an identifying characteristic of communities – is a significant tool in the preservation of ICH but at the same time a delicate issue, and precisely because it is a delicate issue, people try not to oppose it, creating specific systems circumventing the actual applicable law by basing them on exceptions and singular needs of communities. Among the fundamental freedoms mentioned above, freedom of association could also be invoked in the protection of cultural identity, as it gives to individuals the right to gathering, and consequently, rights of entire minorities are defended. Right to physical integrity is another example, which corresponds to Article 5 of IACtHR: in the case of *Moiwana Commu-*

⁴³ WIESSNER SIEGFRIED, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', in *The European Journal of International Law*, Vol. 22, No. 1, 2011, p. 132.

⁴⁴ HAFNER-BURTON E., TSUTSUI K. 'Human Rights in a Globalizing World: The Paradox of Empty Promises', in *American Journal of Sociology*, Vol. 110, No. 5, 2005, pp. 1371-1411.

*nity v. Suriname*⁴⁵ it has been stated that there could be no exemption from law for such right, having the State failed in ensuring the possession of members' traditionally owned lands, obstructing them in respecting their own burial rituals⁴⁶. The village of Moiwana claimed Suriname's failure to investigate and prosecute the responsible of the massacre happened in 1986, which resulted in the displacement of the community and the consequent psychological suffering. For this reason, the State of Suriname has been considered to have violated Article 5 of IACtHR. However, in addition to lack of a well-established framework, limitations to the application of human rights, such as the margin of appreciation of States for instance, but also equality and autonomy given to Indigenous peoples have been ascertained.

Language is a key element of ICH: it is not only a mean to pass down history and values, but also a distinctive mark in an individual's life, especially for Indigenous peoples, who should feel free to speak it whenever they desire. Measures preventing from the use of their own Indigenous mother tongue would correspond to a violation of the right to freedom of expression and to the principle of non-discrimination, as concluded also by IACtHR in the *López Álvarez v. Honduras* case for instance, when it was prohibited to a leader of Garífuna community of Honduras to speak to his partner in Garífuna native language while imprisoned⁴⁷. Mr. Alfredo López Álvarez was a member of a Honduran Garífuna community, arrested in 1997 for drug possession and illegal trafficking. The State of Honduras was found to have violated a series of Articles – no. 5, 7, 8, 13, 24, 25 of the American Convention: from the treatment reserved, to the right to a fair trial, to principles of non-discrimination and equality. The Court also awarded to Mr. López Álvarez and his partner pecuniary and non-pecuniary damages for lost incomes and expenses during the absence of the accused⁴⁸.

Having the duty to preserve all aspects of minorities' cultures, States have to deal with economic costs and political issues too, by sustaining programmes aiming at improving

⁴⁵ In November 1986, armed forces of Suriname attacked the N'djuka Maroon village of Moiwana, killings 40 of its inhabitants and burning its properties. Suriname was found to have violated several Articles of the IACtHR, namely: Art. 1 Obligation of Non-Discrimination; Art. 5 Right to Humane Treatment; Art. 8 Right to Fair Trial; Art. 21 Right to Property; Art. 22 Freedom of Movement and Residence; Art. 25 Right to Judicial Protection. Furthermore, there allegedly had not been an adequate investigation of the massacre, which led to the displacement of Moiwana members from their ancestral lands. Suriname was ordered to comply with pecuniary and non-pecuniary damages stated by the Court.

⁴⁶ LIXINSKI LUCAS, *Intangible Cultural Heritage in International Law*, cit., p. 169.

⁴⁷ *Ibid*, p. 162.

⁴⁸ Case summary available here:

https://iachr.ils.edu/sites/default/files/iachr/Cases/Lopez_alvarez_v_Honduras/Lopez%20Alvarez%20v.%20Honduras.pdf

awareness about local Indigenous language. In New Zealand, Māori language petition in 1972 gave origin to the major part of still existing Māori language recovery programmes: *Te Wiki o Te Reo Māori* – Māori Language Week – for instance, celebrating Māori language on September 14th and the first Māori language radio station on 1983, but the education system was the main target. At Rūātoki opened the first official bilingual school in 1978, while nowadays courses on Māori and Indigenous Studies have been held in Waikato and Auckland Universities, together with arranged private and online Te Reo Māori courses. In particular, more and more youngsters have been trying to transmit to their children or through social media their own knowledge of Māori language, increasing awareness not only at national level, but also worldwide, recalling the interest of those New Zealanders far from their homeland. In 1985 the Waitangi Tribunal stated that *Te Reo Māori* was a *taonga*, and for this reason the British Crown has the duty to protect it under the Treaty of Waitangi, but Māori was made an official language of New Zealand only in 1987, under the Māori Language Act 1987⁴⁹.

The right to a private and family life is particularly well-established under the law of the Council of Europe, represented by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The European Social Charter also stated that the State has to guarantee social, economic and political protection without interfering with one's private life, unless it is in accordance with the law or for public safety. However, although the European Convention is one of the most innovative international instruments, Indigenous peoples are not mentioned at all. On the other hand, Article 21 of the American Convention on Human Rights⁵⁰ has a relevant influence in guaranteeing the right to territorial property and the enjoyment of its resources. Indeed, the right to a private and family life should also concern environmental protection: Indigenous peoples have a deep relationship with their own lands and surrounding natural resources, often linking them to Gods and because their populations have lived those lands for thousands of years, they have the proper knowledge to be the guardians of those territories. It is not unknown that Indigenous lands are frequently appropriated by governments and sold to private companies without the full and prior consent of communities, cutting them off their way of life, often vital for their survival⁵¹. Moreover, most of the claims presented to the New Zea-

⁴⁹ BALLARA ANGELA, *Te Wiki o Te Reo Māori - Māori Language Week Page 2 – History of the Māori Language*, available at: <https://nzhistory.govt.nz/culture/maori-language-week/history-of-the-maori-language>

⁵⁰ Also known as the Pact of San José, the American Convention on Human Rights was adopted in November 1969 by its 23 members, and entered into force on July 18, 1978, with 11 ratifications.

⁵¹ AMNESTY INTERNATIONAL, *Indigenous Peoples*, available at: <https://www.amnesty.org/en/what-we-do/Indigenous-peoples/>

land Waitangi Tribunal were about abuse of land as consequence of the Treaty of Waitangi between the Crown and the Māori people, which made Aotearoa-New Zealand a British colony in 1840.

The same right may also consider the way of life in relation to other people or the way of life of a community, giving a more collective dimension to a typical individual right. The concept of family of Indigenous people does not encompass the Westernized one: instead of two parent and their children, Indigenous family may be much larger, comprehending multiple generations and even non-blood related people or even entire tribes, that could be represented by the term 'extended family', *whānau* in Te Reo Māori. This family structure has a pivotal role in the survival of their cultural identity by strengthening the feeling of belonging among the members, both spiritually and culturally.

In conclusion, it might be said that Indigenous peoples are recognized at the international level, especially thanks to the intervention of international organizations, such as the UNESCO and its several established Conventions, but it is mainly up to States to create the conditions for a respectful debate between native populations and the most recent citizens and governments, having Indigenous peoples the knowledge to correctly manage the territories they have been living for centuries and the resources there safeguarded.

As written by Wiessner:

'The traditional dichotomy of individual and collective rights, with a wary eye on the latter, needs to be overcome to ensure the cultural survival of threatened and vanishing communities and traditions. In its place, an order of human dignity with specific functional rules needs to be established which works to allow Indigenous peoples to survive and to flourish⁵²'

If on the one hand, human rights may be applied for this purpose, on the other hand, they may be an obstacle/a limitation in the protection of cultural heritage, when debate is not held properly, making Indigenous peoples feel forced in abandoning some of their practices in order to obtain international aid and recognition⁵³.

⁵² WIESSNER SIEGFRIED, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', in *The European Journal of International Law*, Vol. 22, No. 1, 2011, p. 139.

⁵³ LIXINSKI LUCAS, *Intangible Cultural Heritage in International Law*, cit., p. 173.

Chapter 2

Intellectual Property and Cultural Heritage

E koekoe te tūi, e ketekete te kākā, e kūkū te kererū.

TE TŪI CHATTERS, THE PARROT GABBLES, THE WOOD PIGEON COOS.

Intellectual property rights shall be generally promoted and protected with the purpose of creating an environment in which creativity and invention may flourish, encouraging the commitment of additional resources and make economy grow by creating new industries and jobs, with a consequent enhancement of quality of life. They are also fundamental in the preservation of Indigenous traditional knowledge, and in this chapter the categories of IPR and the most relevant international tools and agreements would be outlined by illustrating their specific role in the conservation of Indigenous cultural heritage.

1 Intellectual Property Rights

Finding its origins in Britain in the 16th and 17th century with the establishment of the 1624 Statute of Monopolies and the 1710 Statute of Anne, which established first British patent and copyright law respectively, intellectual property rights developed as mechanisms in order to protect industrial inventions and individual intellect. The first known use of this specific term dates back to 1769 in a *Monthly Review* article, but the meaning of intellectual property was slightly different from the actual common one: while nowadays it is represented by copyrights, trademarks and patents, until 19th century intellectual property was more identified as the knowledge of a determined population, especially through literary and art works⁵⁴. Moreover, there have been some difficulties when the intangible origin of the term has been compared to concrete elements of property, such as lands and goods, but it is thanks to the 1883 Paris Convention for the Protection of Intellectual Prop-

⁵⁴ BANNER STUART, *American Property: A History of How, Why and What We Own*, Harvard University Press, 2011, p.23.

erty and the 1886 Berne Convention for the Protection of Literary and Artistic Works firstly identify the significance of intellectual property worldwide, both managed by the World Intellectual Property Organization (WIPO). Concluded in 1883 but revised six times between 1900 and 1967, and then amended in 1979, the substantive provisions of the Paris Convention fall into three main categories: national treatment – guaranteeing the same protection to nationals of other Contracting States –; right of priority over applications presented by others of the same invention in that period in any other Contracting State –; and common rules, such as for unfair competition and indications of source for instance. Together with it, Berne Convention contributed to the creation of WIPO, who replaced the two International Bureaus united in 1893. It is the specialized United Nations agency established in 1970, aiming at the worldwide protection of the rights of creators and owners of intellectual property rights. A forum for member states has been also provided by the organization in order to harmonize and create rules and practices for the safeguarding of IPRs. The Berne Convention is based on three main principles: (i) national treatment: works originating in one of the Contracting States must be given the same protection in each of the other Contracting States; (ii) automatic protection: protection must not be conditional upon compliance with any formality; (iii) independence of protection: protection is independent of the existence of protection in the country of origin of the work. In this Convention also moral rights are provided.

If enterprises are given the right to protect their inventions, then should Indigenous peoples have the same right too, being often the main source of knowledge of these inventions: Article 27 of the Universal Declaration of Human Rights, which '*provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic production*'⁵⁵, may be combined with Article 31 of UNDRIP, which recognizes the right of Indigenous people '*to maintain, control, protect and develop their intellectual property (...), traditional knowledge and traditional cultural expressions*'⁵⁶, highlighting the duty of States to take the needed and effective measures to recognize and protect these rights. However, the Declaration of Belém - the product of the First International Congress of Ethnobiology⁵⁷ - was the first international organization to recognize the obliga-

⁵⁵ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *What Is Intellectual Property?*, WIPO Publication No. 450E, p. 3.

⁵⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Protect and Promote Your Culture. A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*, 2017, p. 10.

⁵⁷ Began in 1988 in Belém, Brazil, the First International Congress of Ethnobiology was held, where various Indigenous communities coming from all the continents, scientists and environmentalists had the opportunity to discuss the best strategy to adopt in order to safeguard communities and their uniqueness in the use and

tion of compensation to natives for their traditional knowledge and their resources⁵⁸. As result of the Declaration, the Global Coalition for Bio-Cultural Diversity was established and one of its first tasks was the creation of a Working Group on Intellectual Property Rights, now called Working Group on Traditional Intellectual, Cultural and Scientific Resource Rights.

Intellectual property concept from an Indigenous point of view differs further from the ones previously cited: Western society usually separate tangible and intangible property⁵⁹, which in turn distinguishes itself in cultural and intellectual property, while native peoples do not make this distinction, believing instead that the two spheres are strictly connected, and one influences the other. Furthermore, Indigenous societies take more into account the collective benefit that can derive from their knowledge, especially for future generations: in fact, it is often not possible to determine the ownership of knowledge or the creator of a work, because it is more likely that more generations have cooperated in the creation of that work or specific knowledge, making it owned even by a whole tribe or family, who usually share them with their own community. Consequently, it is not also possible to establish a precise period of protection, provided by most intellectual property rights⁶⁰.

1.1 Categories of Intellectual Property Rights

Intellectual property rights are defined as *'the rights given to persons over the creations of their minds (giving) the creator an exclusive right over the use of his/her creation for a certain period of time'* and mainly divided in two groups: copyrights and rights related to copyrights; and industrial property rights, which are subdivided in trademarks and geographical indications, and patents, trade secrets and industrial designs⁶¹. They differ not

management of natural resources.

⁵⁸ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit., p. 1-2.

⁵⁹ Western concept of society also focuses on so-called *income rights*: *'the economic and commercial potential of assets'* (Lea D., 2008, p. 169).

⁶⁰ LILLEY SPENCER, *Indigenous Intellectual and Cultural Property Rights*, Presented at the 8th Asia-Pacific Specials, Health and Law Librarians Conference 22-26 August 1999 Hobart, Tasmania, Massey University Library, p. 2.

⁶¹ WORLD TRADE ORGANIZATION, *What Are Intellectual Property Rights?*, available at: https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm

only in the time-limit protection, in subject, conditions and requirements for their protection, but they also depend on the several and different domestic and/or regional laws.

1.1.1 Copyright

Copyrights cover a variety of literary and artistic works in the literary, scientific and artistic domain summarized in Article 2 of the Berne Convention: from books, to musical compositions, photography, sculptures, translations, choreographic and cinematographic works and many more. However, the list is considered not to be exhaustive, given the fact that national laws may protect other forms of expression of these works, as computer programs⁶² for example, protected under the 1996 WIPO Copyright Treaty (WCT) too, which entered into force in 2002 and recognizes to computer programs and databases the right of distribution, right of rental and a broader right of communication to public. Contracting Parties have to adopt those necessary measures to avoid the circumvention of technological measures and to ensure the application of the treaty.

Both economic and moral rights are involved: economic rights grant a financial remuneration from the use of that work to its owner, who may approve or prohibit the distribution, reproduction, broadcasting, adaption, translation and public performance. Economic rights could also be transferred to individuals or companies able to manage them, expecting royalties in return: with an assignment, the property of the copyright is assigned to a new owner, but in those nations, where only licensing is allowed, a third party is authorized to finalize those actions listed here above for a specific period of time or purpose. Moral rights instead, would remain with authors and creators even if economic rights have been transferred and they are represented by the right of paternity – the right to claim authorship of a work – and the right to integrity – which allows to take action whether honor and reputation of the author are distorted – included in Article 6bis of Berne Convention. Moral rights are also potentially useful in TCEs context, being a means to ensure respect and safeguard authenticity of TCEs and avoid offenses and misrepresentations, as happened in occasion of Olympic Games in Sydney in 2000. In this case, in the website of the Olympic Museum had been posted artwork of Australian Aborigines available for being downloaded as wallpapers, without artists' permission. In compliance with the agreement, artists received a monetary compensation as infringement and a letter of apology for cultural harm by the

⁶² A set of instructions that controls the operations of a computer to enable it to perform a specific task, such as the storage and retrieval of information.

President of the Olympic Museum Foundation. Three years later, Australian Government founded the Indigenous Communal Moral Rights (ICMR) Bill, which entitles Indigenous peoples to '*take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material*' by giving them '*legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom*'⁶³.

In Article 9 of the Berne Convention it is stated a category of exceptions to copyright protection, allowing free use of reproduction – which differs from *non-voluntary or compulsory licenses* that requires compensation be paid to the right owner for non-authorized exploitation – in specific cases, such as quoting, for teaching purposes or news reporting. Contrarily, unauthorized copying for commercial purposes of copyright material is defined as 'piracy' and, as clandestine activity, gains are no subject to taxation, but the quality cannot be compared to original works. Remedies to piracy mainly consist in civil redress to compensate the damage caused to the copyright owner, but some laws also provide for fines or imprisonment. The Anton Piller order is an important arm against piracy: it is an order permitting inspections of premises in case of alleged copyright infringement, named after the case Anton Piller K.G. v. Manufacturing Processes Ltd of 1976, dealing with theft of trade secrets. Applied also in New Zealand, it results efficient against piracy because: (i) granted on an *ex parte* basis, meaning that the defendant is taken by surprise, avoiding evidence to be destroyed; (ii) it allows the copyright owner to inspect premises of the defendant and the documents related to the alleged infringement; and (iii) an injunction accompanies the order of inspection to avoid the alteration or removal of documents reported in the order⁶⁴. In common-law jurisdiction in particular, in cases of infringement, perpetual injunction is often adopted as remedy to prevent any repetition of the infringing act, together with damages.

Another limitation is represented by the intangible nature of some works, being the reason for not recognizing those works at national level, unless they are not 'fixed in a tangible form'. This is typical of Common Law countries and results in a not effective protection of intangible cultural heritage through IPR, as often considered part of daily life of communities and not documented. On the other hand, Civil Law countries are based on the *droit d'auteur* system, focusing more on the rights of the copyright owner and not requiring the tangibility of the work. Usually transmitted orally, through copyrights it is complicated to de-

⁶³ TORSEN M., ANDERSON J., *Intellectual Property and the Safeguarding of Traditional Cultures. Legal Issues and Practical Options for Museums, Libraries and Archives*, World Intellectual Property Organization, 2010, pp. 39-40.

⁶⁴ WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO *Intellectual Property Handbook*, 2008, pp. 53-54.

termine who the right holders are, and they do not allow melodic themes to develop, it rather makes it illegal⁶⁵.

Limitation may come also from the level of access to protected works by disabled people: that is why the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled was adopted by WIPO in 2013, whose member States have to establish the necessary limitations and exceptions in order to develop and spread published works in formats accessible to disabled people⁶⁶. Recent digital technology may support this aim, but it has also the skill to recreate perfect copies of protected works.

Protection under copyright lasts from the creation of the work – or when it is fixed in a tangible form – until not less than 50 years after the owner's death before becoming public domain, as stated by the Berne Convention, as known as 'life+fifty' term of protection. In some countries, the duration of the copyright may reach 70 years after author's death – in Mexico for instance, from 75 to 100 years –, so that the descendants have an economic return too. Resale rights indeed – guaranteed in Article 14 of Berne Convention –, allow an artist or his/her heirs to receive royalties when the artwork is resold by art-market professionals, such as auctioneers and art dealers. Usually limited to graphic or plastic art, these rights were first introduced in France in 1920, while European Union waited the following century to issue a dedicated directive. These percentages could also help those Indigenous artists and their communities in case of difficult economic conditions: it is not rare that traditional works are sold for thousands of dollars, while their artists suffer from poverty and often unaware of it⁶⁷. Copyrights recognize authorship, but traditional cultural expressions are often renamed works of 'unknown authors' due to the fact they used to be documented by non-indigenous people for their own studies, noting down only few individuals' names or pseudonyms. It happens more often to identify the region or community of that TCE from the used material or specific details, instead of the individual author, but this does not happen in case of 'orphan works'. In Canada for instance, it has been adopted a legislation creating a compulsory licensing scheme (that allows) the use of published works to be issued by the national copyright authority on behalf of non-locatable copyright owners⁶⁸.

⁶⁵ LIXINSKI LUCAS, *Intangible Cultural Heritage in International Law*, cit., pp. 182-186.

⁶⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Understanding Copyright and Related Rights*, 2016, p.18.

⁶⁷ TORSÉN M., ANDERSON J., *Intellectual Property and the Safeguarding of Traditional Cultures. Legal Issues and Practical Options for Museums, Libraries and Archives*, cit., p. 41.

⁶⁸ Ibid, pp. 34-36.

1.1.2 Trademarks and Geographical Indications

In the first subcategory of industrial property rights, distinctive signs are protected, with the purpose of not only promoting fair competition, but also helping consumers in making conscious choices among different goods and services.

The origins of trademarks could be led back to the habit of craftsmen putting their 'mark' on their products, while nowadays this signature guarantee the exclusive right to authorize third parties to use this sign, expecting a payment in return. This identification sign may be recognized by a specific combination of numbers, letters, symbols and so on that distinguish it from the others – the first trademark registered in the United Kingdom was red triangle in 1876 –, and there is no limitation in the period of protection, being always possible to renew trademarks by paying the corresponding fees. Trademark owner has to particularly pay attention to the risk of transforming the mark into a generic term – because maybe the only product in that specific sector – and liable for removal from the register, and improper use by other people. That is why a designation should always be added to the trademark, avoiding articles, plurals and the possessive 's'⁶⁹. Collective and certification marks are also provided: while the first are used to identify products adhering to determined requirements of an association – useful also when there are more than one individual handcrafts and native crops manufacturers within a single community, being able to reduce costs for trademark⁷⁰ -, the others are not linked to any membership but comply with given standards. In other words, while collective marks may be used only by determined companies or members of associations owning the collective mark, certification marks may be used by anyone complying with the standards⁷¹. The Madrid Agreement Concerning the International Registration of Marks and the Madrid Protocol are those agreements supporting WIPO in the administration of the international registration system for trademarks⁷². In case of failure of renewal, the trademark would be removed from the register, but the owner may renounce to the registration at any time; in case of failure to use instead, the owner may also ask for the cancellation of the trademark, losing the rights granted from it. A trademark can also be considered null and void when it consists of signs that should not have been

⁶⁹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO *Intellectual Property Handbook*, cit., p. 79.

⁷⁰ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Protect and Promote Your Culture. A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*, cit., p. 42.

⁷¹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO *Intellectual Property Handbook*, cit., p. 69.

⁷² WORLD INTELLECTUAL PROPERTY ORGANIZATION, *What Is Intellectual Property?*, WIPO Publication No. 450E, pp. 9-11.

registered, with the consequent removal from the register⁷³. Threats may come from infringements too, such as piracy – registration or use of a foreign trademark not registered or invalid in the country –, counterfeiting – economic crime that consists in the imitation of a product – and imitations of labels and packaging, for which rapid and far-reaching measures are needed, including severe sanctions and empower authorities to increase controls at the borders⁷⁴. Licensing could be a solution, especially when trademarks of foreign companies are used by local businesses or it is common in agreements among partners of developed as licensors and developing countries as licensee, involving also patents, know-how and types of intellectual property.

The world-leading initiative for Indigenous peoples is New Zealand *Toi Iho* mark, a registered and globally recognized mark of quality and authenticity of Māori art and artists. It includes *toi iho* Māori Made, *toi iho* Mainly Māori made, *toi iho* Māori Co-production and *toi iho* Licensed Stockist, but even if first suggestions occurred in the first half of the 20th century, it was not created until 2002 when the Government developed a Cultural Recovery Package through Creative New Zealand agency. At that time, many Māori identified *toi iho* as the only available and legally effective option they had to safeguard authentic Māori art⁷⁵.

Geographical indications instead, ensure to consumers the place of origin and specific characteristics of a product – in which traditional knowledge and traditional cultural expression could be included⁷⁶ –, usually referring to agricultural products because of the peculiar geographical environment in which they are produced, and the quality deriving from there. For this reason, they are strictly related to those laws in protection of consumers and certification marks against unfair competition, being exposed to misappropriation, counterfeiting or forgery. Some TCE may be included in those goods protected by geographical indications, as handicrafts from natural resources, but others as Indigenous names or signs may themselves be geographical indications⁷⁷. While it is not contained in the Paris Convention, the term ‘geographical indications’ has been chosen from WIPO to describe the

⁷³ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Intellectual Property Handbook*, cit., p. 83.

⁷⁴ *Ibid*, pp. 90-91.

⁷⁵ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., pp. 111-118.

⁷⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Protect and Promote Your Culture. A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*, cit., p. 50.

⁷⁷ TORSEN M., ANDERSON J., *Intellectual Property and the Safeguarding of Traditional Cultures. Legal Issues and Practical Options for Museums, Libraries and Archives*, cit., p. 59.

subject of a new treaty to protect internationally names and symbols indicating a geographical origin a determined product⁷⁸. WIPO indeed, administers three treaties providing protection to geographical indications: the Paris Convention for the Protection of Industrial Property, the Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration. Paris Convention uses 'indications of source' instead, whose provisions are stated in Article 10(1) and applies Article 9 sanction in case of false indications of source. Madrid Agreement's purpose is to suppress deceptive indications of source too, seizing their importation in any member states. In addition to these applicable sanctions, Lisbon Agreement provide for the application of national legislation – Article 8 – and other penal or administrative measures⁷⁹. The Geneva Act entered into force in February 2020, updated the existing Lisbon Agreement by providing protection to both appellations of origins and geographical indications in multiple jurisdictions through filing a single application and paying only one set of fees⁸⁰. As suggested by its name, it was used to safeguard only appellations of origins, which are more stringent than geographical indications, and used when there is a stronger link between the place and the product given by climate or traditional methods for instance. Section 3 of the second part of TRIP Agreement is dedicated to geographical indications, mainly in Article 22 preventing from the use of goods indicating a different origin than the true place and unfair competition. Article 23 refers specifically to wines and spirits, for which it is reserved an additional protection, while Article 24 states three exceptions to Article 22 and 23's commitments in relation to World Trade Organization members, namely continued and similar use of geographical indications for wines and spirits, prior good faith trademark rights, and generic designations⁸¹. Geographical indications last for as long as the tradition exists and they are suitable to communities because they may be based on collective decision-making processes and tradition, and because they are not freely transferable, cannot be taken away from the community⁸².

⁷⁸ WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO *Intellectual Property Handbook*, cit., p. 121.

⁷⁹ Ibid, pp. 125-128.

⁸⁰ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Main Provisions and Benefits of the Geneva Act of the Lisbon Agreement (2015)*, 2018.

⁸¹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO *Intellectual Property Handbook*, cit., p. 130.

⁸² LIXINSKI LUCAS, *Intangible Cultural Heritage in International Law*, cit., p. 193.

1.1.3 Patens, Industrial Designs and Trade Secrets

Patents, Industrial Designs and Trade Secrets are included in the second subcategory, where the first, as incentives to recognize one's cleverness, assure for up to 20 years the exclusive right over a new solution to a problem, or a new product or process that present a new way of doing something. The invention cannot be used or sold without patent owner's permission or license, who has the duty to publish information about his creation, which would enter into public domain when patent right expires. The owner is also responsible for the detection of infringement and evaluate if offering a license or prefer legal action, which would usually lead to civil sanctions – award of damages, injunction, destruction of the infringing product or the tools used. Infringement may arise in three cases – deliberately without or without trying to avoid the infringement and accidentally – and these elements have to be proved: the carrying out of a prohibited act, which must have been done the publication of patent application, in the country where the patent is granted. However, there are few exceptions to be considered, such as using the patented product for scientific research, patent's owner authorization or license⁸³. For being granted, a patent must have an element of novelty and an inventive step, whose examination would have been carried out by the competent national or regional office⁸⁴. Three historically significant steps have marked the evolution of patents: *privileges*, used between the 15th and the 18th century; *national patents* from 1790 to 1883; and the *internationalization of patens* with the enter into force of Paris Convention. The term patent indeed comes from royal 'letters patent' – as known as *literae patentes* – issuing special rights accorded by sovereign to determined people, excluding them from taxation for instance. The first to use these kinds of privileges was the Republic of Venice in 1474, called 'Parte Veneziana'⁸⁵. An innovative step has been taken by WIPO with the establishment of the Patent Cooperation Treaty (PCT), which implements the registration of a single international patent application, having the same effects of national ones. Three criteria make a work patentable: novelty, inventive step and industrial application. While the last two refer to its non-obviousness and its utility and conformity to the field of technology respectively, for being new, the work shall be recent and original, so it does not fall in prior art. Prior art is defined in Regulation 33.1 of the Patent Cooperation Treaty as:

⁸³ Ibid, pp. 29-33.

⁸⁴ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *What Is Intellectual Property?*, cit., pp. 4-7.

⁸⁵ P. MARETT, *Intellectual Property Law*, London, Sweet & Maxwell Limited, 1996, p. 7

everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e. that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date.

Prior art is recognizable through a description in a published writing, in spoken words or through its use and it is supposed to encompass all the aspects of knowledge, both tangible and intangible ones⁸⁶. In Article 27 of the TRIPS Agreement fields of technology that may be excluded from patentability are listed, in particular:

- *'discoveries of materials or substances already existing in nature;*
- *scientific theories or mathematical methods;*
- *plants and animals other than microorganisms, and essentially biological processes for the production of plants and animals, other than non-biological and microbiological processes;*
- *schemes, rules or methods, such as those for doing business, performing purely mental acts or playing games;*
- *methods of treatment for human or animals, or diagnostic methods practiced on human or animals (but not products for use in such methods).'⁸⁷*

For being patentable, inventions must also have practical purposes, making possible the creation of the products or its components, or use in practice in case of a process. Specifically, WIPO makes a distinction between 'applicability' and 'industrial applicability': while the first reflects the practical possibility of manufacturing, the last is the one of carrying out an invention by technical means on a certain scale. Dutfield presented four different reasons demonstrating that patents would not be the proper solution for the protection of traditional knowledge: patents not only are expensive and require to write their specifications adopting a technical language, that would be difficult to replicate by Indigenous peoples; but they also base themselves on newness and discovery, not on tradition – transmitted from generation to generation, without time limits –; and lastly, patents are individual achievements, while TK is a collective value⁸⁸.

On the other hand, Industrial Design focuses on the aesthetic feature and visual appeal is what influence the final decision of consumers in preferring a product over another

⁸⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Intellectual Property Handbook, cit.*, p. 19.

⁸⁷ *Ibid*, p. 18.

⁸⁸ DUTFIELD G., *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, Earthscan, 2004, pp. 104-105.

and has to comply with originality and non-functionality requirements. Indeed, it is applied to several categories of leisure and luxury goods with the aim of avoiding unauthorized imitations and copies for up to 15 years and guaranteeing a fair return. The first law for the protection of industrial designs in the United Kingdom was the Designing and Printing of Linens, Cotton, Calicoes and Muslins Act of 1787, which protected for two months *'every person who shall invent, design and print (...), and become the Proprietor any new and original pattern for printing Linens, Cottons, Calicoes and Muslins'*. From the textile sector, with the growing level of industrialization it was possible to achieve a major consolidation through the Designs Act 1842, which expanded protection to any design of any substance – artificial or natural –, shape or configuration and by any means⁸⁹. Thanks to the Hague Agreement Concerning the International Registration of Industrial Design 1925, industrial designs are no more limited to the country in which they are protected, but it has been possible to establish a procedure with a single application through WIPO, effective in all the member States and minimum formalities⁹⁰. The Agreement was revised five times between 1934 and 1979, and a further Act was adopted in Geneva in 1999, which seems to be the most advantageous and Contracting Parties are encouraged to join. Nowadays, the use of computers for new designs is more frequent, arising the question if the computer has to be considered like any other tool and the person the right owner. In this respect, Section 214 of the British Copyright, Design and Patents Act 1988 stated that *'in case of a computer-generated design the person by whom the arrangements necessary for the creation of the design are undertaken shall be taken to be the designer'*⁹¹.

Whenever patents or trademarks are not applicable, trade secrets have to be used when protection of confidential information is needed, such as technical know-how and knowledge resulting from talent and experience. Their secrecy mainly relies on their own holders, but it has also to be commercially valuable and known by few persons if industrial and commercial espionage wants to be avoided. A first category is related to information that may be object of patentability and have a technical character – production methods, formulae or prototypes –, but also commercial secrets have to be considered, as sales and distribution methods, advertising strategies, price agreements, list of suppliers and customers. There is always the risk of breaching contract or confidence, which in most of the

⁸⁹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Intellectual Property Handbook*, cit., pp. 112-113.

⁹⁰ DUTFIELD G., *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, cit., pp. 12-14.

⁹¹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Intellectual Property Handbook*, cit., p. 116.

cases would lead to the loss of protection, but if someone discover the secret information independently, the use of that information would not be considered as misappropriation⁹². Some countries include violation of trade secrets in unfair competition law or other specific legislations, while other treat this violation as an aspect of tort law and it may constitute a criminal offense. It is not rare to see a combination of civil and penal sanctions, but it has to be taken into account the circumstances: when intimidation has been applied to employees or they have been induced to violate the secrecy, only civil tort law is applicable⁹³.

1.1.4 Plant Variety Rights

IPR for plant varieties are a powerfully debated issue, significantly in the context of developing countries, wherever agriculture is still the main supply of sustenance for many communities. At the center of this debate there is the question of access to biological and generic resources and the control over them by individuals or private companies: even if plant breeders' IPR are granted and it would stimulate private investment – so that farmers would use new varieties based on their own methods –, on the other hand, arguments about sustainable use, food and nutrition and human rights were raised. The never implemented Papal States Edict of 3 September 1833 was the first legislative proposal concerning declarations of ownership of new inventions and discoveries in the fields of the technological arts and agriculture, but it had to be waited for three decades before the foundation of a plant breeding industry, with the publication of Mendel studies on heredity. Contrarily to the consideration of being premature to include the subject of plant varieties within the Paris Convention in 1955, in the first few years of the 20th century innovations in the agricultural field were first included in an intellectual property statute: the US Plant Patents Act of 1930, which constituted a *sui generi* system⁹⁴ able to confine protection to asexually reproduced plants and exclude tubers in order to avoid monopolies on such basic foods⁹⁵. The 1930 Act was foreshadowed by the 1906 'Bill to amend the laws of patents in the in-

⁹² DUTFIELD G., *Intellectual Property, Biogenetic Resources and Traditional Knowledge*, Earthscan, 2004, pp. 60-62.

⁹³ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Intellectual Property Handbook, 2008*, p. 150.

⁹⁴ Literally: of its/his/her/their own kind, in a class by itself. A system adapted to a specific subject. If on the one hand, with this system, solutions would overcome objections, on the other hand it results to be expensive, needing the implementation of additional supervisory bodies (Lixinski, 2014, p. 122).

⁹⁵ THIPPESWAMY S., "Plant variety protection: an historical perspective", in *International Journal of Development Research*, 7, (11), 2017, pp. 16839-16840.

terest of the originators of horticultural products’, which resulted unsuccessful and was later replaced by analogous Acts in 1907, 1908 and 1910.

First suggestions from Europe came from France with a Decree establishing a Register for Newly-bred plants in 1922, similar to the seed certification system adopted in the Netherlands 10 years later. It was a Ministerial decree providing important information for farmers on the innovative characteristics of the varieties and their agronomic values, based on official tests by the *Institute National Recherche Agronomique*. The – non-compulsory - registration of a variety lasted for six years, but it was renewable and it gave to the applicant the exclusive use of variety denomination and exclusive ability to put ‘seeds registered within the register of selected plants’ on the seeds⁹⁶. Then, the precursors of the International Union for the Protection of New Varieties of Plants (UPOV) were the Czech law on the Originality of types, seeds and seedlings and the Testing of Horticultural Types of 1921, and the German one on the Protection of Varieties and the Seeds of Cultivated Plant of 1953. UPOV was adopted in 1961 during the second session of the Paris Conference and later revised in 1972 with only 12 State members. The reluctance was given in particular to the obligation to choose between patent or UPOV protection, not both. With 1991 revision, for becoming a member, States were required to protect at least 15 plant species. Furthermore, it was given the right to breeders – who bred or discover and developed a variety – to use protected varieties to create new ones, recognizing that also discovered varieties should be protected⁹⁷.

New Zealand is an UPOV member since 1981, having about 1.300 varieties under grant as June 2020, 87 new applications filed in 2019/2020 and about 350 under test⁹⁸.

For being granted, PVR have to determine their distinctness – clearly distinguishable from any other existing –, uniformity – sufficiently uniform in a range of key characteristics – and stability – true reproduction from one generation to the other. With the exceptions of trees, vines and potatoes, which are protected for 30 years, PVR are usually granted for 25 years⁹⁹. Together with these requirements, they have to conform with the guidelines given by UPOV for the denomination of varieties, such as not consisting solely of figures – of only

⁹⁶ LOUWAARS, BURGARD, *Variety registration: The Evolution of Registration Systems With a Special Emphasis on Agro-Biodiversity Conservation*; HALEWOOD, *Farmers' Crop Varieties and Farmers' Rights: Challenges in Taxonomy and Law*, Routledge, 2016, pp. 187-188.

⁹⁷ THIPPESWAMY S., *Plant variety protection: an historical perspective*, cit., pp. 16841-16842.

⁹⁸ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Plant Variety Rights Infographic 2020*, available at: <https://www.iponz.govt.nz/assets/Uploads/iponz-plant-variety-rights-infographic-2020.pdf>.

⁹⁹ PLANT VARIETY RIGHTS, *Plant Variety Rights*, available at: <https://www.plantvarietyrights.org/plant-variety-rights.html>.

numbers –, refers to specific characteristic that in reality it does not possess, making a phonetic difference when needed, and not containing comparisons and/or superlatives¹⁰⁰.

2 The Relevance of International Agreements

Together with the World Heritage Convention, the ICESCR, the ICCPR and the GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are among the most relevant legally binding international agreements for the safeguarding of Indigenous intellectual property rights that would be outlined. In particular, the principles contained in Article 12 of both Covenants – free disposition ‘*of natural wealth and resources*’ (basing on the) *mutual benefit*’ – and in Article 15 of ICESCR – right of ‘*protection of moral and material interests*’ – demonstrated to be the main instruments dealing with human rights, supporting international law in giving the right to Indigenous peoples to benefit from their own resources and knowledge¹⁰¹.

2.1 GATT Agreement on Trade-Related Aspects of Intellectual Property Rights

At the request of United States, IPR were included in GATT¹⁰² negotiations, formulating the TRIPS¹⁰³ section – entered into force in 1995 with the establishment of the World Trade Organization – in order to guarantee a minimum level of protection to IPR, increase awareness of their importance in international trade, so that developing countries too could export to industrialized countries’ markets and create dispute-settlement mechanisms. The significance of TRIPS Agreement is not limited to the establishment of the World Trade Organization (WTO), but it also provides the most extensive global regulation of IP rights. Contrarily to the Convention on Biological Diversity that aims at ensuring the rights of Indigenous peoples and preserving biological diversity, TRIPS’ preamble defines IPR as pri-

¹⁰⁰ INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS, *Explanatory Notes on Variety Denominations Under the UPOV Convention*, 2012.

¹⁰¹ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit., p. 111.

¹⁰² The General Agreement on Tariffs and Trade was signed by 23 countries in Geneva on October 30, 1947, effective until the establishment of the World Trade Organization in 1995.

¹⁰³ The Agreement on Trade-Related Aspects of Intellectual Property Rights is an international agreement signed by all 164 WTO member countries in April 1994 and entered into force in January 1995.

vate rights and focuses on the allowance of biological patentability. Among the 73 Articles divided into seven parts, no. 27 (3b) has been argued, considered a threat to communities and their customs because it excludes from patentability

'plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than nonbiological and microbiological processes'.

There have been several interpretations of this Article due to its vague language, using 'may' and not making a clear distinction among plants, animals and microorganisms. This is viewed as an imposition contrary to centuries-old traditions of communities based on sharing innovation in favor of a system that should protect plant genetic resources by limiting its access. This may seem the optimal solution, especially for those endangered varieties of plants and animals, but it is opposite to Indigenous customs, who can only call for State intervention and prohibit multinational companies – pharmaceutical ones in particular – from patenting what they found on their own lands¹⁰⁴.

Nonetheless, developing countries expressed their preference in favor of WIPO, retaining it a more suitable framework for IP-related matters, that was further confirmed because of the strict agenda of the Uruguay Round and the strong influence of developed countries.

2.2 The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

The Rome Convention established in 1961 was the first international response to the need of securing legal protection to three categories: performers – actors singers, musicians, dancers and those who perform literary or artistic works –; producers of phonograms, where *phonograms* means '*any exclusively aural fixation of sounds of a performance or of other sounds*'; and broadcasting organizations, who may authorize or prohibit acts as rebroadcasting and fixation¹⁰⁵. Thanks to this Convention, so-called *neighboring rights* – or related rights – were provided in response to those technological developments able to disseminate artistic works and make copyright law fail. These rights protect from broadcasting or communication to the public of a "live" performance, recording an unfixed

¹⁰⁴ Ibid, pp.102-103.

¹⁰⁵ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Summaries of Conventions, Treaties and Agreements Administered by WIPO*, 2013, p. 41.

performance, reproducing a fixation of the performance, resulting particularly useful in those countries where tradition is mainly transmitted orally, and it does not surprise that more than half of countries that enacted the Convention are developing ones.

In oral cultures, culture is transmitted to descendant generations through songs, chants and stories, that is why traditional cultural expression may be protected by related rights as performances, since it is often transmitted to public by performers and by taking this step, not only a means of protection has been offered, but also the basis for the foundation of national industries to propagate the vast and invaluable cultural heritage in foreign markets too. In other words, *'protection of copyright and related rights serves the twin objectives of preserving and developing national culture and providing a means for commercial exploitation'*¹⁰⁶.

Even if it contributed to the inclusion in the TRIPS Agreement of provisions on the rights of performers, producers of phonograms and broadcasting organizations, Rome Convention is generally viewed as out-of-date and needs revision or replacement. Indeed, it is a matter of fact that for two of the three categories has been provided an updated protection by WIPO Performances and Phonograms Treaty (WPPT) adopted in 1996 – often associated with the WIPO Copyright Treaty, referring to them collectively as Internet Treaties – and the Beijing Treaty on Audiovisual Performances of 2012¹⁰⁷, which provides for a 50-years term of protection.

2.3 The Convention on Biological Diversity

CBD was adopted on June 5, 1992 at the Earth Summit in Rio de Janeiro during the UN Conference on Environment and Development, signed by 153 States. It entered into force on December 29, 1993, when the 30 ratifications prescribed by the Convention itself were reached. Although today it has 196 member States, there is still one great absent: the United States of America, who signed but did not ratify the Convention.

For the first time, Indigenous Peoples are expressively mentioned, and Article 8 of the Convention recognizes the fundamental contribution to biodiversity conservation of communities and allowing farming ones to claim IPR for the relevant role they play in the conserva-

¹⁰⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Understanding Copyright and Related Rights*, cit., pp. 32-33.

¹⁰⁷ Ibid, p. 29.

tion. In the same Article, it is required the creation of an international structure to develop protective and equitable sharing mechanisms, support to several categories of Indigenous organizations and the demarcation of their own land. Article 6 indeed, calls for strategies and programs for conservation and sustainable use of biodiversity, where natives would participate among the main executants with their values and criteria. While following Articles aim at increasing awareness through education and research, no. 14 deals with *environmental impact assessment*, which – for being effective – needs the full participation in all phases of locals, including their own guidelines; the prior informed consent; and efficient legal mechanisms in case of redress and compensation. This cooperation may be facilitated through a *clearing-house mechanism* - which should include full Indigenous participation in conceptualization, implementation and maintenance phases, where priorities and guidelines would be defined by securing protection and compensation stated in IPR agreements - cited in Article 18, which may be combined with conservation centers or databases designed and maintained by communities themselves.

Article 16 is another important section of the Convention, which regards access to and transfer of technology. Even if traditional technologies have not always been considered technologies internationally, CBD not only includes them, but it also elevates them as relevant ones in the conservation and sustainable used of biodiversity by providing for the necessary measures to protect their IPR¹⁰⁸.

From Article 23, the different bodies of the Convention have been established, starting from the Conference of the Parties, which has the full authority, but also two possibilities are proposed: the first is about the establishment of a Subsidiary Body on Scientific, Technical and Technological Advice, whose advisory role to the Conference of Parties refers to Indigenous traditional knowledge for all aspects of *in situ*¹⁰⁹ conservation; the second is the development of a '*protocol on Indigenous and traditional technologies based on knowledge, innovations and practices of local communities embodying traditional lifestyles*'¹¹⁰ used to strengthening communities. Further details of the Subsidiary Body are reported in Article 25 of CBD and, as written by Posey and Dutfield, it should: include scientific and technical experts from communities; wider apply Indigenous innovations and practices after having identified the most relevant ones; develop methods and guidelines using Indigenous criteria

¹⁰⁸ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit., pp. 103-107.

¹⁰⁹ From Latin, meaning situated in the original place.

¹¹⁰ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit., p. 108.

and propose IPR model legislation, in order to establish monitoring institutions and ensure CBD implementation. A fair representation of Indigenous peoples should be guaranteed not only in the CBD Secretariat (Article 24), but also in the Subsidiary Body because of the precious knowledge and contribution locals embody for an effective research and application of the Convention.

2.4 The International Labour Organizations' Convention 169

With the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries adopted in 1959, the ILO was the first UN organization to handle Indigenous issues. Convention no. 105 was later replaced in 1989 by no. 169 Convention Concerning Indigenous Peoples in Independent Countries. The main difference between the two is the use of the term 'peoples', chosen to be the only way to describe Indigenous and Tribal peoples as it '*better reflects the distinctive identity that a revised Convention should aim to recognize for these population groups*'¹¹¹.

The Convention is divided into ten parts, where, after the first general part, the second one concerns land rights, based on the criteria of territorial occupation; the third and fourth sections deal with conditions for employment and recruitment; the fifth is dedicated to social security and health and the sixth to communication; latter parts regard administration policies and final provisions.

Up to the present, only 23 States¹¹² have ratified and accepted as law the Convention, considered to offer only limited rights, even if in Article 7 it has been stated that Indigenous peoples' right to control over their economic, cultural and social development on their own, States have to respect the collective aspects of the relationship natives-land and recognizing the importance of their culture and traditional knowledge – Article 13¹¹³.

¹¹¹ INTERNATIONAL LABOUR CONFERENCE, 75th Session. *Partial Revision of the Indigenous and Tribal Populations Convention*, 1957 (no. 107). Report VI (2), Geneva 1988, pp. 12-14.

¹¹² Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Luxembourg, Mexico, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela.

¹¹³ POSEY DARREL, DUTFIELD GRAHAM. *Beyond Intellectual Property Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, cit., p. 117.

3 Intellectual Property and Cultural Heritage

Both intellectual property and cultural heritage are kinds of properties generated from one's mind and both of them have an economic value, but their relationship and coexistence need to be balanced and coordinated¹¹⁴. The meaning and clarity of 'protection' are fundamental, because of risks of unintentional falling of TCE under public domain or IPR misappropriation, or cultural preservation policies result to be more appropriate for being redressed to communities' needs for instance. Traditional cultural expressions – or expressions of folklore¹¹⁵ – are the product of inter-generational traditions, customs, knowledge, beliefs and artistic works that may vary locally¹¹⁶, whose main characteristics are: (i) being handed down from one generation to another; (ii) reflecting a community's cultural and social identity; (iii) consisting in peculiar heritage elements; (iv) being made by unknown authors and/or by communities and/or by individual commonly recognized the right or permission to do so; (v) being created as vehicles of cultural expression; (vi) constantly evolving within the community. In other words, TCE's main role is spiritual and social, but they are relevant in the economic development too, and that is when IP comes into play, by providing not only legal protection, but it may also strengthen cultural identity itself by preserving its distinctiveness. WIPO's work is in line with this sense of protection, whose interface with cultural heritage had been highlighted through UNESCO's initiatives¹¹⁷. The cooperation between the two Organizations first developed in the 1980s, resulting firstly in the assistance to the Tunisian Government in developing a model law on copyright for developing countries, ensuring protection to tangible national folklore¹¹⁸, then in the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, with the purpose of maintaining a balance between the protection against abuses of expressions of folklore and the encouragement of its further dissemination. The Expert Committee in particular, found

¹¹⁴ FOLARIN SHYLLON, 'Cultural Heritage and Intellectual Property Convergence, Divergence, and Interface', edited by LOGAN W., MALREAD N.C., ULLRICH K.; *A Companion to Heritage Studies*, Wiley-Blackwell, 2015, pp. 55-68, p. 56.

¹¹⁵ 'Folk' means 'people' and 'lore' refers to 'a body of traditions and knowledge held by a particular group'.

¹¹⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 5th session, 2003, p. 27.

¹¹⁷ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Intellectual Property and Traditional Cultural Expressions/Folklore*, WIPO Publication No. 913(E), pp. 5-10.

¹¹⁸ *Ibid*, p. 61.

the lack of proper sources able to identify and protect folklore expressions and strongly believed that folklore became fundamental as means of its own development, and that any distortion prejudiced the cultural and economic interests of a nation. The Model Provisions was followed by significant meetings as the World Forum on the Protection of Folklore, which took place in Thailand in 1997, and where preservation and conservation of folklore worldwide, legal means of protection influencing national regimes, and economic repercussions of exploitation were the main topics. Indeed, in the adopted plan of action, the principal needs were a new international standard for legal protection of folklore and find an equilibrium between the owners of folklore and its users. In addition, an Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established in 2000, focusing on access to genetic resources and benefit-sharing too.

Fact-finding missions were conducted by WIPO in 28 countries between 1998 and 1999 in order to interview and gather the communities' expectations and need in intellectual property field by also involving NGOs, academics, governmental and private representatives. Results were reported in the Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions, also known as FFM Report, and the main need identified by Indigenous peoples were IP protection to support economic development, prevent unauthorized uses and prevent third parties acquiring IPR over TCE.¹¹⁹

Cultural and intellectual property rights were first identified also as human rights in the Universal Declaration of Human Rights, and then further emphasized in other international and regional instruments, such as ICESCR, ICCRP, the Vienna Declaration and Program of Action. If on one hand the two systems are compatible, on the other hand, they diverge in some respects: while the beneficiaries of cultural heritage are universal, intellectual property has individual or group right owners; while cultural heritage is everlasting and has no boundary, IPR present time-limitations and may differ territorially. Both of them are properties, since the intellectual property is a product of the human intellect and through it, cultural heritage may be developed¹²⁰.

¹¹⁹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *WIPO Intellectual Property Handbook*, cit., pp. 62-63.

¹²⁰ FOLARIN SHYLLON, *Cultural Heritage and Intellectual Property Convergence, Divergence, and Interface*, cit., pp. 55-68, pp. 57-60.

4 The Issue of Public Domain

Another argument to bear in mind is the relationship between IPR and the free circulation of manifestations of heritage: cultural heritage is often considered as a product to be traded, revealing lack of IP protection – concerning mainly private rights instead of public domain – and the concept mismatch between Western and Indigenous peoples.

As written in Lixinski, public domain¹²¹ may be divided in public domain and *domaine public payant*. In both cases, in defense of interests deriving from the exploitation of ICH a national authority is designated, but while in the latter fees have to be paid in order to prevent plagiarism; the second is more common, being able to keep some level of protection to authors' moral rights¹²².

Intangible cultural heritage is often believed to fall under public domain because the timeframe for IP protection has expired, associating it to ancient practices, but it is more realistic thinking that if it does not fit into Western IP norms, it is assumed that communities have no rights over it and it is made free for all to use, just because they may not use their own land for cultivation or exclusive manner, or they do not show constantly its possession. According to Indigenous' point of view, knowledge or land may be shared or publicly known, but it does not mean that it is open to everyone's use or free to be taken. Because knowledge structures of Indigenous peoples are different, public domain may have a 'freezing' effect on them – *viable public domain* –, while a *dynamic public domain* would result more suitable so to not deny the capability of Indigenous peoples to develop over time and continue to guarantee their cultural presence at the international level¹²³.

Locals are often unaware of those instruments that would regulate the use of their knowledge, not possessing the necessary expertise and resources for adding to it a commercial value. It results even more difficult in national markets, where knowledge and ICH is integral part of social life. For this reason, unfair competition law or torts rules may be used to protect communities as economic actors and prevent third-parties ICH appropriation. IP as tort in particular, not only attracts interest and investment recognizing the marketing potential of ICH, but also creates the conditions to redress inappropriate uses¹²⁴. It is also true

¹²¹ It differs from the idea of common, which refers instead on a sort of controlled distribution with no financial benefits (Lixinski, 2014, p. 201).

¹²² LIXINSKI LUCAS, *Intangible Cultural Heritage in International Law*, cit., pp. 198-200.

¹²³ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., pp. 64-68.

¹²⁴ LIXINSKI LUCAS, *Intangible Cultural Heritage in International Law*, cit., pp. 195-197.

that through sharing and adaptation heritage is kept alive and transmitted to future generations, but TCE should at least be defended from defamatory and false of sacred and secret TCE. States indeed, have to provide effective redress mechanisms also when the free, prior and informed consent of Indigenous peoples has not been sought and just compensation is not enough, keeping into account the fact that communities would rather prefer maintaining their stewardship on their own heritage instead of remuneration.

To conclude, among the several reasons, Indigenous traditional knowledge has to be safeguarded for equity consideration, providing for a fair compensation whenever it turns into a commercial gain; because of its contribute to environment and biodiversity conservation; and preservation of traditional practices and customs for future generations. Its development shall also be promoted so as to avoid misappropriations and biopiracy – referring to the unauthorized commercialization of Indigenous biogenetic resources¹²⁵. Intellectual property and cultural heritage safeguarding policies provided by WIPO and UNESCO are strictly related and one influences the other, having the same purpose: preserve and let develop Indigenous culture. Indeed, intellectual property has been recognized as cultural property in the founding document of WIPO, including literary and artistic works, while in 2003 UNESCO Convention intangible heritage has been accepted as intellectual property since its first Article.

It is also a matter of fact that most part of the Indigenous ICH ended up in Western public domain, often through misappropriation or misunderstanding in Indigenous knowledge systems – which would need to be better taken into consideration in intellectual property laws –, that is why natives need to better understand those strategies able to keep their traditional knowledge and cultural expression out of it.

¹²⁵ GREAT BRITAIN COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, Integrating Intellectual Property Rights and Development Policy, CIPR, 2002, p. 78.

Chapter 3

Māori People of New Zealand

Ko taku reo taku ohoho, ko taku re otaku mapihi mauria.

MY LANGUAGE IS MY AWAKENING, MY LANGUAGE IS THE WINDOW OF MY SOUL.

Mātauranga Māori may be simply identified with 'Māori knowledge', but it covers a broader range of aspects, including world views, values and their own way of knowing. It derives from the verb *mātau* – to know – and differently from what it may be thought, the term became common only in the 1980s, when it appeared in governmental policies and included: Māori involvement in knowledge economy, Māori-medium education level and Treaty of Waitangi claims. In particular, it is a '*dynamic and evolving system of knowledge (...) framed by the whakapapa – genealogy – of all things and whanaungatanga – kinship connections – between them*'¹²⁶. It is undeniable that *mātauranga Māori* made the commonly known Aotearoa New Zealand, since it was only a native land, until becoming a British colony; that is why in this chapter I would gather the most relevant events in New Zealand history since the Western world appeared for the first time in the Pacific Ocean to better understand why Māori culture has to be respected.

1 Why Māori Interests Should Be Met

The European world made its entry into New Zealand when Dutch explorer Abel Tasman anchored in Golden Bay, at the top of South Island, in December 1642, but he did not go ashore. James Cook did 127 years later, followed by French explorers Jean François Marie de Surville in 1769 and Marion du Fresne in 1772¹²⁷. Cook's time in Aotearoa New Zealand is one of the most well-documented and recorded. In his diaries and

¹²⁶ TE PAPA NATIONAL SERVICES TE PAERANGI, *Mātauranga Māori and Museum Practice*, 2005, pp. 2-3.

¹²⁷ O'MALLEY V., STIRLING B., PENETITO W., *The Treaty of Waitangi Companion: Māori and Pākehā from Tasman to Today*, Auckland University Press, 2011, p. 8.

letters, he wrote down his observations about Māori society and lifestyle: what they look like, their character, what they eat, where and how they live. They were compared to the inhabitants of the South Sea Islands – today’s Solomon Islands –, visited by the British voyager before his arrival in New Zealand, for their similar language, government, mankind and religion. Native people were also described as strong, well-made, warlike people, ‘with sentiments void of treachery’¹²⁸, but Europeans learned how to manage them, thanks to their superiority given by firearms. Thereafter, contacts became more regular because mutually beneficial, especially for coastal tribes, who were interested in new technologies and crops, so they established commercial trading gardens to supply European ships, exchanging potatoes, vegetables, timber and flax for muskets and metal tools. Even though most of the visitors were transient, some were invited to live with Māori to facilitate relationships, under their protection and marry Māori women, becoming permanent residents, approximately 2000 by 1839. Now newcomers were seen as a new *hapū* with whom to enhance advantageous relationships, no longer as goblins from the sea. Māori leaders – *rangatira* – tried to obtain as many benefits as possible for their *hapū* by making arrangements with the royal family in Great Britain and ambassadors and leaders from other countries, such as Americans and France, who were interested in New Zealand too, but British were the only people with whom the natives particularly wished to strengthen their international links, by also visiting the royalty in London, as much as British chose to enter into a contract with Māori, identifying themselves in Māori and *Pākehā*.

1.1 The Treaty of Waitangi

From 1808, northern *rangatira* began meeting in formal assembly called *Te Waka-minenga o Ngā Hapū o Nu Tīreni* – the General Assembly of the Tribal Nations, known as the Confederation of Chiefs –, to discuss about law and policies concerning newcomers, who had been welcomed following the principle of *manaakitanga* – hospitality – and expecting respect for Māori role of authority and their jurisdiction in their own land. Some totally ignored them, as Marion du Fresne and his crew did, killed because fishing in a supposed restricted area. Then they had been got even by the death of 250 Māori, neglecting the law of their home-country as well.

¹²⁸ Ibid, p. 9.

Thanks to the Reverend William Yate, in 1831 a petition was sent by 13 northern chiefs to King William complaining about his citizens' conduct with their *hapū* and asking for protection, since France was trying to declare its sovereignty on the islands. Immediately after James Busby was appointed as British Resident, he landed in New Zealand in May 1833 with the reply of the King¹²⁹. One of Busby's first tasks was to assign a national flag to the United Tribes, voted and selected on March 20, 1834, so that natives' ships could fly it and have free access to international ports and benefit of British protectorate when in international waters¹³⁰. Then he convinced a number of leaders to sign a Declaration of Independence, under which Britain would have recognized the predominant power and authority of the United Tribes of New Zealand¹³¹. Formally recognized in 1836 by the British King, signed by 34 chiefs on October 28, 1835 in Waitangi, the Declaration reached 52 signatures by 1839, including Te Wherowhero's, the chief of Waikato, who would become the first Māori King.

The full name of the formal written statement was *He whakaputanga o te Rangatiratanga o Nu Tirene* – Declaration of Independence of New Zealand – and it was drafted by Busby and the missionaries Henry Williams and William Colenso. It was written in Māori language, then bad translated in English, because each of the four articles used *matou* – we or us –, referring to the Confederation of Chiefs and the *hapū*, used only in the first one in the English version, where instead it was used the third person 'they'¹³². *He Whakaputanga* consisted in four articles and it:

1. Declared New Zealand as a *whenua rangatira* – independent state – '*under the designation of the United Tribes of New Zealand*'¹³³;
2. Proclaimed *kingitanga* – sovereign power –, *mana i te whenua* – authority in the land – and *huihuinga* – congress –, by which laws would be made, but it did not meet, also because inter-tribal wars;

¹²⁹ NETWORK WAITANGI (N.Z.), *Treaty of Waitangi Questions and Answers*, Christchurch: Network Waitangi, 2016, pp. 8-10.

¹³⁰ BASIL KEANE, *He Whakaputanga – Declaration of Independence*, Te Ara - the Encyclopedia of New Zealand, available at: <http://www.TeAra.govt.nz/en/he-whakaputanga-declaration-of-independence/print>

¹³¹ O'MALLEY V., STIRLING B., PENETITO W., *The Treaty of Waitangi Companion: Māori and Pākehā from Tasman to Today*, cit., p. 28.

¹³² BASIL KEANE, *He Whakaputanga – Declaration of Independence*, cit., p. 2.

¹³³ O'MALLEY V., STIRLING B., PENETITO W., *The Treaty of Waitangi Companion: Māori and Pākehā from Tasman to Today*, cit., p. 31.

3. Stated that the congress would meet each autumn and act as a parliament, regulating trade, preserving peace and good order, dispensing justice and framing laws; it also invites tribes from South Island to join;

4. Established that a copy would be sent to the king of England and thanked him for the acknowledgment of the flag¹³⁴.

It was not only about the ban of a 'separate legislative authority' – *kāwanatanga* – in the country¹³⁵, but this document was also not completely accepted by the Colonial Office in Great Britain, affirming that a new policy was needed. Additionally, France increased its religious missions in Oceania, as United States did by expanding their whaling areas¹³⁶.

The foundation of the New Zealand Company¹³⁷ and the related land purchase issue, the growing French interest in the region claimed in the 1831 letter and the common unrest were the results of an increasing number of British settlers in the country in the 1830s¹³⁸. In South Island it was even worse due to attacks by Re Rauparaha – chief of Ngāti Toa, as known as the southern Napoleon –, which had forced the population to move to New South Wales and sell their lands to foreign people from other islands and have contracts to purchase with New Zealand Company too, who often declared to own more than it really owned, being unable to satisfy the demand of the arriving British immigrants. With over two-thirds of the state sold, for Lord Normanby, Secretary of State for the Colonies at that time, it was easier to decide for the annexation of New Zealand¹³⁹. He instructed the naval office Captain William Hobson to enact a treaty with the natives and '*acquire sovereignty over the whole or any part of the country that Māori wished to cede*'¹⁴⁰.

Hobson left London on August 15, 1839 and he was named Lieutenant-Governor on January 14, when he was in Sydney, on his way to the neighboring country. When he reached

¹³⁴ BASIL KEANE, *He Whakaputanga – Declaration of Independence*, cit., p. 2-3.

¹³⁵ NETWORK WAITANGI (N.Z.), *Treaty of Waitangi Questions and Answers*, Christchurch: Network Waitangi, cit., p. 10.

¹³⁶ NZ MINISTRY FOR CULTURE AND HERITAGE, *Taming the Frontier - Page 4 - Declaration of Independence*, 2016.

¹³⁷ Founded in London in 1825, it played a key role in the colonization of New Zealand. Based on the principles of systematic colonization and the idea of a new English society in the southern hemisphere formulated by Edward Gibbon Wakefield, its members were private investors, especially aristocrats, members of the Parliament and magazine publishers.

¹³⁸ O'MALLEY V., STIRLING B., PENETITO W., *The Treaty of Waitangi Companion: Māori and Pākehā from Tasman to Today*, cit., p. 32.

¹³⁹ THE TREATY OF WAITANGI INFORMATION PROGRAMME, *The Story of the Treaty pt. 1*, State Services Commission, Wellington, 2005, p. 11.

¹⁴⁰ NETWORK WAITANGI (N.Z.), *Treaty of Waitangi Questions and Answers*, Christchurch: Network Waitangi, cit., p. 13.

the Bay of Islands on January 29, 1840, he immediately began to draft the treaty with the support of his secretary James Freeman and the British Resident James Busby. Neither of them had competence in law and no lawyer or Colonial Office official was consulted¹⁴¹. On that day, it was also decided to hold a gathering on 5th February at Busby's home in Waitangi, where previous meetings have already been taken place: in 1834 to choose the national flag and the following year to sign the Declaration of Independence. Busby asked the Church Mission printer William Colenso to produce urgently 100 invitations - about twenty of them are supposed to be consciously altered asking for dead chiefs - to send to the confederated chiefs in the north in order to meet '*the chief of the Queen*', in light of the fact that Māori independence constituted the main obstacle to the full affirmation of British sovereignty¹⁴².

Because of an unexpected stroke, Hobson handed over his annotations to Busby to complete the draft of the treaty, who received two sets of notes: the first, referred to both confederated and independent chiefs, was in Hobson's handwriting and included only a preamble; the second instead was in Freeman's calligraphy, citing only the confederated chiefs, and it consisted in a different worded preamble and three articles. In the first article, Māori cede a specified area; in the second one they '*yield to the Queen the exclusive right of pre-emption over any wastes land*'; and in the third one they receive all the rights and duties as British Subjects. Busby principally lengthened the articles and shifted a final statement, in which Māori would adhere to the terms of the treaty. The main change is in Article 2, British Resident's own initiative, where the Crown would guarantee the '*full and undisturbed possession of their lands and estates, forest, fisheries and other properties as long as they wished to retain them*'¹⁴³. Realizing that a treaty in English could not be understood, or even debated or agreed to by Māori, Reverend Henry Williams and his son Edward Marsh were appointed to translate the English version into *te reo* – Māori language – and read the text of the agreement on 5th February in front of about 1000 chiefs, their tribes and the Europeans who came. A five-hour discussion followed the Final English Draft reading, debating with the chiefs who refused it, therefore Hobson decided he would meet again the chiefs who wanted to sign two days later. That night chiefs and missionaries discussed the reasons for and against signing, which would bring advantages in trade rela-

¹⁴¹ ORANGE CLAUDIA, *The Treaty of Waitangi*, Bridget Williams Books, 1987, ch. 3.

¹⁴² ORANGE CLAUDIA, *The Treaty of Waitangi: A study of its Making, Interpretation and Role in New Zealand History*, University of Auckland, 1984, pp. 132-133.

¹⁴³ *Ibid*, pp. 135-136.

tions and avoid intertribal warfare. Furthermore, they were assured of being allowed to exercise power over their properties. On the other hand, the European impact on inland people was less powerful, and most of them refused to sign, mainly because in some districts intertribal disputes were in progress, and British interference was not appreciated¹⁴⁴. As about forty Māori leaders had come to the decision, they could not wait until the prearranged day and summonsed Hobson to sign the treaty that day, 6th February. Only Māori text was signed, while English version was not even read or discussed. After each chief signed, the Lieutenant-Governor shook their hand and pronounced his famous words '*He iwi tahi tatou – We are (now) one people*'.

1.1.1 The Principles

Just a few days later after the signing, Reverend Henry Williams translated the Māori text back into English, which became the 'official English text'¹⁴⁵ after missing the draft read at the gathering. Nevertheless, Hobson never authorized an official English version, affirming that '*the treaty which forms the base of all my proceedings was signed at Waitangi on the 6th February 1840*', and no English copy was signed on 6th February. Only a small number of *rangatira* signed the version in English language, in agreement to what was discussed in their mother tongue¹⁴⁶. The two texts were assumed to have the same meaning and Williams guaranteed the accuracy of his translation, even though a word-for-word translation was impracticable¹⁴⁷ from his point of view, but there are significant differences between what was discussed and what was written in the two sheets. The issue was more complicated by the fact that, at the time, Māori society was an oral rather than a literate one, trusting what Hobson and the missionaries said, rather than the written words¹⁴⁸. Nonetheless, only a very few leaders were able to write their own names, often with an un-

¹⁴⁴ ORANGE CLAUDIA, *Treaty of Waitangi*, Te Ara – the Encyclopedia of New Zealand, available at: <http://www.TeAra.govt.nz/en/treaty-of-waitangi/print>, p. 4.

¹⁴⁵ THE TREATY OF WAITANGI INFORMATION PROGRAMME, *All about the Treaty*, State Services Commission, Wellington, 2005, p. 3.

¹⁴⁶ NETWORK WAITANGI (N.Z.), *Treaty of Waitangi Questions and Answers*, Christchurch: Network Waitangi, 2016, p. 16.

¹⁴⁷ THE TREATY OF WAITANGI INFORMATION PROGRAMME, *All about the Treaty*, cit., p. 3.

¹⁴⁸ BELICH JAMES, *A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century*, 1996, pp.195–196.

certain calligraphy, demonstrating inexperience with writing. The rest of them put an X or drew partly their *moko* – facial tattoo¹⁴⁹.

The preamble of the treaty sets the initial statements, expressing the Crown's intention to provide a British settlement and establish a government to ensure peace and order, protecting Māori interests and, as written in the native language text, assuring them the ownership of their own lands and properties since they wanted to keep them¹⁵⁰.

In the first Article of the English version, Māori cede the full authority over everybody and everything all through the land. Contrarily, Māori allowed only the presence of a governor, who would exercise *kāwanatanga*, a loan translation from governorship that do not exist in Māori language. It is a neologism used in the biblical texts translated by the Church Missionary Society with reference to Pontius Pilate and his governance¹⁵¹. It differs from words as *rangatira*, which implies the execution of the jurisdiction, and *mana*, associated with authority: these are the closest to the meaning of sovereignty, but Williams and most of the missionaries wanted the agreement to be signed, having a vested interest in the acreages and the application of the British law in the colony and he knew that if he used these words, Māori would not sign the treaty¹⁵². Although the concept of sovereignty could not be expressed in Māori, it does not mean that they did not know what it was because it had already been used in the Declaration of Independence, proving the chiefs' understanding of the term¹⁵³.

Contradicting the first article of the Crown's text, *Te Tiriti o Waitangi* upheld the *tinio rangatiratanga* – exercise of chieftainship – of *hapū* over their *whenua* – lands –, *kainga* – villages – and what was precious to them – *taonga* – and it gave to the Crown the right to buy land from them if they decided to sell it. In the English version instead, Britain had the exclusive right of purchase and, as long as Māori wished, they would have the '*exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties*'. The application of this article in particular, will be further analyzed in chapter 5, being at the center of Wai 262 claim more than one century later. The preemption was translated with *hokonga*, which expressed the familiar term for Māori of buying, selling and bartering of goods, but in many cases brought to the Waitangi Tribunal was shown how the colonists

¹⁴⁹ SIMPSON TONY, *Before Hobson*, Wellington: Blythwood Press, 2015, p. 192.

¹⁵⁰ THE TREATY OF WAITANGI INFORMATION PROGRAMME, *All about the Treaty*, cit., p. 5.

¹⁵¹ FENTON S., MOON P., *The Translation of the Treaty of Waitangi: A Case of Disempowerment*, cit., p. 34.

¹⁵² NETWORK WAITANGI (N.Z.), *Treaty of Waitangi Questions and Answers*, Christchurch: Network Waitangi, cit., p. 17.

¹⁵³ FENTON S., MOON P., *The Translation of the Treaty of Waitangi: A Case of Disempowerment*, cit., p. 33.

forced properties out of Māori hands. Moreover, *taonga* did not mean only substantial elements, but also everything considered as treasure, such as language, health, culture or sacred places¹⁵⁴.

The last article is thought to be a fair translation from the English content, making Māori people British Subjects, with all the relative rights and Crown's protection; followed by the adhesion to all the terms of the treaty. Nevertheless, the signatures gathered in Waitangi did not even represent the North Island as a whole and Hobson needed the majority of them. That is why several officials and missionaries were asked to collect further signatures around the country, so rather than risk of losing the original one, another eight copies of the treaty had been made. The Lieutenant-Governor could not collect himself the adhesions because of his illness, but he considered the initial signings the de facto treaty, while the later ones were a ratification and confirmation¹⁵⁵. Between February and September 1840 about fifty meetings were organized, gathering more than 500 signatures, including around thirteen women chiefs¹⁵⁶.

On May 21, 1840 Hobson proclaimed full sovereignty over New Zealand: over the North Island based on the treaty cession and over South Island on the basis of Cook's discovery. He sent the copies to the Colonial Office with a certification by Henry Williams that the English text was a literal translation, but it was not, and each copy had slight variations. Williams would be blamed because he did not respect his role of mediator between the two cultures, but he is one of the many examples of translators, who had determined their translation strategy reflecting their historical time, religion and ideology¹⁵⁷.

1.1.2 Māori Land Loss

It is not new that land is the core of Indigenous culture and spirituality¹⁵⁸, from which depend the survival and development of that people. As contained in Article 26 of UNDRIP, rights over land are among the most important both at national and international level¹⁵⁹.

¹⁵⁴ NETWORK WAITANGI (N.Z.), *Treaty of Waitangi Questions and Answers*, Christchurch: Network Waitangi, cit., p. 15.

¹⁵⁵ ORANGE CLAUDIA, *The Treaty of Waitangi*, Bridget Williams Books, p. 48.

¹⁵⁶ THE TREATY OF WAITANGI INFORMATION PROGRAMME, *The Story of the Treaty pt. 1*, cit., p. 16.

¹⁵⁷ FENTON S., MOON P., *The Translation of the Treaty of Waitangi: A Case of Disempowerment*, cit., pp. 40-41.

¹⁵⁸ Spirituality has to be differed from religion: while the first 'can be seen as an internal connection to the universe, which includes a sense of meaning or purpose in life', religion refers to practices and rituals as

On November 4, 1840 New Zealand was officially declared an independent colony of New South Wales, but only in the beginning the conditions of the treaty were kept, by dint of Māori economic growth by helping new settlers with food supplies, assistance and protection.

However, within four years natives' doubts were confirmed: the Crown would not uphold its obligations, in light of the fact that a 'protector of aborigines' revealed himself a land-purchase negotiator and properties were often torn off with force, neglecting the second article of the Māori-language text¹⁶⁰. When violence was not used, chiefs were persuaded through deeds of sale to sell their lands cheaply, arguing about presumed economic advantages for the *hapū*. It allowed New Zealand Government to purchase them at higher prices thanks to the doctrine of pre-emption, as written in the English second article, only British Crown could buy directly Māori lands, 'protecting' them from private European purchasers. These deeds were not always clear about size and location of the areas, and because Māori did not see this transfer as an absolute ownership and their insufficient knowledge about buying and selling land, considered a heritage from *tūpuna* – ancestors –, what remains were small and inaccessible reserves, not being able to support the local population¹⁶¹.

Over the 1840s and 1850s tensions worsened, principally when Māori population started to decline; in less than twenty years European people equaled the Indigenous people of New Zealand, about 67,000 each, many of which had British racist attitudes towards the native race and its inferiority, with a sense of entitlement to land, even if it was not bought honestly¹⁶². In response, Waikato's tribes formed an alliance with the aim of the tribal unity, whose head was Te Wherowhero, Tainui's chief, renamed Pōtatau and proclaimed the first Māori King. With the belief of a peaceful co-existence between the Queen and the Māori King, the *Kīngitanga* – King movement – wanted to retain land by withholding it from sale, but it was considered a threat for Britain and its settlements. This resulted in several fights, as known as the New Zealand Wars, fought between 1845 and 1872 and escalated dramatically in

expressions of one's spirituality. UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL-DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *State of the World's Indigenous People*, ST/ESA/328, New York, United Nations Publication, 2009, p. 60.

¹⁵⁹ Ibid, p. 54.

¹⁶⁰ ORANGE CLAUDIA, *Treaty of Waitangi*, Te Ara – the Encyclopedia of New Zealand, cit. p. 5.

¹⁶¹ BOAST RICHARD, *Te tango whenua - Māori land alienation*, Te Ara – the Encyclopedia of New Zealand, <http://www.TeAra.govt.nz/en/te-tango-whenua-maori-land-alienation/print>, p. 3-4.

¹⁶² NETWORK WAITANGI (N.Z.), *Treaty of Waitangi Questions and Answers*, Christchurch: Network Waitangi, 2016, p. 21.

the 1860s, in the midst of which Governor Thomas Gore Browne called a conference at Kohimarama with the hope to convince Māori leaders to join his actions in Taranaki and reject the Māori King movement. On that occasion, the chiefs discovered the differing understandings of the treaty and passed a resolution, akin to a ratification, with the promise to hold other conferences to discuss the share of power, but, as happened for the *huihuinga* – the congress established with the Declaration of Independence –, no more were held¹⁶³. To overpower the *Kīngitanga*, New Zealand government developed its own army, supporting the British forces in the North Island with the invasion of Waikato in 1863-1864, the biggest single campaign. The governing power adopted further punitive measures for Māori rebellion, such as the imprisonment of the opponents and the confiscation of extensive areas, which had taken place in South Auckland, Tauranga, Ōpōtiki-Whakatāne, Hawke's Bay and the biggest ones in Waikato and Taranaki under the New Zealand Settlements Act 1863.

Native Lands Act 1862 and 1865 established the Native Land Court – later called Māori Land Court –, presided by the local resident magistrate and a panel of Māori jurors, who had to examine titles to Māori land. It made easier to sell the land, by converting Māori land rights into Crown-granted titles, alienating almost the entire South Island by thirty years after the signing of the treaty, as did in the North Island in the early 1890s¹⁶⁴. Any Māori could apply for a hearing, which used to take place far from tribal homelands, thus landowners had to pay not only court and survey costs and legal fees, but also accommodation. Paradoxically, the chief of Renata Kawepo won some cases, gaining back part of Hawke's Bay territory, but he had to sell part of these land to pay these costs. In the beginning, the Court used to name up to 10 owners for a less-5,000 acres area, the so-called '10-owner rule' even if more claimed its ownership. The rule was abolished in 1873, making equal owners all people that had an interest on a land. The abolition of the Court was sought through the Native Rights Bill 1894, claiming for Māori rights to state their own land laws and to control reserved lands, but the Bill was rejected by the Parliament in 1896¹⁶⁵.

In 1864 the first Public Works Act was drafted, enabling New Zealand Government to take Māori land – preferable because requiring less compensation for owners – for the construction of roads, railways and airports and it was never given back to the owners, even when the land was not used. In 1880s, the West Coast Commission – a commission of enquiry of

¹⁶³ ORANGE CLAUDIA, *Treaty of Waitangi*, Te Ara – the Encyclopedia of New Zealand, pp. 6-7.

¹⁶⁴ BOAST RICHARD, *Te tango whenua - Māori land alienation*, Te Ara – the Encyclopedia of New Zealand, pp. 4-5.

¹⁶⁵ TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND, *Te ture – Māori and legislation: Page 3. The Native Land Court*, available at: <https://teara.govt.nz/en/te-ture-maori-and-legislation/page-3>

the Crown –, under the West Coast Commission Reserves Settlement Act 1881, established a system of leasehold titles believing that Māori did not have the right to live on the lands they were benefiting from. Settler farmers were favored in leasing Māori land with a fractioned market rate, while Māori were rated at up to 300% for the equivalent land and for shorter periods, as stated in the Native Lands Rating Act 1882. In order to weaken the protests of the period, seven regional Māori Land Councils were established with the Māori Land Administration Act 1900. The structures of these councils changed over the years: from five to seven members each – with a majority of Māori but with a European chair –, to three – only one Māori –, and from 1913 it further reduced to two members, the judge and the registrar of the Court. By 1906 they also changed their name in Māori Land Boards, which in around twenty years gained the full power as landowners. It had to be waited until 1952 for disestablishing the boards and the management of lands would return to tribes, but by then, almost all Māori lands in both islands had been alienated¹⁶⁶. In those decades, some improvements in Māori customary law could be witnessed, since the Status of Children Act 1969, providing for the removal of the legal distinction between legitimate and illegitimate children, both Māori and Europeans. The Resource Management Act 1991 '*explicitly recognized Māori spiritual and cultural values and the principles of the Treaty of Waitangi*', and environmental legislation started to be taken into account, involving *iwi* and leading to success legal actions to safeguard lands, rivers, reefs and other meaningful resources. Nevertheless, a real significant improvement in Māori land policy happened with *Te Ture Whenua Māori 1993* – also known as Māori Land Act 1993 – which openly recognized the importance that has the land for Māori people, requiring the Māori Land Court to assist Indigenous landowners '*to promote the use, development and control of Māori land*'¹⁶⁷. Under Section 17 in particular, given a recommendation by the Māori Land Court, the Chief Executive of the Ministry of Māori Affairs may reserve a determined area for common use and benefit by building village sites, meeting places or burial ground for instance. Māori take the advantage in using these reservations to make the land inalienable and protect some archeological sites¹⁶⁸.

¹⁶⁶ TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND, *Te ture – Māori and legislation: Page 4. Administering Māori Land*, available at: <https://teara.govt.nz/en/te-ture-maori-and-legislation/page-4>

¹⁶⁷ TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND, *Te ture – Māori and legislation: Page 5. Restoring Māori Customary Law*, available at: <https://teara.govt.nz/en/te-ture-maori-and-legislation/page-5>

¹⁶⁸ PATERSON ROBERT K., *Protecting Taonga: the Cultural Heritage of the New Zealand Māori*, cit., p. 122.

1.2 The Waitangi Tribunal

In the 1960s, the emerging Māori protests groups started to take actions against the Government over issues ranging from land laws and the exclusion from rugby tours of South Africa in 1960, to disrespect of *Māoritanga* – Māori traditions, ideals and culture. All the anti-war, women and Indigenous' rights movements appeared during this period and flourished in the succeeding decade writing letters and organizing petitions and marches¹⁶⁹. Along with them, other young urban groups considered 'radical' and 'extreme'¹⁷⁰ grew, such as *Ngā Tamatoa* – the Young Warriors – and *Te Roopu o te Matakite* – the Group of the Foresighted –, which organized demonstrations revolved around Waitangi Day. Commemorations of the signing of the treaty had started in 1932, when Governor-General Lord Bledisloe gifted the Treaty House and grounds to the nation, bringing the treaty back to the public eye. 6th February was declared national day of thanksgiving in 1960, but only fourteen years later national holiday, renamed New Zealand Day¹⁷¹. Protests about these celebrations began in the early 1970s and continued through 2000s: in 1973 *Ngā Tamatoa* activists wore black armbands, to represent mourning the Māori land loss and at the 150th anniversary in 1990, and a young Māori girl threw a t-shirt at Queen Elizabeth II. It was followed by the march in 1975, comparable to the 1972 protest by the Native American organizations in the United States '*Trail of Broken Treaties*', making an alliance between several Māori groups, including the *Kīngitanga*, the New Zealand Māori Council, the *Ngā Tamatoa* and the New Zealand Women's Welfare League. It left *Te Hāpua* on 14th September – Māori language day, remembering the day when the te reo Māori petition was presented at Parliament¹⁷² – and reached Wellington on 13th October, after having written a memorial of rights signed by more than 6,000 people and shown to the Prime Minister Bill Rowling, demanding the repeal of all the acts that could alienate tribal land, which should be invested perpetuity in Māori¹⁷³.

As a partial response to these movements, the Treaty of Waitangi Act 1975 established the Waitangi Tribunal, a permanent commission of inquiry to hear Māori grievances regarding

¹⁶⁹ BASIL KEANE, *Ngā rōpū tautohetohe – Māori protest movements*, Te Ara - the Encyclopedia of New Zealand, pp. 1-2.

¹⁷⁰ O'MALLEY V., STIRLING B., PENETITO W., *The Treaty of Waitangi Companion: Māori and Pākehā from Tasman to Today*, cit., p. 292.

¹⁷¹ Ibid, p. 303.

¹⁷² BASIL KEANE, *Ngā rōpū tautohetohe – Māori protest movements*, cit., p. 7.

¹⁷³ Ibid, p. 3-4.

the breaches of the Crown of the principles of the treaty, but it could only examine claims after the passing of the 1975 act¹⁷⁴. In 1985 it was given retrospective jurisdiction back to the February 6, 1840 and since then more than 1,300 claims have been registered and 95 reports released¹⁷⁵.

The Tribunal is led by a person in charge of proceedings, who may be a Judge of the High Court or the Chief Judge of the Māori Land Court. The Chairperson is assisted by the other members of the commission – up to twenty from 2008, in equal numbers Māori and *Pakehā*, men and women¹⁷⁶ – and nearly fifty representatives of the Ministry of Justice, who administer the conduction of research, the interaction with the petitioners and the report writing assistance to the members of the tribunal¹⁷⁷.

Any individual Māori can make a grievance, even though legal assistance and joint representations are preferred, being more effortless for organizations to pursue their demands¹⁷⁸. Firstly, it has to be proved the inconsistency of the principles of the Waitangi, which must relate to '*an Act of Parliament, regulation or other statutory instrument; a practice or policy adopted by the Crown or on behalf of the Crown; an action or omission by the Crown or on behalf of the Crown*'¹⁷⁹. Claims from a specific area are brought together in a single inquiry, setting up the 37 inquiry districts program: for instance, the Ngāi Tahu claim covering most of the South Island has been completed, as the majority of the other districts. Otherwise, other inquiries are still active, such as Te Papanahi o Te Raki, Taihape, Porirua ki Manawatu, while Te Rohe Potae is at the report writing stage¹⁸⁰.

The inquiry process consists of five stages:

1. *Casebook Preparation*: here a casebook of research is produced before hearings, taking about up to four years to bring it to completion. This since 1995. From 2001 a new approach has been adopted, encouraging the proceed to negotiations sooner by holding

¹⁷⁴ WAITANGI TRIBUNAL, *The Role of the Tribunal*, available at: <http://www.waitangitribunal.govt.nz/about/about.asp>

¹⁷⁵ NZ MINISTRY OF JUSTICE, *Presentation on the Waitangi Tribunal*, Wellington, 2005, p. 7.

¹⁷⁶ WAITANGI TRIBUNAL, *Waitangi Tribunal Bibliography Part 1: Waitangi Tribunal Reports, Statements and Publications*, 2018, available at: <https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-Bib-2018-pt1.pdf>

¹⁷⁷ WAITANGI TRIBUNAL, *Frequently Asked Questions*, available at: <http://www.waitangitribunal.govt.nz/about/frequentlyaskedquestions.asp#6>

¹⁷⁸ MELVIN GEOFFREY, *The Claims Process of the Waitangi Tribunal: Information for Claimants*, Waitangi Tribunal, Wellington, 2000, p. 20, <http://www.waitangitribunal.govt.nz/doclibrary/public/TheClaimsProcessoftheWT.pdf>

¹⁷⁹ GOLDSTONE PAUL, *Treaty of Waitangi Settlements Process*, NZ Parliamentary Library, 2006, p. 8.

¹⁸⁰ WAITANGI TRIBUNAL, *District Inquiries*, <https://www.waitangitribunal.govt.nz/inquiries/district-inquiries/>

conferences, where the claimants present their statements of claim and the Crown its own statement of response¹⁸¹;

2. *Interlocutory Conferencing*: the claims are enriched with more details and refined;

3. *Hearings*: this is crucial for the resolution process, where the evidence and the submissions of the two parties are heard and tested. Maintaining its formality, it usually takes place in *marae* – social and religious sacred place – and could extend over a year¹⁸²;

4. *Report Writing*: Tribunal writes a report about how the claim is ought to be settled. The New Zealand Government is not obliged to accept the recommendations, but a 'binding recommendation' may be made for land under the New Zealand Railways Corporation Restructuring Act 1989, memorialized lands and sacred places and land previously owned by Great Britain. In these cases, the Crown and the petitioners have 90 days to reach a settlement. If it does not happen, the recommendation takes effect¹⁸³;

5. *Negotiations and Settlement*: this phase might be omitted, but in many cases, Māori prefer to wait for a Waitangi Tribunal report to deal with the Office of Treaty Settlements, which is a component of the Ministry of Justice established in 1995¹⁸⁴. For the negotiations six principles have been developed: good faith – the process must be based on mutual trust and cooperation –; restoration of relationship – strengthen the parties –; just redress – it concerns directly *'the nature and extent of breaches suffered* –; fairness between claims, transparency and government-negotiated – the treaty settlement process is undeniably one of negotiation between the claimants and the government, the only ones who can achieve fair and durable settlements¹⁸⁵. Once an Agreement in Principle or Heads of Agreement has been signed, a Deed of Settlement – the final agreement – is drafted. It must be approved by the Cabinet before the ratification of the claimant group, and it would not become operative until the Parliament has passed an Act for it¹⁸⁶.

¹⁸¹ GOLDSTONE PAUL, *Treaty of Waitangi Settlements Process*, cit., p. 10.

¹⁸² WAITANGI TRIBUNAL, *The new approach revisited: a discussion paper on the Waitangi Tribunal's current and developing practices*, 2005, <https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-The-new-approach-revisited.pdf>, p. 17.

¹⁸³ MELVIN GEOFFREY, *The Claims Process of the Waitangi Tribunal: Information for Claimants*, cit., pp. 7-8.

¹⁸⁴ GOLDSTONE PAUL, *Treaty of Waitangi Settlements Process*, cit, p. 6.

¹⁸⁵ NZ OFFICE OF TREATY SETTLEMENT, *Ka tika ā-muri, ka tika ā-mua: he tohutohu whakamaārama i ngā whakataunga kereāme e pā-ana ki te Tiriti o Waitangi me ngā whakaritenga ki te Karauna - Healing the past, building a future: a guide to Treaty of Waitangi claims and negotiations with the Crown*, Wellington, New Zealand: Office of Treaty Settlements, 2015, pp. 25-26.

¹⁸⁶ GOLDSTONE PAUL, *Treaty of Waitangi Settlements Process*, cit., pp. 15-17-18.

However, the Tribunal does not always suggest that the land should be returned to Māori ownership. It may be proposed compensation, as known as a settlement redress: a Crown apology; a financial and commercial redress that it is not only a repayment of the losses of the claimant group, but also a contribution to reestablish a basis for the future economy; and a cultural redress, which contributes to protect sacred places and to recognize special rights to places, such as lakes, mountains and rivers, as happened in March 2017 with the recognition of the legal rights as a human being of the Whanganui river¹⁸⁷. The year following the extension of the mandate of the tribunal, the treaty was integrated into New Zealand law, even if in a limited manner, thanks to the State-Owned Enterprises Act 1986, which proposed the transfer of assets from the departments of the Government to state-owned enterprises, but these were nothing, but private companies owned by the Government¹⁸⁸. Section 9 of the act reported '*Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi*'¹⁸⁹. The legislative document challenged in court in 1987, when the Principles of the Treaty were defined with the judgement of *New Zealand Maori Council v Attorney-General*. This was the first court case to define the principles more in detail – until that moment only an uncompleted list with general terms – and some of them identified by the 1987 case were: the duty to act reasonably and in good faith; the active Crown protection of Māori interests; the Government should make informed decisions; the Crown should remedy past grievances and it has the right to govern.

There were further developments in later cases during the 1990s, including: *New Zealand Maori Council v Attorney-General 1989*, which related to forests; *Tainui Maori Trust Board v Attorney-General 1989*, which related to coal; *New Zealand Maori Council v Attorney-General 1991*, which related to the radio spectrum; *New Zealand Maori Council v Attorney-General 1992*, which related to broadcasting assets. This allowed to give the precedence of those legislations, in which the treaty is mentioned in strong terms, over the other parts of that legislation whether they come into conflict, increasing the number of laws referred to the principles of the treaty, as: Environment Act 1986, Conservation Act 1987, Resource Management Act 1991 and Crown Mineral Act 1991.

¹⁸⁷ ELEANOR AINGE ROY, *New Zealand river granted same legal rights as human being*, 2017, <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>

¹⁸⁸ NZ LEGISLATION, *State-Owned Enterprises Act 1986*, <http://www.legislation.govt.nz/act/public/1986/0124/latest/whole.html#DLM98028>

¹⁸⁹ LAKING ROB, *State-owned enterprises' performance*, Te Ara - the Encyclopedia of New Zealand, <http://www.TeAra.govt.nz/en/state-owned-enterprises/page-2>

The Principles of the Treaty have become a common issue in contemporary New Zealand society and politics. In 1989 the Fourth Labor Government adopted a list of principles, similar to the one established in the 1987 case, as known as the ‘Principles for Crown Action on the Treaty’. These were: the principle of government – *kāwanatanga* principle: Government has the right to govern and make laws; the principle of self-management – *rangati-ratanga* principle: iwi – communities – have the right to organize as iwi, and, under the law, control their resources as their own; the principle of equality: all New Zealanders are equal before the law; the principle of cooperation: both the Government and iwi are obliged to accord each other reasonable cooperation on major issue of common concern; the principle of redress: Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur¹⁹⁰.

On the other hand, not everyone accepted the idea, complaining about the Treaty of Waitangi Grievance Industry. As a result, in 2005 politician Doug Woolerton introduced the Principles of the Treaty of Waitangi Deletion Bill, supported by the 13th Deputy Prime Minister of New Zealand Winston Peters and others, but the bill failed to pass its second reading in November 2007^{191 192 193}.

A remarkable step has been taken by New Zealand Ministry of Foreign Affairs and Trade in 2017, with the Ministry’s Māori Engagement Strategy: in the following four years it aims at improving the partnership and consultation with Māori community by involving them in the staff of the Ministry and promote *mātauranga* Māori. Two years later the Ministry also agreed on the establishment of Taumata, involving recognized leaders by Māori themselves – the Ministry deliberately did not take part in the selection – to engage with the Ministry of trade issues and improve the connection with iwi trade-related interests. As it has been written in 2019-2020 MFAT report, the need for this engagement model came from Māori concerns about *‘increasing volatility and uncertainty for agricultural traders in the global marketplace; the fast-moving nature and pace of change; and the number of negotiations*

¹⁹⁰ HAYWARD, *Principles of the Treaty of Waitangi – ngā mātauranga o te Tiriti*, Te Ara – the Encyclopedia of New Zealand, <http://www.TeAra.govt.nz/en/principles-of-the-treaty-of-waitangi-nga-matauranga-o-te-tiriti/print>, pp. 1-7.

¹⁹¹ NZ HERALD, Peters unveils NZ First treaty policy, 2005, available at: https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10332036

¹⁹² NZ FIRST, Doug Woolerton’s Principles of the Treaty of Waitangi Deletion Bill, 2007, available at: <https://web.archive.org/web/20070701035301/http://www.nzfirst.org.nz/feature/?i=27>

¹⁹³ NZ PARLIAMENT, Principles of the Treaty of Waitangi Deletion Bill - First Reading, 2015, available at: https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050608_00001017/principles-of-the-treaty-of-waitangi-deletion-bill-first

under way that are of interest to Māori”¹⁹⁴. Main Taumata tasks include support in the research and analysis with a Māori point of view in order to improve understanding of Free Trade Agreement and it is seen to be working alongside with the Federation of Māori Authorities and Pou Tahua of the National Iwi Chairs forum.

2 Misleading Concepts and the (Mis)Use of Māori Culture

One of the purposes to be reached by Indigenous peoples is the recognition and respect of their role as guardians of the environment, their traditional knowledge and *taonga*. In *te reo Māori* exists a specific word: *kaitiakitanga* – guardianship –, used since 1980s in Waitangi Tribunal claims over land and or natural elements. As it has already been said, between communities and land there is a unique relationship, where if the environment is damaged, it would correspond to a spiritual damage. *Kaitiakitanga* for Māori is also important for empowering partnership with agencies and ministries, being officially recognized in 1991 in the Resource Management Act, which would be described deeper in the next chapters¹⁹⁵. Guardianship would also include: ‘*deciding on the appropriateness of any research; control over access to their TK and related resources; and the right to free prior-informed consent*’¹⁹⁶. That is why consultation prior use is always advisable, but it seems to exist no trace of clear and established channels to guide users to properly refer to *kaitiaki* and avoid excuses such the one of not knowing who to consult with.

The major part of misappropriations of Māori culture take place outside Aotearoa New Zealand, starting from one of its most popular symbols: the *moko*, the typical Māori facial tattoo. Traditionally, it is worn by both men and women, representing their social status and tribe of origin, but nowadays its motifs are often mis-used in merchandising clothes – as Thierry Mugler and Jean Paul Gaultier did –, videogames, tattoos on common people’s body without even knowing the meaning and more, disrespecting Māori protocols. One first example of misappropriation is represented by a Dutch restaurant serving New Zealand and Australian cuisine, which renamed itself *Moko* and used the image of a blonde tattooed Dutch woman. Then, in 2009 the representation by Barry Ross Smith of young Queen Eliz-

¹⁹⁴ NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS AND TRADE, *2019-2020 Annual Report*, 2020, p. 51.

¹⁹⁵ DAVID-IVES CORINNE, ‘Guardians of the Environment. Indigeneity and Ecology’ in *New Zealand in Light of the WAI 262 Claim*, Elohi, 2013, p. 11-27, pp. 14-15.

¹⁹⁶ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., p. 44.

abeth II with a *moko* on her chin – usually worn by people of Ngāi Tuhoē – and the date of the Treaty of Waitangi in Roman numerals. It is not necessary to underline that it was inappropriate and considered an insult to the Queen, demonstrating the unsuccessful attempt at representing the self-determination of Aotearoa, as the artist wished, who in response did a self-portrait with a full facial tattoo to symbolize the growing equality of the Pacific and European cultures¹⁹⁷. The most recent fact of appropriation of *moko* was in the latest Cyberpunk 2077 videogame, when the picture of a character customization including a traditional female *moko* became viral, putting at risk the fine line between appreciation and appropriation. The excitement for the release after years of development transformed into disappointment of gamers, forcing Sony after only one week to pull the game from PlayStation Store and apologize for the inconvenience, offering refund to unsatisfied fans.¹⁹⁸

Another well-known element is the haka, object of several Waitangi Tribunal cases. *Ka Mate haka* in particular, is supposed to be the last part of Te Rauparaha's chant – the prestigious chief of Ngāti Toa and warrior that won various battles against other *iwi* and colonial governments – that, combined to body acts, it is still performed and known worldwide, especially because played by the All Blacks before their matches since 1905 – when they played overseas, from 1987 it started to be used in every game played. Emblematic is the Fiat television commercial, where black-dressed women played *ka mate haka* and in the final scene a little boy showed his tongue, so as to imitate *haka* final action. If in Italy the advertisement became popular, on the other side of the world the offense was immense. According to Māori culture, haka cannot be performed by women and although the request of New Zealand Ministry of Foreign Affairs and Trade, Fiat refused to withdraw the commercial. Neither the proposals of changing it with a real Māori group or a designed haka, nor non-offensive marketing campaign were successful, made evident the need of an international system to meet Indigenous peoples' interests¹⁹⁹. Thanks to the Haka Ka Mate Attribution Act 2014, British Crown recognized *ka mate haka* significance, and Ngāti Toa as its *kaitiaki*, affording to them the right of attribution, which is applied whenever *Ka Mate* is as-

¹⁹⁷ Ibid, p. 30.

¹⁹⁸ DEGUARA BRITTNEY, 'It's definitely appropriation': Use of *tā moko* in Cyberpunk 2077 video game, 2020, available at: <https://www.stuff.co.nz/pou-tiaki/123715517/its-definitely-appropriation-use-of-t-moko-in-cyberpunk-2077-video-game>

¹⁹⁹ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., pp. 42-43.

sociated to any publication for commercial purposes, any communication to the public and any film in which it is included²⁰⁰.

Cultural heritage and land are also really important to Indigenous peoples because representing a deep connection to their Gods, each one representative of one specific aspect of the environment, as forests, sea and cultivated food for instance. *Papatūanuku* – the earth mother – for example, is one of the most important *atua*, who gave origin to the world together with *Ranginui* – the sky father – and their children: their name associated to goods considered *noa* – not sacred –, such as food, tobacco and alcohol, would be considered offensive. In the first years of 2000s Lego launched a new series of Bionicle, imagining the storyline of the inhabitants of *Mata Nui* and the villain *Makuta*. A letter of complaint was sent by New Zealand lawyer Maui Solomon because of the misappropriation of Māori words with a spiritual significance and, following a meeting between Lego's representatives and Māori groups, Lego admitted the improper use and agreed to not use Māori names in future versions of their toys²⁰¹.

Ngāi Tahu is the guardian of *pounamu*, the treasured greenstone that can be found in New Zealand South Island. It was used by Māori for knives and adzes, but also earrings, necklaces and rings were made from it. By 1860s the Crown had the control over *pounamu* too, and Ngāi Tahu had to wait more than one century to regain it, when the Ngāi Tahu (Pounamu Vesting) Act 1997 was passed and recognized them the ownership and management of the New Zealand jade. The iwi later drafted a resource management plan for the protection and sustainable use of the stone, which was approved in 2002 and known as Pounamu Resource Management Plan, establishing a Pounamu Management Officer and specific requirements for carvers, and demonstrating their ability properly safeguard taonga from their misappropriation in mass-produced souvenirs and illegal export²⁰².

These are only few demonstrations of how people from outside the community often take advantage thanks to their ability in obtaining IPR for creations deriving from Indigenous' heritage, who rightfully complain the disrespectful and inappropriate ways in which their culture is utilized without their consent.

²⁰⁰ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Introduction to the Trade Marks Act 2002 – Practice Guidelines*, available at: https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/intro/#jumpto-6_002e-definition-of-a-trade-mark5

²⁰¹ ANDERSON JANE, *Indigenous Traditional Knowledge & Intellectual Property*, Duke University School of Law – Center for the Study of the Public Domain, 2010, pp. 15-16.

²⁰² TE ARA – THE ENCYCLOPEDIA OF NEW ZEALAND, *Story: Pounamu – jade or greenstone*, available at: <https://teara.govt.nz/en/pounamu-jade-or-greenstone/page-1>

To sum up, Te Tiriti o Waitangi is still the referring document in the attribution of roles over cultural heritage among Great Britain, Aotearoa New Zealand and Māori community. It means that New Zealand Government has still the active duty to respect the interests guaranteed under the treaty and provide those solutions able to balance everyone's interests, such as the foundation of the Waitangi Tribunal, but also clearer channels for a proper communication and management of international issues regarding use and appropriation of Māori culture are needed, and that it is why I agree with Lai when she says that there is little that law could do until more transparent channels for potential users are developed. Māori culture still contributes to the identity of modern New Zealand, but it does not necessarily mean that it is truly appreciated. Māori culture appears to be more popular overseas: Māori MP John Tamihere too, believes that there might be a competitive advantage in the international trade that could benefit Māori people itself²⁰³. Considering the still existent disparity between them and *pākehā* in unemployment and criminality rates, trading products part of their cultural heritage would reveal a relevant source of income, but it would also empower their own identity and develop their own methods. Actually, in the last decades Māori urbanization has been increased, mainly in search of work, but at the same time distancing them from their culture of origin, as known as mainstreaming phenomenon²⁰⁴. Māori descendants and IPR experts shall cooperate in order to elaborate the proper instruments to be later implemented in order to keep alive and preserve the uniqueness that distinguish still nowadays Aotearoa New Zealand.

²⁰³ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., p. 2.

²⁰⁴ Ibid, pp. 13-15.

Chapter 4

Enforcement of Māori Intellectual Property Rights in New Zealand

Inā kei te mohio koe ko wai koe, i anga mai koe i hea, kei te mohio koe. Kei te anga atu ki hea.

IF YOU KNOW WHO YOU AND WHERE YOU ARE FROM, THEN YOU WILL KNOW WHERE YOU ARE GOING.

New Zealand history of copyright law, and consequently of IPR, reflects its history as a British colony, being very similar to the one of United Kingdom for most of the 20th and 21st century. Before the Copyright Act 1913 – adopting United Kingdom 1911 Act –, it has to be remarked the Copyright Ordinance 1842, which secured the copyright of printed book to their authors. It mainly aimed to protect a forthcoming Māori grammar written by Reverend Maunsell, a relevant figure for the Māori church at the time. Some differences in New Zealand's law could be found from the 20th century, but these were not particularly substantive: subsequent Acts adopted in 1962 and 1994 in fact, were based on Britain's 1956 and 1988 Acts, which still exercised its colonial influence. The turning point happened in the 1980s, when a free market and deregulated economy were instituted, resulting in the arrest of manufacturing of those goods, which were cheaper if imported. One of the most affected sectors was car assembly, which is still not a New Zealand's strength, but the escalation of car prices was what stimulated a change of direction. New Zealand copyright law included protection of industrial design, in which are contained drawings and models and thus, copyright law could be used to prevent car importation²⁰⁵. In New Zealand was also drafted the Maatatua Declaration on Cultural and Intellectual Property Right of Indigenous Peoples, the first to come directly from Indigenous peoples. In 1993, it was hosted the first International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples by nine tribes of Mataatua – Bay of Plenty, New Zealand –, highlighting the right to self-determination '*and in exercising that right (Indigenous peoples) must be recognized as the exclusive owners of their cultural and intellectual property*'. The use 'ex-

²⁰⁵ FRANKEL SUSY, *A Brief Perspective: The History of Copyright in New Zealand*, Sidney University Press, pp. 73-77.

clusive owners' create some contrast with Article 2 of the Declaration, in which is recommended the recognition of guardianship role of those population, having '*the right to protect and control dissemination of that knowledge*', giving the impression that exclusive ownership refers to what is meant with cultural and intellectual property in Western law. This demonstrates that there is a lack of preciseness in the terms used, risking misinterpretations or having no legal meaning at all. Not surprisingly, it may be affirmed that the Declaration have failed in receiving the proper international recognition, contested also for not being drafted and negotiated among governmental organizations²⁰⁶.

It is my intention in this chapter to resume the main steps taken by New Zealand to ensure intellectual property rights to all its citizens, how they could be applied to Māori people and the relation with private international law.

1 Intellectual Property Office of New Zealand

As part of the New Zealand Ministry of Business, Innovation and Employment, the Intellectual Property Office of New Zealand (IPONZ) is a governmental agency in charge of examine, grant and register intellectual property rights in New Zealand, in particular patents, trade marks, design and plant variety rights. Founded in 1870 with the New Zealand Patent Office, it now administers the Patents Acts of 1953 and 2013, the Designs Act 1953, the Plant Variety Rights Act 1987, the Trade Marks Act 2002 and the Geographical Indication Registration Act 2006. Briefly, IPONZ consists in seven units, which report to a single National Manager and its principal strength is that every application or renewal could be made directly online. According to its year review report released on May 2020, IPONZ saw an increase of almost 4% in patents application, almost reaching 32 000 patents on the register regarding especially medical technology; electrical machinery, apparatus and energy; biotechnology; civil engineering and pharmaceuticals. Even if geographical indications – as predicted – had a slow growth, trademarks continued to escalate: 38% of the more 25 000 trademark applications filed in 2018/2019 used the Madrid system for overseas protection, in particular in electronics and computer; services for business and retail services; scientific and engineering services and software design; honey, confectionery and ice cream; pharmaceuticals, supplements and baby foods. A detail that particularly catches

²⁰⁶ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., pp. 204-206.

my eyes is that 789 applications were referred to the Māori Advisory Committee, and 58 of them were considered to likely offend Māori population. The level of applications in the plant variety rights field is still stable, subdividing themselves in varieties of ornamentals; of fruit and nuts; of crops and vegetables and of pasture. In February 2020, it has also been hosted the 51st session of the Technical Working Party for Ornamentals and Forest Trees in Christchurch²⁰⁷. From the same year, it is possible to check quickly and from any device if a brand name or logo is already in New Zealand trade mark register thanks to the artificial intelligence technology through image recognition developed by Sword Group: Trade Mark Check²⁰⁸. Other services offered by IPONZ are:

- (i) *process and examine patent, trade mark, design, plant variety right and geographical indication applications;*
- (ii) *implement international agreements;*
- (iii) *conduct dispute hearing about intellectual property registrations/eligibility;*
- (iv) *act as a receiving officer for the World Intellectual Property Organisation (WIPO);*
- (v) *respond to requests for information;*
- (vi) *provide assistance including information and training to customers;*
- (vii) *collect application volumes data.*²⁰⁹

It is remarkable that IPONZ offers important and easily downloadable instruments to prevent the use or registration of trade marks or patents that could be considered offensive especially by Māori, avoiding waste of time and money. '*New Zealand intellectual property applications are assessed for Māori cultural elements*', such as Māori words or design, traditional knowledge, plants or animals and music or dance, which could be only a small part or involve the entire intellectual property. The link with Māori culture may not be obvious or taken for granted, that is why IPONZ shares guides in order to understand better Māori imagery, designs, words and concepts and how they could be properly used in intellectual property applications. For instance, *tane* in Japanese means 'seed', but it also may refer to Tānemahuta, the Māori god of forest; or a spiral may remind the *koru* symbol. Here it is applied the principle that any word or design recognized as Māori in New Zealand, it would be

²⁰⁷ INTELLECTUAL PROPERTY OFFICE OF NEW ZEALAND, *IPONZ Year in Review 2018/2019*, 2020, pp. 5-8.

²⁰⁸ *Ibid*, p. 11.

²⁰⁹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, About Us, available at: <https://www.iponz.govt.nz/about-iponz/>

treated as Māori and must be considered by Māori Advisory Committee²¹⁰, established under the Patents Act 2013 as advisor of the Commissioner of Patents on possible exploitations of Māori culture. Its five members – including a Chairperson selected by the Commissioner – have a deep knowledge of *mātauranga* and *tikanga* Māori and have the fundamental role to ensure that no patents or trade marks are registered if contrary to Māori values. There is no extra cost when the application is considered by the Advisory Committee, whose advice will be sent to the Commissioner, who would share the decision with the applicant previously informed of the status of its application²¹¹. The reference point for the efficient relationship between IPONZ and the Commissioner is the so-called *liaison officer*, who is in responsible of the organization and has to attend to the meetings of the Committee; process the correspondence; of the statistics and records of Committee's advice; assisting the Chairperson in the drafting of Committee's annual report. Within the Committee, conflict of interest may also arise in specific cases, especially when a member of the Committee is involved, or a member of his/her family is the applicant or has an interest in an applicant company business and the Commissioner has sought advice. In these cases, the member of the Committee aware of his/her involvement must withdraw from discussions his-/herself or waiting for the Committee to do so; when a member reasonably doubts on another member, he/she has to inform the Chairperson or the Commissioner²¹².

1.1 Patents Act 2013

Patents Act 2013 and Patents Regulations 2014 represent the legal framework for patents in New Zealand. The Act entered into force on 13 September 2014 and it has been applied to applications, whose filing date is later than 12 September 2014 and to all patents in force since the same date. However, the previous Patents Act 1953 and its regulations are still applicable to those applications, whose filing date is before 13 September 2014. Under section 225 of the 2013 Act it has also been established the Patents Māori Advisory Committee (Patents MAC), advising the Commissioner on possible exploitations of inven-

²¹⁰ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Register IP that has a Māori element*, available at: <https://www.iponz.govt.nz/about-ip/maori-ip/register-ip-that-has-a-maori-element/>

²¹¹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Protecting Intellectual Property With a Māori Cultural Element User Guide*, 2016, pp. 5-7.

²¹² NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Terms of Reference for the Māori Trade Marks Advisory Group*, available at: <https://www.iponz.govt.nz/assets/pdf/maori-ip/terms-of-reference-maori-advisory-committee.pdf>, pp. 4-5.

tions contrary to Māori values and whose current Committee Chair is Professor Pare Keiha, but he is also Vice Chancellor for Māori Advancement, Pro Vice Chancellor for Learning and Teaching and Dean/Tumaki of Te Ara Poutama, the Faculty of Māori & Indigenous Advancement at the AUT University. The Patents Act 2013 provides a re-examination of the 1953 Act with key changes, starting from the grounds of examination of the patent: if in the 20th century only novelty was required, in the 21st century also inventive step and utility – specific, credible and substantial use – requirements are necessary. In the 1950s there were no statutory exclusions, but in 2013 were excluded from patentability human beings; methods of human treatment, and diagnosis practiced on humans; plant varieties; computer programs; inventions where commercial exploitation is contrary to public order and/or morality or deriving from Māori traditional knowledge contrary to their values. Another key difference between the two Acts is related to maintenance and renewal fees: in 1953 maintenance fees were not required, but they were for renewal 4, 7, 10 and 13 years from filing; in 2013 instead, both for renewal and maintenance fees are annual starting from the fourth anniversary of filing date²¹³.

The application must be accompanied by a so-called ‘patent specification’, in which the invention is described, and once submitted, it would be published in IPONZ website within 18 months, but it does not grant the patent. In the period between the publication and the acceptance of the patent – about one year –, individuals may write a statement to IPONZ if it is in their opinion that the application lacks at least one of the fundamental requirements. Examination reports and applicants’ responses would be also published in case of issues requiring particular attention, but when it seems to be no compromise, the applicant may require a hearing to state his/her case. The Journal of the IPONZ is published monthly and it also contains acceptance of patents applications, but patent cannot be granted yet, only after three months in which anyone may oppose to it²¹⁴.

1.2 Designs Act 1953

In New Zealand, protection for industrial designs is provided through the Design Act 1953 and the Designs Regulations 1954. As affirmed by IPONZ, registering a design en-

²¹³ AJPARK, *New Zealand’s new Patents Act 2013 The key differences between the Patents Act 1953 and the new Act*, 2014, available at: <https://www.ajpark.com/assets/Uploads/New-Zealands-new-Patents-Act-2013-The-key-differences-between-the-Patents-Act-1953-and-the-new-Act.pdf>

²¹⁴ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Patents Examination Process*, available at: <https://www.iponz.govt.nz/about-ip/patents/process/>

sure more protection instead of the one provided by copyrights, because requiring searching for similar or identical designs first, and establishing real novelty and originality. New Zealand Registered Designs and design applications' classification is in accordance with International Locarno Design Classification System, which has reached its 11th version, established by the Locarno Agreements 1968. Within fifteen days from the application, a report will be sent to the applicant and if the design is considered registrable, an Examination Complete report would be sent too. Whether it is not considered to be registrable, the reasons would be outlined accompanied by those documents required to meet the conditions of registrability within a period of twelve months. Once received the Examination Complete report, a Certificate of Registration is issued and advertised in the monthly journal. Renewal is set at 5 and 10 years from the date of registration – the first application date – and has to be paid by 6 months or the registration would expire. The owner loses his rights on the design once cancelled, which can be stated by the Commissioner of the High Court also because it was not new and original, or because granted to someone who was not entitled to apply²¹⁵.

No dedicated Māori Advisory Committee was established, and if Māori cultural elements are present, the application would be sent to Trade Marks Māori Advisory Committee. IPONZ makes available resources to help applicants identify possible Māori elements in their design in order to avoid contrasts with Māori culture. For instance, most distinctive design elements of Māori imagery are curvilinear as in *moko* – tattooing –, *kowhaiwhai* – rafter patterns – and *whakairo* – carving –; or rectangular as in *tukutuku* – ornamental paneling – or *taniko* – embroidery²¹⁶. They may also contain Māori symbols, as the *hei tiki*, representing the unborn child associated with the Māori goddess of childbirth, Hineteiwaiwa. It is a small carved ornament usually worn as a necklace and made of pounamu, the popular green stone. Furthermore, the major part of trade mark and designs application containing the work 'kiwi' and the *koru* design do not need to be assessed by the Māori Trade Marks Advisory Committee, simply because these two components must not be present in the applications. The Committee would be still involved if included Māori geographical name, any word, name or association that would regard ancestors, sacred places, rituals or elements and anything that could be seen as ambiguous and offensive²¹⁷. An example reported by

²¹⁵ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Designs Examination Process*, available at: <https://www.iponz.govt.nz/about-ip/designs/process/>

²¹⁶ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Māori imagery*, available at: <https://www.iponz.govt.nz/about-ip/maori-ip/maori-imagery/>

²¹⁷ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Māori words and designs*, available at:

IPONZ in the design field, which required the intervention of Trade Marks MAC is the one related to Tamati's application for a new range of sandals with Māori designs, such as *koru* – representing mainly personal growth –, twists – which can be single, double or triple and represent path of life, friendship and love –, *Hei Matau* – abundance, strength and determination – and *Manaia* – spiritual guardian. *Koru* and *Hei Matau* designs were found acceptable, while the other three were considered by the Trade Marks MAC to cause offence to Māori people. Tamati did not have interest in manufacturing products that would be culturally offensive and that would make him wasting time and money, thus he removed the denied versions from the application and persisted with the other two²¹⁸.

1.3 Plant Variety Rights Act 1987

Plant Variety Rights find their application in all new plant varieties other than algae and bacteria. Starting from the date of application, for about 20 years – 20 for non-woody plants, 23 for woody-plants – the right owner is the only person allowed to produce and sell that variety. In the explicit case of fruit, ornamental and vegetable plants, it is possible to market fruits and flowers. This protection is granted under the Plant Variety Rights Act 1987, which also prohibits to falsely claim to be the holder of the right, that a variety is covered by PVR when is not and not using variety denomination. A review of the Act is currently ongoing, considered necessary since the early 2000s, especially when the Waitangi Tribunal Wai 262 report has stated a series of recommendations in the PVR regime. The process of review was further slowed down because of the negotiations of the Trans-Pacific Partnership Agreement, resulted in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), under which New Zealand is required to update and modernize its PVR legal framework by 30 December 2021. Since September 2018 there have been among the Ministry of Business, Innovation and Employment, Māori and Cabinet. The following year, the Ministry published an Options Paper, in which were given the available options for improving the PVR Act. Another document has been released in Au-

<https://www.iponz.govt.nz/about-ip/maori-ip/words-designs/>

²¹⁸ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Protecting Intellectual Property with a Māori Cultural Element User Guide*, 2016, p. 28.

gust 2020, addressing ‘*outstanding policy issues relating to compliance with the Treaty of Waitangi, as well as administrative/operational matters with the PVR Office*’²¹⁹.

A PVR has to be new – sold for less than one year in New Zealand, six months overseas –, distinct – different from other varieties –, sufficiently uniform and stable – it has to correspond to its description and has to be consistent – and have an acceptable denomination – complying with international guidelines –, aiming at encouraging investments and effort in plant breeding in New Zealand²²⁰. The State is one the 74 members of the International Union for the Protection of New Varieties of Plants (UPOV) and takes part to the several Committees and Technical Working Parties. This demonstrates that New Zealand is an active participant and permits to its breeders to apply for PVR also in other member states ‘*under the same provisions as national plant breeders of those states*’²²¹. Any PVR holder may change online some data, such as address for service – as required under section 5 of the Plant Variety Act 1987, it is necessary to have a valid address for service in New Zealand for PVR owners, and in case of multiple owners, a single address has to be authorized to receive all the correspondence from IPONZ – and the name on the PVR register before the acceptance of the application. Renewal of PVR is granted by the payment of the annual fee: IPONZ would send a renewal notification one month the anniversary of the date of the grant, and since then it is given one month for making the payment before a Proposal to Cancel letter is sent. If not interested in the renewal, withdrawal is at the discretion of right holder, but it has to be kept in mind that a withdrawn variety may still be eligible for PVR if new applications are made for the same variety. IPONZ has a Journal for PVR too, which contains all decisions in making or declining grants and every general information on plant varieties and PVR that the Commissioner has to publish, as stated in the Plant Variety Rights 1987. It is published every three months and it is subdivided in ‘online section about application and grants’, where all applications, denials and grants, renewals, changes of ownership and names are resumed, while ‘general information section in pdf format’ contains deadlines, developments also at international level and publications on PVR²²². PVR applications usually do not involve the Māori Advisory Committee, with no separate pro-

²¹⁹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Plant Variety Rights Act Review*, available at: <https://www.iponz.govt.nz/about-ip/pvr/pvr-act-review/>

²²⁰ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Protecting Intellectual Property with a Māori Cultural Element User Guide*, cit., p. 29.

²²¹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *International plant variety protection*, available at: <https://www.iponz.govt.nz/about-ip/pvr/international/>

²²² NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *New Zealand Plant Variety Rights Journal*, available at: <https://www.iponz.govt.nz/about-ip/pvr/pvr-journal/>

cesses or criteria in relation to mātauranga Māori. However, Māori elements may be taken into consideration by inspectors in considering an application. It may happen that *iwi* are involved in PVR without knowing, as in the case of Hamish, a nursery owner, who noticed a seed of a local native plant and decided to collect it. The first seed grew and developed into a cultivar and Hamish presented the application, but it was required the place and date when the original seed had been found – because the variety emerged from discovery and development. It was found out that the land in question was managed by a local *iwi* and if the nursery owner had not been able to present the requested document in the fixed timeframe, demonstrating *iwi*'s awareness of his application for a PVR, the application could have expired, as stated under Section 7 of PVR 1987²²³.

1.4 Copyright Act 1994

Accompanied by Copyright Regulations 1995, the 1994 Act permits copyright owners to manage the activities regarding the use and diffusion of their works, whose categories are further detailed under Section 14. These do not include names, titles, single words and headlines because believed to small and not original for being protected. Some statutes, court judgements and reports of official inquiries do not have copyright protection too²²⁴. However, so-called Crown Copyright would protect for 100 years works created or owned by New Zealand Government, starting from the end of the calendar year in which the work has been made. Legally defined in Section 26 of the Copyright Act 1994, they cover documents released by the Queen and her representatives and it is possible to freely quote these works without permissions with no commercial purposes with some conditions: information must be correctly reproduced, in a not offensive and misleading manner, and neither the State Services Commission emblem nor the New Zealand Government logo may be used. New Zealand legislation, parliamentary debates, select report, court and tribunal judgements, royal commission, commission of inquiry and ministerial and statutory inquiry reports are not covered under Crown copyrights²²⁵.

²²³ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Protecting Intellectual Property with a Māori Cultural Element User Guide*, cit., p. 30.

²²⁴ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Copyright Legislation*, available at: <https://www.iponz.govt.nz/about-ip/copyright/legislation/>

²²⁵ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Crown copyright*, available at: <https://www.iponz.govt.nz/about-ip/copyright/crown-copyright/>

Both civil and criminal penalties are available to courts in the Act in case of copyright infringement: from interim or mandatory injunctions, search orders for the preservation of evidence and damages, to imprisonment up to five years or fines up to NZ\$ 150,000. The Chief of the MBIE is in charge of prosecute offences of ‘manufacturing, importing and selling pirated works’ by acting fairly and consistently. It has to consider several factors: whether there is a credible evidence, whether it is in the public interest proceed with the prosecution, whether the alleged accused person has been identified or it is likely to be identified and so on²²⁶. The Copyright Tribunal has an important role in hearing disputes about copyright licensing agreements under the Copyright Act 1994 and applications of licensing schemes. It was originally established with the Copyright Act 1962 as an independent body, but it does not deal with intellectual property issues and complaints about unauthorized use of a logo or design²²⁷. Tribunal’s decisions about one’s entitlement to license and on what terms are published online and easily accessible. New Zealand also takes part to several international agreements establishing international standards in the copyright protection, including the Berne Convention, the TRIPS Agreement and the Universal Copyright Convention 1952, in order to fulfill its international obligations and give its contribution to global solution²²⁸. As part of related rights, performers’ rights may be used in safeguarding some aspects of mātauranga Māori, as the performance of *waiata* – songs – and *kapa haka*, expecting that moral rights are respected too. If a reproduction of a traditional composition is altered and used for commercial purposes that may offend Māori values, the author could complain the use that would affect author and his/her community’s reputation²²⁹.

1.5 Trade Marks Act 2002

In Section 5 of Trade Marks Act 2002, a trade mark is defined as ‘*any sign capable of: (i) being represented graphically; and (ii) distinguishing the goods or services of 1 person from those of another person*’, where with ‘sign’ it is included brand, colors, letters, names,

²²⁶ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Enforcing Copyright*, available at: <https://www.iponz.govt.nz/about-ip/copyright/enforcing-copyright/>

²²⁷ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Copyright Legislation*.

²²⁸ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Prosecution policy guidelines under the Trade Marks Act 2002 and the Copyright Act 1994*, p. 1.

²²⁹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Protecting Intellectual Property with a Māori Cultural Element User Guide*, cit., pp. 33-34.

numerals, shapes and so on, or a combination of them. These also represent the specific requirements that must be met, namely being a sign, capable of being represented graphically and of distinguishing goods or services of one person from those of another one²³⁰. Once presented the application, in fifteen days IPONZ would examine it and decide, whether the trademark is registrable or not. A trademark could be rejected for grounds concerning its own nature – absolute grounds – or the conflict that would create with other persons, entities or traders’ rights – relative grounds. Examples of absolute grounds are the use of superlatives, descriptive terms, a geographical location, representations of the Royal family – as states in Section 24 of the Act – or because being contrary to mātauranga Māori, while relative grounds may concern the similarity with other applications or well-known mark in the country. In case of non-registrability, IPONZ would send a compliance report, to which applicants are encouraged to reply and discuss about the reasons which lead to a negative response. If the mark is accepted instead, its acceptance notice would be published in The Journal and whether no opposition is raised in the following three months, then the mark will be registered within six months from filing date. Differently from other IPR, a trademark registration may be renewed every 10 years by requiring a renewal up to 12 months in advance – Sections 58 and 59 are dedicated to renewal, removal and restoration of a trademark, while 2003 Regulations 132, 133 and 134 further set out these requirements. If the renewal fee has not been paid by the deadline, the mark would change its status to ‘Registered – past expiry date’, giving a 6-month grace period that, if not respected, it leads to the expiration of the mark without the possibility of being restored. In response to infringements and criminal offences, Trade Marks Act 2002 contains similar civil and penal sanctions to the one written in the Copyright Act 1994, that is to say injunctions, damages, and imprisonment up to five years, involving the MBIE in the prosecution process. A significant Act that imposes criminal responsibility forging, falsely applying or using an existing trademark is the Fair Trading Act 1986, whose provisions mainly find application in commercial activities involving counterfeit goods²³¹.

Under Section 36 of the Trade Marks Act 2002 Article 4 of the Paris Convention for the Protection of Industrial Property has been implemented, giving the right to file further trademarks applications in any signatory state to whoever has already filed one in a signa-

²³⁰ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Introduction to the Trade Marks Act 2002 – Practice Guidelines*, available at: https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/intro/#jumpto-6_002e-definition-of-a-trade-mark5

²³¹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Trade Marks Examination Process*, available at: <https://www.iponz.govt.nz/about-ip/trade-marks/process/examination/>

tory country, receiving priority date of the original application, as long as the other applications are presented within six months from the original one. As member of the WTO, the TRIPS Agreements has also been included in the Act, remarking Article 15, stating that '*signs, in particular words including names, letters, numerals, figurative elements and combinations of colours as well as combinations of such signs, shall be eligible for registration as trade marks*'²³². The adherence to the Madrid Protocol – administered by WIPO – facilitate further trademarks protection overseas. With a single application through local trademark office, owners may be guaranteed protection in the over 100 participating countries. In New Zealand this can be made through New Zealand Office of Origin trademark, but if one has already an international registration and desires to expand it in other countries, it would need to refer directly to WIPO²³³. IPONZ also adopted both Nice and Vienna Classifications to ensure efficient searches of trade marks worldwide: while the former is used to register trademarks – to all applications filed from 24 December 2016 it is applied the eleventh edition came into force under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks –; the latter is a numeral system developed by WIPO '*to describe trade marks containing stylization and/or images*', referring especially to pictorial representations, ornamental motifs or other figurative elements – since 23 December 2017 all applications are in accordance with the eight edition. IPONZ has added to Vienna Classification descriptors precisely for New Zealand images, such as native flora and fauna – fern and kiwi bird for instance –, moko, New Zealand map and flag²³⁴. Classification of goods and services is provided by Sections 31 and 32 of Trade Marks Act 2002 in accordance with Nice Classification system, which includes 45 classes – 1 to 34 for goods, 53 to 45 for services – subdivided in two parts: the first has two alphabetical lists for goods and services, and in the second goods and services are listed in class order.

In 1991 various changes to the Trade Marks Act had been proposed by Ministry of Commerce, expressing the need of a more adequate protection of Māori cultural and intellectual property. Few years later, the Māori Trade Marks Focus Group was established, whose meeting in 1995 and 1996 resulted in the *Māori and Trade Marks: A Discussion Paper*, in

²³² NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Introduction to the Trade Marks Act 2002 – Practice Guidelines*.

²³³ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *International trade marks*, available at: <https://www.iponz.govt.nz/about-ip/trade-marks/international/>

²³⁴ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Introduction to the Trade Marks Act 2002 – Practice Guidelines*.

which were resumed the Group's deliberation concerning the registration of Māori terms, symbology, sounds and smells as trademarks. After further meetings, the Group recommended some measures to be adopted in the field of trade marks by the Cabinet, including a consulting group for the Commissioner consultation with the Cabinet, and in 1999 the Cabinet agreed on the inclusion of the nowadays known Māori Trade Marks Advisory Committee – confirming its establishment with Trade Marks Act 2002 –, aiming at minimize the risk of registering trademarks that may offend Māori people, totally groundbreaking for the national legislature²³⁵. Prior the 2002 Act and the Māori Committee, IPONZ managed autonomously the reject of applications that could result offensive, using an *ad hoc* system similar to the Committee, by referring to Māori IPONZ staff or external experts. When texts or imaginaries had a relevant spiritual and/or cultural meaning, the applicant was required to obtain from the involved *iwi* or *hāpu*, an aspect that it is not present in the current Act²³⁶.

1.6 Geographical Indications Registration Act 2006

Geographical indications in New Zealand are applied to local and international wines and spirits to differentiate from other products in the market, ensuring consumers its authenticity having specific characteristics linked to the place of origin. Applications for geographical indications are examined accordingly to Geographical Indications (Wine and Spirits) Registration Act 2006 – enacted in 2006, but it was brought to Parliament only in 2015 and entered into force in 2017 – and its Regulations. A response would be given within three months and if accepted and no oppositions were present, within six months the geographical indication would be registered and valid for five years from registration date, with the possibility of renewal for further ten years²³⁷. Whether it is not, a compliance report would be sent to the applicant, who has at his disposal six months for responding to IPONZ, that may however lead to a final rejection notice. Applicants have also to provide a description and a reliable evidence of the quality, reputation or other characteristics of the wine or spirit through proven historical background, geographical features, soil composi-

²³⁵ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Trade Marks Practice Guidelines – Māori Advisory Committee and Māori Trade Marks*, available at: <https://www.iponz.govt.nz/about-ip/trade-marks/practice-guidelines/current/maori-advisory-committee-and-maori-trade-marks/>

²³⁶ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., p. 102.

²³⁷ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Geographical Indications*, available at: <https://www.iponz.govt.nz/about-ip/geographical-indications/>

tion, climate and traditional methods of production that make unique that area and that would influence consumer purchasing decisions and the market²³⁸. Also foreign producers may apply for geographical indications protection in New Zealand if certain requirements are met, namely: the name of the GI and the language it is in – an English translation is needed, whether it is not English or Māori, or in a different alphabet than Latin one – and the country in which GI is protected together with a series of documents that certificate it, namely copies of any paper that granted protection in the country of origin, any proposed condition on the use of GI in New Zealand and any other relevant information. In this case, it is not necessary to provide details on the geographical boundaries or on the quality, reputation or other characteristics as in New Zealand²³⁹, where there are no restrictions on the dimensions of the area, but GI boundaries must be based on existing ones and geographical features²⁴⁰. Once registered, restrictions on its use have to be respected, including the ones states in Section 9 of the Fair Trading Act 1986. For what concerns wines, at least 85% of has to be obtained *'from grapes harvested in the place of origin to which the GI relates'* and eventual constituent remainder has to come from New Zealand; while spirits have to origin from the place to which the GI relates. Geographical indications in fact, have the peculiarity of being collective rights, any wine or spirit producer that complies with the provisions related to the use of geographical indication may use it.

According to Section 39A, *'GIs comprising Māori words, imagery or having a Māori significance'*, would be examined by the Māori Advisory Committee and cooperate with the Registrar to determine if the use or registration of a specific wine or spirit would cause offense to the native people²⁴¹. The Registrar may also establish itself a Geographical Indications Committee in relation to registration, alteration or removal of a GI and would include the Surveyor-General – if the issues is related to boundaries –, a New Zealand Geographic Board member – if it relates to place name – and another expert on wine/spirit industry after consultation with national and/or regional organizations. However, before calling a

²³⁸ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Geographical Indications Practice Guidelines – Evidence of Quality, Reputation or Other Characteristics*, available at: <https://www.iponz.govt.nz/about-ip/geographical-indications/practice-guidelines/current/evidence-of-quality-reputation-or-other-characteristic/>

²³⁹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Geographical Indications Practice Guidelines – Requirements for Foreign GIs*, available at: <https://www.iponz.govt.nz/about-ip/geographical-indications/practice-guidelines/current/requirements-for-foreign-gis/>

²⁴⁰ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Geographical Indications Practice Guidelines – Requirements for Defining GI Boundaries*, available at: <https://www.iponz.govt.nz/about-ip/geographical-indications/practice-guidelines/current/requirements-for-defining-gi-boundaries/>

²⁴¹ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Geographical Indications Practice Guidelines – GIs Comprising Māori Word(s) or Imagery*, available at: <https://www.iponz.govt.nz/about-ip/geographical-indications/practice-guidelines/current/gis-comprising-maori-words-or-imagery/>

committee, as state in Sections 53 and 54 of the Act, the Registrar has to take into account several factors, as whether: there might be oppositions to the application; it is supported by national or regional organization in wine or spirit industry; there is an existing homonymous GI or trademarks²⁴². In accordance with Section 18, a geographical indication may not be registered if '*identical to a registered or unregistered trade mark for identical or similar goods or services and its use is likely to deceive or confuse*' if the trade mark owner does not give its permission on the GI registration or co-existence is considered possible²⁴³.

2 When Private International Law Meets Cultural Property

The denomination of the private international law discipline is considered to be recent, dating it back to 1834, but the first group of norms with private international nature comes from the Roman Empire. While initially foreigners had no judicial capacity, in later times, the subjugation of neighboring cities posed the problem of regulating the relations between the inhabitants of these cities and Roman citizens, resulting in the creation of the *ius gentium*: a group of norms managed by the praetor peregrinus, the first private international law system, aiming at regulating relations among different subjects under different legislations. With the fall of the Roman Empire, barbarian kingdoms could not deny the legal status to conquered populations and had neither the necessary means nor the interest in constituting a unified legislation, so they affirmed the principle of the personality of law by applying to the members of an ethnicity their own specific rights²⁴⁴. From IX century, differences among ethnicities started to fade, thanks to mixed marriages and laws for everyone settled in the territory for instance, until the principle of the personality of law completely disappeared, both for the reached ethnic homogeneity and the establishment of the feudal system. In the XX century, in Great Britain and United States²⁴⁵ domicile-inspired connecting criteria and a tendency towards flexible criteria respectively were particularly affirmed, lead-

²⁴² NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Geographical Indications Practice Guidelines – Registrar May Establish GI Committee*, available at: <https://www.iponz.govt.nz/about-ip/geographical-indications/practice-guidelines/current/registrar-may-establish-gi-committee/>

²⁴³ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Geographical Indications Practice Guidelines – Relationships Between Registered GIs and Other Rights*, available at: <https://www.iponz.govt.nz/about-ip/geographical-indications/practice-guidelines/current/relationships-between-registered-gis-and-other-rights/>

²⁴⁴ BAREL B., ARMELLINI S., *Manuale breve di diritto internazionale privato: tutto il programma d'esame con domande e risposte commentate*, Milano, Giuffrè, 2019, pp. 21-23.

²⁴⁵ After the Declaration of Independence, it was used to affirm that conflicts of law among the States was competence of public international law, while private international law was taken into account in resolution of domestic conflicts.

ing to the choice of the law of the forum – the one that guarantees the more satisfactory result concretely, or the one of the State that has stronger interest in the application of its own law. All these theories were codified in the second Restatement of conflict of law of 1971, drafted by the American Law Institute but lacking official status²⁴⁶.

The proclamation of New Zealand as a separate colony of Great Britain in 1841, resulted consequently in the introduction of British general legislations and judicial system. Britain has still been exercising its influence on New Zealand law, and the same is also true for private international law. After showing some reluctance in taking part to international treaties in the field of private international law, where some statutes regarding family law and succession could be identified as a progressive local step, it was not until the end of the 20th century that New Zealand started participating more actively. With Closer Economic Relations in particular, it was aimed to minimize conflicts of laws between New Zealand and Australia, Cook Islands and Niue. The subject of private international law is a separate topic in New Zealand universities, usually found under conflict of laws and there is no explicit provision in the constitutional law. Act of Parliament is the primary source of New Zealand private international law, as primary form legislation, together with delegated legislations, especially the ones under the Reciprocal Enforcement of Judgements Act 1934 that work on private international law issues. Other forms of delegated legislations are those made by Order in Council – the most common – and High Court Rules, particularly relevant for rules of jurisdiction and practices in private international law. There is no trace of a code dedicate to private international law, but several Conventions and Treaties had been implemented in New Zealand law, as the UN Convention on Contract for the International Sale of Goods, the New Zealand Bill of Rights Act 1990 to ICCPR, or the Guardianship Amendment Act 1991 – implementing the Hague Convention on the Civil Aspects of International Child Abduction. In other cases, Acts may state the direct appliance of the treaty in New Zealand law, as the Diplomatic Privileges and Immunities Act 1968 – Vienna Convention on Diplomatic Relations – and the Maritime Transport Act 1994 – Hague Rules on Carriage of Goods by Sea. Judgements of other countries are other sources of private international law principles, and the United Kingdom confirms once again its role as main influencer, followed by the other Commonwealth member states, such as Canada and Australia. For what concerns customary law instead, it is usually used in the commercial setting '*where a reference to custom is to trade customs and usage*' as in the UN Convention on Contracts for the International Sale of Goods. On the other hand, it has a limited role in relation to In-

²⁴⁶ BAREL B., ARMELLINI S., *Manuale breve di diritto internazionale privato*, cit., pp. 30-31.

digenous peoples' law, impacting land social status first, for which there are specific statutes and a separate judicial system: the Māori Land Court for instance, established by *Te Ture Whenua Māori Act 1993* – the Māori Land Act 1993²⁴⁷.

There is an intersection between private international law and intellectual property, even though they are two separate fields of the law, given by the cooperation of WIPO and the Hague Conference on Private International Law (HCCH), capturing judges and academics on issues related to cross-border controversies on intellectual property, that is to say the applicable law, the competent court and how to recognize foreign judgements. Because dealing with private relations, civil, criminal or administrative sanctions – usually applied with intellectual property infringements – are not part of private international law. On the contrary, disputing parties may choose among different remedies, as court adjudication or alternative dispute resolution (ADR), namely arbitration, mediation and conciliation. A basic requirement for calling private international law is the involvement of a foreign element: place of infringement or damage is a foreign state, the disputants are from different countries or the IPR is registered in a foreign country. In a globalized world as it is nowadays, using more and more frequently online services, infringement may occur anywhere, making private international law and intellectual property to meet more than once. This also leads to creation of a new figure: the intermediary, who could be an agent or transporter of goods, or the company owning the server or service provider²⁴⁸.

2.1 Who Is Competent

The HCCH provided useful guidelines in the 2005 Choice of Court Agreements – HCCH Choice of Court Convention – to enforce the intersection between private international law and intellectual property, finding its application in '*exclusive choice of court agreements concluded in civil or commercial matters*'. Together with international instruments, regional ones exist too, but while a group of them sharing legal tradition and/or geographical area do not state specific provisions to be applied to intellectual property controversies – the Minsk Convention, the Montevideo Convention, the Las Leñas Protocol,

²⁴⁷ ANGELO ANTHONY H., *Private International Law in New Zealand*, Kluwer Law International, 2012, pp. 11-19.

²⁴⁸ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *When Private International Law Meets Intellectual Property Law. Guide for Judges*, 2019, pp. 13-15.

the Protocol of Ouro Preto on Preventive Measures, the Inter-American Convention on the Extraterritorial Validity of Foreign Judgements and Arbitral Awards, the Arab League Judgements Convention, and the Riyadh Convention –, others do. In this last category falls the European Union, in particular the Brussels Ia Regulation and the Rome I and II Regulations. The former is also the most recent and prescribes rules for most civil and commercial disputes in EU, letting the parties agree on a court if it is not the case of subjects with an exclusive jurisdiction. The other two deal with applicable law to contractual and non-contractual obligations respectively, in civil and commercial conflicts with a foreign element, where the applicable law is the one of the countries *'in which the party who is required to effect the contract's 'characteristic performance' has his or her habitual residence'*. Treaties administered by WIPO and TRIPS Agreement also contribute to minimize differences among intellectual property national law by setting minimum standards of protection, favor their development – as in the WIPO Joint Recommendation Concerning Protection of Marks, and Other Industrial Property Rights in Sign on the Internet of the very few first years of 2000s –, and ensure the principle of national treatment – see Article 2(1) of the Paris Convention, Article 5(1) of the Berne Convention and Article 3 of the TRIPS Agreement. The European Union, together with the African Regional Intellectual Property Organization (ARIPO), the African Intellectual Property Organization (OAPI), the Southern Common Market (Mercosur) and the Andean Community – Bolivia, Colombia, Ecuador and Peru – are among those regional organizations that reached a sort of 'regional IP harmonization', by establishing their own courts to address IP matters, such as the Court of Justice of the EU and Andean community. Furthermore, a number of soft-law initiatives propose normative frameworks for cross-border IP conflicts: the 2015 HCCH Principles on Choice of Law in International Commercial Contracts (HCCH Principles); the 2008 American Law Institute (ALI) Intellectual Property Principles Governing Jurisdiction, Choice of Law, and Judgements in Transnational Disputes; the 2011 European Max Planck Group's Principles on Conflict of Laws in Intellectual Property (CLIP); the 2009 Transparency of Japanese Law Project's Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgements in Intellectual Property; and the 2010 Joint Proposal on the Principles of Private International Law on Intellectual Property Rights, drafted by PIL Association of the Republic of Korea and Japan²⁴⁹.

Whether a court has the jurisdiction over the dispute is decided in accordance with the private international law of the state where the court is located, basing also on eventual re-

²⁴⁹ Ibid, pp. 21-27.

gional provisions. The first step to be taken is establishing the nature of the issue and address it to the most proper application of private international law, followed by the determination of whether the issue may be decided by the court. Then, the basis of jurisdiction has to be chosen, and because in this thesis I focused on Aotearoa New Zealand, the next steps would regard mainly common law countries. In these jurisdictional structures, 'personal jurisdiction' requires the defendant *'to have sufficient contact with the place where the court is located'* and refers to the court's power to make its decisions binding, while 'subject matter jurisdiction' requires the court *'(to have) jurisdiction over the legal issues in dispute'* and gives it the decision-power to the court *'depending on the nature of the claim'*. For private international law is relevant to determine defendant's 'principal home', especially in intellectual property disputes, where more and more often multiple defendants coming from different states are involved. This may happen with subsidiaries of the same company for instance, making the defendant be sue in the court corresponding to the place where the headquarters of the company are located. Whether the defendant is not domiciled in the forum, service has a relevant role in establishing court's jurisdiction, which may have personal jurisdiction over a defendant not domiciled in the forum if the party have been informed accordingly to rules of service in that court, or court's jurisdiction had been submitted by the party. However, service may not be sufficient to obtain the jurisdiction, that is why common law policies may contribute with connecting factors²⁵⁰ to demonstrate defendant's link with court's place. Nevertheless, with terms choice of court, choice of jurisdiction or choice of forum clauses it is meant the possibility for parties to decide the court through the non-exclusive clause – hearing would take place in a specific court – or the exclusive clause – the case is brought exclusively in one court and it is more likely to prevail²⁵¹. The HCCH Choice of Court Convention is based on three obligations:

1. *'the chosen court must hear the dispute, unless the agreement is null and void as to its substantive validity under the law of the state of the chosen court;*
2. *any non-chosen court must suspend or dismiss proceeding to which an exclusive choice of court agreement applies; and*

²⁵⁰ Connecting factors may involve proceeding based on: *'a cause of action arising in the state; a breach of contract in the State or a contract made in or governed by the law of the State; on a choice of court agreement; a contravention of legislation of that State, property in that State; or a tortious act committed or suffered in that State'*. Defendant's link may be declared with courts where: *'the infringing person is physically located; the damaged has occurred; people can receive or view the copyright work; the target audience for the website is located; the technical process making the copyright work visible on the Internet was activated; or the data are physically located'*.

²⁵¹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *When Private International Law Meets Intellectual Property Law. Guide for Judges*, cit., pp. 30-35.

3. *a judgement given by the chosen court must be recognized and enforced in other Contracting Parties.'*

The same Convention separate copyright and related rights from other IP rights, where the latter are not fully in the scope of the Convention, being often excluded if the infringement proceeding is not brought in tort or for breach of contract, being conferred to the national or regional court where the IPR protection is granted²⁵². Considering the fact that IPR are limited to the country in which they are registered, exclusive jurisdiction means that only that specific national court is competent to decide a dispute, not taking into consideration parties' domicile. In some cases, courts may decide also on foreign intellectual property infringements when dealing with IPR not requiring public administrative documents for exercising the right, as copyrights. In others, even if competent, courts may choose to decline by adopting the *forum non conveniens* – inappropriate forum, widely in common law States rather than civil law ones – doctrine, whether other similar proceedings simultaneously, or relief is available in a foreign court for instance. States may also have more than one court and every statute has to be considered together with discretionary factors up to the country's law in order to determine and confer the jurisdiction to the most proper court²⁵³.

2.2 Applicable Law

Once chosen the court and jurisdiction, the next issue to face is determining the law to be applied. It consists in a multiple-step process that starts with the identification of legal questions to be answered – the legal relationship between the parties, initial title of ownership, transfer of the title etc. – and eventual preliminary matters. Characterization of legal questions follows, which may fall in law categories about validity, ownership and transferability of rights, contract, tort and secured interest, through three approaches: (i) *lex fori* – the law of the forum –, the most applied one, where the court applies the national law; (ii) *lex causae* – the law applicable to the substance –, implies to determine the applicable law preliminarily because of the possible choice of the judge to adopt foreign law; and (iii) autonomous characterization by regional or international rules. Step 3 identifies overriding

²⁵² Possibilities increase when an online infringement happened, and the variety of locations may include the location: of the actor, of the uploading/downloading server, at which the online action is targeted etc.

²⁵³ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *When Private International Law Meets Intellectual Property Law. Guide for Judges*, cit., pp. 35-44.

mandatory rules, referring to statutes or mandatory rules that have to be considered because significant politically, socially and economically, regardless the nature of the international conflict. If overriding mandatory rules were absent, applicable law would be determined in accordance to choice of law rules and using connecting factors. For what concerns intellectual property as a security right, choice of law results to be more complex and that is why the United Nations Commission on International Trade Law (UNCITRAL) developed the Model Law on Secured Transaction: Article 99 in particular, guarantees the protection of a security right in intellectual property from third parties under the law of the State in which the property is granted. UNCITRAL also developed the Supplement on Security Rights in Intellectual Property, where different options were discussed, namely: '(1) applying the law of the grantor's location; (2) applying the law of the state in which the IP is protected (*lex protectionis* or *lex loci protectionis*) – favored by common law countries – to a security interest in IP; or (3) based on a combination of the first two options'. Article 84 of the Model Law deals with contractual aspects, encouraging the parties to agree on a mutual beneficial applicable law through an existing agreement – *ante-factum* – or reached once the dispute occurred – *post-factum*. However, lack of information of the foreign law could be an issue that courts have to deal with the law decided to apply, but it may be solved through two approaches, depending on how foreign law is treated: with *iuria novit curia* the court is presumed to know all the laws, where foreign law is part of the domestic one; while on the other hand, it is responsibility of the parties to inform judges of the foreign applicable law. In the application of the multiple-step process, a variety of odds may be encountered, and it is in WIPO's opinion that *renvoi* and public policy – *ordre public* – are worth to be mentioned. It seems to be particularly common the vicious circle *renvoi* is in charge to cut when foreign law 'refer the court back to the law of the forum', but at the same time *renvoi* is forbidden by the major part of regional and international instruments, as demonstrated by Article 8 of HCCH Principles: '*a choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise*'; or by Article 20 of Rome I Regulation:

'the application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules over private international law, unless provided otherwise in this Regulation'.

Public policy instead could be easily affected by political, social and economic changes that would influence judges' decisions on the applicable law. Indeed, one of the consequences

in applying this multiple-step process is the incompatibility of foreign law with the public policy of some States, and that is when *ordre public* enters onto the scene, by allowing courts 'to avoid applying the applicable foreign law whenever the substantive content of that law is sufficiently objectionable' on determines values, such as human rights, morality, justice and so on²⁵⁴.

Further questions arise about whether and how decisions and judgements could be recognized and enforced in other countries, involving mainly the court who emitted the judgement, and the one of the States asked to recognize and enforce the judgement. For being enforced, the foreign judgement has to meet certain conditions: first, the lack of international jurisdiction of the court may be taken into account as ground for refusal; second, the major part of States require final and conclusive decisions, so that the dispute cannot occur again between the same parties; third, the judgement has to be based on the merits, and not on domestic procedural rules often rejected; fourth, parties must be identical. In some jurisdictions, damages are awarded and for being enforced, it has to be stated a fixed sum from the court of origin. Recently, a more liberal approach started to be favored, enforcing cross-border non-monetary decisions too. The Australian Foreign Judgements Act 1991 is an example of judgements registration system adopted in certain common law States of some courts from a limited number of foreign countries: whoever desire to enforce a court's decision, it has to register with State or Territory Supreme Court and, once registered, the foreign judgement has the same force and effects as a Supreme Court's one. On the other hand, grounds for refusing to enforce a judgement may vary from being contrary to public policy or obtained by fraud, to incompatibility because of already existing judgements adjudicated differently in other States, to not having granted natural justice, due process or fair trial right to the defendant or given specific circumstances provided by State's law²⁵⁵. Closer cooperation between foreign authorities would be able to tackle other kind of difficulties, i.e., witness or evidence are differently located in respect to the proceedings or public documents are issued by another State. The HCCH developed Conventions in order to manage these difficulties, as the Convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, with the purpose of taking evidence abroad in civil or commercial issues. As stated in the first chapter of the Convention, evidence may be obtained by means of a Letter of Request from the requesting State to the Competent Authority of the requested state, whose law would execute the Letter. Diplomatic or consular

²⁵⁴ Ibid, pp. 47-59.

²⁵⁵ Ibid, pp. 63-70.

agents and commissioners may be in charge of taking evidence, provided that there were no total or partial objections of the relevant State to Chapter II of the Convention. For what concerns witness instead, it is preferable that the evidence of the witness would be given in presence, who usually travels to the location of the hearings. If it is not possible, testimony could be given anyhow through a videoconference, or in another country *'by commissioning the examination of the witness overseas, either by the judge or by another person appointed as an examiner, or by issuing a Letter of Request to a judicial authority in another State'*. Examples of measures in response to the admission of foreign documents as evidence were adopted in Australia for instance, as Foreign Evidence Act 1994 – Section 34 – and the Evidence Act 1995 – Section 157. Similarly, the European Union adopted the Evidence Regulation and the HCCH Convention of 1961 Abolishing the Requirement of Legislation for Foreign Public Documents – the HCCH Apostille Convention) favored the circulation of public documents among contracting countries. Moreover, the HCCH Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matter provides several transmitting channels of service documents abroad, which could be applied only once all requirements are fulfilled – transmission among Contracting Parties, known address, the document to be served is judicial or extra-judicial and refers to civil or commercial issues. Under the main channel, the Central Authority of the requested State would execute the request *'by informal deliver to the addressee'*; by the method stated in requested State's law; or supporting applicant's request if compatible with requested State's law. Alternative channels include consular or diplomatic ones; post; or direct communication *'between judicial officers, officials or other competent persons'* or between an interested party and judicial officers. A practical example is reported under Division 10.4 of Australian Federal Court Rules, where an individual in a foreign jurisdiction could be served only if:

'(a) the proceeding is one of the kinds listed in a table in Rule 10.42 (a list of types of proceedings with factors connecting the proceeding to Australia);

(b) the court has granted the party leave to serve the person – an application for leave requires the party to establish a prima facie case for relief; and

(c) the originating application is served either:

(i) in accordance with a convention, the law of a foreign country, or the HCCH Service Convention (Rule 10.43(2)); or

(ii) if it was not practicable to serve the document in accordance with (i) and if the document has been brought to the person's attention, the court may deem the document as served (Rule 10.48); or

(iii) if service was not successful on the person in accordance with (i), the court may order that another method be used (Rule 10.49).'

New Zealand is exempt from this process, having signed a treaty with Australia that provide for the treatment of New Zealand individuals as Australian ones.

Another final difference between civil law and common law jurisdictions may be seen in the different approach to international parallel proceeding. Within common law jurisdiction, anti-suit injunction could be applied, affecting foreign courts by restraining proceeding in that court; while *lis alibi pendens* doctrine – usually applied in civil law countries – would suspend or dismiss on foot proceedings²⁵⁶.

Concluding, it seems that New Zealand theoretically has the necessary instruments to protect IPR, and the dedicated office under the MBIE also provides useful guidelines to avoid misappropriation – even involuntary – of mātauranga Māori, even if only the fact that the applicant is a non-Māori could be considered offensive²⁵⁷. However, it has to be reminded that not every unauthorized use ends up in court, and that more often this could be easily solved through private negotiations. Moreover, international law changes slowly, Māori need to adopt effective strategies with the existing instruments and distinct their own intellectual property. It is particularly helpful to look for the support of intellectual property expert before any decision or action, so that Māori also give themselves the time to develop their own expertise on the subject and identify the different opportunities and options before applying for intellectual property protection²⁵⁸.

²⁵⁶ Ibid, pp. 72-83.

²⁵⁷ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., p. 103.

²⁵⁸ NEW ZEALAND INTELLECTUAL PROPERTY OFFICE, *Protecting Intellectual Property with a Māori Cultural Element User Guide*, cit., p. 41.

Chapter 5

The Indigenous Flora and Fauna Claim (Wai 262)

Me tīmata mai i te auahatanga a Tāne, i auahatia ai e ia ki te whenua e takoto nei, ko Tiki.

BEHOLD WHAT ORIGINATES FROM THE CREATIVE FORCE OF TANE WHO CREATED AND SCULPTED TIKI FROM THE EARTH ITSELF.

Also known as the ‘Indigenous Flora and Fauna and Cultural and Intellectual Property Claim’ – or ‘Indigenous Flora and Fauna Claim’ –, the 262nd case registered at the Waitangi Tribunal was one of the longest, most complex and the first whole-of-government inquiry, involving more than twenty New Zealand Government’s agencies. It was lodged by six claimants on behalf of themselves and their *iwi* in 1991, but the report was not published until 2011 and gathered all the recommendations by the Tribunal on different issues concerning *mātauranga* Māori and their role as guardians of their own culture and environment. *Ko Aotearoa Tēnei* report has been structured on two levels: two-volume *Te Taumata Tuarua*, where it could be found a more detailed description of the claim; and *Te Taumata Tuatahi*, in which it is provided a briefer description, addressing to a wider readership. ‘*Ko Aotearoa Tēnei*’ literally means ‘this is Aotearoa’ or ‘this is New Zealand’, or both; as specified in the letter of transmittal dated June 28, 2011, it is intentionally ambiguous, to remind that Aotearoa New Zealand has the privilege to be founded on two co-existing cultures: the one of people descending from Kupe²⁵⁹, and the ones came with Captain Cook, bringing their own knowledge, science and culture together. In this last chapter, it would be resumed the pivotal facts, issues and the related points of view of the parties on the Wai 262 claim, the final recommendations stated by the Waitangi Tribunal and how the case still has a symbolical and political influence.

²⁵⁹ Kupe came from the Polynesian village Hawaiki and he is said to be the discoverer of Aotearoa’s islands, but the story changes tradition by tradition. One tells that he reached the island while hunting an octopus belonging to one of his enemies, others tell that he deliberately looked for new islands together with his wife, son, daughters and other people from his village.

1 Introduction

A series of events in the 1980s concerning the exploitation of Māori plants with commercial purpose lacking *iwi*'s consent was mainly what arose the Wai 262 claim and led to its lodging on October 9, 1991. The original six claimants were John Hippolite of Ngāti Kōata – Te Tau Ihu o Te Waka ā-Maui –, Tama Poata of Te Whanau-o-Ruataupare – Ngāti Porou –, Katarina Remene of Ngāti Kahungunu – Te Mātau ā-Maui –, and three from *iwi* of Te Tai Tokerau: Haana Murray of Ngāti Kuri, Hema Nui-a-Tāwhaki Witana of Te Rarawa, and Te Witi McMath of Ngāti Wai. Others embraced the cause in the following years, as the Federation of Māori Authorities, the Te Tai Tokerau District Māori Council – later declined –, the Wairoa-Waikaremoana Māori Trust Board, and Te Waka Kai Ora, who applied for claimant status; or groups from Ngāti Whānau, Ngāti Hikairo, Ngāti Rangitīhi and Te Aitanga a Hauiti, who were heard from claimants' counsel, but did not join as such. The Secretary of Te Rangatiratanga o Ngāti Rangitīhi Incorporated, David Potter, also tried to represent himself, but unsuccessfully. In 2006 two claimants were admitted by the Tribunal: the Wairoa-Waikaremoana Māori Trust Board and Te Waka Kai Ora, who were concerned about the contamination of resources by the pollution of waterways with organochlorine herbicides and about the Australia-New Zealand Therapeutic Products Agreement (ANZTPA) respectively²⁶⁰.

It was claimed that the Crown failed to ensure Māori *tino rangatiratanga* – or absolute authority or chieftainship – guaranteed under Article 2 of the Treaty of Waitangi over natural resources as flora and fauna by alienating their land and suppressing their culture. Consequently, it also included:

- *'a right to development relating to these resources;*
- *a right to determine intellectual property rights in the knowledge and use of indigenous flora and fauna and the preservation of biodiversity;*
- *a right to participate in, benefit from, and make decisions about existing and future technological advances relating to the breeding and genetic manipulation of indigenous flora and fauna;*
- *a right to control and make decisions about propagation, development, transport, study, and sale of indigenous flora and fauna;*
- *a right to protect, enhance, and transmit cultural, medicinal, and spiritual knowledge and concepts relating to indigenous flora and fauna;*
- *a right to environmental well-being dependent on the nurturing and wise use of indigenous flora and fauna; and*

²⁶⁰ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua. Wai 262*, Waitangi Tribunal Report, 2011, pp.8-9.

- *a right to recognition of the iwi interest in the continued existence of indigenous flora and fauna 'as particular species and as interconnected threads of tea o turoa' (the entirety of the natural world).*²⁶¹

It has also been claimed the denial of the Crown to let Māori exercises their *kaitiakitanga* – guardianship – over indigenous flora and fauna by creating reserves and protected species. Indeed, Indigenous peoples do not view heritage as the individual right of ownership, but rather as a collective duty to their ancestors and future generations, being responsible for its safeguard. It is particularly remarkable the stewardship approach explained by Kristen A. Carpenter, Sonia Katyal and Angela Riley in their article '*In Defense of Property*', arguing the relevance of the recognition of both ownership and stewardship existence and the balance that there is need to be between the two. Moreover, ownership is viewed more as a pack of relative rights, together with a 'web of interests', where the web is meant '*a set of interconnections between people and properties, requiring us to analyse the cultural object's nature and characteristics, the interests at stake, and finally the nature of the nonowner's relationships to the objects*'. However, some States fears granting ownerships rights to Indigenous peoples, being not able to think outside the Western concept of property, and for this reason these States would not let them exercise their role as guardians, while this right should interface with current national law, as affirmed by Susy Frankel, Professor of the Victoria University of Wellington and relevant advisor to the Waitangi Tribunal in the Wai 262 case. *Kaitiakitanga* is also part of *tikanga Māori* – Māori customary law –, as an obligation arising from Māori myths and legends, and encompassing intangible elements too, such as language and culture. Those people that have the authority – *mana* – to carry these responsibilities are called *kaitiaki*, who could be a single person, a family, an *iwi* or a sub-tribe. *Kaitiakitanga* concept is well represented in the claimed *tino rangatiratanga*, but it differs from the English version of the Treaty, which represents more the concept of ownership, making the Tribunal asking itself to what extent *tino rangatiratanga* should be guaranteed in order to offer to Māori a proper right to control taonga and mātauranga Māori²⁶². The Wai 262 inquiry had two separate phases, where the first started in 1995, while the second in 2005. The first round of hearings began on September 15, 1997, supplemented with reports on laws relating to flora, fauna and intellectual property – commissioned by the

²⁶¹ Ibid, pp. 1-3.

²⁶² LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., pp. 223-232.

Tribunal and published in 1995 –, on Māori access to *kererū*²⁶³ of 1998, and on British policies from 1840 to 1990s. Interested people and groups were also involved in the inquiry, from professional groups – Designers Institute of New Zealand, New Zealand Institute of Patent Attorneys, Association of Science Educators –, to industry groups, artists, the New Zealand Vice-Chancellors' Committee, Crown research institutes. However, the inquiry showed its difficulties from diverging views since its beginning: about the confidentiality of evidence for instance, the Crown asserted that this had to be '*handled consistently*' and that it had to '*distribute evidence to those departments affected by the claim*', while Māori asked to limit this distribution, ended with a Tribunal's confidentiality order. The scope of the inquiry and defining the issues to cover were other disagreements between the parties, to which the Tribunal proposed a 'schedule of issues' in 1997 and a 'statement of issues' in 2001 as response and asked the parties to draft further statements themselves: the four from claimants' counsel were filed in September and October 2001, the one from the Crown was filed in July 2002. In December 2005, another statement from the Tribunal was released, in which were presented five broad topics: intellectual property of taonga works; intellectual property in genetic resources of taonga species; *mātauranga* Māori, *te reo* Māori; relationship with the environment; and *rongoā* Māori. The statement focused on contemporary laws and policies, rather than Crown's activities since the Treaty was signed. Claimants did not approve this approach, after the Tribunal has gathered parties' positions on the different topics and recognized the core role that kaitiaki in the claim. In the final 2006 statement indeed, *tinu rangatiratanga* was identified '*as the right, while Kaitiakitanga as the corresponding obligation towards taonga*'²⁶⁴. Crown's response was that the protection claimants were looking for was impracticable, viewing *taonga* and *mātauranga* Māori as freely available because in the public domain.

Lastly, it was further claimed that the Crown failed to protect Māori interests and culture from misuses by signing the TRIPS Agreement without a proper consultation with them, demonstrating to favor international obligations, rather than indigenous ones. Furthermore, TRIPS Agreement set minimum standards of intellectual property protection, but the Crown was accused to not have taken the advantage of establishing additional national policies²⁶⁵.

²⁶³ As known as 'New Zealand pigeon', *kererū* is the only remaining New Zealand bird capable of swallowing large fruit, being consequently an important seed disperser for native trees. It was also a significant food source for Māori people and, although widespread in both forest and urban environment, their numbers have declined since European arrival and hunting them is now illegal.

²⁶⁴ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...) Te Taumata Tuarua*, cit., pp. 4-8.

²⁶⁵ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., p. 276.

2 Key Issues

As anticipated, it was covered a wide range of issues in the claim, and the fact that it took almost twenty years before having the final report has inevitably involved external changes and factors that influenced the approaches taken and parties' positions during the course of the inquiry, as the death of some judges, lawyers and claimants, and the international law framework, where there is no need to underline that it – but also the national one – further developed since then. Both the two levels of the report are structured in accordance with the topics, subdivided in eight chapters, some of which cover a single issue, while others gather multiple and interconnected issues that may relate to a common government agency. Chapter 1 concerns *taonga* works, recommending a series of reforms to strengthen their protection and balance *kaitiaki*'s rights and other right holders'. Secondly, given the increasing interests of researchers in Indigenous genetic and biological resources, this chapter would concentrate on bioprospecting, genetic modification and intellectual property rights as patents and plant variety rights. In the third and fourth chapters would be examined the relationship with the environment and the relevance of the Resource Management Act. Chapter 4 in particular, would focus on the compliance to the Treaty of the Conservation Act 1987, the founding statute of the Department of Conservation, which managed land, flora, fauna and marine reserves. While in chapter 5 would be analyzed the work of the national agencies for the conservation of the Māori language, in chapter 6 would concern the work of those agencies responsible for the control of *mātauranga* Māori and that should include Māori in the decision-making process. Then, the Māori traditional healing, better known as *rongoā* Māori, suppressed with the Tohunga Suppression Act, which it was later found out to have had breached the Treaty. Finally, it was questioned whether Māori had been sufficiently consulted by New Zealand Government on international agreements and the entering of international instruments that would affect their interests²⁶⁶.

²⁶⁶ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata Tuarua*, cit., 2011, pp. 10-12.

2.1 Taonga Works

Under Article 2 of the English text of the Treaty of Waitangi it was ensured to Māori ‘*the exclusive and undisturbed possession of their properties*’, while in the native language text, Māori had the ‘*authority and control over all of their treasured things*’, represented by the term *taonga*. These are the expressions of cultural and artistic *mātauranga* Māori developed since their first arrival on the islands: new ways of hunting, horticulture, the construction of meeting houses, carving canoes and the use of *pounamu* for carving weapons. New names were coined for all those unknown flora and fauna species in Hawaiki island, transforming Hawaikian language in Māori language, and consequently, Hawaikian culture became Māori culture. The spiritual kinship bound together people, land, flora and fauna in a web of responsibilities, where the most important one is *kaitiakitanga*, what claimants were mainly asking for: to have practical instruments to pursue their responsibility²⁶⁷. Together with *taonga*, *mātauranga* Māori are products of communities’ minds and hearts, created to be shared – not for an exclusive property –, and Māori are entitled to defend these works from offensive and derogatory uses of them, whether they are the original creators or not²⁶⁸. The Tribunal defines *taonga* work as:

‘a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori.’

where the main obligation of *kaitiaki* is to protect the living part of *taonga* works – *mauri*. The key characteristics of *taonga* works are also *whakapapa*, meaning the fact to bring ancestors to life by telling important lessons or stories, that is *kōrero*. These elements are not present instead, in so-called *taonga*-derived works, which still contain a Māori element, but in a more generalized and adapted way. However, the distinction between the two categories is not always immediate or clear, that is why the Tribunal calls for a case-by-case analysis taken by a body of experts. The ideas and concepts at the basis of both *taonga* and *taonga*-derived works are included in *mātauranga* Māori, which exists both in a more generalized form – significant for all Māori people and with no specific *kaitiaki* – and ‘closely held’ to specific communities, particularly attached to some families and tribes. As it was asked by the claimants, the Tribunal stated that *taonga*, *taonga*-derived works and *mātau-*

²⁶⁷ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata Tuatahi*, cit., pp. 64-65.

²⁶⁸ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata Tuarua*, cit., pp. 43-44.

ranga Māori cannot be publicly used in an offensive and derogative manner, and, even if it was not given any definition, examples as the ones of the *moko* or the *haka* were provided. On the one hand, ‘offensive’ may be referred to trademark law, something that would require its censure; on the other hand, ‘derogatory’ is usually used in the field of moral rights in copyrights law, which would be also applied to taonga-derived works and general use of Māori motifs. A further and core distinction made in this inquiry is offensive/derogatory use and non-offensive/derogatory commercial use, implying the consultation and/or consent of *kaitiaki*, but to whom must it be offensive? According to the Trade Marks Act, it has to be offensive to ‘a significant section of the community, including Māori’, and for this reason IPONZ drafted a set of guidelines for determining offensiveness, which however, did not specified how large should be this section for being considered significant. *Kaitiaki* relationships are still relevant in the non-offensive/derogatory use of *taonga*-derived works, from which is required *kaitiaki*’s consent in some cases, and at the same time they should be the only able to raise complaint. Other criteria as the nature of the use, the effect of the use on the *kaitiaki* relationship, the type of commercial use, the reach of the use and the level of sacredness of the taonga works or mātauranga Māori should also be taken into consideration. Some exceptions are made for non-commercial public use and public use: in the first case, the Tribunal recommends to not control it in order to not prevent uses for academic reasons for instance; while in the second case it would not only be practically impossible to control it, but it would also be seen as an imposition on private lives and choices²⁶⁹. Claimants further raised the issue of non-*kaitiaki* people acquiring and using rights on *taonga* works and *mātauranga* Māori, who would exclude real *kaitiaki* from both financial and in form of acknowledgement benefit. On the contrary, Crown not only responded by affirming that the protection required by claimants was impracticable, but it also viewed that *taonga* works and *mātauranga* Māori are free to be used because in the public domain, being too late to pull them out. Furthermore, Crown assumes that once in the public domain, it is complicated to control uses, precluding other citizens to use these works and undermining national economic development and individual creativity. Interested parties however, support claimants’ view, stressing the need of practical guidelines for recognizing and protecting mātauranga Māori²⁷⁰.

²⁶⁹ LAI JESSICA CHRISTINE, *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?*, cit., pp. 235-248.

²⁷⁰ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...) Te Taumata Tuarua*, cit., pp. 65-76.

2.2 Genetic and Biological Resources

New Zealand boasts unique flora and fauna, estimating 80,000 indigenous species and a great number of these are classified as endemic, meaning that they cannot be found elsewhere on Earth. Part of national identity of all New Zealanders, they have also become a source of profit in biotechnology industries, that is the reason why claimants demand the recognition of these species as taonga Māori in New Zealand law, and because *kaitiaki* they ‘*should have a veto over commercial and scientific exploitation of species that are taonga*’. As expected, the Crown declined this entitlement. The Tribunal reported that some protection has been provided, but existing law fails not only in understanding *kaitiakitanga* power, but also in according the protection it deserves. On the other hand, it agreed in rejecting special property rights to Māori over genetic and biological resources of taonga species. Genetic resources refer to the ‘*genetic information encoded in the DNA sequence, which is located in a cell’s nucleus*’, while biological resources of taonga species mean ‘*the physical material that makes up the microorganism, plant, or animal*’²⁷¹. Three were the main examples of taonga species concerning claimant’s fear of the use of genetic modification to exclude them and their *kaitiakitanga*. New Zealand flax – *harakeke* – is one of the most important plants, if not the most important one in *mātauranga* Māori, both for representing a grandchild of Rangi and Papa and for its several uses: it provides indeed, for medicines, shelter, and fibers for clothes and weaving. Harakeke has been commercially exploited as home plant and ingredient in skincare products and its varieties granted patents not only in New Zealand. Another common plant, a tree in this case, is the so-called *mānuka*, whose timber’s hardness finds application in weapons, *tukutuku* panels, and hooks for instance, but it is also known for its properties in medicinal field. Skin products and cosmetics are also here the principal exploitation, taking advantage of its effects, namely antihistamine, antibacterial, and antifungal, but the subject of several international patents is *mānuka* honey. Pōhutukawa is another central three in Māori tradition: as known as New Zealand Christmas tree and easily found close to coasts, it is characterized by its feathery and red flowers, believed to be warrior Tawhaki’s blood once fell to Earth. Many of these plant species are used in *rongoā* Māori, the traditional healing, to which it is dedicated the sixth chapter of Ko Aotearoa Tēnei report, together with its acceptance by the Crown and its willingness to allow it. *Rongoā* consists in a set of unwritten rules that do not

²⁷¹ WAITANGI TRIBUNAL, *Ko Aotearoa Tēnei (...)* *Te Taumata Tuatahi*, cit., p. 64.

aim to replace *Pākehā* health system, but rather a complement to it. *Tapu* is a key concept, on which so-called *tohunga rongoā* – literally *rongoā* experts, healers – based for putting in to practice their methods: in the first category were included incantations and rituals – *karakia* and *ritenga* –; followed by herbal remedies – *rākau rongoā* –; thirdly, massages – *mirimiri* – were used to relieve sore joints or force evil spirits from one’s body; water is also used in some rituals; and lastly, some minor surgical procedures were practiced, such as incisions and blood-letting²⁷². All these activities were banned with the Tohunga Suppression Act 1907, which remained in force until 1962, when abrogated by section 44 of the Māori Welfare Act, representing another example of European dominance. The Act was identified as a not adequate solution for the late 19th century Māori health crisis, where *tohunga* were often the only option for those Māori who had not the economic resources for medical treatments. Furthermore, it was accused to have failed in the distinction of harmful *tohunga*’s activities from those we were not, not ‘*it was needed to deal with quackery*’, because other parliamentary alternatives were available, as the Quackery Prevention Act 1908 or Section 16 of the Māori Councils Act 1900²⁷³. In this respect, claimants were not only against the commercialization of *rongoā* Māori, but they also underlined the difficulties in attracting national funds and the obstacles coming from the Ministry of Health, who is assumed to have limited the knowledge of *rongoā* practices and practitioners. Crown’s response was in light of collective safety, respecting however the traditional healing by drafting a development plan and aiming at the identification of another national body as substitute of Ngā Ringa Whakahaere. In Wai 262 report indeed, it has been highlighted the relevance a national body would have for the status of *rongoā* and its relationship with bureaucracy, setting it as one of the main purposes²⁷⁴.

For what concerns fauna instead, the two species of *tuatara* are unique to New Zealand and nearly unchanged since dinosaurs’ age. They are believed to be descendants of the sea god Tangaroa, who would have given to them a third eye to see the whole spiritual world. Today, *tuatara* have a deep relation with Ngāti Koa, acknowledge as their kaitiaki in Takapourewa, where, as on Stephens Island in Cook Strait, at least the fifty per cent of *tuatara* live and safeguarded by the Department of Conservation (DOC)²⁷⁵. The development of IPR systems created some points of tensions between those who wish to make profit

²⁷² WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata Tuarua*, cit., p. 604.

²⁷³ *Ibid*, pp. 622-624.

²⁷⁴ *Ibid*, p. 652.

²⁷⁵ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata Tuatahi*, cit., pp. 66-68.

from genetic and biological resources, and kaitiaki, especially when they deal with bioprospecting, genetic modification or IPR – patents and plant variety rights. In its report, the Tribunal give a definition of bioprospecting as

'the search for, and extraction and examination of, biological material or its molecular, biochemical, or genetic content situ – within its natural habitat – or ex situ – outside its natural habitat – for the purpose of determining its potential to yield a commercial product',

for which mātauranga Māori may provide researchers valuable information. In section 12 of DOC's Conservation policy, bioprospecting is undertaken in *'the concession of research on public conservation of lands and waters'*, differentiating research and monitoring purposes, collecting material, both for commercial and non-commercial use. This is subject to section 4 of Conservation Act 1987, where not only included guidelines are included, but also encourages iwi's involvement by also taking into account Māori committees, as DOC does. However, if some reforms about bioprospecting were proposed by the Crown in 2007, mātauranga Māori was still excluded, nor offered any protection to the relationship between *kaitiaki* and taonga species. Exactly on this last point, claimants argued that there must be kaitiaki consent before bioprospectors use *mātauranga* Māori associated to taonga, and it must not damage *kaitiakitanga*; these are the reasons why they also claim for a veto. At the international level, it was first discussed the exploitation of biodiversity by developed countries in developing and underdeveloped countries with the Convention on Biological Diversity – New Zealand became member in 1993 –, which established the international framework for the preservation of world genetic and biological resources: articles 15 and 8 for instance, require the benefit-sharing with the host country and underline the fundamental role of traditional knowledge in biodiversity²⁷⁶. Genetic modification instead, is the science producing genetically modified (GM) organisms, meaning modified, deleted or transferred genes among different organisms. This subject is administered in the Hazardous Substances and New Organisms Act 1996 (HSNO Act), Act's Methodology Order and other regulations, but the first is the one managed by the Environmental Risk Management Authority (ERMA) – later become the Environmental Protection Authority²⁷⁷. HSNO Act aimed at protecting *'the environment and health and safety of people and communities'* from unfavorable effects of new GM organisms and all decisions taken by the Authority

²⁷⁶ Ibid, pp. 72-74.

²⁷⁷ It includes three elements: the Authority, the Agency – as administrative support to the Authority –, and Ngā Kaihautu Tikanga Taiao – the independent Māori advisory committee.

must comply with this purpose and specific requirements: in sections 5,7 and 8 in particular, it is considered Māori relationship with flora and fauna, taking into account the principles of the Treaty of Waitangi and the so-called 'precautionary approach'. For what concerns low-risk genetic modification – GM organism research in laboratories –, the decision-making power of the Authority may be delegate to the ERMA's chief executive, or to one of the Institutional Biological Safety Committees, each of which has at minimum five expert members, and at least one has to be Māori. Indeed, in order to avoid being rejected, applicants must consult Māori before filing an application involving '*DNA from native flora and fauna*', '*huma DNA... of Māori origin*', or '*embryonic stem cells*'; consequently, non-low risk applications result expensive and require long times. Claimants' opinions on genetic modification were divided: on the one hand, a strict tikanga-based approach, disgusted by the whole idea; while on the other hand, there was a more complaisant view for what related to medical benefit and crossing species boundaries were not involved. They did agree however, on the unreal influence of Māori values and Ngā Kaihautū, not allowing them to properly safeguard the relationship among kaitiaki and taonga species and biological resources, demanding more representatives in entities as the Institutional Biological Safety Committees²⁷⁸. A wide number of GM plants have been patented in New Zealand, where GM micro-organisms are patentable too, dividing those who support that research should be treated as invention, worth to be patentable, and those who consider isolation of life forms just discovery by arguing that the privatization of research would obstacle progress and further limit the access to benefits. Together with patents, plant variety rights are those rights able to preserve taonga species, and when these are involved, TRIPS Agreement allows to all its members to adopt the measures that better suit national economic, cultural and social interests. Nevertheless, *ordre public* and morality exclusion shall be taken into account, considered by the Tribunal enough for meeting kaitiaki's interests in this field, but there is no definition of them in the TRIPS Agreement. Both definitions were given by Daniel Gervais, expert commentator of the agreement, who identified morality '*the degree of conformity to moral principles*' related to the prevailing values in a determined society, while *ordre public* '*concerns the fundamentals from which one cannot derogate without endangering the institution of a given society*' – differently from public order, which maintains public safety. Both current and proposed Crown's IP regime were considered to have failed in the protection of kaitiaki relationship with taonga species and in the involvement Māori in deci-

²⁷⁸ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata Tuatahi*, cit., pp. 76-78.

sion-making processes related to the use of mātauranga Māori, especially in the exploitation of intellectual property right, risking destroying kaitiakitanga. Although the Crown tried to justify by affirming that patents and plant variety rights laws were not designed to safeguard kaitiaki's rights, it proposed the introduction of a new Māori advisory committee – described in the previous chapter – in the patents' system, and a new Bill for PVRs was released. The importance of kaitiakitanga with taonga species in Māori culture has to be further underlined in order to respect and recognize them as the main source of the used knowledge in research, and for this reason they shall have a reasonable level of power on intellectual property and related benefits. In relation to GM organisms, Waitangi Tribunal recommended three main reforms with the purpose of giving more recognition to Māori's interests: (i) a third additional paragraph to section 5 of the HSNO Act 1996 encouraging the Act to recognize the relation between kaitiaki and their taonga species; (ii) reinforce Ngā Kaihautū's role by making it in charge of nominating two members of the Authority; and (iii) requiring its advice also in the determination whether an application is relevant to Māori or not²⁷⁹.

2.3 Environmental Aspects

Other than *kaitiakitanga*, *whanaungatanga* or kinship value has to be kept in mind too: it is what coordinate relationships among Māori, environment and knowledge bodies, being the main reason explaining the unique relation between the people and taonga species and genealogy is the concrete manifestation of this principle. This ideological approach changed in the 1980s, when the Resource Management Law Reform project aimed at shifting to a more focused environmental well-being approach. The first step was taken with the Environment Act 1986, establishing the Ministry for the Environment and the Parliament Commissioner for the Environment, but few years later local councils responsible for the land use were largely reduced, favoring regional councils. In 1991, the Resource Management Act was adopted, replacing previous acts, regulations and norms, and the first to introduce the concept of sustainability and sustainable management of natural resources, reported in Section 5. It was amended several times, but according to Māori there were still unresolved claims to the ownership of minerals, geothermal energy, water, sea and riverbeds that made them sceptical on the respect of their position as *kaitiaki*. In the

²⁷⁹ Ibid, pp. 80-91.

RMA are proposed two mechanisms able to give to kaitiaki proactive control over taonga: the first is in Section 33, allowing local authorities to delegate their functions and duties to *iwi* or other authorities; while the second, in Section 188, allows any body that is interested in applying ‘to the Minister for the Environment to be made a heritage protection authority for the purposes of protecting ‘any place’’. However, even attempted, both of these mechanisms had never been applied in favor of Māori: in fact, between 1991 and 2010 there was no delegation, and no *iwi* was approved as HPA. Their contribution was taken more into account when the Local Government Act 2002 required local authorities to ‘provide opportunities for Māori contribution to its decision-making processes; consider ways in which it may foster the development of Māori capacity to contribute to those processes; and provide relevant information to Māori for the purpose’, as stated under Section 63. Even if the RMA is considered to be an important step in the involvement of Māori in the managements of the environment and natural resources, the claimants’ opinion was that in practice it failed, not giving control over taonga, not establishing a partnership model as reported in Section 36B and making their influence still inconsistent, stressing the need for reforms in respect of sections 333, 36B and 188²⁸⁰. Some improvements may be seen in partnership agreements, which seem to effectively involve Māori in the decision-making process, as for Waikato river, Te Arawa and Taupō lakes²⁸¹.

The Department of Conservation has another main role in the national environmental conservation, responsible of more than one third of New Zealand’s lands, and all the forests, mountains, rivers and Indigenous flora and fauna there included. This however, raised claimants’ argument about the exercise of their obligation as guardians, limited by the presence of DOC, its restrictions on access and control over *taonga* and *mātauranga Māori* and their exclusion from decisions concerning commercial activities. Moreover, DOC administers several Acts, that is: the Conservation Act 1987 – DOC’s founding Act –, the National Parks Act 1980, the Wildlife Act 1953²⁸², the Marine Reserves Act 1971²⁸³, the Reserves Act 1977, and the Marine Mammals Protection Act 1978²⁸⁴. Section 4 of the Conservation Act in particular, states New Zealand’s obligations in giving effect to the prin-

²⁸⁰ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...) Te Taumata Tuatahi*, cit., pp. 105-117.

²⁸¹ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...) Te Taumata*, cit., pp. 277-278.

²⁸² Under this Act, only the Director-General may authorize the taking and/or killing of protected wildlife from DOC estate.

²⁸³ It safeguards unique underwater areas and related marine life; whose preservation is in national interest.

²⁸⁴ No one may take any marine mammal, alive or dead, without a permit from the Minister or his or her delegate.

ciples of the Treaty of Waitangi in DOC's actions, as proven in the 1995 Whale case; it also imposes not to limit safeguard procedure only to consultation, but to take a wider view of the principles. *Pou Kura Taiao* in this respect plays a relevant role, as mediator supporting DOC's conservancies for an effective relationship with Māori. Conservation General Policy (CGP) however, has a different opinion, thinking that more than *Pou Kura Taiao* has to be done: 'may' policies for instance, as negotiating agreements and authorized use of traditional elements on a case-by-case basis; inviting iwi to actively participate in the management of marine reserves. As result, DOC drafted *Te Kete Taonga Whakakotahi*, which has the purpose of proposing a series of mechanisms for the transfer of ownership and the delegation of decision-making authority²⁸⁵. It was further tried to formalize Crown's relations with Māori through *Crown-Māori Relationship Instruments: Guidelines and Advice for Government and State Sector Agencies* by *Te Puni Kōkiri* and the Ministry of Justice in 2006, especially stating that:

First, any government agency drafting a Crown-Māori Relationship Instrument (CMRI) is authorized to use only three sources of statements about the principles of the Treaty: approved statements of government policy that are already in use; statements used in government submissions to the courts or Tribunal; or statements drafted especially for the particular circumstances or relationship.

Secondly, the guidelines ban government agencies from including in any agreement an admission of Treaty breach, unless there has been a previous independent admission of the same breach in the Treaty settlement process.

Thirdly, all CMRIs across the entire state sector are subject to approval by a specially constituted official group²⁸⁶.

These however, according to the Tribunal, result to be restrictive for DOC, an organization that manages its relationship with communities through 13 regional conservation boards and the New Zealand Conservation Authority (NZCA) – established under sections 6A and 6B of the Conservation Act and having a national view –, where the first have to advise NZCA on any conservation issue related to any area under its jurisdiction – established under sections 6L and 6M, having their own territories²⁸⁷.

²⁸⁵ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...) Te Taumata Tuatahi*, cit., pp. 126-131.

²⁸⁶ Ibid, p. 133.

²⁸⁷ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...) Te Taumata Tuarua*, cit., pp. 225-226.

2.3.1 Aotearoa New Zealand Biodiversity Strategy 2020

The first Biodiversity Strategy and Action Plan was published in February 2000, as response to the declining state of Indigenous flora and fauna and as fulfillment of the Convention on Biological Diversity. In that period about 1 000 New Zealand animal and plant species were endangered, and for this reason four national goals were set 'to turn the tide' on the decline of biodiversity, together with thirteen principles for the conservation of biodiversity and the correct implementation of this Strategy. The following action plan established five goals: a) mainstreaming biodiversity across government and society; b) reduce pressures on biodiversity and promote sustainable use; c) safeguarding ecosystems, species and genetic diversity; d) enhance the benefits to all; e) enhance implementation²⁸⁸. Expired in 2020, it was substituted by the latest biodiversity strategy, pursuing the previously cited goals by providing the overall strategy for the next 30 years. Moreover, *Te Mana o te Taiao* outlines five pressures on biodiversity: 'historical and ongoing impacts of invasive species, changes in land and sea use, direct exploitation of species, climate change, and pollution'²⁸⁹. Invasive or non-indigenous species are those species brought by people outside New Zealand and still threaten national biodiversity, as rats, rabbits, cats, deer and so on. As response, another goal described in the plan is the Predator Free 2050 effort, aiming at supporting existing conservation programs and eradicate those predators threatening national taonga. By 2025, it is intended to increase the hectares of that area where predators are suppressed, remove mammalian ones from natural reserves and develop a scientific solution for it, valid for at least one small species. For what concerns climate instead, sea level rise, its acidification and the increase in temperatures are among the principal threats that the country has to deal with. The increase in sedimentation, especially in coastal areas, changed significantly marine environments too, but also impacted pollution level – light, noise, liquid and solid.

In the 2020 strategy are outlined the three guiding pillars for its implementation plan: (i) *tūāpapa*, recognizing that in order to tackle with biodiversity crisis, the proper conservation system is needed; (ii) *whakahau*, aiming at involving all New Zealand citizens; (iii) *tiaki me te whakahaumanu*, restoring and promoting sustainable use. For each *pou* – pillar – a series of outcomes to be reached by 2050 are listed, as improving conservation legislation,

²⁸⁸ OF NEW ZEALAND, New Zealand Biodiversity Action Plan 2016-2020, pp. 3-7.

²⁸⁹ NEW ZEALAND GOVERNMENT, *Te Mana o Te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020*, 2020, p. 19.

mātauranga Māori as integral part of biodiversity research and management, sustainable use of natural resources, effective protection of animal and plant species fully involving guardians. The *He Awa Whiria* approach – referring to braided rivers – has been adopted for the implementation the strategy, by bringing together different groups of people – iwi, common people, governmental agencies, organizations etc. –, instruments and a range of disciplines. This allows to take into account different perspectives and knowledge systems, including mātauranga Māori²⁹⁰.

2.4 Te Reo Māori

At the end of the 19th century, a great number of Māori were bilingual before the imposition of English language and the consequent identification of the three phases of the 20th by the Waitangi Tribunal. In the first period in particular, from 1900 to 1925, children had to leave Māori outside school, focusing on their English learning, and when they entered in their adulthood, between 1925 and 1950, they would speak Māori only to their parents and older relatives, and not to their own children, so that they would not to be punished as they had been. The generations of 1950-1975 grew up with further policies aiming at monolingualism and knowing very little *te reo Māori*. An important evidence was provided by Professor Bruce Biggs' research, which demonstrated that the percentage of Māori children speaking their mother language declined from 90% in 1913, to 80% in 1923, to 55% in 1950, to 26% in 1958, to 5% in 1975. In response to this decline, in 1972 a petition was signed by 30,000 people and presented to the Parliament for making Māori language to be taught in schools, which lead to the establishment of the annual celebration of Māori Language Day, became Māori Language Week in 1972. Other petitions followed, as the one in 1978 calling for a Māori television production unit, and the one 1981 with the purpose of making *te reo Māori* an official language. Since the foundation of the first bilingual school in Rūātoki in 1977, one of the most relevant development in Māori language schooling was the establishment of *kura kaupapa* – Māori immersion primary school –, followed by the Matawaia Declaration 1988, when bilingual school communities asked for an independent Māori education authority '*establish Māori control and the autonomy of kaupapa*

²⁹⁰ Ibid, p. 37.

*Māori practices in the education system*²⁹¹. Māori language is an identity and status symbol for Māori within New Zealand society, recognized – together with its dialects – as a *taonga* in the Māori Language Act 1987 and, according to Angelo and Perham, should be given legal personality, as it has been done to Whanganui river, the first worldwide river to be recognized as a legal person in 2017. *Te reo Māori* had been already object of other claims, as Wai 11, which came to the conclusion that Māori language was included in those *taonga* guaranteed and protected under the Treaty of Waitangi. In Wai 262 case, because of the ministerial review announced by the Minister of Māori affairs, Waitangi Tribunal was requested to release the report concerning *te reo Māori* in advance in respect to the rest of the report, and so it has been done in October 2010²⁹². It resulted that the Crown lacked strategies for the protection of the native language and did not plan any specific intervention, having a *benign neglect* approach, but at the same time recognizing its obligations towards *te reo Māori*. Here dialects were not included, even if the Waitangi Tribunal declared them as true *taonga* and fundamental in the revitalization of the language, for which it would need at least 16% of the population speaking *te reo Māori*, according to Professor Katharina Ruckstuhl. A sign of revival of Māori Language occurred in the 1980s given the abundance of older fluent speakers, both in urban and rural area. However, from mid-1990s it has experienced another decline due to resources, as teachers who did not match the demand. For revitalizing properly *te reo* there would also need Crowns' compliance to partnership, Māori speaking government, wise policy and appropriate resources²⁹³. The Māori Language Act 1987 has been a milestone in New Zealand history, because gave official status to Māori language, established the Māori Language Commission, and lead to important developments in the education and broadcasting fields. For instance, for what concerns education, in 1999 it was recognized the *kura kaupapa* guiding philosophy, in 2008 it was launched the Education Ministry's Māori-medium curriculum and in the same year its Māori education strategy was published; then, 21 iwi radio stations were fully operational by 1993, a Māori television channel on a permanent basis first went on air about ten years later²⁹⁴. Another achievement is the Māori Language Strategy, a 25-years strategy for the revitalization of *te reo* revised in 2003, having as goals the strengthening the language recognition, use, educational opportunities and role of communities as leaders in

²⁹¹ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata*, cit., pp. 393-396.

²⁹² Ibid, p. 387

²⁹³ Ibid, p. 439.

²⁹⁴ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata Tuatahi*, cit., p. 155.

this process of revitalization. Nonetheless, few years later it was stressed the need of a further intensive support to *whānau* in increasing the number of speakers and the language status at the international level too.

3 Final Recommendations

Being a commission of inquiry, the Waitangi Tribunal's recommendations are not legally binding, but it certainly has a significant influence on New Zealand Government activities related to Māori history and culture. Wai 262 recommendations are summarized at the end of every single chapter of the report, concerning the specific issue of the chapter, but with a single common conclusion: the current national law is not able to protect mātauranga Māori. Generally, all of them aim at improving and strengthening the partnership between Māori people and New Zealand Government, especially in respect for those issues involving mātauranga Māori and the explicit recognition of Māori as kaitiaki. In particular, DOC was recommended to take a more active role in the creation of a bioprospecting regime complying with section 4 of Conservation Act, while some changes on ERMA's Methodology Order were proposed. Focusing on intellectual property instead, reforms on patents and plant variety rights were recommended, resulting in the establishment of the Māori Advisory Committees and a series of ethical guidelines to be respected²⁹⁵. For being widely used, the Committee shall advise the Commissioner not only when patentability requirements are questioned, but also in case of '*any existing and conflicting kaitiaki interests, even if the requirements to patentability are satisfied*'²⁹⁶. Furthermore, the Committee should be able to elaborate guidelines and protocols in order to comply with Article 2 of the *Te Tiriti o Waitangi*.

The Resource Management Act seemed to be potentially the right tool for the management of the environment together with the native people if properly reformed: it shall achieve *enhanced iwi management plans*, treating these plans as any other district or regional policy; improve delivering-control mechanisms, so that sections 33 and 36B would be correctly used. Moreover, the Ministry of Environment was advised to adopt more often

²⁹⁵ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...) Te Taumata Tuarua*, cit., pp. 211-212.

²⁹⁶ LAI JESSICA CHRISTINE, *Māori Traditional Knowledge and the Wai 262 Report: A Coherent Way Forward?*, University of Lucerne, Switzerland, i-call Working Paper No. 03, 2012, p. 19.

national policy statements on '*Māori participation in resource management processes*'²⁹⁷. As response, the Ministry for Environment drafted the National Policy Statement on Indigenous Biodiversity (NPS), which aims at the resolution of uncertainties and as the improvement in the management and protection of Indigenous biodiversity originating from the Resource Management Act 1991. It finds its principal application in wetlands, while coastal marine areas and freshwaters would be administered by New Zealand Coastal Policy Statement (NZCPS) and the National Policy Statement – Freshwater Management respectively. The NPS would not only identify Significant Natural Areas (SNAs), but also provide for the necessary measures to protect them from threats, as the climate change for instance. NPS consultations were closed on March 14, 2020, with the purpose of having first SNAs identification by 2023, and the full implementation of the Statement by 2008²⁹⁸.

Iwi consultation is essential also in the issue related to Māori language, together with the Te Taura Whiri commission, which became the leading sector agency, monitoring the health of *te reo Māori* by reporting the improvements to community every two years. Regular reporting is also recommended in the making of international agreements, where negotiation with Māori did not exist: that is the reason why the Tribunal suggested for the identification of existing bodies that may be used as forums and increase the dialogue on international instruments²⁹⁹.

Across the several issues, education, art, heritage, environment, science and so on, the key common recommendation was establishing partnership models between Māori and the Crown for each of these fields, where the latter has an active responsibility to provide for the necessary instruments and shift its point of view. It was time to move forward.

²⁹⁷ Ibid, pp. 285-286.

²⁹⁸ SIMPSON GRIERSON, *He Kura Koiora I hokia: Draft National Policy Statement on Indigenous Diversity*, 2019, available at: <https://www.simpsongrierson.com/articles/2019/he-kura-koiora-i-hokia-draft-national-policy-statement-on-indigenous-biodiversity>

²⁹⁹ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi*. Wai 262, Waitangi Tribunal Report, 2011, p. 240.

All in all, as affirmed by David Williams in the 2006 'Wai 262' film, the key issue of Wai 262 claim is whether Māori have to fit into the national IPR law systems, language of dominance, or there is a significant place for them and their own culture. There was a push from government to make people move to cities and urban areas, putting them away from their ancestors, leaving further less or no control to *kaitiaki* over their *taonga*. There was also little room in New Zealand law for *mātauranga* Māori and for the relationships upon which it is founded³⁰⁰, when pluralism shall be considered as a virtue. This claim was about mainly about how Māori and Crown law systems may work together, and thanks to the Waitangi Tribunal's interventions – recommending new frameworks, funds, bodies or new policy measures – it was given a clearer status of this relationship and how it should change.

³⁰⁰ WAITANGI TRIBUNAL, *Ko Atoreroa Tēnei (...)* *Te Taumata*, cit., p. 699.

Conclusion

When it was asked me the issue of my thesis and I used to answer ‘*essentially, intellectual property rights of Indigenous peoples*’, other than ‘*what?*’, the answer I received back most frequently was ‘*do they really have any? I thought it was more related to business companies*’. This allowed me to understand that intellectual property of Indigenous peoples is commonly confused with their cultural heritage and its preservation. In a certain way, Indigenous peoples may be imagined as family companies, who put into practice their ideas to evolve their own communities and make life easier, from horticulture and fishing techniques to *pounamu* ornaments for Māori; and by sharing their knowledge with other communities or nations, they nourish their people, that is why these intellects should be treated as intellectual property in the same way as Western ones. Both companies and Indigenous traditional knowledge are based on ideas from which they may expect something in return: if the former have to pay attention to the attempts of their competitors of copying their products, the latter has to fight for being recognized and not damaged from those who have been trying to take away their identity, little by little.

Even if interconnected, it is about two separate topics, administered by two different world organizations: UNESCO for the safeguard of cultural heritage, while WIPO deals with intellectual property rights. One of the first outcomes I was able to determine is the fact that both subjects are vague and ambiguous, which does not help in the determination of which international body and/or convention one has to refer to, especially when private international law disputes are involved, often facing with an obsolete international legal framework. Nowadays, Indigenous cultures are further threatened by the uniformity brought by globalization: here the challenge for governments is to find an equilibrium between ‘*protection and preservation of cultural expressions (...) and the free exchange of cultural experiences*’³⁰¹. Indigenous communities are, indeed, precious resources for States in the drafting of ethical frameworks and partnerships for what concerns climate change and environmental sus-

³⁰¹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 5th session, 2003, annex p. 3.

tainability for instance. Native people strongly desire to be involved in these processes and cooperate with governments: they have not been asking concrete property – a concept that generally even does not exist in Indigenous terminology –, but rather to be recognized as custodians or guardians of their own traditional knowledge. In claiming this right however, they often find a wall that exclude them in decision-making processes, not taking into consideration their point of view, interests and the relevance of the benefits that may derive from. This happened in the New Zealand Wai 262 claim, where it has been reported that the British Crown and the New Zealand Government still have a powerful influence over *mātauranga Māori* and its circulation, as through television, school, radio and museums. Museums in particular, may create the conditions for involving Māori communities in the care of *mātauranga Māori e taonga* – both tangible works and intangible knowledge – through dedicated exhibitions and programmes for instance. *Tikanga Māori* is also included, setting guidelines for the interaction with visitors, principally younger generations, who will have the duty to pursue in the mission of granting equality and non-discrimination at national and international level. An emblematic example is the Museum of New Zealand Te Papa Tongarewa – literally ‘*container of treasures*’ –, which since its first opening in 1998 has permanent exhibitions on New Zealand history and Māori culture.

I completely agree with Anderson, when she encourages the facilitation of Indigenous networks, where communities may share their own experiences and discuss about Indigenous issues; it would strengthen contacts among different peoples, but also compare the different cases, where it perhaps may be discovered that remedies for a specific topic have been already identified, applied and, if properly readapted, may work again. This would also involve more precise international guidelines and new international bodies dedicated to commercial and non-commercial disputes concerning intellectual property and Indigenous traditional knowledge³⁰², particularly related to the issue of the public domain, in which Indigenous cultures often fall because it is taken for granted that, being cultures dated centuries before, it does not necessarily have to recognize them something.

Another point to take into account is the availability of resources, especially law instruments in the case of intellectual property rights: while Europeans – who later became United States or New Zealand citizens too – had and still have the instruments thanks also to the improvement of digital technology and a greater access to global networks, which have been making great strides and making more and more accessible the most disparate in-

³⁰² ANDERSON JANE, *Indigenous Traditional Knowledge & Intellectual Property*, cit., pp. 42-43.

formation on any topic. For some Indigenous peoples this still remain a utopia, both because loyal to their historical traditions and because Western dominance imposed them to stay few steps back. It is up to States to provide and adopt the necessary strategies, being responsible of all their citizens, and make these instruments available to most fragile groups. In this respect, the Wai 262 case not only tried to keep into consideration both parties' points of view and interests, but also tried to give a modern interpretation of the Treaty of Waitangi, which is still today part of the constitutional law and for this reason, it has to be looked as a fundamental factor in the shaping new Aotearoa law framework, in addition to Wai 262 recommendations that have already given a new starting point³⁰³.

It is time to keep moving.

³⁰³ LAI JESSICA CHRISTINE, *Māori Traditional Knowledge and the Wai 262 Report: A Coherent Way Forward?*, University of Lucerne, Switzerland, i-call Working Paper No. 03, 2012, p. 30.

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