Table of Contents

Abbreviati	ons	xix					
Notes on	Contributors	XXV					
Part I.	Introduction Silke von Lewinski						
Part II.	Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law Peter-Tobias Stoll and Anja von Hahn						
Section 1.	. Indigenous Peoples in International Law						
Section 2.	Indigenous Peoples: Definition IssuesI. The Term 'Indigenous': An ApproximationII. The Recognition of Indigenous Peoples as 'Peoples'	10 11 15					
Section 3.	Some Essential Characteristics of Indigenous Cultures I. Collective Rights II. Indigenous Peoples and Their Land III. Indigenous Heritage: Indigenous and Traditional Resources	17 17 18 19					
Section 4.	Relevant Human Rights Norms in the Context of Indigenous Knowledge and Indigenous Resources I. General Human Rights Norms Relevant to the Protection of Indigenous Knowledge and Indigenous Resources	21					
	 Human Rights Standards for the Protection of Intellectual Property Other Relevant Standards in the Context of Indigenous 	21					
	Resources and Traditional Knowledge II. Specific Human Rights Instruments for the Protection of	23					
	Indigenous Peoples 1. ILO Convention No. 169	24 25					

	 Draft Declaration on the Rights of Indigenous Peoples The Proposed American Declaration 	26 29
Section 5.	Indigenous Peoples in International Environmental Law I. The Convention on Biological Diversity 1. 'Indigenous and Local Communities' 2. The General Concept	30 31 32 32
	 (a) Dependence of Indigenous and Local Communities on Biological Resources (b) The Concept of Benefit-Sharing 3. Art. 8(j) of the CBD as the Key Operative Provision (a) Art. 8(j) in Context: in situ Conservation of Biological Diversity as a State Obligation and the 	32 33
	National Law Limitation (b) Subject and Contents	34 34
Section 6.	Ongoing Discussions: Recent Developments in International Forums Regarding Indigenous Resources and Traditional	
	Knowledge	35
	I. The World Intellectual Property Organization Traditional Knowledge in the Context of the WTO	36 37
	II. Traditional Knowledge in the Context of the WTOIII. The Convention on Biological Diversity	38
	IV. The Food and Agriculture Organization of the United Nations: The International Undertaking on Plant Genetic	30
	Resources and the Concept of Farmers' Rights	41
	1. 'Farmers' Rights' and Indigenous Peoples	42
	 The Concept of Farmers' Rights Farmers' Rights, Traditional Knowledge and Intellectual 	43
	Property	43
	V. The United Nations Conference on Trade and Development VI. The World Health Organization	44 45
Section 7.	Recent Developments at the Regional and National Levels with Regard to the Protection of Indigenous Resources and Traditional Knowledge	45
Section 8.	Statements, Declarations, Charters, Resolutions, and Recommendations by Indigenous Peoples	49
Section 9. Bibliograph	Conclusion	52 52
Part III.	Analysis of Different Areas of Indigenous Resources	59
Section 1.	Traditional Knowledge Antony Taubman and Matthias Leistner	59
	I. Findings at the Factual Level	59
	 Recognizing the Characteristics of Traditional Knowledge Sources of Factual Information 	59 64

m 11	C	7 , ,
Table	Ot	Contents
IUUU	U.J	COMMENTS

1	V
1	Λ

		3.	Term	is and	Defin	itions		68
			(a)	Choic	ce of	Termin	nology	69
				(aa)	Gene	eral		69
				(bb)	Addı	ressing	Indigenous Knowledge in Particular	69
			(b)	Subje	ect Ma	atter to	be Covered: Characterizing	
				Tradi	tional	Knov	vledge	71
				(aa)	Holis	stic A ₁	proach	71
				(bb)	Dive	ersity		72
				(cc)	Self-	Refere	ential Aspect of Defining TK	73
				(dd)	The	Role o	of a Definition of TK	74
				(ee)	Link	age w	ith Traditional Community and	
					Dyna	amic,	Intergenerational Quality	77
			(c)	Scop	e of L	Legally	Protected TK	78
		4.	TK a	and IP	Prote	ction i	in an Holistic Context	81
		5.	Need	ds and	Expe	ctation	is for the Protection of Traditional	
			Knov	wledge	•			82
			(a)	Posit	ive Pr	otection	on	83
			(b)	Defe	nsive	Protec	tion	85
		6.	The	Focus	on th	e Poin	t of Access	87
			(a)	Gene		_		87
			(b)				ocumentation Measures –	
					_		Disadvantages	87
							y Law	89
		8.					nd Collective Marks and	00
T	т		•	graphic				90
1	I.		_	_			Regarding the Protection of	00
				al Kno		_	C. T. 4 . 11	92
		1.					for Intellectual Property Rights	92
			(a)	, ,		al Lev	/ei	92
				(aa)	Pate		tive Drotoction of TV Innovetions	93
					(1)		tive Protection of TK Innovations agh the Patent System	95
						/*\	TK as Inherent Subject Matter for	93
						(1)	Patent Protection	95
						(ii)	Cultural and Legal Constraints on	
						(11)	Use of Patent System	
							by TK Holders	97
						(iii)	Inventorship in a Traditional	71
						(111)	Context	97
						(iv)	Application of Patentability	
						(11)	Standards in the Context of	
							TK Systems	100
								_ 00

		(2)	Defen	sive Protection in the Patent	
			Syste	m: the PCT	
			and II	PC	104
			(i)	Recognition of TK in the Patent	
				System	104
			(ii)	International Patent Classification	104
			(iii)	Patent Cooperation Treaty	104
			(iv)	WIPO Recommendations on the	
				Recognition of TK	105
			(v)	The Dilemma of Pyrrhic	
				Protection	106
	(bb)	Geo	graphic	al Indications and Certification	
		Mar	ks		107
	(cc)	Supp	oression	n of Unfair Competition	109
	(dd)	Sui	Generis	Protection	111
(b)	Regio	onal I	Level		113
	(aa)	And	ean Co	mmunity	113
	(bb)	Euro	pean P	Patent Convention	114
		(1)	Nove	lty and Inventive Step under	
			the E	PC	114
		(2)	Cases	on Patenting TK-Related Inventions	115
	(cc)	Reg	ional M	Iodels for Protection	120
	(dd)	Bila	teral Ag	greements	120
(c)	Natio	nal L	Level		121
	(aa)	Pate	nt Law		121
		(1)	Gener	ral Considerations and Some	
			Cases	s: TK under	
			Natio	nal Patent Law	121
		(2)	Positi	ive Protection of TK under	
			Natio	nal Law	123
		(3)	Defer	nsive Protection of TK against	
			Illegit	timate Patenting	124
			. ,	Per se Exclusions of TK from	
				Patentability under National Law	124
			(ii)	Enhanced Disclosure Mechanisms	
				under National Law	126
	(bb)			s, Public Certification Systems	
		and	_	aphical Indications	127
		(1)		ctive Marks and Certification	
				s (Annette Kur)	127
		(2)		c Certification Systems	
			(Anne	ette Kur)	129

			(3)	Geographical Indications	
				(Roland Knaak)	130
			(4)	Conclusions (Annette Kur)	131
			(5)	Related Regulation	132
		(cc	Trac	le Secrets and Confidential Information	132
				ognition of Customary Law in	
				onal IP Laws	134
		(ee		Generis Protection of TK under	
				onal Law	136
			(1)	General	136
			(2)	Objectives of Sui Generis Protection	138
			(3)	Legal Basis for Protection	140
			(4)	Forms of Knowledge Protected	141
			(5)	Beneficiaries of Protection	143
			(6)	Manner of Protection	144
				(i) Prior Informed Consent	144
				(ii) Exclusive Rights	145
				(iii) Domaine Public Payant	147
			(7)	Registration	148
			(8)	Recognition of Customary Law	149
		2. Forms of	Legal	Protection beyond Intellectual Property	
			_	nal Level	151
		(a) Co	nventio	n on Biological Diversity	151
		(b) FA	O Inter	national Treaty	154
		(c) Inte	ernation	nal Covenant on Economic, Social	
		and	d Cultur	ral Rights	155
	III.	Draft Laws a	nd Oth	er Models	156
		1. Internation	onal Le	vel	156
		(a) WI	PO Dra	aft Sui Generis Protection against	
		Mi	suse an	d Misappropriation of TK and	
		Re	lated W	IPO Developments	156
		(aa	n) Dra	ft Provisions	156
		(b) Re	lated D	evelopments	159
		(c) Co	nventio	n on Biological Diversity	162
		(d) W.	ro tri	PS Council	165
		(e) Cu	stomary	y Law in International Instruments	169
		(f) UN	I Decla	ration on the Rights of Indigenous	
		Ped	oples		171
		2. Draft Sui	i Gener	is Models at the Regional Level	172
	IV.	Conclusions			173
ection 2	Gen	etic Resources			181
JUIUII Z.		ny Taubman			101
	I	Introduction			181
	1.		Biolog	ical Diversity? The Challenges	101
			_	L'enetic Resources	181
		01 1108 WI			

	2.	The	New Le	egal and Policy Environment for Genetic	
		Reso	urces		185
	3.	Valu	ing Ger	netic Resources	187
			_	ic Resources as a Public Good	187
		(b)	Divers	se Value Systems and Genetic Resources	188
		(c)		chnology Patents as Means of Realizing	
			Value		190
II.	Fin	dings	at the I	Factual Level	192
				vork for Factual Findings: Genetic Diversity	
				Biotechnology	192
				mpirical Framework for Review of Genetic	
			Resou		192
		(b)		ic Diversity and a Common Technology	
			Platfo		193
		(c)		ation through Transgressing Species	
			Bound		194
		(d)		olicy Implications of Genetic Diversity	196
	2.	` '		Diversity in the Regulation of Genetic	
			urces		198
		(a)		ing Regulatory Regimes to Forms of Genetic	
		(33)	Resou		198
		(b)		Distinctness of the Human Genome	201
	3.			e between Intellectual Property and Genetic	
			urces		205
III.	Exi			Provisions Relevant to Genetic Resources	217
AAA.		_	_	sources as the Subject of Intellectual Property	217
				f Current Questions	221
				Property Instruments	222
				ational Level	222
		(44)		International IP Law in Context	222
			` '	The TRIPS Agreement	225
				The Budapest Treaty	229
			` '	Plant Breeders' Rights	230
		(h)	,	nal and National Levels	236
		(0)	_	The Distinction between 'Naturally	
				Occurring' and 'Isolated' Genetic Material	236
				Valuing the Pathway from the Genetic	250
			,	Resource to the Product or Valuing the	
				Product?	238
				Overview of the Issues in Patenting Genetic	250
			,	Material Material	240
				Defensive Measures in National and Regional	270
			, ,	Patent Law	242
					242
				(1) A Priori Exclusions	443

		(2) Conditional Exclusions	245	
	4. Non-intellectual Property Instruments			
		(a) International Level	249	
		(aa) Genetic Resources as National Property and		
		the Eclipse of the Common Heritage	249	
		(bb) Convention on Biological Diversity	252	
		(1) Central Principles	252	
		(2) The CBD Objectives and Intellectual		
		Property	254	
		(i) Sovereignty over Genetic		
		Resources	255	
		(ii) Retroactivity	256	
		(iii) Diffusion of Genetic Resources		
		and Scop of Sovereignty	257	
		(iv) Prior Informed Consent	257	
		(v) Equitable Benefit Sharing	259	
		(vi) Equitable Belletin Sharing (vi) Transfer of Technology	262	
		(3) Food and Agricultural Organization:	202	
		International Treaty	269	
			273	
	TV	(b) National and Regional Levels Draft Laws and Other Models	277	
	IV.	1. Tailored Patent Disclosure Mechanisms for Genetic	211	
			277	
		Resources 2. CBD Bonn Guidelines	281	
			283	
		3. CBD International Regime 4. EAO: Standard Material Transfer Agreement	284	
		4. FAO: Standard Material Transfer Agreement 5. WIDO: Guidelines on Access and Repetit charing	286	
	T /	5. WIPO – Guidelines on Access and Benefit-sharing	288	
	V.	Conclusions	200	
Section 3.		tection of Traditional Names and Designations	293	
	Ann	ette Kur and Roland Knaak		
	I.	Findings at the Factual Level	293	
	II.	Existing Legal Provisions Regarding the Protection of		
		Traditional Names and Designations	296	
		1. Intellectual Property Rights	296	
		(a) International Level	296	
		(aa) Trademarks	296	
		(1) Overview	296	
		(bb) Geographical Indications	301	
		(cc) Unfair Competition	308	
		(b) Regional Level	308	
		(aa) Trademarks	308	
		(1) The Community Trademark System	308	
		(2) Other Regional Systems	310	
		(bb) Geographical Indications	310	
		(1) EC Regulation 2081/92	310	

				(2)	Georgraphical Community Collective	
					Marks	312
		(c)	Natio	onal L	evel	313
			(aa)	Trad	emarks	313
				(1)	Absolute Grounds for Refusal	314
					(i) Lack of Distinctive Character	314
*					(ii) Deceptive Marks	316
					(iii) Offensive Marks	317
					(iv) Registration in Bad Faith	320
					(v) Signs Excluded from Registration	321
				(2)	Relative Grounds for Refusal	322
				(3)	Rights in the Case of Successful	
					Registration	323
				(4)	Domain Names	324
				(5)	Misrepresentation	327
			(bb)	Geog	graphical Indications	328
				(1)	Registration System	328
				(2)	Authorizing Procedures	328
				(3)	No Formalities	329
				(4)	Trademark Law - Grounds for Refusal	330
				(5)	Geographical Collective or Certification	
					Marks	331
		2. Outs	ide In	tellect	ual Property	332
	III.	Draft Lav	ws and	Othe	er Models	332
	IV.	Conclusio	ons			332
		1. Gene	eral Re	emark	S	332
		2. Solu	tions f	or Im	proved Protection	333
		(a)	Exen	nption	s from the Country of Protection	
			Princ	eiple		333
		(b)	Need	for I	mprovement of Informational	
			Infra	structi	are	334
		(c)	Meas	sures a	at the National Level	334
		(d)	Prior	Right	ts	335
Bibliograph	ny					335
a	W 11	-				
Section 4.			7 7 7			339
	Agn	ès Lucas-S			1 T 1	000
	1.	Findings				339
					Value of Folklore	340
					orms of Exploitation of Folklore	341
					s of Indigenous Peoples with Respect	
			eir Fol			343
					f Folklore	344
	II.	_	Legal	Regin	nes Regarding the Protection of	
		Folklore				350

1.	Intel	lectual	ual Property Rights					
	(a)	Interr	national Level					
		(aa)	Copyrig	ght	350			
			(1) T	he Berne Convention	350			
			(2) T	he TRIPS Agreement and the WCT	353			
		(bb)	Neighb	ouring Rights	354			
			(1) T	he Performer's Neighbouring Rights	354			
			(2) T	he Neighbouring Right of the Producer				
			O	f Phonograms	356			
		(cc)	The Int	ernational Conventions concerning				
			Industri	al Property and Unfair Competition	357			
	(b)	Regio	onal Lev	el	359			
		(aa)	Europe		359			
			(1) T	he European Directives in the Field of				
			C	opyright and Neighbouring Rights	359			
			(2) T	he European Directives in the Field of				
			Ir	idustial Property	361			
		(bb)	The An	nericas	361			
			(1) T	he North American Free Trade				
			A	greement	361			
			(2) T	he Cartagena Agreement	361			
			(3) N	IERCOSUR	363			
			(4) T	he Central American Convention				
			0	n the Protection of				
			Ir	ndustrial Property	364			
		(cc)	Africa		364			
			(1) A	nnex VII concerning Copyright	365			
			(i) Annex VII in the 1977 Version	365			
			(i	i) Annex VII in the 1999 Version	367			
			(2) T	he Annexes concerning Industrial				
			P	roperty	368			
		(dd)	Pacific	Islands	369			
	(c)		nal Leve		370			
		(aa)	Protecti	ion on the Basis of Copyright	370			
			(1) C	lassification of National Copyright				
			L	egislation	371			
			(i	National Legislation with no				
				Reference to Folklore	371			
			(i	i) National Legislation Expressly				
				Excluding Folklore from				
				its Scope of Application	372			
			(i	ii) National Copyright Legislation				
				Granting Direct Protection				
				to Folklore	373			

		(2)	Direct Protection of Folklore via	
			Copyright	383
			(i) The Obstacles to Protection of	
			Folklore via Copyright	383
			(ii) Assessment of the Protection of	
			Folklore by Means of	
			Copyright	390
		(3)	Indirect Protection of Folklore on the	
			Basis of the Rules concerning	
			Collections and Adaptations	393
			(i) Collections	393
			(ii) Adaptations	394
		(4)	Indirect Protection of Folklore on the	
			Basis of Neighbouring Rights	397
			(i) The Producer's Neighbouring	
			Right	397
			(ii) The Performer's Neighbouring	
			Right	398
	(bb)	Prote	ection on the Basis of Industrial Property	399
		(1)	Design Law	399
		(2)	Trademark Law	400
		(3)	Geographical Indications	406
		(4)	Unfair Competition	407
	(cc)	Sui C	Generis Intellectual Property Right	411
		(1)	Panama	411
		(2)	Other Examples	413
2. Le	egal Prote	ection	of Folklore outside Intellectual Property	413
(2	a) Custo	omary	Law	413
(t	cultu	ıral H	eritage Legislation	420
	(aa)	Inter	national Level	420
		(1)	The 1972 World Heritage Convention	
			and the 2003 Intangible Cultural	
			Heritage Convention	420
		(2)	The 1970 Unesco Convention on Cultural	
			Property	422
		(3)	The 1995 Unidroit Convention	424
	(bb)	Regi	onal Level	425
		(1)	On the Continent of Europe	425
		(2)	On the Continent of the Americas	425
		(3)	On the Continent of Africa	426
	` '		onal Level	428
(0			Instruments in the Field of Human	
	Right		the Rights of Indigenous Peoples	434
	(aa)		Legal Instrument in the Field of	
		Hum	an Rights	434

		(bb) The Legal Instruments in the Field of	
		Indigenous Peoples' Rights	439
		(i) ILO Convention No. 169	439
		(ii) The United Nations Human Rights	
		Commission	441
III.	Dra	aft Laws and Other Models	445
	1.	The Tunis Model Law on Copyright	
		(WIPO/UNESCO, 1976)	445
	2.	The Model Provisions for National Laws on the	
		Protection of the Expressions of Folklore against	
		Illicit Exploitation and Other Prejudicial Actions	
		(WIPO/UNESCO, 1982)	447
	3.	Draft Treaty for the Protection of Expressions of	
		Folklore against Illicit Exploitation and Other	
		Prejudicial Actions (WIPO/UNESCO, 1984)	451
	4.	Draft Declarations in the Field of Indigenous Peoples'	
		Rights	453
		(a) The Draft Declaration on the Rights of Indigenous	
		Peoples	453
		(b) Draft Principles and Guidelines on the Heritage of	
		Indigenous Peoples	456
		(c) Draft Regional Declarations on the Rights of	
		Indigenous Peoples	458
		Draft National Legislation	459
	6.	WIPO Intergovernmental Committee on Intellectual	
		Property and Genetic Resources, Traditional Knowledge	
		and Folklore - Revised Provisions for the Protection of	
		Expressions of Folklore: Policy Objectives and Core	4.60
		Principles	460
	7.	OAPI/ARIPO Draft Legal Instrument on the Protection	4 6 7
	_	of Expressions of Folklore	467
	8.	The Initiatives of Various Semi-Official and Unofficial	1.00
		Groups in the Field of the Protection of Folklore	469
		(a) International Level	469
		(b) Regional Level	474
		(c) National Level: The Example of Australia	476
		(aa) Report of the Working Party on the Protection	171
		of Aboriginal Folklore (1981)	476
		(bb) Report of the Committee of the Inquiry into	177
		Folklife in Australia (1987)	477
		(cc) Stopping the Rip-offs (1994)	478
TTT		(dd) Our Culture, Our Future (1997)	478
IV.		onclusions	480

Bibliography		
Part IV.	Final Considerations Silke von Lewinski	
Section 1.	Preliminary Remarks	507
Section 2.	The Needs as Expressed by Indigenous Peoples	508
Section 3.	Protection by Existing Intellectual Property Regimes I. Protection of Genetic Resources, Traditional Knowledge	509
	and Folklore Per Se	509
	II. Protection of 'Derivates'	512
	1. 'Derivates' Produced by Indigenous Peoples	513
	2. 'Derivates' Produced by Outsiders	513
	(a) Opposition to Intellectual Property Rights of	
	Outsiders of Indigenous Communities	513
	(b) Possible Responses to Claims for Defensive	
	Protection	514
Section 4.	Protection of Genetic Resources, Traditional Knowledge and	
	Folklore by Legal Regimes beyond Classical Intellectual Property	515
	I. Customary Law	516
	1. Problematic Issues	516
	2. Basic Approaches	517
	II. Sui Generis Protection as a Means to Respond to Specific	
	Needs	518
	1. Holders of Rights	519
	2. Object of Protection and Uses Covered	520
	3. Other Issues	521
	4. Objections to Sui Generis Protection: Public Domain	521
	5. Selected Practical Aspects of Legal Protection: Databases	
	and Collecting Societies	524
	(a) Databases	524
	(b) Collecting Societies	525
Section 5.	The Level of Legal Measures	526
Section 6.	Additional Instruments	527
Section 7	Practical Measures	528
Bibliograph		528
Index		531