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Promoting Indigenous Innovation, Enterprise, and Entrepreneurship through the Licensing of Article 31 Indigenous Assets and Resources

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PROMOTING INDIGENOUS INNOVATION, ENTERPRISE, AND ENTREPRENEURSHIP THROUGH THE LICENSING OF ARTICLE 31 INDIGENOUS ASSETS AND RESOURCES*

*Danielle M. Conway***

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* *See infra* text accompanying notes 69 (citation to the language of UN DRIP article 31) and 77 (discussion of legitimacy of the UN DRIP) and discussion in Section III.C herein. The use of the term “Article 31 assets and resources” specifically references that provision of the United Nations Declaration on the Rights of Indigenous Peoples dealing with Indigenous peoples’ right to exercise authority and control over their cultural heritage, traditional knowledge, and traditional cultural expressions in addition to any intellectual property rights in these assets and resources.

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I. INTRODUCTION

INDIGENOUS peoples have embraced the concept of entrepreneurship for generations. The concept, as practiced by them, however, may be described differently from contemporary definitions of entrepreneurship. In the latter, “entrepreneurship” brings to mind the competitive nature of business and its requisite emphasis on individuality for the purpose of commercialization of innovations.¹ To this end, mainstream entrepreneurship has been defined as the act of taking goal-directed action for any number of purposes, such as obtaining something, accomplishing something, or operating independently under one’s own authority.²

In not so stark contrast, indigenous entrepreneurship recognizes the value of commerce for the attainment of social benefits for the collective.³ As such, indigenous entrepreneurship has been defined as “the cre-

1. Kevin Hindle & Michele Lansdowne, *Brave Spirits on New Paths: Toward a Globally Relevant Paradigm of Indigenous Entrepreneurship Research*, 18 J. SMALL BUS. & ENTREPRENEURSHIP 131, 133 (2005).

2. Biobele Richards Briggs, *Issues Affecting Ugandan Indigenous Entrepreneurship in Trade*, 3 AFR. J. BUS. MGMT. 786, 786 (2009); see also Kevin Hindle & Peter Moroz, *Indigenous Entrepreneurship as a Research Field: Developing a Definitional Framework From the Emerging Canon*, 6 INT’L ENTREPRENEURSHIP & MGMT. J. 357, 360 (2009) (The article describes an emergence perspective and an opportunity perspective of entrepreneurship. The emergence perspective views entrepreneurship as organizational “where the evolutionary and dynamic aspects of entrepreneurship are crucial and the focus is on organizing activities.” The second perspective treats entrepreneurship as relating to “the discovery, evaluation and exploitation of opportunities.”); Howard H. Frederick & Dennis Foley, *Indigenous Populations as Disadvantaged Entrepreneurs in Australia and New Zealand*, INT’L INDIGENOUS J. ENTREPRENEURSHIP, ADVANCEMENT, STRATEGY & EDUC. 1, 5 (2006) (explaining that “peoples start businesses either because they want to exploit a perceived opportunity or because they are pushed into entrepreneurship because all other options for work are either absent or unsatisfactory”).

3. Frederick & Foley, *supra* note 2, at 8 (noting that Aboriginal entrepreneurs engage in enterprise among other reasons “to achieve social control”).

ation, management and development of new ventures by Indigenous people for the benefit of Indigenous people,” with equal emphasis on preserving indigenous culture and heritage and achieving self-determination.⁴ Further refinement of this definition was made after extensive empirical study. The more refined definition proffers that “Indigenous entrepreneurship is activity focused on new venture creation or the pursuit of economic opportunity or both, for the purpose of diminishing Indigenous disadvantage through culturally viable and community acceptable wealth creation.”⁵ The key difference between mainstream entrepreneurship and indigenous entrepreneurship is that in the latter, community and the collective are pervasive and ever present.⁶ The infusion of indigenous community values in indigenous enterprise coupled with the injustices visited upon Indigenous peoples explains why the primary goals and objectives of indigenous entrepreneurs, be they individuals or organizations, are to return respect to Indigenous peoples, provide for the survival of future generations, and operate as a means to assert self-determination.⁷

Thus, entrepreneurship emanating from within the collective or having roots in indigenous cultural values is less about wealth creation and individual ascension and more about building capacity to harness the power of economic independence for the purpose of restoring human rights to the world’s five hundred million Indigenous peoples.⁸ While assessment of the level of indigenous involvement in collective entrepreneurship is to date unquantifiable, there are more reliable qualitative examples of indigenous enterprise operating for the social benefit of the indigenous collective.⁹ In an effort to build on these successes, this Article promotes the use of the Declaration on the Rights of Indigenous Peoples (Declaration) as a basis for asserting indigenous control over article 31 assets and resources to spur indigenous enterprise and innovation.¹⁰ After asserting

4. Hindle & Lansdowne, *supra* note 1, at 132–33.

5. Hindle & Muroz, *supra* note 2, at 16.

6. Hindle & Lansdowne, *supra* note 1, at 137.

7. Frederick & Foley, *supra* note 2, at 2, 8 (The article proposes that displaced, marginalized, or disadvantaged peoples who have a prodigious view of their personal attributes yet hold low status in society will be propelled toward entrepreneurship, consistent with the “social marginality theory.” In this way, enterprising behavior compensates for a lack of status or recognition by mainstream society. In describing Indigenous Australian entrepreneurs (Aboriginals), Frederick and Foley conclude that “[t]he [Aboriginal] entrepreneur alters traditional patterns of behaviour, by utilising their resources in the pursuit of self-determination and economic sustainability via their entry into self-employment, forcing social change in the pursuit of opportunity beyond the cultural norms of their initial economic resources.” Frederick and Foley also indicate that the Aboriginal entrepreneur “is motivated more by a need to correct negative social perceptions and racial discrimination than by a need for wealth creation.”).

8. Anna María Peredo et. al., *Towards a Theory of Indigenous Entrepreneurship*, 1 INT’L J. ENTREPRENEURSHIP & SMALL BUS. 1, 15 (2004).

9. Hindle & Lansdowne, *supra* note 1, at 133.

10. *See id.* at 132 (“Stimulation of Indigenous entrepreneurship has the potential to repair much of the damage through creation of an enterprise culture, which fully respects Indigenous traditions but empowers Indigenous people[s] as economic agents in a globally competitive modern world.”). *But see* Frederick & Foley, *supra* note 2, at 8 (admitting the

control, Indigenous peoples can then operationalize the use of their article 31 assets and resources to counteract the “history of dispossession, assimilation, child removal and other previous colonial policies [that have] created a legacy” of economic disadvantage, political and structural disadvantage, geographic and cultural disadvantage, and collective and individual disadvantage.¹¹

One means of implementing the goals and objectives of the Declaration and operationalizing the use of indigenous assets and resources in a collective entrepreneurial effort is the use of licensing to govern transactions, create value, and promote the exercise of indigenous management and control over assets and resources. Focusing specifically on the controlled use of valuable indigenous assets and resources, Part II of this Article describes indigenous entrepreneurship and innovation pre-colonization, the negative effects on indigenous social and economic development post-contact, and colonization’s interruptive impact on innovation and enterprise across indigenous diasporas. Part II also presents a discussion about the revival of indigenous innovation and enterprise through the rekindling of traditional knowledge and practices within indigenous communities.

Part III analyzes the rights reasserted by Indigenous peoples in the Declaration on the Rights of Indigenous Peoples. The discussion specifically addresses the framework, purpose, and goals of the Declaration to promote authority and control over indigenous lands, resources, and assets. Moreover, there is an examination of the perceived paradox between indigenous values and indigenous participation in the mainstream marketplace.

Part IV focuses on licensing as a mechanism to both implement the goals and objectives of the Declaration and to reassert indigenous authority and control over indigenous assets and resources. Part V addresses perceived obstacles to implementing the Declaration through use of licensing. Finally, Part VI concludes with observations and recommendations for universal implementation of the Declaration on the Rights of Indigenous Peoples to secure self-determination through, among other relevant public policy initiatives, indigenous entrepreneurship and economic development.

II. INDIGENOUS INNOVATION AND ENTERPRISE PRE- AND POST-COLONIZATION

A. PRE-COLONIZATION INDIGENOUS INNOVATION AND ENTERPRISE

Indigenous peoples are no strangers to innovation, enterprise, and entrepreneurship.¹² As the world’s First Peoples, Indigenous peoples are

lack of knowledge of the number of self-employed Indigenous Australians and noting the declining trend of indigenous involvement in small business activities).

11. Frederick & Foley, *supra* note 2, at 10.

12. *Id.* (Aboriginals displayed “entrepreneurial practice in the pre-colonisation period. The aqua-culture industry of the Gunditjmarra people of Lake Condah in western Victoria

responsible for the creation and deployment of many systems of trade and barter that have formed the basis of modern commerce. For example, Polynesians, Aboriginal Peoples, and Torres Strait Islander Peoples used canoes and outriggers, navigating by wind and the constellations.¹³ They visited surrounding islands by traversing river and ocean networks to marshal resources, such as shells and pearls, bamboo products and woodcarvings, grinding stones, weapons, foodstuffs, and livestock, all in the name of trade.¹⁴

The foundations of trade and the vehicles to facilitate trade among Indigenous peoples were inherently innovative, enterprising, and entrepreneurial. The concept of indigenous innovation combines the extensive knowledge held by Indigenous peoples of their traditional lands and the indigenous skills in designing tools and artifacts adaptable to their environment.¹⁵ Take, for instance, indigenous methods of transportation, specifically the canoe. Indigenous peoples across the globe used the bark of native trees along with rope to build canoes or outriggers.¹⁶ These vehicles facilitated trade, livelihood, and survival.

Indigenous peoples relied upon their knowledge of their lands, waters, sky, and resources to navigate the vehicles they developed.¹⁷ Between 300 CE and 1200 CE, Polynesians used their indigenous knowledge to sail millions of miles throughout the Pacific to engage in trade.¹⁸ Notable innovators and entrepreneurs before colonization, the Māori controlled a large share of commerce in Aotearoa (New Zealand).¹⁹ The Māori were involved in the export of produce to Australia and other countries.²⁰ As described by R.W. Firth, “[t]he deep interest taken in work, the commendation of it in proverb and in song, . . . the close attention paid to quality, the administration of skill, the wide fame accorded to acknowledged experts and the preservation of their names in tribal memory . . . [comprise] a definite social attitude in favour of industry.”²¹ The Māori were also adopters and adapters of technology, specifically musket use, agricultural and shipping methods, and book publishing processes.²² The Māori ex-

and the extensive enterprise interaction of the people in the Arnhem land with other clans hundreds of miles to the south and the Macassans from what is now Indonesia are just two illustrations.”).

13. *Societies and trade*, REEFED, http://www.reefed.edu.au/home/explorer/hot_topics/gbr_traditional_owners/societies_and_trade (last visited Oct. 16, 2010).

14. *Id.*

15. *Australian Indigenous tools and technology*, AUSTRALIAN GOVERNMENT CULTURE PORTAL, <http://www.cultureandrecreation.gov.au/articles/indigenous/technology/> (last updated Dec. 10, 2007).

16. *Id.*

17. *Societies and trade*, *supra* note 13.

18. Dave Hansford, *Early Polynesians Sailed Thousands of Miles For Trade*, NAT'L GEOGRAPHIC NEWS (Sept. 27, 2007), <http://news.nationalgeographic.com/news/2007/091070927-polynesians-sailors.html>.

19. Frederick & Foley, *supra* note 2, at 4.

20. *Id.*

21. *Id.*

22. *Id.*

emplify an Indigenous peoples whose mana²³ grew with the practice of enterprise and innovation.²⁴

B. COLONIZATION AND THE INTERRUPTION OF INDIGENOUS INNOVATION AND ENTERPRISE

Colonization, assimilation, and land dispossession negatively impacted all facets of indigenous life. In Aboriginal Australia, the doctrine of *terra nullius* paved the way for Europeans and Australian-Europeans to dispossess and depopulate the Aborigines for the sole purpose of European frontier expansion.²⁵ *Terra nullius* ushered in European dominion and control over the natural resources of the country.²⁶ In Aotearoa, Māori land and resources were confirmed as a British economic interest.²⁷ This interest precipitated the “negotiation” of the ambiguity-fraught Treaty of Waitangi, a contractual vehicle to accomplish annexation and assimilation of the Māori into the British settler community.²⁸ And in Hawai‘i, the introduction of private land ownership resulted in the Māhele of 1848, the legal mechanism that would authorize the monarchy to divide lands between the king, the government, the Ali‘i (chiefs), and the people.²⁹ Unfortunately, the authority to shift lands from the monarchs to various constituents meant that the parcels of land more often than not went to

23. See REV. MĀORI MARSDEN, *The Achievement of Authentic Being: God, Man and Universe, a Māori View*, in THE WOVEN UNIVERSITY: SELECTED WRITINGS OF REV. MĀORI MARSDEN 4 (2003) (discussing “mana” and defining it as “lawful permission delegated by the gods to their human agents and accompanied by the endowment of spiritual power to act on their behalf and in accordance with their revealed will”); REV. MĀORI MARSDEN, *The Natural World and Natural Resources: Māori Value Systems and Perspectives*, in THE WOVEN UNIVERSITY: SELECTED WRITINGS OF REV. MĀORI MARSDEN, *supra*, at 40 (“[M]ana is divine authority and power bestowed upon a person divinely appointed to an office and delegated to fulfil[] the functions of that office. . . . [M]ana enhances a person’s prestige giving him authority to lead, initiate, organise and regulate corporate communal expeditions and activities; to make decisions regarding social and political matters.”).

24. Frederick & Foley, *supra* note 2, at 4.

25. *Terra Nullius—Aboriginal Victoria*, TOURISM VICTORIA, <http://www.visitvictoria.com/displayobject.cfm/objectid.0003A614-D962-1A88-8B4680C476A9047C/> (last visited Nov. 5, 2010).

26. *Id.*

27. P.G. McHugh, *Constitutional Theory and Māori Claims*, in WAITANGI: MĀORI AND PĀKEHĀ PERSPECTIVES OF THE TREATY OF WAITANGI 25, 30 (I.H. Kawharu ed., 1989) [hereinafter WAITANGI].

28. *Id.* at 30. (“In acquiring an *imperium* over other non-Christian societies, the Crown consistently kept to the contractual model. . . . Treaties were a regular feature of the formalities preceding the formal erection of an “*imperium*” over all non-Christian societies which in British eyes had apparently reached a minimal degree of political organization: only the Australian Aborigine, so primitive as scarcely to be human some nineteenth century commentators thought, failed to cross this threshold. . . . The Treaty of Waitangi represents the application of the contractual theory as the basis of the Crown’s sovereignty over the Māori tribes.”); see also R.J. Walker, *The Treaty of Waitangi as the Focus of Māori Protest*, in WAITANGI, *supra* note 27, at 263, 263 (“[B]ecause of serious discrepancies between the translated Māori version of that key article and the English version, the Treaty is a morally dubious document.”).

29. Kenneth R. Conklin, *Were the lands stolen? Do the ceded lands rightfully belong to kānaka maoli alone?*, ANGELFIRE.COM (2002), <http://www.angelfire.com/hi2/hawaiian-sovereignty/stolenlands.html>.

pay for the newly acquired debts of Native Hawaiians imposed by foreigners.³⁰ The result of this method of land and cultural dispossession of Native Hawaiians paved the way for the overthrow of the monarchy and the eventual annexation of Hawai'i by the United States.³¹

The myriad injustices visited upon Indigenous peoples by colonization have negatively impacted numerous facets of indigenous life, including indigenous sustainability and economic development.³² Colonization has and continues to interfere with indigenous economic development by the diversion of indigenous resources to settler communities, by the subordination of indigenous interests to state interests, and by the refusal to recognize the rights of Indigenous peoples to exercise their right to self-determination implemented by the processes that would facilitate indigenous management and control of their assets and resources according to an indigenous-focused development agenda. Colonization has succeeded in producing an uncertain social future for Indigenous peoples because poor housing, education, and health conditions attack successive generations whose ability to work and accrue assets is severely diminished. In response, Indigenous peoples are re-igniting traditional culture, education, and values to restore indigenous identity and to promote indigenous survival through indigenous-focused economic development and sustainability.

C. REVIVING INDIGENOUS INNOVATION AND ENTERPRISE

While key differences and disagreements persist between states and the Indigenous peoples within state borders, one path of agreement emerges—that the paternalistic welfare approach by states to govern Indigenous peoples has proved an abject failure³³ and that indigenous economic independence is a way forward to maintain indigenous community integrity and survival.³⁴ Positioning a discussion of the revival of indigenous entrepreneurship and innovation in terms of advancing self-determination presents entrepreneurship as a social, political, and economic response to ongoing human rights failures. From this perspective, indigenous entrepreneurship is seen as ameliorative, entitling Indigenous peoples to the same fundamental freedoms and access to social, economic,

30. *Id.*

31. *Id.*

32. See Rodolfo Stavenhagen, *Making the Declaration Work*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 352, 353 (Claire Charters & Rodolfo Stavenhagen eds., 2009) [hereinafter *MAKING THE DECLARATION WORK*] (explaining that “in terms of development indicators and living standards (such as the UN Human Development Index and similar measures), Indigenous peoples find themselves consistently below national averages and behind other more privileged sectors of society”).

33. See Hindle & Lansdowne, *supra* note 1, at 134 (referring to the “failure of government indigenous welfare programs”).

34. Frederick & Foley, *supra* note 2, at 11 (“Māori . . . have excelled at establishing an entrepreneurial culture. Māori are ranked globally in terms of measures of early-stage entrepreneurial activity.”).

and political opportunities as other individuals.³⁵

Thus, indigenous entrepreneurship's objective is social improvement and empowerment through economic gain, firmly structured by the incorporation of indigenous cultural values, practices, circumstances, and aspirations. This view is confirmed by the perspective of many indigenous leaders and community members who "see economic development as one important avenue to achieving healthier and wealthier communities."³⁶ Specifically, indigenous leaders and community members "view participation in the global economy, through entrepreneurship and business development, as the key to" economic independence, self-determination, and the re-building of indigenous institutions and infrastructure.³⁷

The United Nations Declaration on the Rights of Indigenous Peoples validates the universal indigenous worldview of commerce and economic development,³⁸ as Indigenous peoples from every inhabited climate zone and continent are reigniting their entrepreneurial spirits as a means of contemporary evolution of indigenous existence in the marketplace of the

35. S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, in *MAKING THE DECLARATION WORK*, *supra* note 32, at 184, 185 ("[T]he Declaration, by its own terms, recognizes that [I]ndigenous peoples have the same right of self-determination enjoyed by [others]. This follows from the principle of equality that runs throughout the text of the Declaration and is made explicit in Article 2, by which both 'Indigenous peoples and individuals' are declared to be 'equal to all other peoples and individuals.'" (footnote omitted).

36. Bob Kayseas et al., *Fostering Indigenous Entrepreneurship: A Case Study of the Membertou First Nation, Nova Scotia, Canada 2 (2006)* (unpublished manuscript), available at <http://Fibea.mgt.unmedu/pdf/papers/Bobkayseas.pdf>.

37. *Id.*

38. The United Nations Declaration on the Rights of Indigenous Peoples officially recognizes the importance of indigenous economic activity to self-determination as a human right. *United Nations Permanent Forum on Indigenous Issues*, UNITED NATIONS (2006), <http://www.un.org/esa/socdev/unpfii/en/declaration.html>. The Declaration has been in draft form since 1985 and was approved on September 13, 2007, with a vote of 143-4 with 11 abstentions. *Id.* The four nations that voted against it, ironically, have significant indigenous populations—Australia, Aotearoa (New Zealand), Canada, and the United States. *Id.* In pertinent part, article 3 states, "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UN Declaration]. Perhaps the best-known statement on the plight of indigenous groups and human rights in the United States during the 20th century is *The Alcatraz Proclamation to the Great White Father and His People*, November 20, 1969. ROBERT ODAWI PORTER, *SOVEREIGNTY, COLONIALISM, AND THE INDIGENOUS NATIONS: A READER 7* (Carolina Academic Press 2005). The proclamation was delivered on Alcatraz Island during eighteen months of highly-publicized Indian occupation. *Id.* It called attention to basic needs lacking on most reservations and rights, such as self-determination, that have been denied. *Id.* In particular, the proclamation inextricably links human rights with indigenous entrepreneurship with this passage:

A Great Indian Training School will be developed to teach our people how to make a living in the world, improve our standard of living, and to end hunger and unemployment among all our people. This training school will include a center for Indian arts and crafts, and an Indian restaurant serving native foods, which will restore Indian culinary arts. This center will display Indian arts and offer Indian foods to the public, so that all may know of the beauty and spirit of the traditional Indian ways.

Id. at 9.

larger globalizing world.³⁹ Objectives of this contemporized indigenous entrepreneurship paradigm include but are not limited to: “self-determination and an end to dependency [achieved] through economic self-sufficiency”; “greater control of activities on . . . traditional lands”; incorporation of cultural values into business activities and strengthening these values through economic development; and improvement of family and community conditions through socioeconomic advancement.⁴⁰

Common threads among Indigenous peoples actively engaging in contemporized indigenous entrepreneurship include the invocation of cultural heritage as guiding principles and inspiration for innovative indigenous products or services, e.g., indigenous assets and resources, some degree of community or tribal involvement, and recognition of the crucial role that traditional lands play in supporting indigenous innovation and enterprise.⁴¹ While many Indigenous peoples have continuously maintained a level of subsistence enterprise or have taken to commerce and entrepreneurship to ameliorate indigenous living conditions for generations, a new era of indigenous innovation and enterprise is being ushered in on the heels of the adoption of the Declaration on the Rights of Indigenous Peoples.⁴²

III. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND THE REVITALIZATION OF INDIGENOUS INNOVATION, ENTERPRISE, AND ENTREPRENEURSHIP

A. THE DECLARATION AS A FRAMEWORK FOR INDIGENOUS INNOVATION AND ENTREPRENEURSHIP

The Declaration is more than merely an aspirational document.⁴³ Far

39. Frederick & Foley, *supra* note 2, at 12.

40. Robert B. Anderson & Robert J. Giberson, *Aboriginal Entrepreneurship and Economic Development in Canada: Thoughts on Current Theory and Practice*, in *ETHNIC ENTREPRENEURSHIP: STRUCTURE AND PROCESS* 141, 143 (Curt H. Stiles & Craig S. Galbraith eds., 2004).

41. Erica-Irene A. Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples*, in *MAKING THE DECLARATION WORK*, *supra* note 32, at 48, 56–57.

42. Stavenhagen, *supra* note 32, at 355.

43. See Dalee Sambo Dorough, *The Significance of the Declaration on the Rights of Indigenous Peoples and its Future Implementation*, in *MAKING THE DECLARATION WORK*, *supra* note 32, at 264, 265 (“There will be those who will attempt to downplay the import of the Declaration due to its non-binding, aspirational nature. Yet, at the same time, very sound arguments can be leveled to support the fact that specific provisions of the Declaration be considered as customary international law, even binding on those states that opposed its adoption.”); see also Mattias Åhrén, *The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction*, in *MAKING THE DECLARATION WORK*, *supra* note 32, at 200, 212. (“To determine the legal status of the rights enshrined in the Declaration, one must analyze every single provision of the Declaration against the background of existing and established international law. The conclusion of such an exercise would probably be that, to a significant extent, the Declaration clarifies and confirms rights that are already formally legally binding and applicable to [I]ndigenous peoples.”).

from it, the Declaration is the manifestation of resurgence, revitalization, and reclamation of the collective essential identities of Indigenous peoples.⁴⁴ Even in the face of uncertain legal guarantees, the Declaration carries with it the kind of authority that empowers Indigenous peoples to demand from themselves and from those with whom they deal recognition of their collective right to exercise control over their indigenous identities, resources, and assets.⁴⁵ In this regard, Dr. Dalee Sambo Dorough (Inuit-Alaska) describes the Declaration as a document that “should be regarded as the new ‘manifesto’ for positive international and domestic political, legal, social and economic action.”⁴⁶

The Declaration also empowers Indigenous peoples to pursue their right to preserve, evolve, and transform their indigenous ways of life.⁴⁷ The framework of the Declaration offers “a [mechanism] by which Indigenous peoples can advance their rights and, more importantly, their worldviews and perspectives.”⁴⁸ Yet, the success of the Declaration must be viewed cautiously, as the date of its adoption by the United Nations General Assembly is not where the struggle for Indigenous peoples’ rights to justice, equality, socioeconomic development, and self-determination ended; rather, that very point in time signaled the commencement of more complex battles on the horizon, as Indigenous peoples face their greatest obstacle to date—implementing the principles of the Declaration.⁴⁹ Advancing this very point, Professor James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, identifies implementation of the Declaration in national legal systems as the next major challenge facing Indigenous peoples.⁵⁰ Professor Anaya cautions that

[T]he Declaration remains more of a reminder of how far there is to go in bringing justice and dignity to the lives of [I]ndigenous peoples than a reflection of what has actually been achieved on the ground. [Professor Anaya expresses] his fear the wide gap between the Dec-

44. Dorough, *supra* note 43, at 265. (The Declaration “affirms a number of collective human rights specific to [I]ndigenous peoples, ranging from the right to self-determination and to lands, territories and resources, to recognition of treaties and the right not to be subjected to forced assimilation, destruction of culture, genocide or any other act of violence, to rights affirming indigenous spirituality, culture, education and social welfare.”).

45. *See id.* at 254 (discussing the meaning and magnitude of the Declaration and stating, “when one begins to consider the import of the [Declaration’s] language, the challenges ahead for breathing life into every provision, and the potential for operationalizing them, one begins to understand [its] full weight and meaning”).

46. *Id.* at 266.

47. *Id.* at 269.

48. *Id.*

49. *See* Stavenhagen, *supra* note 32, at 355 (“How to make the Declaration work is the challenge that we now face. The adoption of the Declaration marks the closing of a cycle of great historical significance, even as it opens, at the same time, a new cycle relating to its implementation.”) (emphasis omitted).

50. S. James Anaya, *UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (Aug. 9, 2010), available at <http://unsr.jamesanaya.org/statements/statement-on-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-to-the-emrip>.

laration and its effective implementation will persist, leading to a certain complacency and acceptance of that condition.⁵¹

As a result, Professor Anaya delivered a charge to international actors, Indigenous peoples, and government officials to pursue “the faithful implementation of the Declaration [with a] focus of concerted attention by governments worldwide, the UN system, and other actors.”⁵²

The Declaration, therefore, is an international instrument that reflects unified views of international human rights law with respect to the agreement’s primary beneficiaries—Indigenous peoples.⁵³ As such, the Declaration is an “international agreement on fundamental individual and collective human rights” enunciating to the world community the required benchmark “to measure the exercise and enjoyment of [Indigenous peoples’] fundamental human rights.”⁵⁴ These minimum or benchmark standards provide the essential framework for a human rights-based approach to addressing the rights, duties, and obligations owed to Indigenous peoples.⁵⁵

The Declaration, even as adopted, has its opponents. Some states question the need for a specific declaration on Indigenous peoples when they, as individuals, have the same rights as everyone else under international human rights laws.⁵⁶ Still other states fear the Declaration’s adoption will “lead to separatism or secessionist movements, which presumably would have serious consequences for national unity, territorial sovereignty and democratic governance.”⁵⁷ There are persuasive responses to the opposition, ranging from the failure of the liberal approach to human rights in relation to Indigenous peoples and the disproportionately greater obstacles that Indigenous peoples face as individuals and as members of collectives that continue to impede upon their enjoyment of universal individual human rights,⁵⁸ to the realization that in a post-colonial world, it is rare that Indigenous peoples would believe that self-determination could only be achieved through secession or the dismemberment of states.⁵⁹

But more important than responding to such points of opposition is the impression that one walks away with after a careful read of the Declaration. Ironically, a thorough read of the Declaration reveals that the lan-

51. *Id.*

52. *Id.*

53. See Dorough, *supra* note 43, at 266.

54. *Id.*; see also Stavenhagen, *supra* note 32, at 354–55. (explaining that “the Declaration clearly distinguishes between the individual rights that [Indigenous peoples] share with all other persons according to the UN Bill of Rights, and the specific rights enjoyed by [I]ndigenous peoples collectively as a result of their indigenous identities”).

55. See Dorough, *supra* note 43, at 266.

56. See Stavenhagen, *supra* note 32, at 360 (“[I]ndigenous peoples are not fully or actually respected in many circumstances. . . . [In fact,] [I]ndigenous people[s] continue to suffer a serious human rights deficit. They do not, in practice, enjoy all their civil, political, economic, social and cultural rights in the same measure as other members of society.”).

57. *Id.*

58. *Id.*

59. See Anaya, *supra* note 35, at 188.

guage of its provisions is no more controversial than the mission statements of most organizations or institutions. Institutions, as well as individuals, use quite similar narratives to promote their ideals and objectives, namely to secure control over their assets and to pursue social, economic, and political growth and development.⁶⁰ What is being communicated in these provisions is the securitization of these same rights for Indigenous peoples.⁶¹

While the Declaration encompasses the full gamut of rights of Indigenous peoples, covering the spectrum of civil, political, economic, social, cultural, and environmental rights, the provisions of the Declaration most relevant for purposes of the Declaration's implementation through the licensing of "Article 31 assets and resources" are articles 3 (right to self-determination), 31 (right to control indigenous intangible assets and resources), and 32 (right to economic development of lands, territories, and resources).⁶²

Article 3 of the Declaration is described as a foundational principle that anchors the constellation of Indigenous peoples' rights.⁶³ Article 3 states "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁶⁴

According to Anaya, article 3 should be interpreted in its contemporary human rights sense, rather than in the sense of traditional states' rights, the latter reflecting attributes of historic sovereignty or statehood.⁶⁵ In this way, article 3 is more in keeping with contemporary human rights law, which recognizes the "diverse and often overlapping identities and spheres of community."⁶⁶ As such, article 3 of the Declaration anchors Indigenous peoples' rights to exercise authority and control over article 31 assets and resources according to a contemporary human rights framework.⁶⁷

Article 31 declares that Indigenous peoples have the right and authority to control, protect, and develop their heritage, traditional knowledge, cultural expressions, and their overall intellectual property.⁶⁸ Article 31 states:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of

60. *Id.* at 185.

61. *Id.* at 184.

62. See UN Declaration, *supra* note 38, arts. 3, 31, 32.

63. Anaya, *supra* note 35, at 184.

64. UN Declaration, *supra* note 38, art. 3.

65. See Anaya, *supra* note 35, at 184.

66. See *id.*

67. *Id.*

68. Adelfo Regino Montes & Gustavo Torres Cisneros, *The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship Between Indigenous Peoples, States and Societies*, in *MAKING THE DECLARATION WORK*, *supra* note 32, at 138, 162.

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

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.⁶⁹

Article 31 recognizes that the value of indigenous assets and resources extends to intangible commodities resulting from the creativity of the indigenous mind and the evolution of indigenous knowledge informed by indigenous cosmogony.⁷⁰ This indigenous creativity, know-how, inventiveness, and innovation are the product of belonging to the collective and incorporating indigenous cultural values in the creation and development of indigenous intangible assets and resources or expressions, knowledge, and heritage identified as intellectual property.

Three significant points can be drawn from article 31. First, potential users of indigenous assets and resources are put on notice of the probable existence of multiple systems of protection inuring to the benefit of indigenous owners, as well as specific obligations respecting the asset or resource. This means that the user may be subject to traditional intellectual property laws as well as indigenous customary laws or protocols in respect to the appropriate use of indigenous assets or resources. Second, states, through a process of consultation with Indigenous peoples, owe a duty at the national level to implement measures to facilitate protection and recognition of indigenous assets and resources. Third, and most important, Indigenous peoples are the holders of the right to exercise authority and control over indigenous assets and resources, thus determining the extent to which an asset or resource can be commodified, or in what manner indigenous assets and resources must be preserved.

Finally, article 32 operates in the sphere of economic, social, and cultural rights, with a specific focus on economic development and economic independence. Article 32 engages Indigenous peoples to exercise authority and control over development affecting their lands and resources and requires states to cooperate in this sphere of economic development to properly and sustainably make approved uses of indigenous lands and resources. Article 32 states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative insti-

69. UN Declaration, *supra* note 38, art. 31.

70. See Åhrén, *supra* note 43, at 203.

tutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.⁷¹

Article 32 also has key points related to indigenous economic development. Article 32, like article 31, portends the need for a critical assessment by Indigenous peoples and states regarding how to proceed with economic development that is both indigenous-focused and consistent and reconcilable with indigenous cultural values. Advising caution, Rodolfo Stavenhagen explains that the important right provided in article 32 “cannot simply be applied mechanically in any circumstances.”⁷² He goes on to state that article 32 “refers . . . to two interlocking rights, the right to development as defined in other UN instruments and the right of Indigenous peoples to ‘determine and develop priorities and strategies’ in order to best exercise that right”⁷³ With article 32 comes an obligation on the part of Indigenous peoples and states to develop public policy to establish priorities, develop and weigh optimal development strategies, and adopt reasonable metrics and outcomes to manage the process of economic development directly and indirectly affecting indigenous economic development.

With the identification of these key provisions of the Declaration, it is vital to refocus attention on the best methods for approaching the implementation of the Declaration to promote indigenous exercise of authority and control over article 31 indigenous assets and resources and the equally important right to impose obligations on users of article 31 indigenous assets and resources. Article 31 rights can be referred to in the context of a value-obligation model. Specifically, Indigenous peoples, as the rightful owners and stewards of their assets and resources, have the authority to impose obligations on those who would use their assets and resources.⁷⁴ Because of the special relationship between Indigenous peo-

71. UN Declaration, *supra* note 38, art. 32.

72. Stavenhagen, *supra* note 32, at 357.

73. *Id.*

74. *Cf. id.* at 368 (“The basic principle underlying [the UN’s new human rights] approach is that the realization of human rights should be the end goal of development, and that development should therefore be perceived as a relationship between rights holders and the corresponding duty bearers. All programs designed in accordance with this approach incorporate human rights indicators for the purpose of monitoring and assessing the impact of development projects and programs.” Stavenhagen goes on to state that “[a] rights-based approach identifies [I]ndigenous peoples as full holders of human rights and sets the realization of their rights as the primary objective of development Attested best practices in development based on the rights of [I]ndigenous peoples are to be found in social and political processes initiated by indigenous communities and organizations in exercising and defending their rights. These are empowerment processes which are predi-

ples and their lands, territories, assets, and resources, the obligations imposed upon users extend not just to the indigenous owner but also to the indigenous asset or resource itself. The Declaration supports this value-obligation model by virtue of Indigenous peoples' right to protect and preserve their culture, identity, assets, and resources, and the equally compelling right to establish institutions to manage and control these assets and resources so that they can retain their wealth-creating value.⁷⁵

B. IMPLEMENTING THE DECLARATION

Implementation of the Declaration, with specific emphasis on articles 3, 31, and 32, is largely dependent on the legitimacy ascribed to it. Claire Charters defines legitimacy, with respect to the Declaration "as the quality in international norms that leads states to internalize a pull to voluntarily and habitually obey those norms, even when it is not necessarily in their interests to obey and despite the lack of a sovereign or sanction for failure to comply."⁷⁶ Legitimacy of the Declaration rests, first, upon its ability to convey the principles of justice that come along with recognizing Indigenous peoples' right to exercise authority and control over their article 31 assets and resources, and, second, upon its ability to influence engagement by Indigenous peoples and non-indigenous peoples.⁷⁷

Implementation of the Declaration must also be undertaken according to the Declaration's rights-based framework, which is the optimum approach to achieving social justice for Indigenous peoples.⁷⁸ This approach is especially valid in the context of promoting indigenous entrepreneurship and economic development. The Declaration rewrites the narrative of indigenous claims to lands and other inextricably-linked resource rights and expressly promotes the use of rights to generate community-based opportunities for innovation and development.⁷⁹ The Declaration functions as a countermeasure to the long history of discrimination and inequality suffered by Indigenous peoples, but in a manner that embraces cooperation and consultation with states, multinational corporations, civil society, and non-indigenous peoples.

cated on the assumption that [I]ndigenous peoples own their rights and on strengthening the ability of these peoples to organize and demand the observance and exercise of their rights . . .").

75. UN Declaration, *supra* note 38, arts. 11–14, 20.

76. Claire Charters, *The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples*, in *MAKING THE DECLARATION WORK*, *supra* note 32, at 280, 281.

77. *Id.* at 280–81.

78. Claire Charters & Rodolfo Stavenhagen, *The UN Declaration on the Rights of Indigenous Peoples: How It Came To Be and What It Heralds*, in *MAKING THE DECLARATION WORK*, *supra* note 32, at 10, 13 (The Declaration "recognizes [I]ndigenous peoples' rights as inherent. . . . The Declaration not only elaborates on these rights but also imposes obligations on states and on international organisations and inter-governmental bodies as well.").

79. Danielle M. Conway, *Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources*, 15 *TEX. WESLEYAN L. REV.* 207, 254–55 (2009).

In this manner, a rights-based approach rejects the notion that Indigenous peoples must occupy the status of beneficiary in relation to the benevolent “other” in seeking to exploit article 31 assets and resources that by their very nature are the subject matter of indigeneity. By focusing on fairness and distributive justice, the Declaration does not challenge the legitimacy of the “other”; instead, the Declaration impresses upon the “other” the obligation to engage Indigenous peoples as peoples owed respect, equality, and the right to exercise authority and control over their property and their economic destinies.⁸⁰ Quite logically, one can introduce the concept of licensing as a mechanism to exercise authority and control over property as consistent with the goals and objectives of the Declaration.

Implementation of the Declaration can also be achieved by engagement legitimacy. Engagement legitimacy is a simple yet powerful concept. Claire Charters explains engagement legitimacy as “the increase in a norm’s authority deriving from interaction with that norm post its establishment, leading to an internalization of the norm.”⁸¹ Engagement legitimacy can result from the dissemination of knowledge of a norm.⁸² Thus, simply referencing it, encouraging discourse around it, or framing legal or policy issues around its provisions can achieve engagement with the Declaration.⁸³

Raising awareness of norms in the legal arena is imperative because lawyers, judges, and legislators will be confronted with cases involving the rights of Indigenous peoples. When these actors do not possess awareness of a norm, such as the Declaration, their approaches to decision-making can lead to unintended or harmful results. Consider, for example, *Reece v. Island Treasures Art Gallery, Inc.*⁸⁴ *Reece* presented a scenario in which a non-native Hawaiian, *Reece*, filed a lawsuit for copyright infringement against a native Hawaiian, *Colucci*, and the art gallery that displayed the latter’s work.⁸⁵ The alleged “unauthorized use” to which *Reece* referred focused on a stained glass work created by *Colucci* that depicted hula kahiko.⁸⁶ The hula kahiko is a form of cultural expression

80. Charters, *supra* note 76, at 288 (Consistent with the jurisprudence before the UN Committee on the Elimination of Racial Discrimination and before the Inter-American Human Rights Commission, “[t]he Declaration recognises [I]ndigenous peoples’ rights to their lands, including those traditionally owned, occupied or otherwise used or acquired. . . . These cases illustrate that rights to property, rights to equality and rights to culture require equal recognition of [I]ndigenous peoples’ land rights. In this way, by recognising [I]ndigenous peoples’ rights to land, the Declaration goes some distance towards improving the fairness of international law.”).

81. *Id.* at 288.

82. *Id.* at 292.

83. *Id.* at 282.

84. 468 F. Supp. 2d 1197 (D. Haw. 2006). This case is important because it marks a pivotal point in the extension of western copyright protection at the expense of protection of cultural resources and the recognition and adherence to indigenous customary law. A critical discussion and analysis of the *Reece* case is printed in Conway, *supra* note 79, at 246–50.

85. *Id.* at 1201.

86. *Id.*

communicating identity, which makes it a subject of great appreciation and significance to native Hawaiians and non-native Hawaiians.⁸⁷

The decision provided a short-term result that on first blush seems laudable in that it denied Reece's claim of copyright infringement. But, by failing to educate itself about the Declaration, the court worked an unintended injustice to Native Hawaiian Rights. The injustice was the court's failure to recognize article 31 rights to indigenous cultural heritage, while at the same time inadvertently and ironically invoking harmful narratives from uniform western intellectual property laws that are ill-equipped to respond to the protection envisioned by the Declaration.

The most harmful injustice is exemplified by the court's unilateral donation of native Hawaiian article 31 assets and resources to the public domain.⁸⁸ Native Hawaiians did not challenge Reece's photograph as an invasion of native Hawaiian interests in the cultural practice and expression of hula. In fact, the native Hawaiian community tolerated Reece's use of culturally significant expression. Despite this tolerance, Reece felt emboldened by western intellectual property law to sue, among others, a native Hawaiian artist for her expression of her cultural identity. In responding to the dispute before it, the court invoked only federal copyright law; it overlooked the primacy of the Native Hawaiian Right to use traditional practices in sanctioned cultural expression.⁸⁹ At the same time, the court, when assessing whether Reece's photograph could be copyrighted, unilaterally laid claim to the practice of hula kahiko by defining the practice as an "idea . . . forever the common property of mankind."⁹⁰ The court unilaterally decided that the practice of hula kahiko was "unprotectable" and thus "owned" by the public domain, not native Hawaiians.⁹¹

The district court's determination that several elements of hula kahiko amount to ideas or facts under a western paradigm results in a dual misappropriation of native Hawaiian resources and intangible assets. In two virtually consecutive transactions, native Hawaiian traditional resources and intangible assets were misappropriated: first, with the filing of a copyright infringement action by a non-indigenous individual, and second, by the unilateral judicial decision to transfer ownership of aspects of the hula kahiko to the public domain.⁹² This decision clearly indicates a lack of awareness of article 31 of the Declaration.

Engagement legitimacy can also be accomplished through socialization and interaction or interpretation and internalization.⁹³ The process of socialization and interaction is characterized by continuous involvement by states and actors in world affairs, which themselves are governed by

87. *See id.* at 1206–07.

88. *See id.* at 1199–1200.

89. *Id.* at 1202–10.

90. *Id.* at 1202.

91. *Id.* at 1202–10.

92. *Id.* at 1201, 1206–07.

93. *Id.*

norms such as the Declaration.⁹⁴ Socialization and interaction are described as “constitutive and generative, creating new interests and values for actors.”⁹⁵ These new interests and values become the state preference because of habitual compliance.

Alternatively, engagement legitimacy can be accomplished through interpretation and internalization.⁹⁶ Indigenous peoples have the power to facilitate interaction with the Declaration by framing issues in terms of the Declaration’s language when required and appropriate.⁹⁷ Invoking the Declaration in governmental and nongovernmental settings allows for repeated interaction with and analysis of the provisions as well as those documents and writings that interpret the provisions.⁹⁸ With every interaction with the Declaration, especially those that yield express decisions and outcomes, the Declaration moves one step forward toward internalization within the consciousness of the decision-maker.⁹⁹ As evidenced by Section IV of this article, native Hawaiians embarked on the road to engagement legitimacy by incorporating the Declaration on the Rights of Indigenous Peoples and the Paoakalani Declaration as interpretive provisions into their license agreements that govern the appropriate use of their indigenous subject matter.

Another imperative for the Declaration on the Rights of Indigenous Peoples is achieving its implementation at the national and local levels of respective state governments. Regardless of its adoption at the international level by the United Nations General Assembly, “[o]f immediate concern is the fact that governments do not consider the Declaration to be legally binding because it is not an international convention that requires ratification.”¹⁰⁰ As such, implementation of the Declaration at national and local government levels will depend largely on an orchestrated effort to educate Indigenous and non-Indigenous peoples and organizations of its existence and its meaning, to empower a new generation of indigenous representatives and leadership to work with it, and to intro-

94. See Charters, *supra* note 76, at 292.

95. *Id.* at 293.

96. *Id.*

97. *Id.* at 294.

98. *Id.*

99. *Id.* at 294–95. “There are numerous ways in which [I]ndigenous peoples can enhance the legitimacy of the Declaration through encouraging and even ensuring that states interact with it, precipitating the process of interpretation and then internali[s]ation. Generally, [I]ndigenous peoples can start by framing their issues in terms of the Declaration’s rights and freedoms in political and legal initiatives. . . . Engagement legitimacy can attach to norms even when states are reluctant to engage with those norms or reject them outright. For example, continuing its opposition to the Declaration, Canada argued forcefully for the inclusion of the words ‘where appropriate’ at the end of the sentence in the resolution setting out the Special Rapporteur’s mandate requiring him to promote the Declaration. Ironically, to achieve inclusion of these words, Canada was forced to engage with the Declaration”

100. Stavenhagen, *supra* note 32, at 355; see also Åhrén, *supra* note 43, at 204 (“[M]ost states recognize that they are obliged to rectify injustices of the past by recognizing rights that continue today. In addition, most states presumably nurture an aspiration to improve the situation of [I]ndigenous peoples. However, this has rarely been reflected in state legislation, policies or practices.”).

duce it conspicuously into various relevant institutions, including judiciaries, legislatures, academia, and the public media.¹⁰¹

One example of successful orchestration of implementation is the case of the land dispute between the Indigenous peoples of India, the Dongaria Kondh and the Kutia Kondh, and Vedanta Resources, an FTSE 100-listed metals and mining company with interests in India, Zambia, and Australia.¹⁰²

This is an all too familiar case of indigenous land misappropriation and early complicit activity at the local government level to facilitate the displacement of traditional owners and users of land, territory, and resources.¹⁰³ The Dongaria Kondh and the Kutia Kondh have lived and practiced indigenous self-identity, sustainability, and development in the Niyamgiri Hills for generations.¹⁰⁴ Not only do these tribes spiritually interact with their environment, but they also use sustainable practices to develop their lands for subsistence agro-forestry as well as commercial trading.¹⁰⁵ Through the connection of culture and land, the Dongaria Kondh and the Kutia Kondh have developed world-renowned skills in horticulture, producing both food and medicines for community use and for marketable commodities.¹⁰⁶ The Niyamgiri Hills are the “sole and unique habitat” of the indigenous community.¹⁰⁷ Any major disruption of their relationship with their environment would threaten their cultural integrity, their economic independence, and their survival.¹⁰⁸

Vedanta Resources proposed a mining lease to the government of India, which would allow for the mining of bauxite, aluminum refining operations, and mining-related activities, such as tree-felling, blasting, soil removal, road building, heavy machine movement, and denial of land access in the highest hills of the Dongaria Kondh and Kutia Kondh tribal lands.¹⁰⁹ Vedanta urged that these activities would not result in human displacement. Taking this as true (even though that was not the case), Vedanta failed to further address the major issue of resource displacement—an outcome that would directly undermine indigenous land management and economic development.¹¹⁰ More gripping is the initial response by the government (1) to approve Vedanta’s activities in viola-

101. See Stavenhagen, *supra* note 32, at 366.

102. Cf. *Thirumulpad v. Union of India*, (2007)12 S.C.R. 447 (Supreme Court of India considers granting clearance to mining project subject to compliance with Rehabilitation Package), *amended by* (2008) 9 S.C.C. 711 (judgment granting Sterlite permission to mine Niyamgiri). See generally N.C. SAXENA, S. PARASURAMAN, PROMODE KANT & AMITA BAVISKAR, REPORT OF THE FOUR MEMBER COMMITTEE FOR INVESTIGATION INTO THE PROPOSAL SUBMITTED BY THE ORISSA MINING COMPANY FOR BAUXITE MINING IN NIYAMGIRI (2010).

103. *Id.* at 40–43.

104. See *id.* at 24–25, 33–34.

105. *Id.* at 30–31.

106. *Id.* at 28.

107. *Id.* at 34.

108. See *id.* at 25, 34–37.

109. See *id.* at 11.

110. See *id.* at 34–37.

tion of the Indian Constitution's mandate to recognize the rights of listed tribes and (2) to ignore its administrative obligation to consult with the Indigenous peoples about the impact of Vedanta's activities on indigenous livelihood and economy.¹¹¹ In this case, domestic legislation consistent with the Declaration was already enacted, but the Indian government attempted initially to ignore it.¹¹²

The Dongaria Kondh, Survival International,¹¹³ and various human rights organizations and activists challenged Vedanta's proposed mining lease and illegal land occupation through the concerted actions of physical protest and legal action.¹¹⁴ In support of their cause, the indigenous-led contingent relied upon the Indian Constitution, which expressly recognized the special rights of schedule-listed tribal groups.¹¹⁵ They also relied on a 2006 Indian legislative enactment called the Forest Rights Act.¹¹⁶

The Indian government's Forest Rights Act was "visionary in its scope."¹¹⁷ It recognized the injustice of the prior treatment of forest dwellers as encroachers and further recognized the pre-existing rights of tribal owners to their ancestral lands.¹¹⁸ The law recognized both community and individual claims to the ownership of forest resources.¹¹⁹ The law also recognized local governance structures as authorities for filing claims.¹²⁰ Finally, the law required prior free and informed consent as an essential function of local governance and self-determination.¹²¹

In applying the legislation to the case brought by the Dongaria Kondh, the government and the courts acknowledged that Vedanta's mining activities would disrupt twenty percent of the social and economic life of the indigenous community in the Nyamgiri Hills.¹²² The authorities acknowledged that disruption would occur to more than one village; it would affect a habitat that sustained multiple villages and community networks.¹²³ In addition, the authorities acknowledged that the Indigenous peoples safeguarded and nurtured their ancestral lands and retained the power to protect them from destruction.¹²⁴

The Dongaria Kondh-Vedanta case illustrates the power of positive law to promote the very kind of justice envisioned by the Declaration. Ab-

111. *Id.* at 12–14.

112. *See id.* at 5–6, 59–63.

113. *About Us*, SURVIVAL INTERNATIONAL, <http://www.survivalinternational.org/info> (last visited Oct. 27, 2010) ("Survival is the only international non-governmental organization supporting tribal peoples worldwide.").

114. *See* SAXENA, PARASURAMAN, KANT & BAVISKAR., *supra* note 102, at 11.

115. *See id.* at 11, 24, 73.

116. *Id.* at 44.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 37.

123. *See id.* at 34–39.

124. *See id.* at 47.

sent this positive law, the probable outcome of the conflict between indigenous interests and multinational interests would be the wholesale disruption of indigenous lands, resources, identity, and economic independence. A far different outcome, however, can be achieved by virtue of the will, desire, and capacity to implement, through domestic legislation, the principles enunciated in the Declaration.

C. ARTICLE 31 INDIGENOUS ASSETS AND RESOURCES: FOUNDATIONS FOR INDIGENOUS INNOVATION AND ENTREPRENEURSHIP

Terms such as “traditional knowledge,” “cultural heritage,” and “traditional cultural expressions,” all refer to the same common set of general intangible features of assets and resources that emanate from indigenous existence.¹²⁵ Among these features are belief systems, cosmology, environmental, agricultural, medicinal, botanical, and zoological knowledge, construction and craft techniques, legends, folklore, traditions, songs, dances, and expressions that are typically perpetuated intergenerationally through means other than writing.¹²⁶ Throughout previous articles by this author and others, the term “Indigenous assets and resources” has been used to reference these features of indigenous “intellectual property.”¹²⁷ “Property” is a western concept associated with individual ownership and rights of exclusion historically not relevant to indigenous existence before colonization.¹²⁸ And while the term “intellectual property” serves as a proxy term describing the above-listed components of indigenous intangible assets and resources, in the western sense, “intellectual property” is inadequate on both philosophical and political levels because of the colonizers’ use of mainstream intellectual property law as a tool to commodify, misappropriate, and unlawfully exploit these same indigenous assets and resources.¹²⁹

And while “traditional” is a seemingly appropriate term to reference indigeneity, integrity, and authenticity, the term carries with it inaccurate notions of rigidity, ancientness, and the novelty of obsolescence. Al-

125. For an example of the use of each term, see the following sources. JONATHAN CURCI, *THE PROTECTION OF BIODIVERSITY AND TRADITIONAL KNOWLEDGE IN INTERNATIONAL LAW OF INTELLECTUAL PROPERTY* 14–17 (2010) (defining “traditional knowledge”); John Henry Merryman, *A Licit International Trade in Cultural Objects, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW* 269, 286 n.1 (Kate Fitz Gibbon ed., 2005) (defining “cultural property”); *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE*, WORLD INTELLECTUAL PROP. ORG. 1–22 (2008), available at http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf (defining “traditional cultural expressions”); see also UN Declaration, *supra* note 38, art. 31 (“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression . . .”).

126. See *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE*, *supra* note 125, at 5–6.

127. Conway, *supra* note 79, at 209.

128. *Id.* at 218–19.

129. See, e.g., Jessica Myers Moran, *Legal Means for Protecting the Intangible Cultural Heritage of Indigenous People in a Post-Colonial World*, 12 *HOLY CROSS J.L. & PUB. POL’Y* 71, 71 (2008) (“[B]ecause intellectual property laws result from Western values, they were used as tools of colonization.”).

though Indigenous peoples in general hold deeply rooted beliefs and practice customs steeped in tradition, indigenous knowledge is constantly adapting, evolving, increasing, and being further enriched with each successive generation.¹³⁰ Indigenous knowledge is anything but obsolete or fixed in time and space.

Thus, in furtherance of the principles of engagement legitimacy, from this point forward, reference will be made specifically to “Article 31 indigenous assets and resources” in recognition of the adoption of the Declaration on the Rights of Indigenous Peoples. When read alongside articles 3 and 32, it is clear that Indigenous peoples have the right and the authority to decide when and if to make use of article 31 assets and resources for the purposes of indigenous economic development in a manner consistent with indigenous values, customs, and protocols.¹³¹

Creating new and improved technologies, new and improved processes, and, especially relevant to Indigenous peoples, new adaptations of existing knowledge or ways of doing things is considered the cornerstone of innovation. Accordingly, although colonization may have stunted indigenous innovation and economic development, it did not erase the presence and power of indigenous knowledge, heritage, and resources that can now serve as the foundation for launching indigenous enterprises. As such, Indigenous peoples are in a prime position to kick-start indigenous economic development by harnessing and adapting article 31 indigenous assets and resources to build and sustain indigenous enterprises. Notably, it is in a state’s interest to recognize and protect, in accordance with the Declaration, article 31 indigenous assets and resources so as to equally advance innovation in indigenous communities and protect indigenous entrepreneurs from those who benefit from free riding on often non-rivalrous indigenous assets and resources. Such free-riding creates a danger that the pace of technological innovation in indigenous sectors will fall below socially optimal levels.¹³²

IV. IMPLEMENTING THE DECLARATION THROUGH LICENSING OF ARTICLE 31 INDIGENOUS ASSETS AND RESOURCES

This Section will introduce how licensing facilitates the exercise of authority and control over indigenous assets and resources that provide the

130. See TERRI JANKE, *OUR CULTURE, OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS* 77 (1998), available at <http://www.frankellawyers.com/av/medical/report/culture.pdf> (“Such cultural practices and expressions *are continuously evolving* and comprise both intangible and tangible elements.”) (emphasis added).

131. UN Declaration, *supra* note 38, arts. 3, 31–32.

132. See William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 192 (Stephen R. Munzer ed., 2001); see also WILLIAM W. FISHER, *Intellectual Property and Innovation: Theoretical, Empirical, and Historical Perspectives*, *PROG. SEMINAR ON IP AND INNOVATION AND THE KNOWLEDGE-BASED ECONOMY* 1 (May 2, 2001), available at <http://cyber.law.harvard.edu/people/TFisher/Innovation.pdf>.

foundation for indigenous entrepreneurship. Licensing is merely one mechanism to implement specific provisions of the Declaration. The licensing of indigenous assets and resources presents a unique opportunity to take the Declaration from an aspirational state to an operational state, from which indigenous entrepreneurs can cement in commerce the value of indigenous assets and resources to commercial market participants, both indigenous and non-indigenous. There are myriad examples of Indigenous peoples engaging in commerce on individual and institutional levels.¹³³ What is presented below is an example of commercial application of the Declaration from the perspective of Indigenous peoples.

A. THE PROCESS

A licensing project undertaken with Indigenous peoples in Hawai'i was the development of licensing strategies for the use and distribution of native Hawaiian pathways to education-embodied publications. Native Hawaiian kūpuna and educators, through a non-profit organization called the Native Hawaiian Education Council, sought to protect the value of their indigenous approach to educating indigenous children. Part of the initial process was to frame the goals of the native Hawaiian collective with the promise of the Declaration. Another significant part of the process was to introduce the collective to the principle that a commercial transaction involves an exchange of value, as distinct from a transaction exchanging money for goods. Reframing the concept of a commercial transaction was integral to the continued viability of the process and its outcome because of the absolute requirement that the collective comply with indigenous principles regarding sharing knowledge for the benefit of the community.

Drawing on the discussion in Section III.C of this Article, the collective accepted and integrated the idea that their indigenous knowledge had value to users and that remuneration for use of this knowledge did not necessarily require the transfer of cash for product. Instead, the collective internalized the term "commercial transaction" to mean an exchange of obligations that facilitated the proper use of the knowledge transferred pursuant to the license terms. For example, foremost in the mind of the collective was maintaining the integrity of the traditional knowledge embodied in the publication, consistent with indigenous customary laws and protocols. Accordingly, the collective determined that the exchange of value would be access to the indigenous knowledge in the publication in exchange for an obligation to maintain the integrity of the traditional knowledge in accordance with protocols delineated in the preamble of the license agreement.

After establishing a foundation with which to engage non-indigenous licensees, the collective selected a working group of kūpuna, whose kule-

133. See, e.g., SAXENA, PARASURAMAN, KANT & BAVISKAR, *supra* note 102, at 26, 28; Kayseas et al., *supra* note 36, at 17–19.

ana closely aligned with the indigenous asset that was the subject of the license. This working group approached its business from a completely indigenous perspective, ranging from the procedures for conducting meetings to delineating approaches to arrive at consensus. The substance of the meetings is an indigenous private matter, yet the disclosure of the process for arriving at the indigenous licensing product is permissible.

In order to arrive at an indigenous license product, the collective addressed questions presented within a document drafting facilitation matrix. This matrix attempted to cross reference fundamental aspects of standard license agreements with core principles related to indigenous exercise of control over indigenous assets and resources. The core principles that emerged from the cross-referencing exercise included the following: respect; indigenous control; authorization, consultation, and consent; interpretation, integrity, and authenticity; secrecy and confidentiality; attribution; recognition and protection; and payment and benefit-sharing. The collective proceeded to identify and discuss how these fundamental concepts were reflected, if at all, by native Hawaiian customary law or protocols. Once the protocols were identified, explained, thoroughly discussed, and internalized, they became the core principles that would be used in the license agreement's preamble to establish the context within which the license agreement would be interpreted.

B. THE OUTCOMES

The creation of a license product from the process described above is as monumental as the Declaration that inspired it. The license product celebrates the vitality and import of Indigenous peoples' contributions to society. The license product is an expression of indigenous identity and survival, as well as a contribution to society's store of knowledge in the field of education. To demonstrate the nature of this license's dual benefits, portions are recreated below with the permission of the collective.¹³⁴

TITLE OF PROVISION	AUTHOR COMMENTARY	INDIGENOUS LICENSE PROVISIONS
PREAMBLE	The Preamble was viewed as the most important section in the license agreement because it served as the primary source of knowledge to teach the parties, specifically non-indigenous licensees, about native Hawaiian principles, customs, and protocols. The agreement is unique in that it does not represent a standard boilerplate; instead it represents an introduction to the perspectives and worldview of native Hawaiians as a collective, not just the views of	We declare this Preamble as Kānaka Maoli of Hawai'i, through honoring of our ancestral relations and on behalf of our lāhui: kūpuna, mākuā, haumāna, a me nā hanauna e hiki mai ana. The purpose of this declaration is to ensure that our kuleana (duties) are to protect our indigenous intellectual property rights of the publication Nā Honua Maui Ola. This kuleana is built on the foundation of collaboration and united efforts by the University of Hawai'i at Hilo, Ka Haka

134. Portions of this license are reproduced with the express permission of the Native Hawaiian Education Council, the steward for the project that led to the drafting of several license agreements related to the ownership and use of the knowledge and embedded within Nā Honua Maui Ola.

those involved in the drafting. The Preamble is deliberately lengthy because it conveys the desire of native Hawaiians to impose specific obligations on license parties. Whereas a preamble or recital is normally not binding, native Hawaiians intended that the parties to the license agreement be governed by the tripartite protocols that guide how the license agreement must be interpreted and executed. The native Hawaiian collective expressly and affirmatively intended that the Preamble's content reflect promises, duties, and obligations as to the following relationships: the parties themselves, the Article 31 indigenous assets and resources, and the interaction with the agreement. The Preamble establishes that the protocols therein contained, and the rights declared in the Paoakalani Declaration¹³⁵ and the UN Declaration on the Rights of Indigenous Peoples, are sources of binding authority for describing the context of the agreement and interpreting the agreement's provisions.¹³⁶ The binding nature of the Preamble is also reflected by each provision's direction to refer back to it and to define how the respective provisions will govern each party's conduct in relation to the other parties, the Article 31 indigenous assets and resources, and the agreement itself.

ʻUla Keʻelikōlani, College of Hawaiian Language, Native Hawaiian Education Council, and Hawaiian communities throughout the State of Hawaiʻi. We declare this Preamble

... *first*, to serve as our kuleana (duty) the education needs of our native Hawaiian children and community. Healthy families and communities are achieved through providing for the native Hawaiian voice, viewpoint, and perspective to the education that native Hawaiian children receive,

... *second*, to serve other children, both indigenous and non-indigenous,

... *third*, to use with purpose and intent the ʻike, specifically the 8 horizons (pathways), and 16 identified guidelines as a living work of determining what native Hawaiian education looks like,

... *fourth*, to grow through the reaffirmation of Nā Honua Maui Ola as renewed efforts that are ongoing, developmental and progressive that sustain our own indigeneity as Kānaka Maoli,

... *fifth*, to honor as our collective priority all Indigenous Peoples of the world,

... *sixth*, to advocate for narrative, face-to-face talk story that builds relationships and shared connections to resources as ceremony, protocol, and research.

... *seventh*, to ground us in our collective ancestral spirituality.

This declaration protects our indigenous intellectual property rights in its entirety. Nā Honua Maui Ola is our maui, spiritual life force that provides the framework to build healthy resilient communities that are sustainable and prosperous. The scope of this preamble is to respect the native Hawaiian protocols as essential license terms and conditions of the rights declared in Paoakalani Declaration and the UN Declaration on the Rights of Indigenous Peoples. The scope of these license agreements

135. See generally NATIVE HAWAIIAN INTELLECTUAL PROPERTY RIGHTS CONFERENCE, PALAPALA KŪLIKE KA 'AHA PONO: PAOAKALANI DECLARATION (2003), <http://www.papaalokahi.org/coconut/resources/pdf/PaoakalaniDeclaration05.pdf> [hereinafter PAOAKALANI DECLARATION].

136. XUAN-THAO N. NGUYEN, ROBERT W. GOMULKIEWICZ & DANIELLE CONWAY-JONES, INTELLECTUAL PROPERTY, SOFTWARE, AND INFORMATION LICENSING: LAW AND PRACTICE 48 (2006) (“[A preamble is] binding in the sense that [it is] an authoritative description of the context for the license. A party cannot later claim the setting for the license is different than described in the [preamble].”).

support the use of Nā Honua Maui Ola, and this publication is protected through the stewardship of shared collective practices. By this preamble, we declare our intentions to protect Nā Honua Maui Ola as Hawaiian philosophy, beliefs and values as described within the knowledge creation and context of our native Hawaiian protocols.

The Preamble continues with identification and explanation of the specific native Hawaiian protocols and their contextual meaning governing the relationship between the license parties themselves, their relationship to the Article 31 indigenous assets and resources, and their relationship to the agreement itself. The protocols are meant to bind the agreement; they are also meant to teach and obligate the license parties. The express statement of the protocols within a license agreement whose subject matter is Article 31 indigenous assets and resources is pioneering, as it represents a new era of social transaction in which the value is in educating and obligating those who would engage the license agreement from a native Hawaiian perspective.

Kānaka Maoli Protocols for Nā Honua Maui Ola:

Respect and Ethical Behaviors

1. Noi – declares intention and expectations for ethical, appropriate behaviors in relation to the knowledge and resources of the publication Nā Honua Maui Ola.
2. Hoʻomākaukau – prepares license agreements as defined through the process and application of user groups of the publication Nā Honua Maui Ola.
3. Hoʻokō Kuleana – evaluates requests responsibly, intelligently and reflectively.

Acknowledging Indigenous Stewardship

1. Hō ʻihi aku – respects ancestral relationships and connections to resources by asking permission.
2. Hō ʻihi mai – Behaves respectfully and responsibly.

Maintaining Indigenous Integrity, Adaptation and Authenticity

1. Pono – asserts purposeful righteousness, respecting the sources of knowledge, sincerity, honesty and shared purpose.
2. Mālama – maintains balance of traditional and contemporary values and practices.
3. Kū ʻauhau – honors the Kumu Honua Maui Ola as the foundation of the publication Nā Honua Maui Ola.

Honoring Sacredness

1. Piko – recognizes piko as the seamless relationship across time and space as past, present, future and past-future.
2. Kōkua – practices reciprocity for the purpose of prosperity and sustainability.
3. Aloha – embraces a personal commitment to practice spirituality and to mālama akua, mālama ʻāina and mālama kānaka.

DEFINITIONS

The Definitions provision of the license is integral to the engagement of the Paoakalani Declaration as a source document. The license incorporates by reference the Paoakalani Declaration, which

(i) Kānaka Maoli knowledge and resources are defined in paragraph 2 of the Paoakalani Declaration.

(ii) Kānaka Maoli Traditional Knowledge, Cultural Expressions and Artforms are defined in

	clearly expresses the intent of native Hawaiians to have the boundaries of the agreement assessed through a native Hawaiian lens. ¹³⁷ Even in situations where ambiguity may arise, a court or a mediator would presumably be obligated to resolve misunderstandings, ambiguities, or conflicts from the perspective of native Hawaiian interpretation and meaning of terms.	paragraphs 10 through 16 of the Paoakalani Declaration
PROTOCOLS	The Protocols provision confirms the binding nature of the protocols set forth in the preamble. Read in conjunction with the Preamble, the Protocols provision ensures that the license parties covenant to comply with them.	The protocols written in the preamble are binding upon the parties in relation to the use of Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge Cultural Expressions and Artforms.
STEWARDSHIP	The Stewardship provision gives meaning to the collective, as opposed to individual, ownership of, <i>inter alia</i> , Article 31 indigenous assets and resources. The Stewardship provision puts the licensee on notice of the native Hawaiian organization, institution, or collaborative partnership having the authority and the responsibility to manage, preserve, and exploit the Article 31 indigenous assets and resources. Failure to identify “the owner” of Article 31 indigenous assets and resources has long been viewed as a reason not to recognize or protect them under intellectual property law protection regimes. The Stewardship provision responds to this deficiency and requires licensees to interact with the steward(s) consistent with the obligations imposed by the Preamble’s protocols.	Native Hawaiian Education Council & Ka Haka ʻŪla Keʻelikōlani, in accordance with the protocols established herein and consistent with paragraph 22 of the Paoakalani Declaration and Articles 14, 18, 31, and 40 of the UN DRIP, have the authority to, <i>inter alia</i> , maintain, control, protect, and develop Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms.
LICENSE GRANT	The Grant of License provision embodies all of the principles of self-determination sought to be exercised by native Hawaiians consistent with the goals and objectives of the Paoakalani Declaration and the UN Declaration on the Rights of Indigenous Peoples. ¹³⁸ The Grant of License provision confirms and substantiates native Hawaiians’ control and management of Article 31 indigenous assets and resources under an exploitation regime developed, imposed, and administered by them. The Grant of License provision allows native Hawaiians to	Upon the terms and conditions set forth in this agreement, including the protocols written in the preamble, Licensor hereby grants to Licensee and Licensee hereby accepts for the term of this Agreement, a non-exclusive license to [THE SCOPE OF THE LICENSE CAN BE TAILORED TO MANY DIFFERENT USES BY VARIOUS DIFFERENT PARTIES] use Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms in an environment that will educate native Hawaiian, Indigenous, and

137. See PAOAKALANI DECLARATION, *supra* note 135.

138. See *id.* at 2; UN Declaration, *supra* note 38, Annex.

determine with whom they will deal and to what extent.

non-indigenous children and community members through native Hawaiian voice, viewpoint, and perspective. Licensor retains all rights not explicitly granted hereunder.

RESTRICTIONS

The Restrictions provision is an extension of the Declaration's objective to anchor the exercise of authority of Article 31 indigenous assets and resources with the principle and practice of self-determination. With the Restrictions provision, native Hawaiians determine, consistent with the protocols in the Preamble, what uses of the Article 31 indigenous assets and resources by the licensee are not permitted. The major issue in drafting the Restrictions provision was the realization that routinely Article 31 indigenous assets and resources are stripped of their indigeneity and reused in contexts that are incompatible and inconsistent with native Hawaiian custom.¹³⁹ Stripping indigeneity from Article 31 indigenous assets and resources sabotages their integrity and authenticity. As such, the Restrictions provision serves the goal of protecting and preserving Article 31 indigenous assets and resources in accordance with the responsibility owed by the steward(s).

(i) Licensee is restricted from creating derivative works of Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms or any other Kānaka Maoli knowledge or resource related to this Agreement.

(ii) Licensee is restricted from modifying Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms or any other Kānaka Maoli knowledge or resource related to this Agreement.

(iii) Licensee is restricted from using Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms or any other Kānaka Maoli knowledge or resource related to this Agreement to implement a system of education based, directly or indirectly, on Nā Honua Maui Ola unless the Native Hawaiian Education Council & Ka Haka ʻŪla O Keʻelikōlani have approved implementation as satisfactory and consistent with the protocols written in the preamble.

CONDITIONS

The Conditions provision not only protects and preserves Article 31 indigenous assets and resources, it also estops licensees from attacking the validity of ownership over, or the validity of the agreement to govern, Article 31 indigenous assets and resources. The Conditions provision also enlists licensees to police the use and misuse of Article 31 indigenous assets and resources. In this way, licensees are placed in a stewardship role in relation to Article 31 indigenous assets and resources, and they become obligated to the same degree as native Hawaiians in protecting them.

(i) Licensee shall not harm, misuse, or bring into disrepute Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms or any other Kānaka Maoli knowledge or resource related to this Agreement.

(ii) Licensee shall not attack the stewardship and title of Licensor or Grantors in and to Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms or any other Kānaka Maoli knowledge or resource related to this Agreement.

(iii) Licensee shall not attack the validity of this license.

(iv) Licensee shall use Nā Honua Maui Ola itself and its embedded Kānaka Maoli Traditional Knowl-

139. See, e.g., *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1206-07 (D. Haw. 2006).

edge, Cultural Expressions, and Artforms or any other Kânaka Maoli knowledge or resource related to this Agreement in accordance with the orientation and training procedures established by the Native Hawaiian Education Council & Ka Haka ʻŪla O Keʻelikōlani

(v) Licensee shall provide notice to Licensor of any use of Nā Honua Maui Ola itself and its embedded Kânaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms or any other Kânaka Maoli knowledge or resource related to this Agreement that is inconsistent with the protocols and terms set forth in this Agreement.

(vi) Licensee shall use Nā Honua Maui Ola itself and its embedded Kânaka Maoli Traditional Knowledge, Cultural Expressions, and Artforms or any other Kânaka Maoli knowledge or resource related to this Agreement in accordance with the scope of the license grant and in a manner consistent with the protocols written in the preamble.

GOVERNING LAW The Governing Law provision reconfirms that the Paoakalani Declaration and the UN Declaration on the Rights of Indigenous Peoples are the authoritative sources for construing and interpreting the license agreement. The Preamble, the Protocols provision, and the Governing Law provision are consistent in their approach to identifying the documents that will establish the agreement's interpretive framework. The Governing Law provision also legitimizes the rights and obligations imposed by the Paoakalani Declaration and the UN Declaration on the Rights of Indigenous Peoples. In this regard, the Governing Law provision of the license agreement achieves the vital object of this article—implementation of the Declaration.

This Agreement shall be governed by, subject to, and construed according to the guidelines, principles, and protocols set forth in the preamble written above, Palapala Kūlike O Ka ʻAha Pono Paoakalani Declaration (Oct. 3-5, 2003), and the United Nations Declaration on the Rights of Indigenous Peoples. The jurisdiction in which this agreement will be interpreted will be the State of Hawaiʻi.

V. ADDRESSING INDIGENOUS CONCERNS AND ASSERTING THE BALANCE: INDIGENOUS PARTICIPATION IN THE MARKETPLACE

The notion that indigenous entrepreneurship is inherently paradoxical to participation in the western marketplace must be challenged, even though there is a fine balance indigenous entrepreneurs maintain with their own world and the western world. This balance considers that indig-

enous entrepreneurs exist within transgenerational communities with complex cross-cultural linkages with the west.

Far from fully segregating from western society and the states in which they reside, indigenous entrepreneurs seek to promote indigeneity through indigenous and non-indigenous commerce. As Hindle and Lansdowne explain, “[t]here need be no paradox, no contradiction, no values sacrifice, no false dichotomy between heritage and innovation.”¹⁴⁰ Reference to the goals and objectives of the Declaration bear this out. For example, article 19 of the Declaration relates to Indigenous peoples’ participation with respect to issues that affect them, their lands, their resources, and their rights.¹⁴¹ The Declaration also calls for good-faith efforts by states to consult and cooperate with Indigenous peoples about economic and social development that directly or indirectly impacts their rights.¹⁴² Accordingly, the Declaration, by its very terms, promotes collaboration between states and Indigenous peoples.

Further, many indigenous leaders are sounding the call to innovate in the areas of indigenous enterprise in a manner that will adequately deal with the perceived tension between entrepreneurship and the obligations to the indigenous collective. For example, the Chief of the Membertou band, in assisting with the successful deployment of the “First Nations Progression Model”¹⁴³ to manage the band’s economic development to achieve social objectives, provided the following insight:

Conservation and sustainability, including stewardship of the land, are traditional native values that have been important to Mi’kmaq peoples over hundreds and thousands of years. . . . There is only one economy – the mainstream economy – but we have to bring our concepts into the monetary system built on innovation and success. There’s no dishonour in measuring success through profit and return on investment. But it has to occur within native cultural values framework.¹⁴⁴

140. Hindle & Lansdowne, *supra* note 1, at 140.

141. UN Declaration, *supra* note 38, art. 19.

142. *Id.* art. 32.

143. See Kayseas et al., *supra* note 36, at 12–13. (The band CEO explained: “We think the First Nations Progression Model does work . . . thinking like a business but operating within the context of a government, being true to who [we] really are and working for [our] constituents.”). The First Nations Progression Model adopts the features of a business or commercial organization, a traditionally non-indigenous framework. *Id.* at 13. “The model consists of three stages,” which include “capacity building[,] preparation, and economic development . . .” *Id.* at 17. These three phases rest “on four value pillars,” which include “conservation, sustainability, innovation, and success.” *Id.* These phases and pillars are supported by some common organizational best practices existing in successful enterprises that do not necessarily owe their roots to indigenous society but have still found a place in indigenous-focused enterprise. These best practices include communication aimed at transparency, leadership recruitment, indigenous-focused strategic planning, establishment of indigenous and non-indigenous strategic partnerships and ventures, attainment of ISO 9000 quality management system certification, and maintenance of strong recognition and respect for heritage and culture. *Id.* at 13–15.

144. *Id.* at 16.

The above statement reflects the belief that the power of indigenous culture and values are not to be overshadowed by mainstream global economies, while simultaneously appreciating that indigenous values and identities must evolve to create and sustain innovative enterprises that survive and succeed at indigenous economic development and for the social benefit of the indigenous collective.

VI. CONCLUSION

Implementing the Declaration is vital to promoting indigenous innovation, enterprise, and entrepreneurship. As the Declaration's very existence proves, indigeneity plays a key role in economic and sociopolitical self-determination. Hindle and Lansdowne convey that "[i]ndigenous entrepreneurs can use their heritage—they don't have to lose it when they set out in pursuit of venture success."¹⁴⁵ The survival of [I]ndigenous peoples, in spite of efforts to assimilate and colonize, is a testament to the enduring proposition that "[t]he teachings of many [i]ndigenous traditions are rich in stories of brave-hearted, individual men and women in quest of new knowledge, new ways of doing things, [and] new discoveries leading to a better life for many people."¹⁴⁶

In this quest, Indigenous peoples have identified licensing as a reliable interim mechanism to promote, conserve, and benefit from the value of their article 31 indigenous assets and resources. Licensing promotes the desired rights-based approach to the recognition and protection of article 31 indigenous assets and resources, which in turn supports the Declaration's principles of securing self-determination for Indigenous peoples and groups by providing the subject matter and the platform for indigenous-focused and indigenous-driven innovation, economic development, and entrepreneurship.

145. Hindle & Lansdowne, *supra* note 1, at 140.

146. *Id.*