

ISBN No.0 904938 76 X

APFT Working Paper - September 1997

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## National Laws and International Agreements affecting Indigenous and Local Knowledge: Conflict or Conciliation?

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APFT is financed by the European Commission DG VIII

# National Laws and International Agreements affecting Indigenous and Local Knowledge: Conflict or Conciliation?

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### Summary

Over the past 20 years, Indigenous peoples have become the focus of increasing interest and international debate. The United Nations has been a primary forum for these discussions through ECOSOC's Working Group on Indigenous Populations, which has developed the Draft Declaration on the Rights of Indigenous Peoples (Appendix 1), the Year - and subsequently Decade — of Indigenous People, the proposed Permanent Forum for Indigenous People, and the Commission on Sustainable Development. Indigenous and traditional communities figure prominently in the Earth Charter, the Convention on Biological Diversity (CBD), Agenda 21, and the Convention on Desertification.

The CBD particularly raises questions of access to and benefit sharing from wider use and application of traditional technologies and biogenetic resources. Intellectual property rights (IPRs) are considered the principal mechanisms available to facilitate the sustainable use of the "components of biological diversity" and thereby link Indigenous and sustainability issues with biotechnology and global trade through GATT/TRIPs. IPR is seen by Indigenous, traditional and local communities - as well as many environmental and human rights groups - as a serious threat to local economies, cultures, and biodiversity.

Many Indigenous groups have become well-informed, articulate and effective spokespersons for more general concerns of Indigenous and non-Indigenous communities around the world that despair at the loss of local autonomy and control, increasing commoditisation of common resources, and the erosion of biological and cultural diversity. Re-thinking "top-down" development, documentation of anthropogenic landscapes, recognition of traditional ecological knowledge, and a surge of "biodiversity prospecting" have accentuated Indigenous points of view, while highlighting potential value of traditional knowledge and biogenetic resources

IPRs, however, threaten the "free exchange" of information and resources that has presumed to benefit humanity through research, scholarship, and development of medicines, agriculture, forest and conservation systems. A new dialogue is necessary that establishes equitable relationships between Indigenous, traditional and local communities, and the scientific research institutions that increasingly provide the intellectual and informational underpinnings for international trade and development.

Existing legal and non-legal mechanisms are inadequate to insure the equity of partnerships, pointing to the necessity of developing additional and alternative strategies that are built more negotiations of the terms of, and the mechanisms and methodologies for, this dialogue will dominate debates until sufficient consensus can be attained to insure trust from all partners.

The process will undoubtedly include re-evaluation of Nation State sovereignty, the role of science and scientists, international monitoring and enforcement structures, business ethics and practice, and transparency, accountability, and control of trade.

## Indigenous Peoples in International Forums

### *Indigenous peoples and the right to self-determination*

Although defining "Indigenous" has proven problematic for international organisations (Clay 1991), Indigenous peoples themselves offer several definitions. For example, the World Council of Indigenous Peoples provides the following definition:

Indigenous peoples are such population groups who from ancient times have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others.

A definition of Indigenous peoples which has gained broad international acceptance is that of the 1989 International Labour Organisation *Indigenous and Tribal Peoples Convention (ILO 169)*, which is the only international legal agreement specifically on Indigenous peoples. It states that people are considered Indigenous if they are:

- a) tribal peoples in countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations
- b) peoples in countries who are regarded by themselves or others as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain, or wish to retain, some or all of their own social, economic, spiritual, cultural and political characteristics and institutions. In addition, the Convention establishes another important principle:

**Self-identification** as Indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this convention apply.

The "S" on Indigenous peoples is very significant, because it implies collective rights as ethnic nations. These rights are subsumed under the **right to self-determination**, that includes rights to land, territory, and resources. Most Nation States have resisted recognition of self-determination, and subsequently, the term "peoples" (Clay 1991, 1994; Kingsbury 1992a,b,1994). Official UN documents use "people", or even the weaker term "populations" that implies lack of collective rights altogether.

Indigenous peoples interpret the right to self-determination to include rights to tangible and intangible cultural, scientific and intellectual resources. The 1994 Statement from the International Consultation on Intellectual Property Rights and Biodiversity, organised by the Coordinating Body of Indigenous Peoples of the Amazon Basin (COICA) states:

All aspects of the issue of intellectual property (determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation) are aspects of self-determination. For Indigenous peoples, accordingly, the ultimate decision on this issue is dependent on self-determination.

*The UN Conference on Environment and Development (The Earth Summit)*

The UN Conference on Environment and Development (UNCED) produced a number of international agreements that highlight the importance of Indigenous peoples and their role in the conservation and sustainable use of the components of biological diversity (Gray 1990a; Mead 1994b). For example, the Preamble of the 1992 Convention on Biodiversity Diversity (CBD) recognises the:

close and traditional dependence of many Indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Article 8.j, which is concerned with Indigenous peoples and *in situ* conservation, calls on States to:

respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote the wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In Article 18.4., knowledge, innovations, and practices are referred to as "traditional and indigenous technologies". This is a curious usage of the term because as such they are presumably subject to the relevant agreements on transfer, access, and IPR protection. On the one hand, recognition of traditional knowledge as technology elevates Indigenous knowledge to an internationally recognised category; on the other hand, Indigenous technologies are subsumed under laws which uphold Nation State sovereignty.

Agenda 21 devotes entire Chapter (26) to "Recognising and Strengthening the Role of Indigenous People and their Communities". Item 26.4b proposes that governments should:

**adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary administrative systems and practices.**

Indigenous peoples are actively involved in discussions at the Commission on Sustainable Development (CSD), which was set up to monitor and coordinate the CBD and other environmental conventions and agreements. Currently the CSD is evaluating Agenda 21, including Chapter 26. Issues of access and benefit-sharing, focusing upon IPRs, are becoming high-profile.

## **Genetic Resources and Knowledge Systems**

### *Historic interactions*

Despite international recognition, Indigenous peoples' roles in biodiversity conservation have been underestimated. One reason is a failure to perceive the **anthropogenic** (i.e. human-created) or **humanised** (i.e. human-modified) nature of apparently "pristine" landscapes. As scientific documentation and understanding improve, "wild" resources and areas are increasingly found to be the result of co-evolutionary relationships between humans and nature. This inter-dependence is now recognised by UNESCO in its World Heritage Convention as "Cultural Landscapes" (UNESCO, 1994; also see O'Keefe 1992, 1993, 1994).

Recognition of anthropogenic landscapes has important implications for ownership, and consequently, IPRs. "Wild" species are products of nature and, presumably, human societies have no special claim to them. Species or landscapes that have been moulded or modified by human presence, however, are not automatically in the public domain and, consequently, local communities may claim special rights over them.

This extends the implications of IPRs for communities beyond the recognised categories of use, extraction, processing, and preservation. The Covenant on Intellectual, Cultural and Scientific Property Rights (in Posey & Dutfield, 1996) outlines the following categories of protection:

1. Sacred property (images, sounds, knowledge, material, culture or anything that is deemed sacred and, thereby, not commoditisable);
2. Knowledge of current use, previous use, and/or potential use of plant and animal species, as well as soils and minerals;
3. Knowledge of preparation, processing, or storage of useful species;
4. Knowledge of formulations involving more than one ingredient;
5. Knowledge of individual species (planting methods, care for, selection criteria, etc.);
6. Knowledge of ecosystem conservation (methods of protecting or preserving a resource that may be found to have commercial value, although not specifically used for that purpose or other practical purposes by the local community or the culture);
7. Biogenetic resources that originate (or originated) on Indigenous lands and territories;
8. Cultural Property (images, sounds, crafts, arts and performances);
9. Classificatory systems of knowledge, such as traditional plant taxonomies.

All of these are protected as part of the larger need to protect land, territory and resources and to stimulate self-determination for Indigenous and traditional peoples.

### *Knowledge and conservation*

Many of the world's richest areas of biological diversity have for millennia been, and continue to be, inhabited, managed, maintained and defended against destruction by Indigenous peoples (Clay 1988; Colchester 1994a; Colchester & Lohman 1993; Pimbert & Pretty 1995). The twelve *megadiversity countries* also have some of the most diverse Indigenous societies, within whose territories much of the biodiversity is still conserved.

The term, Indigenous Knowledge System (IKS), is used by scientists to describe the totality of information, practice, belief and philosophy that is unique to each Indigenous culture. An IKS may be commonly held within a community or Indigenous society, or it may be known only to specialists, tribal elders, lineage or gender groups.

Traditional Ecological Knowledge (TEK) is another term used to describe those aspects of IKS that are directly related to management and conservation of the environment. Johnson (1992:4) defines TEK as "a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use."

Indigenous knowledge is being increasingly utilised to identify useful species and methods for preservation, processing, and application of those species. Research and development costs can be significantly reduced using traditional knowledge that has been "extracted" or "mined" from

Indigenous Knowledge Systems. Once bits of knowledge have been removed from the local *in situ* system, local communities lose control over the information because mechanisms are inadequate to effectively protect their rights (Gray 1991; Mead 1994).

The Convention on Biological Diversity provides for two quite distinct approaches to Indigenous peoples: (1) *in situ* conservation utilising knowledge, innovation and practices of local communities embodying traditional lifestyles, and (2) wider use and application of Indigenous technologies. The latter amounts to a global call to extricate aspects of knowledge from its systems context without providing appropriate mechanisms for protection and equitable benefit-sharing. It should not be of any surprise, therefore, that Indigenous peoples are suspicious of the CBD and its expansion of Nation State sovereignty over their knowledge and biogenetic resources.

### *Biotechnology and "biodiversity prospecting"*

Biodiversity prospecting is the exploration of biodiversity for commercially valuable genetic and biochemical resources, with particular reference to the pharmaceutical, biotechnological and agricultural industries (Reid *et al* 1993). Recent advances in biotechnology have increased the ability of scientists to investigate organisms at the genetic level and to find ways to commercialise products developed from such investigations. Expectation of profits from these new products has stimulated biodiversity prospecting that, according to some, will in turn stimulate conservation through the profit motive (Joyce 1994).

It is difficult to estimate the commercial promise of biodiversity prospecting. Given that to date only a small proportion of biodiversity has been exploited, economic potential is thought to be enormous.

For medicines alone, the 1985 market value of plant-based medicines sold in developed countries was estimated at a total of \$43 billion (Principe 1989). This frequently cited estimate is unreliable, but whatever the true amount might be, only a minuscule proportion of profits have been returned to Indigenous peoples from whom much of the original knowledge came (I have estimated less than 0.001%; Posey 1990).

Companies that produce seeds and agrochemicals benefit substantially from the free flow of germplasm from Indigenous lands. The market value of the seed germplasm utilising traditional landraces is estimated by RAFI at \$50 billion per year in the US alone (UNDP 1994: 19). Consequently, Indigenous peoples are providing subsidies to a modern agricultural system that barely recognises their contributions. Similar situations exist with timber and non-timber forest products (Burley 1987, 1994), as well as other natural product markets, such as personal care, foods, industrial oils, essences, pesticides, and preservatives.

Biodiversity prospectors assume that organisms and ecosystems are "wild" and, therefore, part of "the common heritage of humankind". Even when "leads", or even processed materials, are provided by Indigenous peoples, it is the company that makes the protectable "discovery".

Indigenous peoples see this situation as being parallel to the Europeans' "discovery" of the New World and are understandably weary of biodiversity prospecting (see Section 4).

In Costa Rica, for example, INBio, an NGO closely linked with the government, was given rights to commercialise biogenetic resources to Merck Pharmaceuticals. The agreement included collections on national lands, including those of eight Indigenous peoples, none of

which was ever consulted nor named as beneficiary.

Indigenous peoples are particularly disturbed about the "discoveries" made from blood samples (Mead 1994a). Under the guise of "good science", the Human Genome Organisation (HUGO) and one of its subsidiary projects (the Human Genome Diversity Project), coordinates the collection of blood samples from isolated communities "threatened with extinction". The results will supposedly reveal evolutionary links and identify genetic sequences for gene therapy to improve human health (Cavalli Sforza *et al* 1991).

The "Human Vampire Project", as it is known by Indigenous peoples, has brought much discredit to scientific research because, once collected, data and cells are available for commercial exploitation. Collections are also made without the Prior Informed Consent of the sample groups.

At least three patent applications have been made for cell lines developed from blood "donated" by Indigenous peoples, including one from a member of a recently-contacted group of 260 hunter-cultivators in New Guinea. The patent holder is the US Department of Commerce, with the US government scientists involved in the project and the anthropologist who introduced the research team to the tribe designated as inventors.

New Guinea has shown no concern over this situation. Indeed, most Nation States show concern over exportation of traditional genetic resources or knowledge. This may be because the image of Indigenous peoples as primitive and savage has been essential for the historic takeover of their lands and resources. Thus, by recognising the value of traditional resources, the philosophical underpinnings of colonisation and domination are challenged. Predictably this process is slow and meets opposition at all levels of society and government.

## **Intellectual Property Rights and Ownership of Knowledge**

### *Intellectual property rights as legal instruments*

Patents are perhaps the most famous of these and discussions of intellectual, cultural and scientific property usually degenerate into the legal quagmire of patentability. Patents are of very limited interest to most Indigenous peoples because of difficulties in documenting "inventions" and identifying individual inventors. Since Indigenous knowledge is considered in the "public domain", then "uniqueness" is also problematic.

Even if technical requirements for patents were satisfied, costs of filing, maintaining, monitoring, legally implementing and enforcing would be prohibitively expensive for most Indigenous groups (Colchester 1994b). The same can be said for Plant Breeders' Rights (PBRs), whose requirements for varietal protection can in principle be met by Indigenous farmers, but only after considerable laboratory and research investments.

Know-how and trade secrets have potentially greater applicability, but also entail specialised legal advice and corresponding expenses. Appellation of origin and trademarks are relatively accessible IPR tools and can be effectively applied to products coming from Indigenous lands or produced under Indigenous auspices or licensing agreements.

Copyright is easily obtained and is helpful in the protection of written texts, works of art and databases. Enforcement and monitoring of copyright can be difficult, time-consuming and

costly. Scientists regularly depend upon copyright protection for protection of their own works and are increasingly extending that protection through co-publishing with Indigenous collaborators.

Copyright-like mechanisms are being attempted in some countries with Community Inventories (see Section 6.2) of useful plant varieties and species. Inventories may be kept by the community under strict rules of access, or published to put registered materials into the public domain in hopes of impeding patent applications by others. This strategy is a form of "defensive publication", which argues that information in the public domain should not be protectable by IPRs. This is a dangerous tack, since most patents are on processes of extraction, purification, or synthesis, not on the original product or compound itself (Gannon, Guthrie & Laurie 1993). Publication itself may actually facilitate commercial exploitation of knowledge and resources, given the inequity of IPR application.

Such a case came from the description of *tiki uba*, an anti-coagulant used by the Amazonian Urueu-Wau-Wau tribe, published in an article in a well-known magazine (McIntyre 1988: 807). Based on the published information, Merck Pharmaceuticals "discovered" that the plant extract was indeed effective and might therefore be useful in heart surgery (Jacobs et al 1990: 31). Merck attempted to develop a new pharmaceutical product without any consideration for the Urueu-Wau-Wau, who were by then threatened with extinction (Posey, Dutfield, Plenderleith, 1995).

### *Indigenous problems with IPRs*

IPRs are problematic for Indigenous peoples for the following reasons:

(i) they are intended to benefit society through the granting of exclusive rights to "natural" and "juridical" persons or "creative individuals", not collective entities such as Indigenous peoples (Boyle, 1996). As the Bellagio Declaration puts it:

Contemporary intellectual property law is constructed around the notion of the author as an individual, solitary and original creator, and it is for this figure that its protections are reserved. Those who do not fit this model - custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties, for example - are denied intellectual property protection.

(ii) they cannot protect information that does not result from a specific historic act of "discovery". Indigenous knowledge is transgenerational and communally shared. Knowledge may come from ancestor spirits, vision quests, or orally-transmitted lineage groups. It is considered to be in the "public domain" and, therefore, unprotectable.

(iii) they cannot accommodate complex non-western systems of ownership, tenure, and access. IPR law assigns authorship of a song to a writer or publishing company that can record or publish as it sees fit. Indigenous singers, however, may attribute songs to the creator spirit and elders may reserve the right to prohibit its performance, or to limit it to certain occasions and to restricted audiences.

(iv) they serve to stimulate commercialisation and distribution, whereas Indigenous concerns

may be primarily to prohibit commercialisation and to restrict use and distribution. According to the 1994 COICA Statement:

For members of Indigenous peoples, knowledge and determination of the use of resources are collective and inter-generational. No Indigenous population, whether of individuals or communities, nor the government, can sell or transfer ownership of resources which are the property of the people and which each generation has an obligation to safeguard for the next.

(v) they recognise only market economic values, failing to consider spiritual, aesthetic, or cultural - or even local economic - values. Information or objects may have their greatest value to Indigenous peoples because of their ties with cultural identity and symbolic unity.

(vi) they are subject to manipulation to economic interests that wield political power. *Sui generis* protection has been obtained for semi-conductor chips and "literary works" generated by computers, whereas Indigenous peoples have insufficient power to protect even their most sacred plants, places, or artefacts.

(vii) they are expensive, complicated, and time-consuming to obtain, and even more difficult to defend.

### *Intellectual property rights in the global economy*

The Trade-Related Aspects of Intellectual Property Rights (TRIPs) section of the GATT Treaty is intended to harmonise national IPR regimes and create what Northern countries call a "level playing field". Assuming all Nation States comply fully with TRIPs, national regimes will be virtually identical to the current United States system. Opponents feel that this will allow the United States, Europe and Japan to dictate trading rules.

GATT, and the new World Trade Organisation (WTO) that will implement it, have served to stimulate interest in IPRs. Article 27 ("Patentable Subject Matter") provides for one interesting option, that of an "effective" *sui generis* system for plant variety protection. The call for countries to define their own system of protection is an opportunity to introduce a community-based rather than individual-based system. It is unclear what "effective" means, although some countries are making efforts to define their own alternative systems (e.g. Brazil, India, the Andean Pact).

Indigenous peoples are vociferous in their opposition to GATT/TRIPs with or without a *sui generis* option (see 4.3). They feel that the globalisation of trade weakens even further their political and economic influence, while undermining traditional systems of biodiversity conservation (Gray 1990b; Mead 1993).

### *Biopiracy*

Northern governments and multinational corporations have been successful in pressuring the rest of the world to accept the argument that extended and strictly-enforced IPR regimes are necessary and mutually beneficial. Sometimes by persuasion - and at other times by threats - Southern governments have acquiesced to this view. Piracy of books, designs, trademarks, recordings, and computer programs, as well as illicit sales of pharmaceuticals, have been major targets for attack.

Recently, the Rural Advancement Foundation International (RAFI) has shown how corporations themselves have pirated biogenetic resources and knowledge. Small farmers and Indigenous peoples have begun to attack institutions and companies involved in this "biopiracy".

Use and abuse of IPRs show that:

(i) Although industries seek legal monopoly for their applications of traditional knowledge and resources, Indigenous peoples cannot obtain the same protection.

(ii) Well-meaning scientists involved in non-commercial research become implicated when their data are published or collections made available for commercial interest.

(iii) Many biodiversity-rich countries lack the capacity to adequately exploit the commercial potential of their most valuable resources.

(iv) Even when governments or national scientists benefit from new product development, local communities rarely see even "trickle down" benefits.

(v) "Free access" has a negative effect on the environment as well, since local communities have no control over exploitation.

### **Indigenous Views**

In recent years Indigenous peoples have become well organised, articulate and politically astute. Their views are widely cited and have come to represent the concerns of local communities - Indigenous and non-Indigenous - around the world. Sometimes the term "broader alliance" is used in reference to a political coalition with traditional farmers, foresters, gatherers, fisherfolk, and herders. Increasingly, however, the alliance is growing to include other citizens worried about biosafety, erosion of local institutions, loss of freedom, and environmental degradation.

Indigenous peoples feel that "development" has been imposed upon them in ways that violate their rights and damage the environment. According to the (1992) *Indigenous Peoples' Earth Charter*.

The concept of development has meant the destruction of our lands. We reject the current definition of development as being useful to our peoples.

They also believe that they have an important role to play in conservation. According to the (1995) *Final Statement of the Regional Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights*, Suva, Fiji:

We assert that 'in situ' conservation by Indigenous peoples is the best method to conserve and protect biological diversity and Indigenous knowledge, and encourage its implementation by Indigenous communities and all relevant bodies.

However, they demand that recognition of this role be used to support territorial and other rights. The (1992) *Charter of the Indigenous-Tribal Peoples of the Tropical Forests (CITP)* states that:

The best guarantee of the conservation of biodiversity is that those who promote it should uphold our rights to the use, administration, management and control of our territories.

We assert that guardianship of the different ecosystems should be entrusted to us, Indigenous peoples, given that we have inhabited them for thousands of years and our very survival depends on them.

Indigenous societies honour the principle of free exchange and do not necessarily want to close themselves off from others. *The CIPT* declares that:

Indigenous peoples are willing to share our knowledge with humanity provided we determine when, where and how it is used. At present the international system does not recognise or respect our past, present and potential contributions.

The *CIPT* condemns:

those who use our biological diversity for commercial and other purposes without our full knowledge and consent.

The (1993) *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples* adds further restrictions to use of traditional resources:

Indigenous flora and fauna is inextricably bound to the territories of Indigenous communities and any property right claims must recognise their traditional guardianship.

Commercialisation of any traditional plants and medicines of Indigenous peoples must be managed by the Indigenous peoples who have inherited such knowledge. A moratorium on any further commercialisation of Indigenous medicinal plants and human genetic materials must be declared until Indigenous communities have developed appropriate protection measures.

Existing IPRs are not viewed by Indigenous peoples as adequate to implement "appropriate protection measures". According to the Statement from the (1994) *COICA Regional Meeting on Intellectual Property Rights and Biodiversity* in Santa Cruz, Bolivia:

For Indigenous peoples, the intellectual property system means legitimisation of the misappropriation of our peoples' knowledge and resources for commercial purposes.

Therefore:

There must be appropriate mechanisms for maintaining and ensuring rights of Indigenous peoples to deny indiscriminate access to the resources of our communities or peoples and making it possible to contest patents or other exclusive rights to what is essentially Indigenous.

As regards biodiversity prospecting and patenting life, the *Pacific Regional Consultation's Final Statement* calls for "**a moratorium on bioprospecting in the Pacific**" and urges Indigenous peoples "**not to co-operate in bioprospecting activities until appropriate protection measures are in place**". Delegates also agreed on "**the establishment of a treaty declaring the Pacific Region to be a *life-forms patent-free zone***" including in the treaty "**protocols governing bioprospecting, human genetic research, in situ conservation by Indigenous peoples, ex situ collections and relevant international instruments.**"

Indigenous peoples feel threatened by the world trade system, especially since the Uruguay Round negotiations first included discussions on trade-related IPR. Shiva (1994) observes that

## GATT/TRIPs:

has failed to recognise the more informal, communal system of innovation through which Third World farmers produce, select, improve and breed a plethora of diverse crop varieties.

The *Pacific Regional Meeting* urges:

those Pacific governments who have not signed the General Agreement on Tariffs and Trade (GATT) [should] refuse to do so, and encourage those governments who have already signed to protest against any provisions which facilitate the expropriation of Indigenous peoples' knowledge and resources and the patenting of life forms.

According to M. Idris, Chairman of Third World Network (1995), a grouping of organisations and individuals involved in Third World issues:

Our governments must oppose the TRIPs agreement of the Uruguay Round...that protects the intellectual pirates by giving them the title "intellectual property owners".

## **Governments and Nation States**

Some Nation States are responding through discussions on appropriate legislation intended to establish equitable terms for granting access to biogenetic resources and sharing benefits with Indigenous peoples.

*The Andean Pact*

Model laws are being considered by the Andean Pact countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) for the conservation and sustainable use of biological material used as a source of genetic resources. Member States are permitted to set terms for access to their biological resources that may include the following: sharing of benefits between receivers of biological resources, members states and providers, which may be legal entities, private individuals, or Indigenous or local communities; restrictions on transfer to third parties; reporting on obligations on future uses; obligations related to intellectual property; exclusivity and confidentiality; recognition of the member states or provider in the publication of research results. When the provider is an Indigenous or local community, member states may take measures to enable them to enter into access agreements.

*The Brazilian Indigenous Societies Act*

This proposed law was approved in 1994 by the House of Deputies of the National Legislature. It has never passed into the Senate and is still under consideration for its legality.

The proposed law is intended to protect and assure respect for Indigenous peoples' social organisation, customs, languages, beliefs and traditions, and rights over their territories and possessions. Articles 18-29 deal with the intellectual property of Indigenous peoples. Among the important provisions of benefit to Indigenous peoples are the following: the right to maintain the secrecy of traditional knowledge; the right to refuse access to traditional knowledge; the right to apply for IPR protection, which, in the case of collective knowledge will be granted in the name of the community or society; the right of prior informed consent (to be given in writing) for access to, use of and application of traditional knowledge; the right to co-ownership of research data, patents and products derived from the research; and, the right of communities to nullify patents illegally derived from their knowledge.

## *Indian Parliamentary Debates*

The government of India has attempted to amend the 1970 Patent Act in conformity with the requirements of GATT-TRIPs, thereby fulfilling part of India's obligations for WTO membership. However, the Upper House of the Indian Parliament, in response to mass protests by farmers groups and opposition parties has voted for a deferment of the amendment. It remains to be seen whether the government will use undemocratic means to push through the Patents Bill (Shiva 1995). A strong traditional and tribal movement in India is pressing for Community Intellectual Rights (CIRs) similar to that proposed by Nijar (1994) and described below.

## *Philippines Presidential Decree*

*The Philippines Executive Order No. 247: "Prescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, Their By-Products and Derivatives, for Scientific and Commercial Purposes; and for Other Purposes"* is probably the first national law to implement the CBD's provisions on access and benefit sharing. Section 1 declares that the policy of the State is: 'to regulate the prospecting of biological and genetic resources so that these resources are protected and conserved, are developed and put to the sustainable use and benefit of the national interest'. In the case of the 'ancestral lands and domains' of Indigenous peoples, Section 2 states that bioprospecting is permitted only with: 'the prior informed consent of such communities; obtained in accordance with the customary laws of the concerned community'. In this way, State sovereignty rights are strengthened, yet by recognising that control over genetic resources is most effectively established at the local level, the traditional resource rights of Indigenous peoples and local communities have, to some degree at least, been recognised (Posey, 1996).

## *Model Community Intellectual Rights (CIRs)*

CIRs are intended "to prevent the privatisation and usurpation of community rights and knowledge through existing definitions of innovation" (Nijar 1994). Model legislation asserts the existence of knowledge that is communally owned and shared, with "innovators" being Indigenous peoples who have not heretofore revealed their knowledge or resources to the outside world. Local communities are vested with "custodianship rights of innovation" in two ways:

- i) Constructive Trustee: local community leaders are nominated or appointed to act for the whole community as trustees for the beneficiaries (the community);
- ii) Higher Trust: builds on the concept that governments claiming sovereign rights are, in fact, holding those rights in trust for the community.

Section 5 of the CIR Act calls for a **Registry of Invention** (similar to the Community Register described above). Here a community may register its innovations simply by declaring their existence. The idea is similar to copyright law, whereby "protection generally arises with no need for formal acceptance by a registering authority". Failure to register does not surrender innovation rights, but by making such a register, patent application by others may become more difficult or impossible (see also Section 3.1 on Defensive Publication).

## **Mechanisms and Solutions**

### *Self-demarcation of Indigenous peoples' territories*

Legal title to lands and territories is primary for Indigenous peoples. Documentation of traditional land use, including knowledge and use of plants, animals, soils, water systems, forests, etc. can be fundamental to claiming rights. Delimiting sacred sites or areas of cultural and historical significance become not only legal acts, but also awareness-raising exercises for local communities. Since cultural landscapes are usually difficult to detect and "read" by outsiders, mapping of these notifies others that lands are not "wild" and unclaimed, but occupied and significant.

Self-demarcation is a strategy that several Indigenous peoples have decided to pursue, such as the Ye'kuana in Venezuela. Self-mapping as a community procedure for demarcation has become an important process in Participatory Rural Appraisal (PRA), Participatory Action Research (PAR) and similar collaborative research methods of oral history and ethnohistory.

### *Community databases of Indigenous knowledge and local biodiversity*

#### a) Community registers

Community registers have been developed in India as a means of securing community control over TEK. Local people document all the known plant and animal species with full details of their uses. Community members are then in a position to refuse access to the register, and to set conditions under which others would be allowed access. Community registers can be used as evidence of intimate knowledge of the local environment in order to support claims to legal title of land and territory.

Although community registers would be kept locally, they could be components of regional and national registers containing information freely available to communities. This would keep such information in the public domain.

#### b) Indigenous knowledge databases

Some Indigenous peoples have established databases, which they themselves control, ensuring their ability to control access and use of their knowledge and related information. For example, the Canadian Inuit of Nunavik and the Dene have their own information databases to:

**create a dialogue based on respect and equality, not to create a catalogue and make it 'available' to the 'real scientists'. We must not allow indigenous knowledge to be reduced solely to an interesting research topic for Western science.** (Simon & Brooke, 1997).

#### c) Community-Controlled Research (CCR)

Community-Controlled Research (CCR) is research where the objectives and methodologies are decided upon by Indigenous peoples themselves. The Kuna of Panama and the Inuit have established guidelines with the intention that CCR is the only form of research allowed on their territories.

(i) The Proyecto de Estudio para el Manejo de Areas Silvestres de Kuna Yala (PEMASKY) and the Asociacion de Empleados Kunas (AEK) of Panama have produced an information manual for researchers on *scientific monitoring and cooperation*. Kuna objectives are outlined with regard to forest management, conservation of biological and cultural wealth, scientific collaboration, research priorities, and guidelines for researchers. Collaboration with Western scientists is encouraged for basic ecological research, botanical and faunal inventories, and the study and recording of Kuna traditions and culture. Research is designed to provide the Kuna with information useful to them and under their control (Chapin, 1991).

(ii) The Inuit Tapirisat of Canada produced a background paper, *Negotiating research relationships in the North*, containing a useful list of principles based on existing ethical guidelines and the concerns expressed by members of Inuit communities to be followed by all researchers.

### **Traditional Resource Rights (TRR)**

Given that knowledge and traditional resources are central to the maintenance of identity for Indigenous peoples, the control over these resources is of central concern in their struggle for self-determination. Following COICA:

A system of protection and recognition of our resources and knowledge must be designed which is in conformity with our world view and contains formulas that...will prevent appropriation of our resources and knowledge.

Traditional Resource Rights (TRR) has emerged as a concept that more accurately reflects Indigenous and traditional peoples' views and concerns. TRR amasses "bundles of rights" already widely recognised by international legally and non-legally binding agreements in an effort to build a solid foundation for more equitable systems of protection and benefit sharing.

Basic principles upon which TRR is based include: basic human rights, right to development, rights to environmental integrity, religious freedom, land and territorial rights, right to privacy, prior informed consent and full disclosure, farmers' rights, intellectual property rights, neighbouring rights, cultural property rights, cultural heritage recognition, rights of customary law and practice.

Appendix 2 lists "bundles of rights" and their location within international agreements. Although general principles can be found in these agreements, they are on very different political footings. Some are enshrined in legally-binding Conventions, while others are found in non-legally binding documents or model proposals.

Thus, existing "bundles of rights" are wide-ranging, but still inadequate. **TRR is more of a process than a product.** The concept can grow as additional rights accrue and adapted through the development of national and international legislation. It goes beyond other *sui generis* models in that it seeks to protect not only knowledge relating to biological resources; it also asserts the right of peoples to self-determination and the right to safeguard "culture" in its broadest sense.

TRR is rights driven, not economically motivated. Yet by prioritising Indigenous peoples' rights to say NO to exploitation and by acknowledging their basic rights to control access over and receive benefits from traditional resources, commercial and research institutions should find equitable agreements and partnerships more easily attainable.

### **Conclusions**

Intellectual Property Rights (IPRs) have become important to global economic and commercial debates in part because of the massive **perceived** potential for exploitation of biogenetic resources for biotechnology. Similarly, traditional knowledge is expected to drastically cut Research and Development costs. The resulting bioprospecting feeding-frenzy may attenuate when, as many experts predict, the highly exaggerated hype converts to disappointing profits. In the mean time, however, expectations are exalted and IPRs have

become a code for unethical and unsustainable exploitation of local communities and their resources.

Scientists and scientific institutions are affected by this situation as they become involved - actively or passively - with the private sector. Plant, animal, and cultural material collected with public funds for scientific, non-profit purposes are now open for commercial exploitation. Research, even in universities and museums, is increasingly funded by corporations, raising questions of who controls the resulting data. "Purely scientific" data banks have become the "mines" for "biodiversity prospecting". Publishing of information, traditionally the hallmark of academic success, has become a superhighway for transporting restricted (or even sacred) information into the unprotectable "public domain".

Companies that seek ethical and equitable relationships with Indigenous peoples find their efforts undermined by exploitative practices of unethical corporations. Identification of legally-constituted entities and *bona fide* community representatives may be harrowingly difficult, as can be the form and distribution of benefits. Existing business standards and philosophy exclude any obligations to pre-contract and post-profit responsibilities that have become necessary to insure long-term social and ecological commitments.

Nation States find themselves proclaiming major expansions of sovereignty over traditional resources, but with no means to implement or exercise the responsibility that increased sovereignty demands. Frequently, neither technical capacity nor capital potential are adequate to develop the knowledge or genetic materials that are claimed. Furthermore, valuing Indigenous technologies threatens the ideological base that has historically been used to marginalise and exploit local community resources. It is, therefore, problematic that benefits to Nation States will ever "trickle-down" to local communities.

International law hardly exists, and where it does - as in the case of IPRs - it favours industrialised nations rather than bio-culturally rich nations. There is little evidence that existing Western legal structures can be adapted to enhance conservation of biological diversity or empowerment of Indigenous, traditional, and local communities. Any attempts will need to combine "bundles of rights" from a wide-range of agreements to guide a newly emerging system.

The Convention on Biological Diversity, and related UNCED agreements, call for access to, protection of and benefit sharing from the use and wider application of traditional technologies. However, enforcement mechanisms - nor, indeed, even the general basis of agreement as to what to enforce - are far from appearing on the international scene. The fundamental question of what are legal requirements versus moral and ethical responsibilities portends many difficulties for all "stakeholders".

Rather than looking hopelessly on, one hopes that the situation will provide opportunities for new dialogues, increased recognition of Indigenous peoples and their knowledge, new codes of ethics and standards of conduct, socially ecologically responsible business practices, holistic approaches to sustainability, and alternative concepts of property, ownership, and value. IPRs - replaced by a rights-based Traditional Resource Rights concept - can serve to catalyse this dialogue, and, indeed, transform conflict into conciliation.

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## APPENDIX 1

### UN DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

As Agreed Upon By Members Of The Working Group on Indigenous Populations  
At Its Eleventh Session - 1993

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognising the right of all peoples to be different, to consider themselves different, and to be respected as such,

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

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

**Reaffirming** also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

**Concerned** that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

**Recognising** the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures, and from their cultures, spiritual traditions, histories and philosophies,

**Welcoming** the fact that indigenous peoples are organising themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

**Convinced** that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions,

cultures and traditions, and to promote their development in accordance with their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

**Recognising also** that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

**Emphasizing** the need for demilitarisation of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among the nations and peoples of the world,

**Recognising** in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

**Recognising also** that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

**Considering** that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

**Acknowledging** that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

**Bearing in mind** that nothing in this Declaration may be used to deny any peoples their right of self-determination,

**Encouraging** States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned

**Emphasizing** that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

**Believing** that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

**Solemnly proclaims** the following United Nations Declaration on the Rights of Indigenous Peoples:

## **Articles**

### **Part I**

1. Indigenous peoples have the right to the full and effective enjoyment of all human rights and

fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

2. Indigenous individuals and peoples are free and equal to other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

3. 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.

4. Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

5. Every indigenous individual has the right to a nationality.

## **Part II**

6. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

7. Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

8. Indigenous peoples have the collective and individual right to maintain and develop their distinctive identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

9. Indigenous peoples and individuals have the right to belong to an indigenous community or

nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

10. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

11. Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
- (b) Recruit indigenous children into the armed forces under any circumstances;
- (c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;
- (d) Force indigenous individuals to work for military purposes under any discriminatory purposes.

### **Part III**

12. Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

13. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

14. Indigenous peoples have the right to revitalise, use, develop and transmit to future generation their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by any other appropriate means.

### **Part IV**

15. Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

16. Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measure, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

17. Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

18. Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous peoples have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

## **Part V**

19. Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

20. Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

21. Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

22. Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of

employment, vocational training and retraining, housing, sanitation, health and social security. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

23. Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

24. Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals. They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

## **Part VI**

25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationships with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

26. Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

27. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

28. Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

29. Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

30. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

## **Part VII**

31. Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

32. Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

33. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

34. Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

35. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders. States shall take effective measures to ensure the exercise and implementation of this right.

36. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

## **Part VIII**

37. States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

38. Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

39. Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

40. The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realisation of the provisions of this Declaration through the mobilisation, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

41. The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

## **Part IX**

42. The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

43. All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

44. Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

45. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

## **APPENDIX 2**

Traditional Resources Rights

Supporting agreements

Category

Legally binding

Not legally binding

Human rights  
ICESCR, ICCPR, CDW, CERD, CG, CRC, NLS  
UDHR, DDRIP, VDPA  
Right to self-determination  
ICESCR, ICCPR  
DDRIP, VDPA  
Collective rights  
ILO169, ICESCR, ICCPR  
DDRIP, VDPA  
Land and territorial rights  
ILO169, NLS  
DDRIP, FP  
Right to religious freedom  
ICCPR, NLS  
UDHR  
Right to development  
ICESCR, ICCPR, ILO169  
DDHRE, DDRIP, DHRD, DICED, VDPA  
Right to privacy  
ICCPR, NLS  
UDHR  
Prior informed consent  
CBD, NLS  
Agenda21, DDRIP, DICED  
Environmental integrity  
CBD, CCD  
Agenda21, DDHRE, DICED, FP, RD  
Intellectual property rights  
CBD, GATT, UPOV, WIPO, NLS  
Agenda21  
Neighbouring rights  
RC, NLS  
Right to enter into legal agreements, such as contracts and covenants  
NLS  
Cultural property rights  
Unesco-CCP, Unesco-WHC, NLS  
Right to protection of folklore  
NLS  
Unesco-WIPO, Unesco-F  
Right to protection of cultural heritage  
Unesco-WHC, NLS  
Unesco-PICC  
Recognition of cultural landscapes  
Unesco-WHC  
Recognition of customary law and practice  
CBD, ILO169, NLS  
DDRIP  
Farmers' rights  
FAO-IUPGR

## NOTES

CBD, *Convention on Biological Diversity* (1992) – 162 states parties as of 10 July 1996.

CCD, *UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (1994)

CDW, *UN Convention on the Elimination of all Forms of Discrimination Against Women* (1979) – 138 states parties as of 31 December 1994.

CERD, *UN Convention on the Elimination of all Forms of Racial Discrimination* (1966) – 142 states parties as of 31 December 1994.

CG, *UN Convention on the Prevention and Punishment of the Crime of Genocide* (1948) – 116 state parties as of 31 December 1994.

CRC, *UN Convention on the Rights of the Child* (1994) – 168 states parties as of 31 December 1994.

DDHRE, *UN Draft Declaration of Principles on Human Rights and the Environment* (1994).

DDRIP, *UN Draft Declaration on the Rights of Indigenous Peoples* (formally adopted by the UN's Working Group on Indigenous Populations in July 1994).

DHRD, *UN Declaration on the Human Right to Development* (1986).

DICED, *Draft International Covenant on Environment and Development* (1995)

FAO-IUPGR, *International Undertaking on Plant Genetic Resources* (1987 version).

FP, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (1992)

GATT, *Final Document Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (1994) — 120 members of the WTO as of April 1996.

ICCPR, *UN International Covenant on Civil and Political Rights* (1966) – 129 states parties as of 31 December 1994.

ICESCR, *UN International Covenant on Economic, Social and Cultural Rights* (1966) – 131 states parties as of 31 December 1994.

ILO169, *International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) – 11 states parties as of August 1996.

NLs, national laws.

RC, *Rome Convention for the Protection of Performers, Producers of Phonograms and*

*Broadcasting Organizations* (1961) – 47 states parties as of 31 December 1994.

RD, Rio Declaration (1992).

UDHR, *Universal Declaration of Human Rights* (1948).

Unesco-CCP, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970) – 79 states parties as of 1 January 1994.

Unesco-F, *Recommendations on the Safeguarding of Traditional Culture and Folklore* (1989).

Unesco-PICC, *Declaration on the Principles of International Cultural Cooperation*.

Unesco-WHC, *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972) – 135 states parties as of 1 January 1994.

Unesco-WIPO, *Model Provisions for National Laws on Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1985) .

UPOV, *International Union for the Protection of New Varieties of Plants Convention* (1961, revised in 1972, 1978, and 1991) – 31 states parties as of 15 November 1996 (2 of the 1961 Convention, 26 of the 1978 Revision, and 3 of the 1991 Revision).

VDPA, UN *Vienna Declaration and Programme of Action* (1993).

WIPO, World Intellectual Property Organization (administers international IPR agreements, such as: the *Paris Convention for the Protection of Industrial Property* (1883, revised most recently in 1967) – 139 states parties as of 19 September 1996; *Berne Convention for the Protection of Literary and Artistic Works* (1886, revised most recently in 1971) – 119 states parties as of 21 August 1994; *Madrid Agreement Concerning the International Registration of Trademarks* (1891, revised most recently in 1967) – 51 states parties as of 1 July 1996; *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration* (1958, revised most recently in 1967) – 17 states parties as of 1 July 1996; *Patent Cooperation Treaty* (1970) – 87 states parties as of 19 September 1996.

## **Résumé**

*Les lois nationales et les accords internationaux concernant la connaissance autochtone: conflit ou conciliation?*

Cet article considère l'impact des Droits Intellectuels (DI) sur les peuples indigènes. Ceci est devenu un débat international avec les organismes tels que la *Convention on Biological Diversity* (CBD) et d'autres (surtout organisé par l'ONU). La question est à qui appartiennent les droits aux technologies traditionnels et ressources biogenétiques? L'établissement et la codification des DI servent à la fois de protéger les autochtones et menacer l'échange libre des idées qui est essentiel pour une grande partie de développement (ceux qui peuvent bénéficier les autochtones). Également, les mécanismes légaux et non-légaux ne sont pas suffisantes pour assurer l'égalité et la justice des partenariats entre autochtones et des sociétés ou des états.

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