

**Biodiversity, Traditional
Knowledge and Rights of
Indigenous Peoples**

Victoria Tauli-Corpuz

TWN

Third World Network

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Preface

THIS booklet is my report of the discussions, analyses and conclusions of the “Workshop on Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples” organized by the Tebtebba Foundation in coordination with the Third World Network and GRAIN which was held in Geneva, Switzerland, on 3-5 July 2003.

A workshop statement which has the consensus of the all the participants is still being processed. Since it was felt that a report on this workshop is important to share with others I summarized the main points which were discussed and debated upon.

The recommendations which appear in this booklet do not have the consensus of the participants as there are a few of the participants who decided that they would not like to engage with bodies like the Convention on Biological Diversity, the World Intellectual Property Organization, nor the World Trade Organization. However, for those who opt to engage with these bodies, the recommendations which are here reflect what has been agreed upon.

The participants of the workshop were indigenous representatives from Africa, South America, Asia, the Pacific, the Arctic and North America and representatives of international and national NGOs. A few representatives of UN agencies were present as observers.

This workshop was held so that we would have a better understanding of the state of play on how traditional knowledge and biodiversity are being addressed by intergovernmental agencies and to see how these processes relate to discussions around indigenous peoples’ rights.

We shared our experiences on the ground and in engaging with multilateral bodies and our own perspectives and analyses of the issues. On the basis of our understanding, our own experiences and insights, we formulated this statement, which we hope would serve as a framework to guide us in our work on safeguarding our heritage.

The main multilateral organizations we looked into were the World Intellectual Property Organization (WIPO), World Trade Organization (WTO) and the Convention on Biological Diversity (CBD).

We also looked at the “International Treaty on Plant Genetic Resources” of the Food and Agriculture Organization (FAO) and United Nations bodies dealing with indigenous peoples, particularly, the Working Group on Indigenous Populations, Working Group Elaborating on a Draft Declaration on the Rights of Indigenous Peoples, and the Permanent Forum on Indigenous Issues.

We looked at the synergies and contradictions, gaps and limitations on how these various bodies are addressing traditional knowledge, biodiversity and indigenous peoples’ rights. We shared our experiences on how we are safeguarding and perpetuating biodiversity and traditional knowledge and how these efforts link with our overall struggles for our rights as indigenous peoples.

We highlighted the key problems and tried to reach common views and positions on how to deal with these. Finally, we agreed on some follow-up activities which we would undertake jointly and activities which we can carry out in our own communities and organizations.

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HERITAGE AND TRADITIONAL KNOWLEDGE

HERITAGE is everything that defines our distinct identities as peoples. This is bestowed on us by our ancestors and endowed to us by nature. It includes our socio-political, cultural and economic systems and institutions; our worldview, belief systems, ethics and moral values; and our customary laws and norms.

It includes traditional knowledge, which is the creative production of human thought and craftsmanship, language, cultural expressions which are created, acquired and inspired, such as songs, dances, stories, ceremonies, symbols and designs, poetry, artworks; scientific, agricultural, technical, and ecological knowledge and the skills required to implement this knowledge and technologies.

Heritage includes human genetic material and ancestral human remains. It includes what we inherited from nature such as the natural features in our territories and landscapes, biodiversity which consists of plants and animals, cultivars, micro-organisms and the various diverse ecosystems which we have nurtured and sustained.

It includes our sacred sites, sites of historical significance, and burial sites. It also includes all documentation of us on film, photographs, videotapes and audiotapes, scientific and ethnographic research reports, books and papers.

Interdependent whole

Our heritage cannot be separated into component parts. It should be regarded as a single integrated, interdependent whole. We do not award different values to

different aspects of our heritage and we do not classify them into different categories such as ‘scientific’, ‘spiritual’, ‘cultural’, ‘artistic’ or ‘intellectual’, nor separate elements such as songs, stories, science, etc.

We also do not differentiate levels of protection to the different aspects of our heritage. All aspects are equal and require equal respect, safeguarding and protection. In the same vein, we do not see the protection of our rights to our cultures as separate from territorial rights and our right to self-determination.

Heritage and traditional knowledge are inextricably linked to our territorial and resource rights and our cultural rights. These form an indivisible whole which cannot be fragmented. Our responsibility is to safeguard, develop and protect our heritage from misuse and misappropriation, so it could be passed on to future generations.

Our claim to the right to control and manage our heritage, knowledge and biodiversity is based on our inherent right to self-determination. The success of our struggles to have our right to self-determination and to our territories and resources recognized will ensure the perpetuation, safeguarding, protection and further development of our heritage.

The dismemberment of our rights and the way our heritage is broken up, folklorised and wrenched away from the territories and resources to which it was intrinsically linked is a major threat to its continuing existence.

The seamless relationship of our heritage to our economic, social, cultural, civil and political rights and the indivisibility of all these rights must be acknowledged and mechanisms should be put into place to protect these rights as an integrated whole. The indivisibility of these rights is captured in the United Nations Draft Declaration on the Rights of Indigenous Peoples. Thus, we have made it our priority to work towards its adoption by the UN General Assembly, and to ensure that there are national legislations recognizing the rights of indigenous peoples.

The erosion and loss of our heritage, traditional knowledge, cultures and biodiversity has been mainly caused by colonization where Western economic, cultural and political systems were super-imposed over our traditional systems.

Even after colonization we still face the following problems:

- the appropriation, alienation and degradation of our ancestral territories;
- the denial of our territorial and resource rights;
- discrimination and the lack of respect for cultural rights which has led to the erosion of our cultures;
- the incursion of so-called development projects such as big dams, mining, oil and gas extraction, logging of protected areas, chemical-based and biotechnology-driven intensive large scale agriculture, which have led to the destruction of our ecosystems;
- the militarization of our communities and the displacement from our territories; and
- the imposition of neo-liberal and economic globalization policies and programs.

The best protection and defence of our biodiversity and traditional knowledge is for us to persistently assert our right to self-determination and our rights to our territories and resources. Self-determination means our right to freely determine our political status and freely pursue our economic, social and cultural development.

Self-determination also means that in no case may we be deprived of our own means of subsistence. This includes our right to free and prior informed consent and our right to say no to dams, mining, oil and gas extraction, logging, bioprospecting and research done in our communities by external entities. It was because our ancestors resisted colonization and we persisted in resisting against destructive projects and programs that we were able to save the remaining biodiversity in our territories.

We have our own customary laws, social, economic, and political systems which define our relationships to our territories, to the natural world, to our ancestors, the spirits and gods and goddesses, and with our neighbours. These predate the laws and systems of the colonizers and the post-colonial nation-states and have sustained us and our ancestors over centuries.

However, many of these were undermined and destroyed by the colonizers and post-colonial nation-states who imposed their own systems on us. The legislations, policies and programs were deliberately put in place to dominate us and prevent us from using our own customary laws and asserting our right to self-determination.

In spite of all these, however, many customary laws and practices still persist. These include, among others, laws which pertain to the regulation, safeguarding, protection and use of our heritage and knowledge, administration of justice, customary laws on land and land tenure systems, laws which govern our relationship with Mother Earth, with our ancestors and with each other, and systems of conflict resolution when there are disputes arising between communities or tribes. In some countries, where there are existing laws or policies recognizing the rights of indigenous peoples, the use of some of these customary laws are recognized by government.

The dominant development model, which is undergirded by neo-liberalism and economic globalization and which is adopted by most governments in the world today, is highly detrimental to indigenous peoples. This model was designed by the former colonial powers now called the Group of 8 (G8) and it is perpetuated by institutions they control, like the World Bank, the International Monetary Fund (IMF), and now increasingly by the WTO. Transnational corporations are heavily influencing these institutions through direct lobbying or through government officials who represent their interests.

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IPRs REGIME AND TRADITIONAL KNOWLEDGE

ONE key feature of the dominant development model is the creation of the intellectual property rights (IPRs) regime, which is a system based on Western legal and economic philosophy and theory and Western property law. This has its own theory of human nature and believes that private incentives are needed for people to perform labor, innovate and create wealth. It is a historically constructed worldview which arose during the industrial revolution to protect mechanical inventions. Now it is being perpetuated as natural or universal law.

The universalization of IPRs is done through the harmonization efforts of the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO) in which they are obliging their member-states to legislate or change their IPRs law to fit this mold.

IPRs were developed as economic or commercial property rights over various forms of knowledge. IPRs create government sponsored monopolies over knowledge, processes, products, innovations, inventions, even over naturally-occurring plants, animals, human genetic material, microorganisms, and parts or components of plants and animals, such as genes, cells, DNA sequences and biological, microbiological processes and non-biological processes. Without government intervention these could not be monopolized. Essentially, IPRs are legal means used to appropriate knowledge.

The IPRs regime reduces knowledge to a commodity which can be privately owned by an individual, legal person (e.g., corporations) who claim exclusive rights over this. Clearly, IPRs can only emerge from a society where individual

private property rights are held inviolable. The preamble of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the WTO explicitly says that “intellectual property rights are private rights”.

The IPRs regime which includes IPRs treaties and conventions (e.g., the Paris Convention for the Protection of Industrial Property (1883), Berne Convention for the Protection of Literary and Artistic Works (1886), UPOV - International Union for the Protection of New Varieties of Plants, Patent Cooperation Treaty, etc.) are administered by WIPO.

The WTO established the minimum standards of IPRs protection under its TRIPS Agreement and this has extended IPRs to living organisms and life-processes. This agreement obligates the WTO members to change their IPRs laws to conform to these standards. WIPO is helping to strengthen and harmonise IPRs laws of its member states many of which are the same members of WTO.

IPRs and traditional knowledge

We, indigenous peoples, have our own sources of natural law and we consider the values propagated by the individual property-based IPRs regime as values that we do not agree with.

Our indigenous cosmologies and worldviews regard knowledge as gifts or heritage from nature, from the creators and great spirits, and from the ancestors. Knowledge is created collectively, accretionally, and inter-generationally and not just by individuals.

Indigenous innovation is not just motivated by the desire for profit or for commercialization. Indigenous innovation is the result of the deep interrelationship between us and our territories and resources, between us and our ancestors and our gods and goddesses, and among ourselves.

IPRs are based on the protection of individual property rights and these are given as exclusive rights whereas traditional knowledge is held by individuals,

clans, tribes, nations and different independent communities and the use and sharing of this is guided and regulated by complex collective systems and customary laws and norms.

Even if individuals hold the knowledge, their right to use it is collectively determined. They cannot use this in an unconstrained and free manner because they are bound by the laws and customs of their people.

Traditional knowledge cannot be alienated from the community by transferring ownership to another person or corporation because that knowledge is part of the distinct and collective identity and has meaning in the context of that community, not outside it. Consent to use, display, depict or exercise, is therefore temporary, and given only on the basis of trust that recipients respect and uphold the conditions and customary laws that are attached to particular aspects of the heritage.

Traditional knowledge is to be kept in perpetuity to be safeguarded, developed and passed from one generation to the next. The transfer of this knowledge is a collective responsibility and in most cases it is transmitted orally. In some cases these are codified in texts. IPRs, on the other hand, whether in the form of patents, copyrights, trademarks, industrial design, geographical indications, trade secrets, plant breeders rights, database protection, etc., grant protection for a limited period of time.

IPRs emerged from a particular worldview about human nature, knowledge and innovation, and these are designed to protect the rights of individuals and corporations and the economic interests of highly developed countries. We, therefore, cannot see what advantages it can offer to us, indigenous peoples.

Flaws of the IPRs regime

The fundamental flaw of existing national and international IPRs regimes is their failure to acknowledge and recognize the customary laws and systems developed and used by us to protect, safeguard and perpetuate our heritage and

traditional knowledge. This is discriminatory and racist because they ignore other systems which do not conform to their own economic and legal framework.

We take issue with the universalization of the Western IPR regime which is being carried out mainly by institutions like the WIPO, the WTO and with strong support by the World Bank and IMF, through their loan conditionalities. The WIPO and the WTO are the main bodies acting as protectors of intellectual property throughout the world.

The WIPO is basically the collector of intellectual property-related rents for multinational corporations and for the rich industrialized countries. 90 percent of its budget does not come from member governments but from the patent revenues paid by patent applicants under the Patent Cooperation Treaty (PCT).

With the combination of the WTO's power to impose sanctions on its members if they fail to adhere to the Agreements they signed on to, and the WIPO's resources which are used for so-called technical assistance and capacity building programs to ensure that its members adopt and effectively implement the IPRs regimes, the universalization of the IPRs regime is taking place at a very fast pace.

Other United Nations bodies which are tasked to ensure that economic, social, cultural, civil and political rights are protected, do not have such powers to enforce compliance or adequate resources to do technical assistance programs. In many cases we also cannot see the political will to go against the powerful rich member-states. Thus, the balance that we are looking for which can ensure that our indigenous systems and customary laws will get a fair chance to even continue to exist is difficult to see.

The dominant view being promoted is that IPRs forms of protection over traditional knowledge may provide protection to traditional knowledge and can be a basis for recognizing the contributions of indigenous peoples. This recognition

can then make it possible for us to share the benefits which will be generated from the use of our knowledge. This view is fraught with dangers.

First, it fails to acknowledge that we have our customary systems to safeguard and our knowledge to protect.

Secondly, it pushes us to accept a framework which was constructed, in the first place, not to protect our collective rights over our heritage and knowledge. It gives an illusion that the problems of injustice, discrimination, inequity which we are confronted with in relation to how our heritage is used and the continuing erosion of our traditional knowledge can be solved by adopting existing or new forms of IPRs protection.

Thirdly, it does not show the high social costs which come about with the granting of exclusive IPRs to individuals and legal persons. The social costs range from the undermining and destruction of indigenous peoples cosmovisions, cultures and heritage, theft or biopiracy of plant, animal, and human genetic materials and the knowledge around these, the increasing difficulty for millions of poor people to have the access to traditional medicines and treatments, and the increasing monopolization of control over knowledge and technologies by fewer individuals, countries and corporations.

We are convinced that intellectual property rights cannot and will not adequately protect traditional knowledge, much less our ancestral heritage. IPRs remain incapable of protecting traditional knowledge and rights which are generally, collectively held and protected by customary laws.

In contrast to the Western legal system of IPRs, our traditional knowledge cannot be alienated, surrendered or sold on an unconditional basis. Our traditional knowledge is a collective right and the responsibility for its use and management in accordance with indigenous laws and traditions is borne by the community as a whole.

We find it ironical that the IPRs regime, which is an alien and problematic construct for us, is now being proposed as a solution for the protection and safeguarding of our heritage. We discern a similar pattern between how our lands and resources were taken away from us and how our traditional knowledge is being privatized and monopolized by IPRs holders.

When colonizers and governments imposed alien land laws on our ancestors, most of them refused to adhere to the requirements for cadastral land surveys and land registration and titling as individual private property. The main reason was that these land laws ignored our complex customary land tenure systems which included individual, clan, and communal ownership and rights were more custodial and usufructuary.

Our ancestors foresaw that if they use the colonizer's laws our ancestral territories will be dismembered and lost. The imposition of intellectual property rights laws on us would have the same effect. IPRs will fragment our traditional knowledge into pieces to be monopolized and sold until nothing remains of it.

We can ensure the viability and preservation, safeguarding and protection of our heritage through continuous use, by transmitting it to the next generation and through sustained revitalization. We ask that the international community and national governments recognize and support our ways of safeguarding and protecting our heritage and traditional knowledge. Thus, we should not succumb to the proposal to use IPRs to protect our traditional knowledge even with the attraction of benefit-sharing.

It is within this context that we reject the use of the term 'intellectual property' to refer to our traditional knowledge. We realize that the term cannot be generically used to refer to knowledge and heritage because the use of the term assumes an acceptance of the ideology and context behind its use.

Biopiracy has been taking place and is still happening in many of our communities. This includes, among others, the collection and patenting of our tradi-

tional knowledge and genetic materials found in our bodies, medicinal plants, seeds, animals and microorganisms found in our territories.

Our knowledge around plants, animals, microorganisms, ecosystem management, among others, is essential in conserving and using biodiversity, ensuring food security, meeting our health needs, the continuing exercise of our sacred rituals and ceremonies and assertion of our distinct identities.

Some of our movable heritage, cultural expressions, plant, animal, microorganism and human genetic materials are now found in public and private gene banks, research and health institutes, museums, botanical parks, and in the laboratories and databases of universities and corporations.

We believe that the misuse of the knowledge we share can cause severe physical or spiritual harm to the custodians of the knowledge or to their entire tribe or nation. This is because they have not ensured that this knowledge is properly used. Thus, misappropriation or misuse is not just a violation of the rights of the knowledge holders but could also have serious implications for their continuing survival as distinct peoples.

Concept of public domain

The evolution of the concept of public domain is also very much linked with the evolution of intellectual property rights. Public domain refers to that which is not claimed as private property or that which is commonly known or disclosed. What is categorized to be in the public domain can be accessed and freely used by anybody.

Generally, public also refers to the State. That which is not privatized is owned by the State. Much of our knowledge and our plant, animal and human genetic resources, cultural expressions which are now considered to be in the public domain were acquired from us without our free, prior and informed consent.

Traditional knowledge is not in the public domain. While much of it is known because we openly share this knowledge, it is still held by individuals, clans, tribes, nations and different independent communities. The use and sharing of this knowledge is guided and regulated by complex collective systems, customary laws and norms.

While we share some of our knowledge and genetic materials, we reiterate, this does not mean that we put these in the public domain for unfettered use by anybody. We share these with those who are trusted, those who will use these for the common good and not for their own selfish ends, and those who know their roles and responsibilities in using the knowledge and resources.

We have developed nuanced systems and mechanisms which enable us to safeguard and protect our knowledge and to define how, when and to whom it can be shared with. The public domain concept has not taken these into consideration. There are many significant studies already done which document these systems and these show clearly the inappropriateness of applying the concept of public domain to the knowledge and heritage of indigenous peoples.

It is on this basis that we are calling for the protection of our heritage which is considered to be in the 'public domain' and this protection will be mainly done through our customary laws which the broader society, the governments and the international community should respect.

Our cultural expressions and symbols and even our ancestral remains which were taken without our consent and are put in the museums and our traditional seeds and plants which are in genebanks and laboratories, and even our human genetic materials which are also in laboratories, cannot be considered to be in the public domain.

Thus, the assumption that our heritage is in the public domain and therefore cannot be protected by IPRs and can be appropriated and used by anybody is fallacious to us. First, our consent has not been acquired when many of these

knowledge and resources were taken away from us and put in the so-called public domain. Secondly, we are not asking that our knowledge be protected by the IPR system. We would like to protect these using our own systems.

Concept of Property

This also explains why we are not comfortable with the use of the term ‘property’, especially in relation to knowledge and resources. The Western concept of property and the associated rights of ownership does not have an exact equivalent in indigenous customary laws and tradition.

We do have various concepts of ownership which could be individual or collective ownership by the clan, tribe or nation but this is not similar to the sense of property in the western system. We conceive of ourselves as custodians or caretakers of knowledge, resources and territory and not as absolute owners.

Knowledge, lands and resources are bestowed to us for our collective and sometimes, exclusive, use, but we have to fulfill our obligations as caretakers of these. Being custodians, we have obligations to link the past, present and future and to ensure that our heritage passes on from generation to generation.

We would rather say we have a relationship of reciprocity with the land, water, the air, Mother Earth and Father Sky, with all other living and non-living things, with the spirits, gods, and goddesses, with our ancestors and the future generations, and with each other.

Our rights to our knowledge, lands and resources are not permanent and the enjoyment of these rights are contingent on how we fulfill our obligations and how we perform our roles as stewards. We cannot claim property rights over life and life forms which is what Article 27.3.b of the TRIPS Agreement is all about. We cannot claim property rights over knowledge. While we would like to perpetuate our knowledge and heritage to future generations, this is not through a system of private property rights.

We have to constantly renew our relationships. Some of us are identified with our totem relatives, such as the salmon, turtle, eagle, the corn, among others. Many of us have the concept and practice of usufructuary rights over lands and resources. Our rituals and ceremonies are renewal rites to express our deep kinship and relationship with our totem relatives, our seeds, our sacred sites, our waters and lands, and with each other. These renewal rites and ceremonies are one of the effective ways of protecting, safeguarding and perpetuating our knowledge and heritage.

Breaking up of heritage and knowledge

Our ways of safeguarding and protecting our heritage and knowledge are clearly different from the IPRs route of the WIPO and the WTO. The main area of divergence is between the commercial approach taken by the IPRs proposals and the rights-based approach which is the framework used by us.

We look at our heritage from a comprehensive moral and human rights perspective. Our right to our heritage which includes, among others, traditional knowledge and our genetic materials, cannot be delinked from the bundle of civil, political, economic, social and cultural rights which we are entitled to enjoy.

All these rights flow seamlessly into each other. Thus, the desegregation of our rights as if these can be treated as separate issues and the breaking up of our heritage to be handled by different international intergovernmental bodies is creating multiple problems for us.

Those among us who are participating with the WIPO and the CBD have asked, time and again, that the link between traditional knowledge, biodiversity and genetic resources with territorial and resource rights and the right to self-determination be acknowledged and established.

However, the WIPO maintains that its mandate is to promote and protect intellectual property rights and not human rights. The CBD says its mandate is the conservation and sustainable use, and equitable sharing of biological diversity.

Therefore, human rights issues such as land rights and self-determination should be brought to the UN Commission on Human Rights.

It is clear to us that these bodies have inherent limitations in addressing more holistically our issues. However, some of us still engage with these bodies to ensure that our concerns can still be presented and considered by the governments.

We also see the need to persist in challenging these bodies to adapt the rights-based approach and not just the commercial approach. Furthermore, we are challenging the WIPO and the WTO to explore what they can do as individual institutions or jointly with other UN bodies to be more holistic, development-oriented, and rights-based in the way they address these issues.

3

THE WORLD INTELLECTUAL PROPERTY ORGANIZATION

THE World Intellectual Property Organization (WIPO) Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was created to explore the use of IPRs regime to protect our traditional knowledge and our genetic materials.

We recognize that the committee has given a higher visibility to indigenous peoples' issues and a greater concern over traditional knowledge, traditional cultural expressions and genetic resources. However, we still maintain that WIPO is the inappropriate forum to develop any policy recommendation which will safeguard our heritage.

It has inherent limitations because of its mandate and because the philosophy behind the IPRs regimes it promotes and administers, conflicts with indigenous peoples' worldviews and values on knowledge and heritage. Besides, WIPO, as mentioned earlier, is one of the main organizations, outside of the WTO, which is promoting harmonization and stronger IP protection.

We are concerned over the way WIPO has appropriated and limited the use of the term 'protection' to IP protection and how it has distinguished this from the concepts of "safeguarding" and "preservation". For us protection also means safeguarding and preserving as well as ensuring that our heritage is perpetuated for the use of future generations. This includes preventing the misappropriation, misuse and commercialization of our heritage without the free, prior informed consent of the custodians of the culture, knowledge and biodiversity. It also means controlling or regulating the use of this.

The non-IPRs route of safeguarding and protecting indigenous heritage, particularly knowledge and genetic resources, has to be acknowledged and explicitly supported by WIPO. The non-IPRs route is through the recognition of our rights to our territories and resources and to self-determination. It is also through the recognition of our customary laws and systems.

If WIPO uses the term “protection”, it should always qualify it by referring to it as IPRs protection so that the wider definition of protection as used by indigenous peoples and others will not be eclipsed by WIPO’s narrow definition.

We do not concede that the framework and definition of the Western legal and economic system of property, in general, and intellectual property, in particular, should be the only definitions and concepts which should be accepted and used.

Indigenous peoples have their own philosophies, customary laws, values and norms around relationships to land, resources and knowledge, which have been used for centuries up to the present, which should be acknowledged as valid and relevant.

WIPO should promote the protection of genetic resources and traditional knowledge based on the customary laws of the indigenous peoples themselves. Disputes over the acquisition and use etc., of indigenous peoples’ heritage should be resolved according to the customary laws of the indigenous peoples concerned.

- (a) We therefore recommend that much more extensive dialogues and deeper review of the problems around the concept of IPRs and associated concepts with it such as public domain, property, etc., especially as these relate to indigenous peoples, be undertaken. If WIPO chooses not to do this, we urge other relevant international organizations to do it. It is important to stress, however, that this should be done in collaboration with indigenous peoples, so that there will be genuine dialogue and our views, experiences and analysis will be faithfully reflected and considered.

- (b) As stated earlier, the western construct of public domain is related with disclosed and undisclosed knowledge and the proposals for disclosure and development of databases. The defensive protection proposal of the WIPO IGC says that we have to document and record our knowledge and put these in databases so that we can claim prior art and therefore prevent others from claiming IPRs over these. If we do not document these then there is no way patent examiners can know that these are already known. Again, we have a problem with this.
- (c) Some of us are presently documenting our knowledge and making community registers of our resources. However, these efforts are mainly intended to record what we have for our own selves and for the use of future generations. These are to be kept in the communities and not necessarily for public disclosure. In situations where our knowledge and resources have been stolen and we have to resort to the use of courts to reclaim these, such documentation can be used.
- (d) Most of us, however, have not done documentation or codification for various reasons:
- Many of us, still basically have oral traditions. Knowledge is passed from generation to generation through oral transmission. Some of our elders express concern over codifying or documenting these because they fear this can cause the disappearance of traditional knowledge. The ceremonies, rituals, story telling, songs and other processes we use to orally transmit these might not be done anymore because we already have recorded what needs to be transmitted. Our elders also say that even if we document these if we do not use the knowledge and enable the youth to learn these by doing, these can disappear very fast.
 - There is fear that if traditional knowledge is documented then it would be easier for others to appropriate genetic resources and such knowledge. We already have many cases and evidences to show how researchers who get the idea of how indigenous peoples use a certain plant, then collect

this plant and with their modern technologies which can isolate the active principles or insert a gene into these, they can claim patent rights over these.

- Documentation entails a lot of money and the use of very modern technologies which most of us do not have nor have any access to.
- (e) There is lack of good faith and honesty on the part of countries who approve patent applications of researchers, institutions, or corporations on our resources and knowledge. Some countries can lower their standards of patentability and they can patent what they call “discoveries”. A person can claim she/he discovered the use of the plant or a gene sequence and on this basis can get a patent. Many of these so-called “discoveries” are already known by indigenous peoples even if we did not register or document these in writing. These countries do not even adhere to what they had once established as patentability criteria when their economic interests are at stake.

We find the proposal for an international, centralized international database on traditional knowledge dangerous. As we said earlier, databases if done and controlled by indigenous peoples in their own communities can be acceptable. However, getting this knowledge and storing it in a place which indigenous peoples cannot have any control nor access to, will further diminish any possibility for us to have a say on how this knowledge should be used.

There are many bad patents granted over medicinal and food plants which we have been using for thousands of years. The patent applications for these have not acknowledged the prior knowledge of and the use by indigenous peoples of these resources. In some cases, even if researchers knew of this, patent laws in some countries do not recognize certain forms of disclosure as prior art.

The requirement for written documentation to adhere to the international classification standards set in the WIPO International Patent Classification (IPC) System so that the data can be used by patent examiners, is something beyond

our resources and capacities. This is yet another reason why we have problems with disclosure proposals.

The burden of proof to show that these are used by indigenous peoples should lie with the patent applicants, not on indigenous peoples. Why should we be burdened with having to document and register our knowledge in the way WIPO wants so that we can defend these from being misappropriated and misused?

If there are ongoing processes where traditional knowledge are being documented, it is of crucial importance that no such documentation be carried out without the relevant people's prior and informed consent. It follows from the fundamental right to self-determination that it is up to us to decide whether or not to document our knowledge and heritage. If we do it, it should be done according to the respective needs and objectives set by our own people.

Should documentation be done by outsiders, and the documenter fails to provide evidence that free and prior informed consent has been obtained, the documentation should be erased or returned, if the custodians of this knowledge so demand.

***Sui Generis* systems**

The IP *sui generis* (unique, or of its own kind) proposal to protect traditional knowledge also poses problems for us.

A *sui generis* system within the IPRs framework is still IPRs. By definition, *sui generis* regimes should be adapted to the object to be protected and to the context where it should be applied. Suggesting a single model of such a regime, defeats the very concept of *sui generis*.

We see our customary laws as unique and of their own kind. These are laws which are appropriate for our own context and worldviews. Governments do not have to create any new *sui generis* laws to protect our traditional knowledge. We reiterate that what governments and the international community can

do is to recognize our customary laws and ways of safeguarding, preserving and protecting traditional knowledge as viable laws and systems. While we are convinced that IPRs cannot adequately protect our traditional knowledge and genetic resources we are also aware that some indigenous individuals use IPRs to protect their individual cultural creations like songs, arts, handicrafts, etc. The few indigenous communities who have opted to use IPRs are exercising their right to self-determination and we respect this. There are rare cases where IPRs can, if utilized correctly by the rightful holders, to a certain extent serve to protect indigenous genetic resources, knowledge and biodiversity.

Since the WIPO-IGC has gone a long way in trying to explore how traditional knowledge, traditional cultural expressions and genetic resources can be protected by IPRs we would like to challenge this Committee, if it chooses to continue to exist, to get engaged in rectifying what is wrong with the IPRs-system.

Challenges to the WIPO-IGC

In particular, the WIPO-IGC can do the following:

- (a) Make a study of the extent of biopiracy which has taken place and which is still continuing in our territories. On the basis of this, come up with recommendations on how remedies can be taken to redress the injustices caused to indigenous peoples. There should be mechanisms set up to repatriate illegally and even legally appropriated genetic materials from us.
- (b) Explore together with other UN bodies, like the Commission on Human Rights, the Permanent Forum on Indigenous Issues, etc., the creation of effective global, regional or national mechanisms for the repatriation of genetic resources, cultural expressions, traditional knowledge which were illegally taken away from us and put in the public domain, public or private gene banks, private collections, corporations, university laboratories, museums, etc.

- (c) Review the standards for patentability of WIPO member states which allow the unwarranted patenting of indigenous knowledge, genetic resources and other life-forms and come up with recommendations on how to rectify these.
- (d) Cooperate with other UN bodies and with indigenous peoples and local communities to start the work towards the creation of an international legal framework for the protection of indigenous knowledge and genetic resources.
- (e) Facilitate our participation, not only in the WIPO-IGC but also in other relevant WIPO committees or working groups, if we so choose, and otherwise ensure that our concerns are being taken into account in all its work. The proposal for the creation of a voluntary fund for indigenous peoples should not only be for our participation in the WIPO-IGC but in other relevant WIPO bodies.
- (f) As previously stated, IPRs cannot adequately address our concerns with regard to traditional knowledge and genetic resources. Therefore, it is paramount that the IGC process does not pre-empt the discussions on these issues in other processes, such as the in the Working Group on the Declaration on the Rights of Indigenous Peoples and in the Convention on Biological Diversity. An adequate protection for indigenous knowledge and genetic resources requires that these issues be dealt with from a human rights and sustainable development perspective.
- (g) We propose that the Permanent Forum on Indigenous Issues convenes various UN bodies and specialized agencies, including the WIPO and the WTO, to discuss the issues of indigenous heritage, traditional knowledge, biodiversity and indigenous peoples' rights. The work done by the WIPO-IGC can be an important input in this process, so we urge WIPO to explore with the Permanent Forum the possibility of holding such a process and provide full support for this.

4

WTO TRIPS AGREEMENT

WE also looked at the WTO, particularly the Trade-Related Aspects of the Intellectual Property Rights Agreement (TRIPS). The particular issues which we were concerned with in relation to the WTO and TRIPS are the following:

TRIPS and harmonization

We stated earlier that we are very much concerned with the role of the WTO in harmonizing IPRs. TRIPS establishes minimum standards, which in reality are very high standards for countries to adopt in the protection and enforcement of almost all the most important forms of IPRs.

These minimum standards are derived from the legislation of highly industrialized countries, which means that TRIPS imposes their forms and levels of protection on all WTO members. While there are some flexibilities allowed, the general aim is to have all WTO members accept the Western IPRs regime.

As previously stated, we are concerned about the imposition and harmonization of TRIPS because of its impacts in undermining our values and worldview on the sacredness of life, and our customary laws on knowledge and biological and cultural diversity.

We reiterate that harmonizing legal systems to fit within a single construct which promotes economic, commercial and trade interests of the rich industrialized countries and corporations is discriminatory and racist. This will make our

struggles to have our rights recognized and promoted in the national and global arena even more difficult.

As a result of our struggles some countries have legislated laws recognizing our rights. In the international arena there is the ILO Convention 169 and the Draft Declaration on the Rights of Indigenous Peoples which is presently being discussed at the Commission on Human Rights. Existing national laws and policies on indigenous peoples' rights are in danger of being considered trade distortive because they may not be consistent with the TRIPS Agreement and other WTO Agreements.

The enforcement mechanism of the WTO is the most powerful one, so far, because non-compliance with the agreements could result into trade sanctions through its dispute settlement system. National laws are now being amended to comply with TRIPS standards and obligations.

Before the TRIPS Agreement, most countries do not allow patents for pharmaceutical compounds or compositions and also restrict patents for biotechnological processes and their products. Now, the scenario is fast changing because countries are now being pressured to adhere to their WTO obligations to harmonize their laws to WTO standards.

Article 27.3(b) and the patenting of life

Article 27.3(b) of TRIPS is the key provision which has opened the floodgates for patenting of life. This Article states: *“Members may also exclude from patentability.. b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants and animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this paragraph shall be reviewed four years after the date of entry into force of the WTO Agreement.* In the past, patents were restricted to the protection of industrial and mechani-

cal processes and products. Now, with Article 27.3(b) patents are allowed on life-forms and life-processes. It does not prohibit WTO members from providing patent protection for plants and animals and requires them to provide patent protection of micro-organisms, non-biological and microbiological processes.

We agree with many of the views raised by indigenous peoples in various forums, by NGOs and even by developing country governments in their submissions to the WTO.

We remain steadfast in our demand for a ban on all patenting of life forms. We reiterate what indigenous peoples said in the statement entitled “No to Patenting of Life” (1999), which states *“Nobody can own what exists in nature, except nature, itself. Humankind is part of Mother Nature. We have created nothing and so we can in no way claim to be owners of what does not belong to us...”*

Patenting and commodification of life is against our fundamental values and beliefs regarding the sacredness of life and life-processes and the reciprocal relationship which we maintain with all creation. The patenting of human genetic materials is a violation of the dignity of human beings and their basic human rights.

The distinction made between plants and animals and micro-organisms, and between biological and non-biological and microbiological processes is meaningless to us because these are all life-forms and life-creating processes which are sacred and which cannot become the subject of individual property rights and ownership.

Mechanical processes and inventions like tools, appliances and machines, which were protected by patents, are totally different from biological and life processes and products. Living things can only be created by nature and nobody can claim that they invented or created a living organism like they invented a mechanical tool or a machine.

Even with genetic engineering, what the genetic engineer does is to introduce a gene into an organism. When a gene is introduced to the self-organizing, self-replicating living organism, this organism will take over and does its own processes. So there is no invention in the way that mechanical products are invented. Thus, even the basic patentability criteria of novelty and inventive step can never be claimed for living things.

Patenting of life facilitates biopiracy (misappropriation of genetic resources and related traditional knowledge) because third parties (corporations, researchers, governments) can make patent claims on genetic materials of plants, animals or microorganisms, based on the knowledge of indigenous peoples and farmers on the uses of these for medicinal, food or agricultural purposes.

Many legal and scientific questions are raised on the validity of patents over life-forms. In spite of these, however, we see on a daily basis, patents being granted over micro-organism, plants, and animals, the species of an entire food crop, gene sequences and even cell lines of human beings.

Some indigenous peoples (e.g., the Hagahai of Papua New Guinea, the Guaymi of Panama, among others) had their cell lines collected and patented without their free and prior, informed consent. We are appalled at the proliferation of bad patents and the way some countries can just violate their own standards of patentability.

There are hundreds of examples of the patents granted on plant, animal and human genetic materials, processing techniques, known and used by indigenous peoples all over the world. Some of the more known ones, are the *hoodia* plant of the San peoples in the Kalahari Desert, *ayahuasca*, *sangre de drago*, *quinoa*, *maca*, among others, of the indigenous peoples of Central and South America, neem, turmeric, basmati rice, jasmine rice, bitter melon, *kava*, *nonu*, etc., from Asia and the Pacific. There are many of these examples which have yet to be exposed and included in the increasing list of knowledge and materials which have been pirated from us.

The few cases where patents were revoked on grounds that they were invalid as they were based on traditional knowledge and therefore did not satisfy the criteria of novelty and inventiveness (neem and turmeric) only happened because of massive protests from farmers, indigenous peoples, NGOs and even governments of countries where these were taken from. The expenses and energies required to have these revoked were tremendous.

We do not think that this should be the route we should take every time there are cases of biopiracy, misappropriation and misuse. There is something clearly wrong within the patent system which has to be corrected and the ones who should bear the primary responsibility in correcting these should be those who created and who are using it.

The experience of the San peoples of Southern Africa with the patenting of the *hoodia* plant which was and is still used by them as a thirst and appetite suppressant, was shared with us. Their *hoodia* plant was registered in 1996 as an international family of patents codenamed “P57” by the South African Council for Scientific and Industrial Research (CSIR). The rights to further research, trial and commercially exploit the patent were licensed to Phytopharm in the United Kingdom and Pfizer Inc. in the USA.

We were appalled by the claim of the head of Phytopharm in the United Kingdom, that to the best of his knowledge, “the San tribe that had provided this knowledge was unfortunately extinct”. This statement implied that no form of appropriate benefit sharing can be negotiated. This was clearly a case of a bad patent. The San peoples could have challenged it but they decided to negotiate a benefit-sharing agreement with the CSIR which was concluded and signed on 24 March 2003. We respect the decision made by the San, and we definitely learned a lot of lessons from this experience which we can share with our own communities.

In the review of TRIPS we looked into some of the proposals from groups of countries on this. One was from Brazil, Cuba, Ecuador, India, Peru, Thailand and Venezuela which proposed that a requirement for disclosure of origin of

biological material and traditional knowledge related to an invention be incorporated into the TRIPS Agreement as a means of preventing biopiracy and to harmonize TRIPS with CBD. For an effective and strong mechanism for disclosure the proposal requires that this be mandatory (all countries will implement it as a requirement for a patent grant), linked to patentability, to prior and informed consent and to benefit sharing.

While this proposal may prevent biopiracy because of the strict requirements pertaining to the disclosure of origin, we are still concerned for reasons we have cited earlier on in the section on disclosure and databases. This position also does not challenge the patentability of traditional knowledge and life-forms which is our basic position with regard to the review of TRIPS.

Nevertheless, we take note that this proposal has raised some issues which we have discussed earlier in this statement:

First it acknowledged *“that databases may be inappropriate for reasons of loss of confidentiality of the traditional knowledge, which is not in the public domain.”*

Secondly, it states that if there are bad patents *“pursuing a legal remedy under international laws and in multiple jurisdictions is complicated and expensive, and may not be economically feasible for many aggrieved countries. Moreover, the peculiar nature of the patent laws in countries which recognize prior art outside their country only in the form of written and published information, make legal challenges formidable and cumbersome”*. These statements reinforce our arguments presented earlier.

The European Union and Switzerland also had a proposal which have indicated their willingness to negotiate on disclosure of origin. However, they refuse to make it a mandatory requirement nor link it to benefit sharing. They even limit the concept of origin to just an indication of a geographical area (EU) or just a “source” (Switzerland).

Another position in both these papers is that the WTO is not the appropriate body to discuss traditional knowledge. The WIPO-IGC is dealing with this and unless they get a final report from the WIPO on their recommendations it is not advisable for WTO to address the issue.

The Africa Group made a comprehensive proposal for the review of TRIPS and this comes in the form of a Decision which WTO members can adopt. We appreciate their proposal in their Joint Communication “*..that Article 27.3(b) be revised to prohibit patents on plants, animals, micro-organisms, essentially biological processes for the production of plants or animals..*”

They also reiterated their proposal in the WTO Seattle Ministerial Meeting, that “*.. the distinction drawn in Article 27.3(b) for micro-organisms, and for non-biological and microbiological processes for the production of plants or animals, is artificial and unwarranted, and should be removed from the TRIPS Agreement, so that exception from patentability in paragraph 3(b) covers plants, animals, and micro-organisms, as well as essentially biological processes and non-biological and micro-biological processes for the production of plants and animals.*” This position echoes the same points we made in the “No Patenting of Life-Forms Statement” we referred to earlier. We fully support this African position.

We also appreciate the list they made on the “Draft Decision on Traditional Knowledge” which identified rights that shall be protected relating to traditional knowledge. This stated that any local community or traditional practitioner should be accorded the following:

- i) *respect for their will and decision on whether or not to commercialise their knowledge*
- ii) *respect and honour of any sanctity they attach to their knowledge*
- iii) *give prior and informed consent for any access and any intended use of their knowledge*
- iv) *full remuneration of their knowledge*

- v) *prevent third parties from using, offering for sale, selling, exporting or importing, their knowledge and any article or product in which their knowledge is input, unless all requirements under this Decision have been met.*

However, we are seriously concerned over their proposal to allow the WTO to deal with the issue of traditional knowledge. The WTO TRIPS Agreement, just like the WIPO, promotes and supports Western IPRs regimes which we have already extensively critiqued earlier. Granting that it will accept this decision, it will still distort traditional knowledge to fit in within their IPRs framework and in the end we might find ourselves in even a worse situation than where we are now.

Another concern is paragraph 2(a) in the Draft Decision which says “*Traditional knowledge is a category of intellectual property rights hereby recognized and protected in accordance with this Decision. Members shall protect and enforce rights in respect of traditional knowledge in accordance with the provisions of this Decision. Members may adopt sui generis systems for more extensive protection.*” Again, we say that traditional knowledge is an integral aspect of our heritage which cannot be adequately protected by IPRs.

We request the African group of countries to stand firm in their position to get the TRIPS Agreement to ban patenting of life-forms and to explore other inter-governmental mechanisms which can address the protection and safeguarding of traditional knowledge more appropriately. We urge other governments to support the demand for patenting of life-forms and to get this language in the TRIPS review.

We do not agree that the WTO nor the WIPO-IGC are the right bodies to deal with traditional knowledge mainly because these bodies are the protectors of IPRs and we have already stated that IPRs cannot protect traditional knowledge.

We propose that the United Nations Permanent Forum on Indigenous Issues (which is under the UN Economic and Social Council) together with the UN

Working Group on Indigenous Populations (which is under the Commission on Human Rights), to bring together governments, UN agencies and other multilateral bodies, indigenous peoples and local communities, to a technical meeting which can explore which UN and other multilateral bodies can jointly put their efforts in addressing indigenous heritage and traditional knowledge. The Convention on Biological Diversity, the WTO and the WIPO should be invited to this technical meeting as these are the main bodies which have been dealing with these issues.

TRIPS and plant variety protection and *sui generis* systems

Plant variety protection (PVP) was developed to protect the interests of commercial plant breeders and not indigenous peoples and farmers. UPOV 1991 is one form of a PVP protection which has high standards of protection for plant breeders that can further facilitate the misappropriation of germplasm and traditional varieties bred and nurtured by indigenous peoples and farmers.

Article 27.3(b) requires member states to protect plant varieties through patents or through the creation of a *sui generis* (i.e., unique or of its own kind) system or any combination of the two.

Developed country governments are pushing developing countries to adopt UPOV 1991 and to consider this as a *sui generis* system. Again, this proposal for a *sui generis* system still is within the IPR framework and does not detract from the patenting of life approach.

5

THE CONVENTION ON BIOLOGICAL DIVERSITY

MANY indigenous peoples have been actively engaged in the Ad-hoc Working Group on Article 8(j) and related provisions of the Convention on Biological Diversity (CBD) and recently, in the ad-hoc Working Group on Access and Benefit Sharing. The CBD is mandated to promote the conservation of biological diversity, sustainable use of its components, and the equitable sharing of benefits arising out of the utilisation of genetic resources.

In relation to traditional knowledge, Article 8 (*In-situ* Conservation) section j of the CBD says – each Contracting Party shall: *Subject to its national legislation, 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 their wider application with the approval and involvement of the holders of such knowledge, innovations, and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.*

Biodiversity has become such an important concern within the past 20 years not only because it is fast disappearing but also because of the growing recognition of its increased economic value and potential for the biotechnology industry. Bioprospecting has become the new extractive activity just like prospecting for minerals in the early days of colonization. The biotechnology industry or life industry and most governments see profits in biodiversity. In the past biodiversity was regarded as the common heritage of humankind and therefore anybody can have free access to it.

National sovereignty principle

When the CBD was adopted in 1992, it changed the way biological resources are regarded – from “a common heritage of humankind” to a principle of “national sovereignty”. Article 15.1. states, *“Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with national governments and is subject to national legislation.”*

Biodiversity is now regarded as a resource upon which terms of ownership, control, access, and benefit-sharing will be subjected to negotiations between the Contracting Parties and even non-parties to the CBD.

We do appreciate that this principle was forwarded by developing country governments to defend national interests against foreign developed country governments and transnational corporations. Countries can now have the right to regulate access to foreigners over their biological resources and knowledge associated with it and also to determine benefit-sharing arrangements.

However, we do not agree that it is just States who have the authority to determine access to genetic resources. If these resources are found in our territories then we should have the primary authority to determine how these biodiversity will be conserved and used. The need to obtain prior and informed consent before access to genetic resources is allowed only pertains to the State not to indigenous peoples nor local communities. This is a serious shortcoming of the CBD. Fortunately, due to the struggles of indigenous peoples in many countries some access and benefit sharing national laws do acknowledge that the prior informed consent of communities have to be obtained.

We should actively engage with States to remind them that their objectives for biodiversity conservation and equitable sharing of benefits cannot be achieved if they do not recognize our rights over our territories and resources. They should not look at this demand as a threat to their national sovereignty but as a significant contribution in enriching the cultural and biological diversity within the

country and the whole world. It is also an acknowledgement that most countries are pluricultural and pluriethnic and this diversity should be seen as an asset not a liability.

With Article 8(j) and associated articles (e.g., 10(c), 17(2), 18(4)), CBD does have the potential to protect our resource rights and our rights to our traditional knowledge and heritage. However there are elements in some of its provisions which can restrict this potential. For instance Article 8(j) does not explicitly recognize our rights to our knowledge and does not link this with our territorial and resource rights. Furthermore, it has the qualifier which says “subject to national legislation”. What if there are no existing national legislations which recognize indigenous peoples’ rights? Most countries, who have indigenous peoples, do not yet have such legislation.

Most of our struggles are still around getting the States to recognize our territorial and resource rights and our right to self-determination. Even if there are national laws on biodiversity, if our rights to our lands and resources remain unrecognized and unprotected, our capacity to conserve our biodiversity will be compromised significantly.

In a way CBD affirms the effectiveness of IPRs in the conservation of biological diversity. Article 16(2) says that access to and transfer of technologies should be consistent with the “adequate and effective protection of intellectual property rights.” There is no acknowledgement in the Convention that the IPRs regime fails to recognise or protect our rights or interests in relation to biodiversity conservation and use.

However, Article 16.5 says that the Parties should cooperate to ensure that patents and other IPRs are supportive of and do not run counter to the objective of the CBD. Somehow, this raised doubts whether IPRs support CBD objectives and acknowledged that there can be conflicts. It is silent on the existence of indigenous and customary laws regulating the use and access of our heritage and knowledge.

However, in spite of these reservations some of us are actively engaged in the CBD because we would like to strengthen its potentials to conserve the biodiversity which we have nurtured and sustained in our territories and to promote the recognition of our rights to our knowledge and resources. Some of us have even been involved in the formulation of national biodiversity laws.

We noted that the Seventh Conference of Parties (COP) of the CBD is going to take place in February of 2004. This is expected to address the following issues in relation to traditional knowledge, access and benefit sharing and intellectual property rights:

- Development of an action plan on capacity-building with respect to access and benefit sharing.
- A review of legislation and procedures for securing the prior informed consent of indigenous peoples and local communities.
- Development of international guidelines for the equitable sharing of the benefits arising from the utilisation of traditional knowledge.
- The role of *sui generis* systems and customary law for the protection of traditional knowledge and within access and benefit sharing arrangements.

Before this COP, there will be the second meeting of the Ad-hoc Working Group on Access to Genetic Resources and Benefit Sharing and the third meeting of the Ad-hoc Working Group on Article 8(j) and Related Provisions to be held in December 2003. We should try as best as we can to formulate positions on the issues to be tackled.

For Article 8(j), we proposed that governments and indigenous peoples start contemplating the creation of a protocol on this. This could be called *Traditional Knowledge Protocol of the CBD*. Since the proposal of developing countries for the creation of an international legal instrument to protect traditional knowledge has been tabled in the WIPO and the WTO, this will be within the framework of IPRs. We would not like traditional knowledge to be dealt with from an IPR framework. Since the CBD is not created to be a body to conserve biodiversity it can develop a protocol on traditional knowledge on the basis of Article 8(j) and related provisions like 10(c).

We also noted that the World Summit on Sustainable Development, which was held in Johannesburg in September 2002, called for the establishment of an international regime on Access and Benefit Sharing and the CBD was tasked to take the leading role in this. This will, no doubt, be taken up at the COP 7. The debate might focus on potential elements and legal standing of such a regime, the role of the Bonn Guidelines on Access and Benefit-Sharing, the role of the WIPO, and the relationship of this with the review of the TRIPS Agreement. We should be active in monitoring and influencing the developments on this proposal.

On access and benefit sharing we should be clear on our strategies. For those of us who want to keep our heritage out of the market we should see what mechanisms and capacities we should develop to achieve this. Some of us who opted for this strategy are now more involved in strengthening the local organizations so that they can assert their right not to allow access to their genetic resources and traditional knowledge. This position has been taken because of increasing biopiracy taking place in our communities where instead of us getting benefits we even have to spend a lot of resources and energy to fight against these.

We have seen experiences where indigenous peoples who entered into some kind of a partnership with biotechnology or pharmaceutical firms, ending up as the gatherers of the raw materials for the corporations. A very unequal kind of relationship has been established between the bioprospectors and the custodians of biodiversity and traditional knowledge.

For those us who decided to be engaged with the market we are strengthening and building mechanisms so that we will get the maximum benefit from the exploitation and use of our biodiversity and knowledge. The experience of the San peoples is one way in which indigenous peoples managed to get an agreement on benefit sharing.

Whether we are engaged with the market or not, we are united to fight against the patenting of life.

We have identified several problems with access and benefit-sharing (ABS) proposals. It is difficult to design ABS policies and laws for the following reasons:

- It is hard to identify who “owns” biodiversity and traditional knowledge. Genetic resources and knowledge on the use of these cut across boundaries whether they are countries, provinces, or municipalities. Benefit-sharing arrangements become highly impractical because many countries and peoples would claim ownership over the same resource.
- Conflicts between national interest and indigenous peoples’ assertion of their right to have control over their resources are always in the picture.
- Even the implementation of free and prior informed consent has been met with many difficulties because there are different standards and criteria used by governments and indigenous peoples and local communities. Governments, corporations, or researchers may claim they obtained FPIC from the communities, but the communities will claim otherwise.
- The potential of benefit-sharing schemes to create conflicts and divisions between communities and within communities is high especially if benefits are just couched in terms of money.

We propose that diverse benefit-sharing schemes be developed. The proposed item to be discussed in COP on benefit-sharing which is the development of an action plan on capacity-building with respect to access and benefit-sharing is a good start. In addition we propose that the Secretariat should make a survey of experiences on access and benefit-sharing, both positive and negative, and lessons can be learned from these which can be shared with indigenous peoples and local communities.

We observed that while much attention has been given to Article 8(j), the related provision Article 10(c) has not been given much attention. This provides that State Parties shall “*protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.*” It would be worthwhile to explore further how to use this Article to strengthen customary laws and systems and traditional knowledge on the conservation and use of biodiversity.

A major focus of the ongoing review of TRIPS has been on the “Review of Article 27.3(b) of the TRIPS Agreement, and the Relationship Between the TRIPS Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge and Folklore”. The proposals from the various groups of countries which were cited earlier were actually on this topic. Since 27.3(b) allows for the patenting of life-forms, which includes plant, animal, micro-organisms, which are all part of biodiversity, it encroaches on the terrain of CBD.

Those who have analysed this issue, say that TRIPS does not support the CBD objectives because the criteria for patentability do not include prior, informed consent or mutually agreed terms for benefit-sharing. The CBD recognizes national sovereignty over genetic resources while the WTO is basically involved in deregulating national laws which are seen to be trade-distortive because they discriminate against foreign countries.

So while the CBD encourages countries to create their biodiversity laws which will regulate the access to their biodiversity and define how benefits can be shared on the use of biodiversity, the WTO is changing national laws to give more rights to transnational corporations (TNCs) and foreign investors and to allow for patenting of life. The operations of TNCs and the liberalization of investments which has allowed the entry of mining companies, loggers, etc. into our territories is causing the rapid erosion of biodiversity and traditional knowledge.

For us, it is clear that there is a conflict between the objectives of the WTO and the CBD. In spite of the limitations of the CBD we would like to see that its objectives are given more priority than those of the WTO. We support the various statements of developing country governments and NGOs which have stressed time and again that the WTO Agreements should not supercede the CBD. In the same manner, we would like to see that the Human Rights bodies having more influence than the trade bodies like the WTO or financial institutions like the World Bank and the IMF.

United Nations bodies

The majority of us who are active in the global arena, have put much of our efforts in the UN bodies dealing mainly with our issues. These are the Working Group on Indigenous Populations, the Working Group to elaborate on a Draft Declaration on Indigenous Peoples, and the UN Permanent Forum on Indigenous Issues. Some of us are also involved with the Organization of American States (OAS) which is also drafting a declaration on the rights of indigenous peoples.

The Draft Declaration has been a centrepiece for many of our efforts because we believe that it is crucial that the UN adopts a Universal Declaration on the Rights of Indigenous Peoples. What we have up to now is a draft which is under negotiation by UN-Member States of the Commission on Human Rights in the Working Group on this.

We are actively participating in this Working Group because we want to ensure that this comes up with a declaration which is similar or even better than the existing Draft which was adopted by the Subcommission on the Prevention of Discrimination and Protection of Minorities in 1993. To us this declaration represents the indivisibility of our civil, political, economic, social and cultural rights.

We note that in paragraph 29 of this Draft the term intellectual property was used. We do not agree that the term “intellectual property” or “intellectual property rights” should be used in any draft on indigenous peoples rights because of the reasons we extensively discussed earlier.

Aside from these bodies, the UN also has appointed a Special Rapporteur who did a *Study on the Protection of the Heritage of Indigenous People*. This study has been finished and a final report was submitted to the Subcommission and is found in UN Ecosoc Document E/CN.4/Sub.2/1995/26.

This report contained in its Annex the Revised Text of the *Principles and Guidelines for the Protection of the Heritage of Indigenous People*. This report rec-

ommended that the General Assembly may adopt a Declaration of Principles and Guidelines on the Heritage of Indigenous Peoples in 1996. It further recommended that a UN technical meeting to propose modalities for the cooperation of relevant UN bodies and specialized agencies in protecting the heritage of indigenous peoples be convened. These recommendations have not been acted upon yet.

The second recommendation is in line with what we proposed earlier. The difference is that we are requesting that the UN Permanent Forum on Indigenous Issues be the body to convene this technical meeting. One of the mandates of the Permanent Forum is to coordinate various UN bodies and specialized agencies so that there will be synergies on how they are addressing indigenous issues. Thus, it is the most appropriate body to do this task. This meeting should ensure the effective participation of indigenous peoples.

The creation of a final draft on a Declaration of Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, can be one output of this technical meeting.

We will present the results of this workshop at the 21st session of the UN Working Group on Indigenous Populations and get the support of the experts and the secretariat to help implement some of the recommendations we have. In particular, we would like them to pursue the recommendations of the Special Rapporteur on Indigenous Peoples' Heritage in coordination with the Permanent Forum and to do studies on the impact of globalization on indigenous peoples, particularly the TRIPS agreement.

6

THE WAY FORWARD

MUCH more needs to be done to strengthen further our capacities to safeguard, protect, and develop our heritage, traditional knowledge and our biodiversity. We propose that this report be used as a discussion piece by indigenous peoples.

The views and proposals presented here can be discussed further and suggestions for improvements or new recommendations and insights can be forwarded to us.

- We agree to organise ourselves into an “Indigenous Peoples Working Group on Heritage, Traditional Knowledge and Biodiversity” and our task is to pursue further the recommendations set forth in this Statement together with other indigenous peoples and support NGOs and experts.
- We will create an e-mail listserve among ourselves which can include those who are interested in actively pursuing discussions and sharing experiences and developments taking place in the communities up to the international level. If we generate resources we may have a simple newsletter which can be disseminated widely.
- We will become active in the campaign against patenting of life-forms and we will cooperate with other peoples’ organizations, farmers groups, scientists, NGOs, etc., who are part of this campaign.

- We will develop popular education and awareness-raising materials on these issues, have them translated into Spanish, and encourage others to translate in their own languages.
- We will hold meetings among ourselves, the frequency at which will be determined by available resources.
- We will continue to engage the active support of our NGO partners in all these endeavours and also the experts whom we invited to participate in this workshop.

BIODIVERSITY, TRADITIONAL KNOWLEDGE AND RIGHTS OF INDIGENOUS PEOPLES

This booklet is a report of the discussions, analyses and conclusions of a “Workshop on Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples” organized by the Tebtebba Foundation in coordination with TWN and GRAIN, held in Geneva, Switzerland, on 3-5 July 2003.

Since a workshop statement with the consensus of all the participants is still being processed, the recommendations in this booklet reflect only the views of the indigenous representatives in the workshop who are engaging with some processes of bodies like the Convention on Biological Diversity (CBD), the World Intellectual Property Organization, and the UN Commission on Sustainable Development and, to a limited extent, the World Trade Organization.

Apart from trying to capture the wealth of experiences of the indigenous peoples of Africa, South America, Asia, the Pacific, the Arctic and North America in safeguarding and perpetuating biodiversity and traditional knowledge, the booklet also attempts to show how these efforts are linked with their overall struggles for their rights as indigenous peoples.

It also highlights their shared experiences on the ground in dealing with issues such as biopiracy, access and benefit sharing and traditional knowledge. It presents their insights on proposals and programs of action from the CBD, the “International Treaty on Plant Genetic Resources” of the Food and Agriculture Organization and UN bodies dealing with indigenous peoples.

It concludes with common views and positions by most of the indigenous participants on how to deal with key problems, and follow-up and joint activities which they can carry out in their communities and organizations.

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TWN INTELLECTUAL PROPERTY RIGHTS SERIES

is a series of papers published by the **Third World Network** to provide a critical analysis of intellectual property rights protection from a Third World perspective. A particular focus is given to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and its implications for developing countries.