

THE RIGHT OF INDIGENOUS PEOPLES TO PERMANENT SOVEREIGNTY OVER GENETIC RESOURCES AND ASSOCIATED INDIGENOUS KNOWLEDGE

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Introduction

Biopiracy and biocolonialism by states, multi-national corporations and other research institutions violate Indigenous peoples inherent right of self-determination, which includes our right to permanent sovereignty over our natural resources. The commercialisation of genes through the application of intellectual property rights law as furthered by the World Intellectual Property Organisation (WIPO) and other United Nations (UN) processes, conflicts with Indigenous Knowledge systems of stewardship and management. The risk of corporate monopolisation over food and other plant genetic resources is further compounded by international trade agreements such as the Trade-Related Intellectual Property (TRIPS) agreement of the World Trade Organisation (WTO), which facilitates the patenting of genes. Indigenous peoples are heavily impacted in this area because they control and occupy lands that are rich in biodiversity, and also maintain Traditional Knowledge about the uses of these resources in their regions. Yet, Indigenous peoples are virtually invisible or marginalised in the global debates about our rights to protect our genetic resources from corporate control. Meanwhile, the Convention on Biological Diversity (CBD), initially hailed as a conservation and sustainable development treaty, has shifted its focus toward defining processes for access and benefit sharing of genetic resources, many of which are drawn from the natural resources that abound in Indigenous territories. Together these international instruments facilitate the theft of biological resources by allowing the 'discoverers' to take and monopolise life forms they had no hand in inventing.

This article will provide a general background on biopiracy in Indigenous territories – the theft of genetic resources and associated Traditional Knowledge – and biocolonialism – the extension of colonisation to the biological resources and knowledge of Indigenous peoples by highlighting case studies of biopiracy from several different Indigenous peoples around the

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world. Furthermore, this article will discuss the failures of the Convention on Biological Diversity to adequately protect the human rights of Indigenous peoples to permanent sovereignty over our natural resources.

I. Biopiracy and Theft of Traditional Knowledge: A New Wave of Colonialism

The genetic diversity that exists within the lands, waters, and territories of Indigenous peoples is threatened by expropriation. These unique genetic resources, which have nurtured the lives of Indigenous peoples for centuries, are sought by the biotechnology industry (both public and private) as it tries to identify genetic material that can be used in the creation of new genetically-engineered plants and animals, and pharmaceutical, nutraceutical, and other potentially profitable products.

A. Case studies on biopiracy in Indigenous territories

Through the application of Western intellectual property law (patents and copyright), corporations are claiming ownership over genes, products, and data derived from genetic resources of Indigenous territories, as well as associated Indigenous Knowledge. This process results in the theft and enclosure of genetic resources developed by nature and centuries of knowledge and practices by Indigenous farmers and pastoralists. The following biopiracy case studies are provided as examples of the biopiracy occurring in Indigenous territories throughout the world.

In the United States, the Anishnabeeg, a Native American peoples whose traditional lands lie in the western part of what is now the State of Minnesota, have opposed the patenting of their sacred manoomin, the wild rice native to their region. NORCAL Wild Rice, a California-based agribusiness owns US Patent number 5955.648 on *zizania palustris*, which uses cytoplasmic genetic male sterility allowing for better commercial production of wild rice. The tribe fears genetically altered wild rice has the potential to contaminate natural wild rice beds, and undercut the markets for naturally harvested and processed wild rice. The Anishnabeeg are exploring options to stem the patenting and genetic alteration of wild rice.¹

In Africa, the San peoples who live around the Kalahari Desert in southern Africa have used the stem of a cactus called hoodia to stave off hunger on long hunting trips. According to their tradition they did not eat while hunting. The cactus attracted the interest of the Western drug company, Phytopharm, based in Cambridgeshire, United Kingdom (UK), which claimed to have discovered a potential cure for obesity derived from the hoodia plant. South Africa's Council for Scientific and Industrial Research (CSIR) sold the development right to Phytopharm, which later patented P57, the appetite-suppressing ingredient in the Hoodia. Phytopharm later sold the rights to

¹ Winona La Duke, 'Wild Rice: Maps, Genes and Patents', *Makoche Reader* 3, Summer 2004.

license the drug for \$21m to Pfizer, the U.S. pharmaceutical giant, without even notifying the San, let alone getting any consent for such transaction. Phytopharm representatives claimed they believed the San peoples that used the Hoodia cactus were extinct. In actuality, the San number 100,000 across South Africa, Botswana, Namibia and Angola.²

After CSIR and Phytopharm were widely criticized for failing to get the consent of the San or recognise the role that the San's knowledge played in identifying the hoodia's ethnobotanical properties, the San peoples recently secured a benefit sharing agreement with South Africa's Council for Scientific and Industrial Research (CSIR) that is widely hailed as a landmark agreement with the potential of earning the San several millions of dollars over the next few years for the use of their knowledge in the commercialisation of the Hoodia plant. One critic notes, however:

The San will receive only a fraction of a percent – less than 0.003% - of net sales. The San's money will come from CSIR's share while the profits received by Phytopharm and Pfizer will remain unchanged.³

Another glaring problem with the contract is that it “explicitly prevents the San from using their knowledge of Hoodia in any other commercial application.”⁴

Indigenous peoples' and farmers' organisations from the Andes protested the US patents on maca, the high-altitude Andean plant (of the Cruciferae [mustard] family) that has been grown for centuries by Indigenous peoples in the Puna highlands of Peru, both as a staple food crop and for medicinal purposes. Efrain Zuniga Molina of the Association of Maca Producers of Valle del Mantaro (Peru) said, "The Andean region is becoming known as the 'biopiracy capital' of the world. We've seen patents on ayahuasca, quinoa, yacon, the nuña popping bean, and now maca"⁵. "These patents claim novel inventions, but everyone knows they are based on the traditional knowledge and resources of indigenous peoples," said Gladis Vila Pihue, a representative of the maca growers association in the Department of Huancavelica (Peru).⁶ Two United States (US) companies, Pure World Botanicals and Biotics Research Corporation hold the three patents related to maca.⁷

Between 1995 and 2000, the Brazilian government estimated that 97 percent of the 4,000 patents taken out on natural products in Brazil were

² Anthony Barnett, “In Africa the Hoodia Cactus Keeps Men Alive. Now Its Secret Is 'Stolen' To Make Us Thin”, *The Observer*, 17 June, 2001.

³ Rachel Wynberg, “Sharing the Crumbs with the San”, Biowatch SA, < www.biowatch.org.za/csir-san.htm >.

⁴ Ibid.

⁵ ETC Group, “Peruvian Framers and Indigenous People Denounce Maca Patents” *Genotype*, 3 July 2002, at < <http://www.etcgroup.org/article.asp?newsid=353> >.

⁶ Ibid.

⁷ Ibid.

requested by foreigners.⁸ Professor Dharani Sundaram from Mato Grosso Federal University says:

The multinationals are plundering everything since Brazil has very weak laws and very often pirates operate hidden behind scientific cooperation projects and eco-tourism. Genetic material samples are illegally taken out of Brazil in just about every way; some have been discovered hidden in the soles of shoes.⁹

In March of 1999, a coalition of Amazonian Indigenous peoples and the Washington, DC-based Centre for International Environmental Law (CIEL) requested cancellation of a patent on ayahuasca granted in 1986 to Loren Miller of the United States. The coalition and CIEL argued the patent variety was neither distinctive nor novel, and that the plant's religious value warranted an exception from patenting. The challenge was successful in getting Miller's patent cancelled. While the coalition and CIEL were precluded by the law from participating in any further re-examination procedures, Miller applied for reconsideration of his patent on the grounds that he had reproduced a 'new' ayahuasca variety and the patent was reinstated. Miller's patent has expired under the seventeen-year patent protection period.¹⁰

A drug called Calanolide A, was originally extracted from the latex of the Bintangor tree which grows in swamps in the Borneo forests. The Dyak people, who live in the jungle in the Malaysian state of Sarawak, use the latex of the Bintangor tree for stunning fish, and the bark for headaches and skin rashes. A pharmacologist working for the United States National Cancer Institute took samples for further research without any consent. Clinical trials show the drug may be effective in the treatment of the AIDS virus and tuberculosis. Even though Calanolide A was discovered before the Convention on Biological Diversity came into effect, the pharmaceutical company that synthesized the drug has entered into a joint venture with the government of Sarawak, promising that 50 per cent of any future profits will return to the government, but not to the Dyak people themselves.¹¹

A recent example of biopiracy came to light in June 2002 when the University of Hawai'i's Marine Bioproducts Engineering Centre (MarBEC) entered into an agreement with Diversa Corporation for biodiversity access and collaboration. The Diversa Corporation engages in bioprospecting, including collecting samples drawn from natural resources and developing the small molecules and enzymes for pharmaceutical, agricultural, chemical and industrial markets. The MarBEC/Diversa Material Transfer Agreement is a contract that gives Diversa the exclusive right to discover genes from existing University of Hawai'i material collections and from environmental samples

⁸ Brazilian Shamans to Discuss Biopiracy, Protection of Practices, Rio de Janeiro, Nov 23, 2001, Agencia EFE S.A., see article at <http://www.grain.org/bio-ipr/?id=63>

⁹ Ibid.

¹⁰ Centre for Environmental International Law, *The Ayahuasca Patent Case*, at <<http://www.ciel.org/Biodiversity/ayahuascapatentcase.html>>

¹¹ Richard Lloyd Parry, "Bio-pirates raid trees in the swamps of Borneo", *The Independent (UK)*, 2 Aug. 2001, <www.earthisland.org/borneo/news/articles/010805article.html>.

collected by the University researchers,¹² with the intent of commercialising the resulting products. Of more than 22,000 known species that inhabit the Hawaiian Islands, 8,850 are found nowhere else in the world. Consequently, Hawai`i and her Indigenous peoples, the Kanaka Maoli, have become a prime target for bioprospecting expeditions seeking new and commercially valuable genetic resources. Diversa considers Hawai`i its ninth biodiversity hotspot.¹³

The State of Hawai`i currently does not have any legislation to regulate bioprospecting nor does the University have any policies to protect the interests of the State or Kanaka Maoli in the natural resources. Kanaka Maoli are very concerned about the University's contract with Diversa because it undermines their recognised rights as equitable title-holders of these resources.

These examples of biopiracy indicate the crucial need for stronger legal regimes to protect Indigenous peoples' rights to make decisions regarding access and use of the genetic resources within their territories. Many people have looked to the Convention on Biological Diversity for guidance in the development of stricter regulations regarding access to genetic resources, however, the following section will explain that this treaty among nation-states not only fails to recognise Indigenous peoples ownership rights to genetic resources, but it has become an instrument to further legitimise the exploitation of genetic resources.

II. Convention on Biological Diversity

As the economic potential of genetic resources began to be realised in the early 1990's, access to genes became a key topic of discussion at the United Nations Conference on Environment in Rio de Janeiro in June 1992, commonly referred to as the Earth Summit. The Earth Summit resulted in an international treaty, the Convention on Biological Diversity (CBD), in which signatory parties agree to ensure the 'conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising from its utilisation.'¹⁴

The CBD makes specific reference to the participation of the participation of 'indigenous and local communities,' therefore, Indigenous peoples have been active participants in the CBD processes over the years, consistently reiterating our fundamental demands for respect and protection of our rights as Peoples. Initially there was great hope that this new global treaty would truly protect the world's biodiversity and respect Indigenous peoples' rights. In recent years, however, it has become evident that the State's interest

¹² 'Material' is defined in the contract as 'soils, sediments, mire, earth, microbial mats and filaments, plants, ecto and endo symbiont microbial communities, endophytes, fungi, animal and/or insect excrement, marine and terrestrial invertebrates, air and water.' The University shall provide to Diversa a minimum of 100 samples per year: See Appendix A of the Agreement, on file with the author.

¹³ See Diversa Corporation's website at < <http://www.diversa.com> >.

¹⁴ Convention on Biological Diversity (CBD), entered into force on 29 December 1993 and at 8 August 2005 has 188 Parties. The CBD's website contains links to the provisions of the Convention, subsequent COP decisions, and other relevant information <www.biodiv.org>

in establishing the international rules for the exploitation of genetic resources has become a primary objective within the CBD. In particular, the CBD has undertaken the mandate to elaborate an international regime on access and benefit sharing. The proposed regime will establish the legal framework and mechanisms that facilitate the commercialisation of genetic resources. While the CBD acknowledges the need to address the exploitation of ethnobotanical and ethnopharmacological knowledge and genetic resources taken from Indigenous peoples without consent nor compensation, the CBD principally considers states as the owners of genetic resources.

A. Background on the CBD relating to access to genetic resources and Traditional Knowledge

The Convention on Biological Diversity (CBD) entered into force on 29 December 1993 and currently has 188 state parties. Article 1 lays out the Convention's three objectives as...

... the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising from the use of genetic resources, including by appropriate access to genetic resources ... , taking into account all rights over those resources'

A framework for the implementation of the third objective (access to genetic resources) is provided in Article 15 of the Convention.

The right of Indigenous peoples to permanent sovereignty over natural resources is particularly threatened by Article 15.1, which states, 'Recognising the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.' Furthermore, Article 15.5 requires that 'access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.' Thus, according to the CBD, sovereign rights to control access to genetic resources are only recognised for the contracting parties, i.e, the States.

In addition, Article 8(j) contains a provision to encourage the equitable sharing of the benefits arising from the utilisation of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity.¹⁵

¹⁵ The full text of Article 8(j) states:

'Each Contracting Party shall, as far as possible and as appropriate:

...

(j) 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 the benefits arising from the utilization of such knowledge, innovations and practices;'

Article 8(j), however, is subject to national legislation. Although 8(j) requires that wider application of Traditional Knowledge, innovations and practices of indigenous and local communities should be ‘with the approval and involvement of the holders of such knowledge, innovations and practices,’ it does not couch it in terms of prior informed consent, as it does for states regarding genetic resources.

By the terms of Article 17 Parties are also under a duty to ‘facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.’ (17.1) Article 17.2 explains that ‘such exchange of information shall include “indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1.” Although there is provision for ‘repatriation of information,’ ‘where feasible’ (17.2), there have been no significant mechanisms or measures to facilitate repatriation of so-called ‘publicly available’ Indigenous knowledge. Indigenous peoples continue to assert that ex-situ Indigenous knowledge is not in the ‘public domain’ as understood under Western intellectual property rights law. In a recently published report of the discussions, analyses and conclusions of the Workshop on Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples, the analysis and concerns of Indigenous peoples regarding the concept of public domain is clearly explained.

Public domain refers to that which is not claimed as private property or that which is commonly known or disclosed. What is categorised 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 privatised 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 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.¹⁶

B. Interplay between the CBD and WIPO

The CBD’s Conference of the Parties (COP) has specifically requested the World Intellectual Property Organisation (WIPO), the primary international organ for the development of intellectual property rights, to prepare submissions on the role of intellectual property in the objectives of the CBD, specifically related to access and benefit sharing and Traditional Knowledge. WIPO prepared a technical study on disclosure requirements related to genetic

¹⁶ Victoria Tauli-Corpuz, *Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples*, 11-12 2003. The workshop summarised in this report was organised by the Tebtebba Foundation in coordination with the Third World Network and GRAIN and was held in Geneva, Switzerland on 3-5 July 2003. Workshop participants included 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.

resources and Traditional Knowledge, which was prepared by the Secretariat of WIPO pursuant to paragraph 4 of decision VI/24 C of COPVI (2002).¹⁷ Many Indigenous peoples oppose the imposition of WIPO's objectives, namely the promotion of international and national legal regimes that establish exclusive rights for individuals for limited time periods (i.e, patents are usually 20-22 years), on to our collective land and knowledge systems. Individual property-based regimes are based on values with which we cannot agree.

In the context of Article 8(j) of the CBD, WIPO proposes intellectual property rights forms of protection over traditional knowledge can be a basis for recognising the contributions of Indigenous peoples. The report on the Workshop on Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples analyses intellectual property rights (IPRs) from an Indigenous perspective. First, IPRs fail to acknowledge that we have our customary systems to safeguard and protect our knowledge.¹⁸

Second, ...

... 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, [and] 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.¹⁹

Finally, the WIPO proposal ...

... does not show the high social costs that come about with the grant 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 monopolisation of control over knowledge and technologies by fewer individuals, countries and corporations.²⁰

Many Indigenous peoples are resolute that 'intellectual property rights cannot and will not adequately protect traditional knowledge.'²¹

A. Development of an International Regime on Access and Benefit Sharing

The COP took a major step towards the development of an international regime on access and benefit sharing at its sixth meeting held in The Hague in April 2002 when 180 Parties adopted the voluntary Bonn Guidelines on Access

¹⁷ UNEP/CBD/WG-ABS/2/INF/4

¹⁸ Tauli-Corpuz, *supra* note 16 at 9.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation.

The Bonn Guidelines are expected to assist parties, governments and other stakeholders in developing overall access and benefit-sharing strategies, and in identifying the steps involved in the process of obtaining access to genetic resources and benefit-sharing. More specifically, the guidelines are intended to help them when establishing legislative, administrative or policy measures on access and benefit-sharing.²²

It is important to note that the vast majority of Indigenous peoples, viewing their participation in the development of the Bonn Guidelines as facilitating biopiracy of their resources and knowledge, made a conscious decision not to actively participate in the discussions on the Bonn Guidelines, and therefore have rejected its application.

Consistent with the CBD's Article 15 relating to national sovereignty over natural resources, the Bonn Guidelines suggest that access to genetic resources be controlled by competent national authorities (see Section IV of the Guidelines). Paragraph 26 states:

The basic principles of a prior informed consent system should include:

...
(d) Consent of the relevant competent national authority(ies) in the provider country. The consent of relevant stakeholders, such as indigenous and local communities, as appropriate to the circumstances and subject to domestic law, should also be obtained.²³

Paragraph 31 further elaborates on this issue by stating:

Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws.²⁴

This language is evidence that the Bonn Guidelines continue to further national sovereignty over natural resources and subject Indigenous peoples' rights to domestic policies and laws. Although the Bonn Guidelines are not binding, the parties do consider them 'a useful first step of an evolutionary process' and may well serve as some basis to a future regime.²⁵

The World Summit on Sustainable Development (WSSD) called for action to 'negotiate, within the framework of the [CBD], bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and

²² < <http://www.biodiv.org/programmes/socio-eco/benefit/bonn.asp> >

²³ Bonn Guidelines, < <http://www.biodiv.org/decisions/default.aspx?m=cop-06&d=24> >

²⁴ Ibid.

²⁵ UNEP/CBD/COP/7/21, Decision VII/19, p. 298, < <http://www.biodiv.org> >.

equitable sharing of benefits arising out of the utilisation of genetic resources.’²⁶ Further, United Nations (UN) General Assembly resolution 57/260 adopted at its fifty-seventh session, invited the COP to take appropriate steps with regard to the commitment made at the WSSD. At the CBD’s Inter-session meeting on the Multi-Year Programme of Work of the Conference of the Parties up to 2010, held in March 2003, a recommendation was made that the Ad Hoc Open-ended Working Group on access and benefit-sharing (ABS Working Group) consider the process, nature, scope, elements and modalities of such an international regime on access and benefit-sharing at its second meeting in December 2003.²⁷ Therefore, the ABS Working Group prepared recommendations on the terms of reference for the negotiation of an international regime, which were submitted to the Conference of the Parties at its seventh meeting (COPVII) in February 2004, in Kuala Lumpur, Malaysia.²⁸

The Parties at COPVII decided that the ABS Working Group would “elaborate and negotiate an international regime on access to genetic resources and benefit sharing with the aim of adopting an instrument/instruments to effectively implement the provisions of Article 15 and Article 8(j).” The Working Group met twice before COPVIII to elaborate the proposed regime within the terms of reference relevant to the nature, scope, and potential elements of the proposed international regime.²⁹

In February 2005, the WGABS-3 met in Bangkok and compiled views and proposals from the different country blocs reflected as various options on the nature, scope, potential objectives and elements of the proposed regime. WGABS-3 also created a matrix, which is a partial analysis of gaps in the CBD and existing international law relevant to ABS.³⁰

The WGABS-4, held in February 2006 in Granada, Spain, began with the African Group’s request to begin discussions from their proposed text drafted as a protocol on ABS (submitted as an information document). Developed countries opposed that proposal, however, and the Working Group consolidated the options previously developed in Bangkok and produced a bracketed text for COPVIII, which reflects the disparate views on the regime from both developing and developed countries’ perspectives on each of the component parts of the proposed regime.³¹

In March 2006, at COPVIII in Curitiba, Brazil, developing countries (Group of Countries of Latin America & the Caribbean - GRULAC, G-77 and China and the African Group) wanted to complete negotiations for a new binding instrument on ABS. The industrialized/developed countries (European Union and JUSCANZ - Japan, USA, Canada, Australia, New Zealand) prefer a

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid, 299.

²⁹ Current Status of the Elaboration and Negotiation of an International Regime on Access and Benefit Sharing, Briefing Paper 1, FSM National Workshop for Multi-Lateral Environmental Agreement Negotiators – April 24-25, 2006 (prepared by Le’a Malia Kanehe, Esq. for SPREP – Pacific Regional Environmental Program) (on file with authors).

³⁰ Ibid. citing UNEP/CBD/WG-ABS/3/L.6, Annex I

³¹ Ibid. citing UNEP/CBD/WG-ABS/3/L.6, Annex II

regime that recognizes the primacy of WTO-TRIPs and WIPO treaties and merely fills gaps in existing laws. As a result of the political impasse between the developing and developed countries, COPVIII decided to reconvene the ABS Working Group twice in the next two-year inter-sessional period before COPIX and instructed the Working Group to continue to elaborate and negotiate the international regime and to complete its work at the earliest possible time before COPX.³² Parties also designated representatives of Canada and Columbia to co-chair the Working Group.

The ABS Working Group will continue its work using the annex developed at its fourth meeting on the nature, scope, objectives and elements, the outcomes of the group of technical experts on the certificate of origin/source/legal provenance, gap analysis and the matrix, and other inputs submitted by Parties. COPVIII also invited Parties to submit information on the legal status of genetic resources in their national law, including their property law where applicable, and requested the Executive Secretary to submit a report to the WGABS-5.

Recognising that an international certificate of origin/source/legal provenance could be a major element of an international regime on ABS, COPVIII decided to “establish a group of technical experts to explore and elaborate possible options . . . for the form, intent and functioning of an internationally recognised certificate of origin/source/legal provenance and analyse its practicality, feasibility, costs and benefits, with a view to achieving the objectives of Articles 15 and 8(j).”³³ The group of experts will be regionally balanced and composed of 25 experts nominated by Parties and 7 observers from, inter alia, indigenous and local communities, industry, research institutions/academia, botanical gardens, other ex-situ collection holders and representatives from relevant international organizations and agreements.

Although Indigenous peoples are only considered observers at the COP, we lobby vehemently that our rights must be recognised throughout the elaboration of the international regime. At COPVII, Canada and Australia blocked language that had the agreement of the other states proposed by the EU that the international regime shall recognise the rights of Indigenous peoples. In the end, the preambular language adopted states that ‘the international regime should recognise and shall respect the rights of indigenous and local communities.’³⁴

Indigenous peoples have successfully lobbied for the inclusion of international human rights law contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights to be considered in a long list of other instruments and processes as possible elements to be included in the international regime. Although this reference to human rights instruments provided some hope for a lobbying foothold in the future meetings, there has been no commitment from Parties that the regime

³² *Ibid.* citing UNEP/CBD/COP/8/L.34, Part A, para 6 and 7.

³³ *Ibid.* citing UNEP/CBD/WG-ABS/4/L.2

³⁴ UNEP/CBD/COP/7/21, Decision VII/19, p. 299, < <http://www.biodiv.org> >

will be consistent with international human rights law. Through two meetings of the Working Group and COPVIII states have failed to discuss how the proposed regime will recognize both territorial and traditional knowledge rights of Indigenous peoples. At CBD meetings, Indigenous peoples advocate that Article 22.1³⁵ of the Convention relating to relationship with other international conventions requires that the decisions of the COP must be consistent with international human rights law.

III. Indigenous Peoples Right of Self-Determination over Genetic Resources

Indigenous peoples have never abandoned our distinct identities and right of self-determination despite the dehumanising and destructive forces of colonisation. We continue to maintain our collective resources for our collective good. We maintain and protect biologically diverse ecosystems that have nurtured our survival in the past and are essential to our survival in the future. At the same time, it has become evident that the global hunger for biological resources poses a disproportionate threat to the resources and knowledge systems of Indigenous peoples. Meanwhile, western intellectual property rights threaten to displace pre-existing Indigenous systems for the protection of knowledge and resources. One author describes the conflict succinctly:

In particular, there is a very serious question whether the category 'property,' or the historically contingent and individualistic notion of property that has arisen in the West, is even appropriate when discussing things like agricultural practices, cell lines, seed plasm, and oral narratives that belong to communities rather than individuals. If we are not capable of acknowledging the existence of different life-worlds and ways of envisioning human beings; relationship to the natural world in our intellectual property laws, then unfortunately, it may be late in the day for biodiversity and hopes for a genuinely multicultural world.³⁶

The International Covenant on Civil and Political Rights Article 1(1)³⁷ and the International Covenant on Economic, Social and Cultural Rights, Article 1 (1)³⁸ state, 'All 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.' Despite the existence of these

³⁵ Article 22.1 states: 'The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreements, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity.'

³⁶ Keith Aoki, 'Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection', *Indian Journal of Global Legal Studies*, Volume 6, Issue 1, Fall 1999.

³⁷ International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, entered into force Mar. 23, 1976, 999 U.N.T.S. 171

³⁸ International Covenant on Economic, Social and Cultural Rights adopted Dec. 19, 1966, entered into force Jan. 3, 1976, 999 U.N.T.S. 3

international standards, it is widely recognised that states often deny or diminish the ability of Indigenous peoples to exercise the right of self-determination. Nevertheless, the right of self-determination is the fundamental premise upon which Indigenous peoples have asserted our proprietary, inherent, and inalienable rights over our Traditional Knowledge and biological resources.

Several international human rights instruments recognise the collective nature of Indigenous peoples' rights of self-determination, including the United Nations Draft Declaration on the Rights of Indigenous Peoples³⁹ and the Draft American Declaration on the Rights of Indigenous Peoples of the Organisation of American States.⁴⁰

By far, the UN Draft Declaration on the Rights of Indigenous Peoples is the international instrument that is the most representative of Indigenous thought and participation,⁴¹ and constitutes the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.⁴² The Declaration states, 'Indigenous peoples have the right to own, develop, control and use the lands and territories...which they have traditionally owned or otherwise occupied or used.'⁴³ Article 29 further states:

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.⁴⁴

In the final report of the Special Rapporteur, Madame Erica Irene A. Daes, on Permanent Sovereignty of Indigenous Peoples over their Natural Resources, she finds that:

... the developments during the past decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally

³⁹ United Nations Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 of 20 April 1994 (Article 42). At the UN Commission on Human Rights, Indigenous peoples have developed and lobbied for the approval of the Draft Declaration on the Rights of Indigenous Peoples which has not yet been adopted because of opposition primarily by developed countries such as the United States, Canada, Australia, and New Zealand.

⁴⁰ Proposed American Declaration On The Rights Of Indigenous Peoples. Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 133rd session, 95th regular session), AG/RES. 1479 (XXVII-O/97)

⁴¹ Sharon Helen Venne, 'Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights', 1998, Theytus Books Ltd, Canada, 137.

⁴² Ibid.

⁴³ United Nations Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1994/2/Add.1 of 20 April 1994: Article 26.

⁴⁴ Ibid Article 29.

use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories.⁴⁵

Special Rapporteur Daes further finds that genetic resources are among the natural resources belonging to Indigenous peoples.⁴⁶ In relation to the right of permanent sovereignty over natural resources of Indigenous peoples, Special Rapporteur Daes concludes 'it is a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.'⁴⁷

For over a decade, Indigenous peoples have consistently asserted their right of self-determination to exercise all the incidents of ownership over their natural resources. For example, in 1992, Indigenous peoples gathered at the Earth Summit issued the Indigenous Peoples' Earth Charter, known as The Kari-o-ca Declaration, which states, in part:

We, the Indigenous peoples, maintain our inherent rights to self-determination. We have always had the right to decide our own forms of government, to use our own laws, to raise and educate our children, to our own cultural identity without interference. ...We maintain our inalienable rights to our lands and territories, to all our resources -- above and below -- and to our waters. We assert our ongoing responsibility to pass these onto the future generations.⁴⁸

In response to the University of Hawai'i-Diversa Corporation contract circumventing their rights, the Kanaka Maoli have taken action to combat the biopiracy occurring in the Hawaiian Archipelago. The first step they took was to develop resolutions and declarations to solidify their position against biopiracy. They have successfully passed two resolutions from one of their largest, local grassroots Kanaka Maoli organisations, the Association of Hawaiian Civic Clubs. The first of these resolutions passed in 2002 urges the State to place a moratorium on all bioprospecting expeditions being undertaken in areas under the State's jurisdiction until such time as appropriate legislation could be enacted.⁴⁹ The second resolution, passed in 2003, articulates their collective rights to their Traditional Knowledge and calls for protective state legislation.⁵⁰

As a result of Ka 'Aha Pono – Native Hawaiian Intellectual Property Rights Conference, held in October 2003, a unifying declaration statement known as the *Paoakalani Declaration* was produced by the participants of the conference:

⁴⁵ *Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, Final Report of the Special Rapporteur, Erica-Irene A. Daes, E/CN.4/Sub.2/2004/30, para. 39, July 13, 2004.

⁴⁶ Ibid, para. 42.

⁴⁷ Ibid, para 40.

⁴⁸ Kari-O-ca Declaration and the Indigenous Peoples' Earth Charter, *The World Conference of Indigenous Peoples on Territory, Environment and Development*, 25–30 May 1992.

⁴⁹ Association of Hawaiian Civic Clubs Resolution 02-08, November 2002: on file with author.

⁵⁰ Association of Hawaiian Civic Clubs Resolution Resolution 03-13, November 2003: on file with author.

... to express our collective right of self-determination to perpetuate our culture under threat of theft and commercialisation of the traditional knowledge of Kanaka Maoli, our *wahi pana* [sacred sites] and *na mea Hawai'i* [all things Kanaka Maoli].⁵¹

In a section pertaining to scientific research, the Paoakalani Declaration states that Kanaka Maoli:

... support a moratorium on patenting, licensing, sale or transfer of any of our plants, animals, and other biological resources derived from the natural resources of our lands, submerged lands, waters, and oceans until indigenous communities have developed appropriate protection and conservation mechanisms.⁵²

Many Indigenous peoples fear the global discussions on sustainable development and poverty alleviation are now being replaced with discussions about new rules and mechanisms for the abject exploitation of genetic resources. Indigenous groups are asserting their own rights to take proactive measures to protect human rights themselves and their territories by controlling research. The *Indigenous Research Protection Act*, developed by the Indigenous Peoples Council on Biocolonialism, helps native governments protect their citizenry and territories against unwanted research by asserting their right of self-determination to regulate research within the territories under their legal jurisdiction.⁵³

Conclusion

Increasingly, states are asserting that their obligations in intellectual property rights treaties and trade agreements and now agreements for the access to genetic resources and Traditional Knowledge may supercede their international duties to uphold the human rights of Indigenous peoples. Efforts to globalise intellectual property rights and harmonise national legislation accordingly cannot in any way diminish the fundamental right of all peoples of self-determination, nor justify claims by states to deny our right to permanent sovereignty over our natural resources. If sovereignty over our natural resources is to mean anything at all, it must mean that Indigenous peoples are the only competent authorities to control access to and use of the genetic resources within our territories and associated Indigenous Knowledge.

It is important that expert opinions external to the CBD framework consider this issue. As WIPO, WTO, CBD and corporations steamroll ahead with their global agenda to commercialise life forms and genetic resources, the human rights bodies of the UN must serve as a check and balance and provide expert legal opinions that affirm the rights of Indigenous peoples. Most importantly, however, Indigenous peoples must continue to exercise their right of self-determination and concomitant right of permanent

⁵¹ Paoakalani Declaration, Oct. 2003, see: < <http://www.ilio.org> >.

⁵² Ibid, Article 21.

⁵³ See: < www.ipcb.org >

sovereignty over the natural resources within their traditional territories to take firm stands against misappropriations of their genetic resources and associated Traditional Knowledge.