



**THE CONVENTION ON BIOLOGICAL
DIVERSITY'S INTERNATIONAL REGIME ON
ACCESS & BENEFIT SHARING:
BACKGROUND & CONSIDERATIONS
FOR INDIGENOUS PEOPLES**



Te Ara Kino by Theresa Reihana (Ngati Hine – Maori of Aotearoa/New Zealand)

COVER

Te Ara Kino

Any person that actually believes that genetic modification is a great leap forward for humankind is either not fully educated on the issue or has forgotten or never known the base principles and sanctity of life. We cannot create new life as a sacrifice to save a life. We cannot own its genetic structure.

Our Whenua (land) is our life. Without it we will not survive. Food production is now a revolving arsenal of fertilizers, sprays and faster, cheaper labourless alternatives. The cost is in the land and the waterways. It is not effective and it is not efficient, it is a hidden time bomb and its clues can be seen on the land, in the hospitals and in the statistics.

Genetic modification will never feed the world, but it will make the rich even richer.

Tikanga is the correct customs or rules. Genetic modification is not our tikanga.

The carved woman is a Kaitiaki or guardian. She is me, or you. How can we protect and nurture that of which is precious and life sustaining when our hands are tied. What use is one acre of organic and clean land when the neighboring 10,000 acres is not? The hue (gourds) representing whakapapa (genealogy), whenua (land), and tikanga (correct customs) were used as preserving and carrying vessels and they contain sacred elements of life. They are breaking. All have the one barcode, as they are all one.

- Theresa Reihana (Ngati Hine – Maori of Aotearoa/New Zealand) www.maoriartist.com/index.html

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The **Indigenous Peoples Council on Biocolonialism (IPCB)**, is an Indigenous peoples' organization based on the Pyramid Lake Paiute Reservation in Nevada, USA (www.ipcb.org). IPCB was created to assist Indigenous peoples in the protection of their genetic resources, Indigenous knowledge, and cultural and human rights from the negative effects of biotechnology. This briefing paper is intended to assist Indigenous peoples to more fully and effectively participate in local, national and international contexts where access to genetic resources and traditional knowledge and benefit sharing is discussed. The first publication has been prepared for the Eighth Meeting of the Conference of the Parties to the Convention on Biological Diversity where governments will negotiate an international regime to govern the buying and selling of genes.

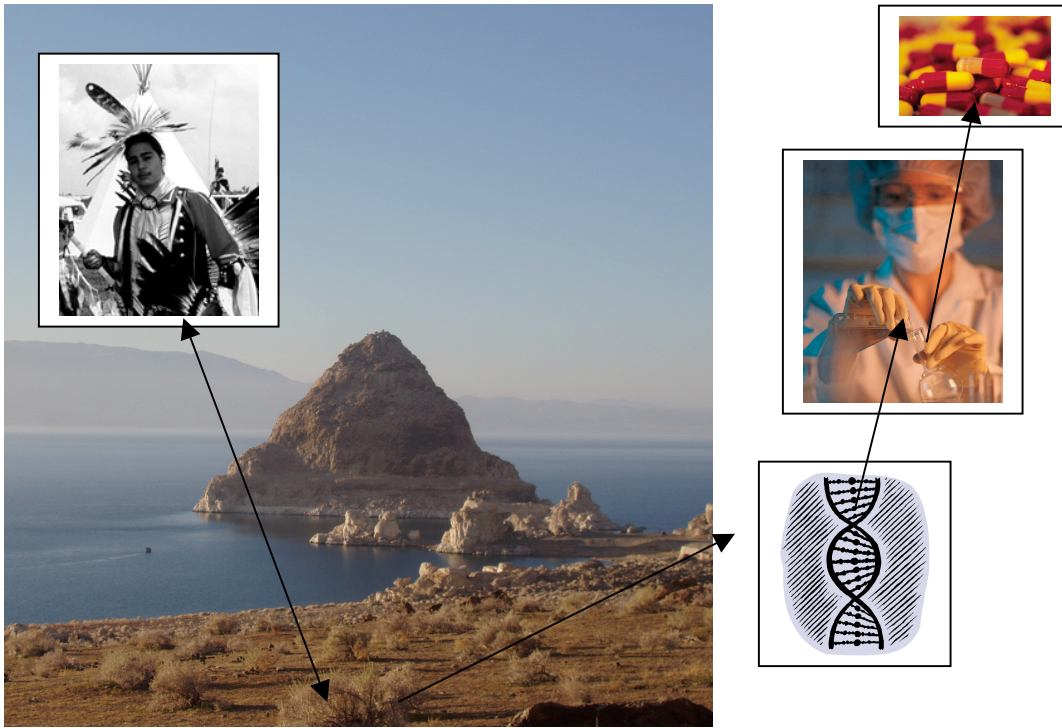
Understanding Terminology: What is ABS (Access and Benefit Sharing)? What are genetic resources?

ABS is CBD terminology for **bioprospecting** activity under taken by corporate, academic, government or independent researchers to find commercially valuable genes within plants, animals or microorganisms and use them for pharmaceutical, chemical, agricultural, or industrial uses. Often researchers follow leads from Indigenous peoples' **traditional knowledge (TK)** about where to find and how to use such plants or animals for medicinal, agricultural or other purposes. Indigenous peoples have known this bioprospecting as **biopiracy** – the theft of Indigenous peoples' knowledge and biodiversity. Developing countries, primarily in the South, are home to tremendous biodiversity, which industrialized countries of the North are seeking to research, develop into new products, and commercialize. The tension between industrialized/developed and developing, biodiverse-rich states over biopiracy has led to “fair and equitable sharing of the benefits arising out of the utilization of genetic resources” as one of three primary objectives of the CBD. Many Indigenous peoples recognize biopiracy as biocolonialism – the extension of the old processes of colonization, including exploitation of Indigenous peoples and our natural resources and imposition of foreign laws, to biodiversity.

BIOPIRACY/BIOCOLONIALISM TIMELINE

- **Western contact - 1992** (Rampant Biopiracy)
- Colonization of Indigenous Territories
- **1992-2002** (Biopiracy continues)
= CBD - “fair & equitable sharing of benefits” & state sovereignty over genetic resources, prior informed consent and mutually agreed terms of national authority
= Some national ABS legislations developed
- **2002-present** (Biopiracy continues) – Conference of the Parties 6 adopt voluntary Bonn Guidelines for ABS
- **2006** – Conference of the Parties 8 = International Regime on ABS
- Biopiracy continues in indigenous territories, but is legitimized by compensating developing countries that consent to providing genetic material

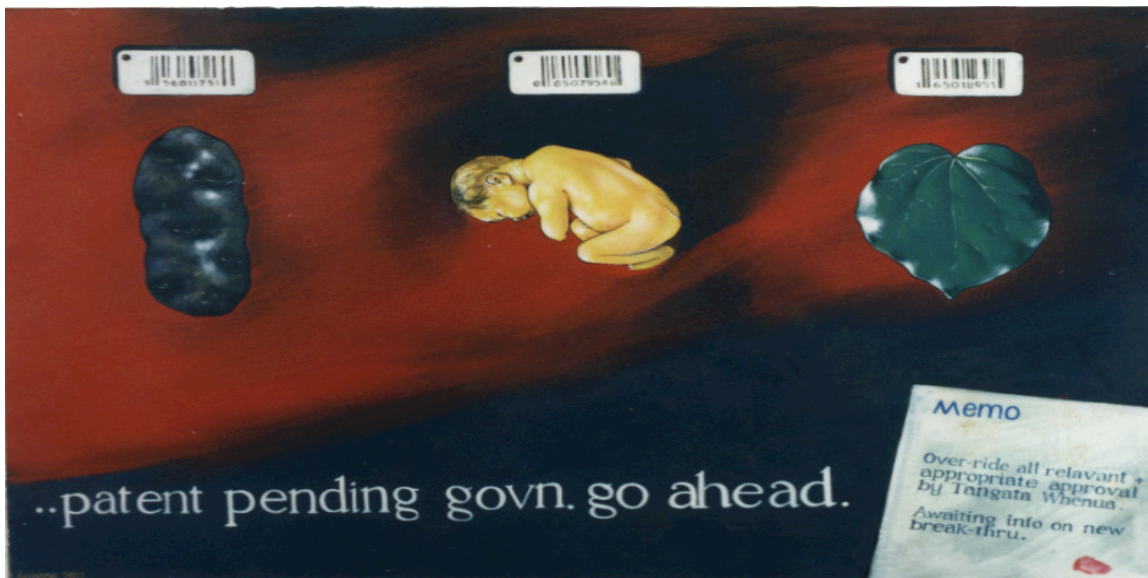
Specifically, ABS refers to **access to genetic resources and benefit sharing** arising from the utilization of such genetic resources. “**Genetic resources**” refers to the genes that make up every living organism, which are seen as resources that can be bought and sold. The “**access**” referred to in ABS refers to obtaining both genetic resources and associated traditional knowledge for the purpose of research and development of a pharmaceutical, chemical, agricultural or other product with hopes of commercialization.



Flow of genes and Indigenous knowledge out of Indigenous territories.

Under the CBD, states are recognized as sovereign over natural resources within their boundaries, and therefore, each state has the right to control access to the genetic resources within their country, which is known as “**prior informed consent**” (PIC). Each state also has a right to benefit from sharing their genetic resources. Under the CBD, the terms of how genetic material and profits, research opportunities, or other benefits will be shared, is supposed to be according to **mutually agreed terms (MAT)** of both the providing country and the user country.

Benefit sharing refers to the monetary compensation or non-monetary benefits (i.e, research opportunities) that the researchers and biotechnology companies are expected to share with the country that provided the genetic resource, or the Indigenous peoples whose traditional knowledge was used, to lead the researchers to a new product. During the research and development phase, scientists isolate genetic traits and proteins that create such traits within an organism. In this process, academic or other public research institutions and biotech companies claim invention over the isolated genes and obtain **patents** – an intellectual property right that confers ownership over the claimed “invention” and grants the patent holder the exclusive right for approximately 20 years to commercialize the invention. The biotech industry claims that without patents, there will be no profits, and therefore, not benefits to share. For many years, Indigenous peoples and civil society have asserted there should be no patents on life.



PATENT PENDING by Theresa Reihana (Ngati Hine - Maori). This painting shows how life is being patented, named and labeled and given numbers, ready for sale. Tangata whenua (indigenous peoples) all over the world have been opposing the patenting of life.

What is the international regime on ABS?

In addition to concerns about conservation and sustainable use of biodiversity, complaints of biopiracy by biodiverse-rich developing states, led to the creation of the CBD, as a treaty that would require those that are profiting from the exploitation of genetic resources and TK to give back to the countries and peoples from whence the genetic material and TK came. In 2002, the Parties, at COP6 adopted the voluntary **Bonn Guidelines** to serve as a model to assist development of national legislation for ABS. Also in 2002, developing countries at the World Summit on Sustainable Development called for an international regime on ABS. In 2004, COP7 decided to begin the elaboration and negotiation of this international regime.

Many Indigenous peoples see the proposed international regime as an attempt to legalize biopiracy under the guise of compensation, i.e, sharing benefits resulting from the patenting and commercializing of TK associated to genetic resources, genes, products of genes, and their derivatives. Although states are somewhat willing to share benefits derived from the use of TK associated with genetic resources, they ignore Indigenous peoples' rights to the genetic resources arising in our own territories.

In 2004, COP7 mandated the Working Group on ABS (WGABS) to elaborate and negotiate this international regime for later adoption by COP. The regime is proposed to facilitate access to both genetic resources and TK associated to genetic resources for the purpose of commercialization, with the alleged goal of sharing benefits, which may be both monetary (such as a % of profits) & non-monetary (such as collaborative research or technology transfer). COP7 created the terms of reference for this negotiation, specifically with regards to the nature, scope, and potential elements of the proposed international regime (VII/19D, annex). At WGABS-3 (Feb. 2005) and WGABS-4 (Feb.

2006), the Parties elaborated on each of those components of the proposed international regime and have forwarded to COP8 a bracketed text for negotiation.

Who are the power brokers and what are their objectives?

- The **Like Minded Mega-Diverse** countries (most Latin America, South Asian & Asian countries) and **the African Group** want a new binding treaty at COP8. These countries are often described as “**countries of origin**” or “**provider countries.**”
- The industrialized/developed countries (**EU, JUSCANZ**, including Canada, Australia, New Zealand, Japan, USA) prefer a non-binding regime, and want to prolong the process of elaboration of negotiation by asserting a need for gap analysis in existing laws. These countries are often referred to as “**user countries,**” but can also be countries of origin and/or providers. JUSCANZ, in the interest of Industry, assert the primacy of the WTO TRIPs Agreement and WIPO patent treaties over the CBD as far as regulating patents.
- **Industry** (i.e, biotechnology corporations) are the primary beneficiaries of intellectual property rights over genetic resources and commercialization. Industry wants predictable guidelines for bi-lateral contracts and view burdensome regulation as a bar to access and also a limit to the amount of benefits that can be generated.

What rights do Indigenous peoples have within the proposed international regime?

COP7 reaffirmed Article 15.1 of the CBD, stating that, “the sovereign rights of States over their natural resources and that the authority to determine access to genetic resources rests with the national Governments and is subject to national legislation.” This language sets a dangerous starting point for future negotiation of the regime, because states assert that they have absolute sovereignty over genetic resources, therefore, the countries do not recognize Indigenous peoples’ rights to control access to our own territories.

The CBD does not refer to us as “Indigenous *peoples*” per se. Rather, we are known as “indigenous communities,” which means that we are not accorded full recognition as *peoples* under international human rights law.¹ This also means that Parties are failing to live up to their legal obligations to comport with international law. (See Annex for a brief listing of relevant international human rights law). Indigenous peoples and local communities are considered “traditional knowledge holders” or “stakeholders,” but not “rights holders.” In the CBD system, we are merely considered affected third parties and only mere observers in the process. Nevertheless, the IIFB has consistently insisted that the international regime *shall* recognize the rights of Indigenous peoples, with no qualifications. But, the COP7 decision merely states that, “the international regime *should recognize* and *shall respect* the rights of indigenous and local communities.” Because the regime is still only proposed, is still under negotiation by the Parties, and therefore, does not exist yet, Indigenous peoples do not have any assurance that our rights will be recognized within it. Therefore, the IIFB has maintained that it is premature to take a position on whether the regime should be binding or not.

¹ Including Charter of the United Nations (1945); International Covenant on Economic, Social and Cultural Rights & International Covenant on Civil and Political Rights (Adopted 1966, into force 1976).

Although we have stated that we have serious concerns with the international regime, we still maintain our need to have full and effective participation throughout the CBD's ABS discussions. Therefore, the IIFB has put forward proposals to improve participatory mechanisms in the Working Group on Access and Benefit Sharing.



At Working Group ABS-3 (Bangkok 2005), the IIFB lobbied co-chairs from Namibia and Australia to request to be allowed to participate in a contact group. Photo courtesy of ENB.

Possible elements of the proposed international regime, which are relevant to Indigenous peoples

COP7 elaborated five possible elements related to Indigenous peoples (VII/19D annex), but they are all limited to our rights related to TK, which includes:

- (x) Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources, in accordance with Article 8(j).
- (xiv) Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights.
- (xv) Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located.
- (xvi) Customary law and traditional cultural practices of indigenous and local communities.
- (xviii) Code of ethics/code of conduct/models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities.

It should be noted that COP7 mandated WG8j and WGABS to collaborate, ostensibly to make recommendations on how to implement such elements related to TK, but have, thus far, failed to make any such contribution for consideration by COP8.

At ABS-3 (February 2005), the EU agreed to support the IIFB text recommendation related to TK, and introduced an option that one of the potential objectives should be to:

- (vii) *Protect the rights of indigenous and local communities to their traditional knowledge related to genetic resources consistent with international human rights obligations.*

Similar language has been forwarded to COP8 for consideration, but it remains in brackets, meaning it is up for negotiation and could be deleted.

Also at ABS-3, in order to facilitate negotiation, the Parties decided to list other potential additional elements that COP could consider that were not already addressed in the COP7 list of elements to be considered. Two of the IIFB and Indigenous Women's Biodiversity Network (IWBN) recommendations from ABS-3 were unfortunately discarded at ABS-4 (February 2006):

- Measures to ensure recognition and protection of the rights of indigenous women as holders and protectors of traditional knowledge and genetic resources
- Measures to protect the rights of indigenous peoples to the genetic resources originating in indigenous lands and territories.

IIFB Positions

The Indigenous Forum has consistently stated that we do not participate in the CBD work on ABS to facilitate access to our TK nor the genetic resources in our territories. However, where the proposed international regime asserts to address Indigenous knowledge and resources, we must protect our rights. The IIFB has stated,

Our rights are not negotiable; our rights are inherent and inalienable and recognized in international human rights law. (Working Group ABS-4, Granada, Jan. – Feb. 2006)

We are rights holders to our TK and genetic resources originating in our lands and territories, therefore, we will continue to defend our fundamental human right of self-determination and the corresponding right of permanent sovereignty over natural resources as the fundamental premise upon which Indigenous peoples have asserted our proprietary, inherent, and inalienable rights over our TK and natural resources, including genetic resources. (Working Group ABS-3, Bangkok, February 2005)

The IIFB has made several interventions asserting that international human rights law recognizes that states do not have absolute sovereignty over natural resources. In particular, we stated that,

State sovereignty does not amount to absolute political or legal freedom. Sovereignty of states is limited by the Charter of the United Nations and by other principles of international law, such as human rights treaties...The CBD should remain mindful of, and act consistently with, existing and evolving human rights standards regarding Indigenous peoples. (Working Group ABS-3, Bangkok, February 2005)

See Annex for selected human rights law relevant to ABS.

Understanding terminology: What do states mean by “protection” of traditional knowledge within the international regime? What do indigenous peoples mean by “protection of traditional knowledge?”

Protection, from an intellectual property law perspective, means that the owner of a patent, a copyright, a trademark or some other piece of intellectual property has a legal right to exclude others from using or reproducing it. The IPR forms of protection for intellectual creations and innovations are time limited, individualistic, monopolistic and

exist for economic benefit. When the states' say they are willing to protect TK, they mean within the context of commercialization.

By contrast, when most Indigenous peoples speak of protecting Indigenous knowledge, we mean it in a much broader sense that includes safeguarding its continued existence and development and protecting the whole social, economic, cultural and spiritual context of that knowledge. Indigenous peoples are seeking mechanisms that protect the holistic, inalienable, collective, and perpetual nature of Indigenous knowledge systems for purposes far more expansive than profit motives.

The World Intellectual Property Organization (WIPO) and CBD proposals for the protection of TK are termed as either “positive” or “defensive” protection. “**Defensive protection**” refers to amendment of existing law or regulatory procedures that would help prevent unauthorized IPR claims. For example, **databases of TK** established for the purpose of documenting TK are proposed as a way to facilitate patent offices’ prior art searches and thereby, limit the scope of a patent claim so it would not extend to TK. At WG8j-3, the IIFB stated that,

Databases of traditional and associated biological knowledge could be a means to facilitate access by external entities, making traditional knowledge vulnerable to exploitation. Further, databases and registries have not yet proven useful as a means to effectively stop the granting of patents on products derived from IK and genetic resources. Traditional knowledge is dynamic, not static and cannot simply be documented and “fixed in a tangible form” to suit intellectual property law standards.

Another proposal for defensive protection is to require **disclosure of the origin of genetic resources and/or TK** relevant to the inventions claimed in patent applications. Developing states want disclosure of origin within a patent application in order to identify the legitimate country of origin or other provider of genetic resources or originators of knowledge that have provided a lead to the creation of a product. Ultimately, disclosure requirements may assist with legitimating countries of origin, provider countries or TK holders’ claims to a share in the benefits of commercialization that would otherwise unfairly benefit corporations that develop and market the commercial product. Under the proposed **certificate of origin** system, patent applicants (i.e, inventors/corporations) would have to obtain official documentation from countries of origin and/or provider countries that genetic resources and/or TK was acquired in accordance with national access and benefit sharing (ABS) regulations requiring prior informed consent (PIC) and benefit sharing. These proposed certificates serve as a stamp of approval to proceed with commercialization.

At ABS-3 & 4, the IIFB decided not to take a position on certificates of origin because it is, at this stage, only conceptual. The general consensus within the IIFB was that Indigenous peoples need more information, which will require practical experience with such disclosure measures. In particular, there are many complexities of how to practically certify the origins of intangible heritage, especially where knowledge may be shared among several communities and may have a transboundary nature. Certification also raises the question of who can legitimately assert an ownership right to TK?

“Positive protection” is understood as TK holders acquiring an IPR or some alternative right created under a new *sui generis* system, such as recording TK in a **register**. Registers differ from databases in that they do not merely compile and list information, rather registration records a claim to the TK in order for the registrant to gain legal rights. The register itself does not grant any rights as such, but would work in tandem with a *sui generis* law that recognizes the registrant as the legal rights holder to such knowledge. Registers and certificates of origin of TK could work together whereby the certifying authority, which at this point is proposed to be a national government agency, could look to a register of TK for the legal knowledge holder. Some Parties have also proposed developing international registry or database of TK, however, the IIFB has strongly opposed this proposal, and it was dropped from WG8j recommendations going to COP8.

No matter the model, each of these proposals would only provide “protection” to TK within a commercial context, albeit under presumably fair and equitable terms. The states’ push to develop IPR-based mechanisms to “protect” IK actually poses much more threat to our knowledge, as a whole, than it can ever claim to prevent.

What benefit is benefit sharing? What does it mean to commercialize Indigenous knowledge and genetic resources?

Within the international regime on access and benefit sharing, the pervasive proposal to Indigenous peoples is that we should accept benefit-sharing arising from the utilization of our TK associated to genetic resources. Although the Parties propose an economic inducement to participate in benefit sharing agreements, Indigenous peoples must carefully evaluate the political, social, and cultural costs of participating in the commercialization of our knowledge and genetic resources.

The offer of benefit-sharing without prior recognition of our right of self-determination to decide whether we allow access to genetic materials within our lands and waters stands to jeopardize Indigenous communities by bribing them to sell, not only their genetic material, but also their TK associated with those natural resources.

It must be stressed here that in the proposed international regime, states offer Indigenous peoples benefit sharing for the use of their TK, but not genetic resources. In the commercialization process of genetic resources, TK is proportionately small in the profit scale. While TK may help identify potentially profitable genetic resources, it is the patent or IPR holders who will truly benefit from any innovation, product, or processes resulting from the exploitation of the genetic resource. Although the TK that led to the invention should be identified as part of the prior art, because TK is prior knowledge, as opposed to a new invention, it should not be included in the patent or other IPR claim. Thus, the value of the TK, if acknowledged at all, will likely be considered a minimal contribution to the commercialization process of genetic resources as compared to the innovation contributed by the inventor/researcher to create a new product. The end result for Indigenous peoples is minimal benefits at the expense of alienating our TK.

Indigenous peoples must also be aware that there is a growing proportion of patents being

claimed over **microorganisms**, especially those referred to as “**extremophiles**,” which are sought by Industry for their genetic traits that allow these organisms to survive in extremely cold or hot environments, such as in the deep sea, icebergs, geysers, geothermal or hydrothermal vents, for chemical application. Industry asserts that where microorganisms are used, there is generally no tie to TK associated to that class of genetic material, consequently, there will be no requirement for benefit sharing with Indigenous peoples, even though those microorganisms may have been collected in our territories.



One biotech company, Diversa Corporation, has sought access to microbes that thrive in extremely hot environments such as hot springs in Yellowstone National Park, US and volcano vents in Hawai`i.

Benefit-sharing arrangements are often promoted as a means of “poverty alleviation,” without regard to the political, social and cultural costs/impacts to Indigenous peoples. It is difficult to see how benefit sharing agreements that allow for the monopolization and alienation of TK and genetic resources can be of any meaningful long-term benefit to Indigenous peoples. Certainly, there will be a promise of some potential income, which could make a difference in the lives of those terribly lacking in economic resources. But, at what cost? In the end, the benefits that come to Indigenous peoples are likely to be quite insignificant compared to those reaped by the industry, academic, and other research institutions with which they are dealing.

By virtue of their inherent right of self-determination, it is of course, the prerogative of each Indigenous peoples/tribe/nation to make their own decisions about benefit sharing agreements consistent with economic development rights. Inevitably, some will decide to enter into such arrangements. Those who make such decisions, whether or not they recognize it, will be accepting western legal frameworks and concepts that do not respect Indigenous laws and customs, and which, in essence, may compromise their right of self-determination by permanently alienating resources and knowledge.

Recommendation:

1. The Executive Secretary consult with appropriate UN human rights bodies and experts to provide accurate information and analysis about the rights of Indigenous peoples over our natural resources, including as it relates to access to genetic resources originating in Indigenous peoples lands and territories traditional used and occupied. In a similar manner of collaboration as the CBD seeks expert advice from WIPO on intellectual property issues, the CBD should seek expert advice from, *inter alia*, the Sub-Commission on the Promotion and Protection of Human Rights, the Committee on the Elimination of Racial Discrimination, the United Nations Permanent Forum on Indigenous Issues, the Working Group on Indigenous Populations, and appropriate human rights special rapporteurs.
2. The COP must adopt specific text that **“Parties shall recognize and respect the rights of Indigenous peoples.”** Further, this recognition and respect must become operationalized in all future negotiations and implementation of the proposed international regime on ABS.
3. In light of the fact that Parties refuse to recognize Indigenous peoples’ rights consistent with international human rights law, the IIFB should, therefore, reaffirm its position not to engage in negotiations in a process that merely seeks to facilitate access to, and commercialize, our genetic resources and TK. We must not be co-opted into such a process that derogates our rights, thereby contributing to our own exploitation.

ANNEX

Selected Relevant Human Rights Law Related to the Proposed International Regime on Access (to genetic resources & traditional knowledge) & Benefit Sharing

Convention on Biological Diversity

Art. 3 – States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment or other States or of areas beyond the limits of national jurisdiction.

Art. 22 – The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

Charter of the United Nations

The Purposes of the United Nations are:

Art. 1.2 – To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Art. 103 – In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Universal Declaration of Human Rights

The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Art. 2 – Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind . . . Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non self-governing or under any other limitation of sovereignty.

International Covenant on Civil & Political Rights – ICCPR/International Covenant on Economic Social and Cultural Rights – ICESCR

1.1 – 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.

1.2 - All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Final Report Permanent Sovereignty of Indigenous Peoples over their Natural Resources (Special Rapporteur, Madame Erica Irene A. Daes), E/CN.4/Sub.2/2004/30, para. 39, July 13, 2004

6. The interest in the application of this principle to indigenous peoples follows from the similarity of their circumstances to the situation of the peoples to whom the principle was first applied. The principle of permanent sovereignty over natural resources in modern law arose from the struggle of colonized peoples to achieve political and economic self-determination after the Second World War. The principle is this: *Peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the benefits of their development and conservation.* Since the early 1950s, the principle has been advocated as a means of securing for peoples emerging from colonial rule the economic benefits derived from the natural resources within their territories and to give newly independent States the legal authority to combat and redress the infringement of their economic sovereignty arising from oppressive and inequitable contracts and other arrangements orchestrated by other States and foreign companies. The principle was and continues to be an essential precondition to a people's realization of its right of self-determination and its right to development. (emphasis added)
8. As a result, it has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples' having the legal authority to exercise control over their lands and territories. Moreover, these exchanges have led to a growing recognition that *an appropriate balance can be reached between the interests of States and the interests of indigenous peoples in the promotion and protection of their rights to self-determination, to their lands, territories and resources, and to economic development.* (emphasis added).
9. The United Nations was the birthplace of this principle and the main forum for its development and implementation. Relevant resolutions were first adopted by the General Assembly in the early 1950s, giving initial recognition to this concept as applied to peoples and nations.⁴ In 1958, the General Assembly established the Commission on Permanent Sovereignty Over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a "basic constituent of the right to self-determination".⁵ But it was General Assembly resolution 1803 (XVII) in 1962 that gave the principle momentum under international law in the decolonization process. *In this historic resolution the Assembly declared that "peoples and nations" had a right to permanent sovereignty over their natural wealth and resources and that violation of this right was contrary to the spirit and principles of the Charter and hindered the development of international cooperation and the maintenance of peace.*
10. While the principle originally arose as merely a political claim by newly independent States and colonized peoples attempting to take control over their resources, and with it their economic and political destinies, in 1966 permanent sovereignty over natural resources became a general principle of international law when it was included in common article 1 of both International Covenants on Human Rights. Common article 1 provides in pertinent part:
 - "1. 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.
 - "2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."
18. . . . *In this context, it is apparent that the term "sovereignty" refers not to the abstract and absolute sense of the term, but rather to governmental control and authority over the resources in the exercise of self-determination. Thus it does not mean the supreme authority of an independent*

State. The use of the term in relation to indigenous peoples does not place them on the same level as States or place them in conflict with State sovereignty. (emphasis added).

38. The analysis of relevant international law (see annex II) shows that there have been substantial developments in international law and State practice with respect to the rights of indigenous peoples to own, use, control, and manage their lands, territories, and resources. Moreover, every year new norms, jurisprudence, and policies are being considered and articulated at both the international and domestic levels. In most instances, these developments reflect greater recognition of indigenous peoples' rights to authority over their lands, territories, and resources and to their own decision-making power regarding their use and development. Logically arising from these property rights, as well as their right to self-determination and the right to development, there is also an increased recognition of indigenous peoples' right to give or withhold their prior and informed consent to activities within their lands and territories and to activities that may affect their lands, territories, and resources.

39. To recapitulate, *the developments during the past two 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 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. . . . (emphasis added).*

40. *Indigenous peoples' permanent sovereignty over natural resources might properly be described as a collective right by virtue of which the State is obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources. (emphasis added).*

41. What are these interests? In general, these are ownership interests, including all the normal incidents of ownership. The interests involved may vary depending on the particular circumstances, but in general these would be the interests normally associated with ownership: the right to use or conserve the resources, the right to manage and to control access to the resources, the right to freely dispose of or sell the resources, and related interests. . . .

42. What are indigenous peoples' natural resources? In general these are the natural resources belonging to indigenous peoples in the sense that an indigenous people has historically held or enjoyed the incidents of ownership, that is, use, possession, control, right of disposition, and so forth. These resources can include air, coastal seas, and sea ice as well as timber, minerals, oil and gas, *genetic resources*, and all other material resources pertaining to indigenous lands and territories. . . . (emphasis added).

47. This authority or "sovereignty" is said to be "permanent" because it is intended to refer to an inalienable human right of indigenous peoples. As discussed earlier, this right arises out of the right of self-determination, the right to own property, the right to exist as a people, and the right to be free from discrimination, among other rights, all of which are inalienable. The word "permanent" is also intended to emphasize particularly that indigenous peoples are not to be deprived of their resources as a consequence of unequal or oppressive arrangements, contracts or concessions, especially those that are characterized by fraud, duress, unfair bargaining conditions, lack of mutual understanding, and the like. This is not to say that the indigenous people that own the resources can never sell or dispose of them. Rather it is to say that the indigenous peoples have the permanent right to own and control their resources so long as they wish, free from economic, legal, and political oppression or unfairness of any kind, including the often unequal and unjust conditions of the private marketplace. The urgency and the difficulty of guarding against such unjust conditions and protecting indigenous peoples' ownership of resources that are coveted by others call for the creation of international mechanisms and bodies capable of preventing the unjust loss of indigenous resources. . . .

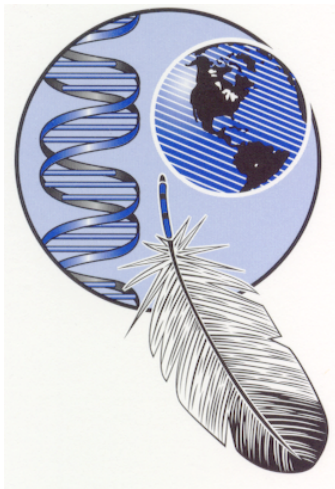
49. Whether or not State authority exists that limits indigenous resource rights, one principle is clear: *all State authority over resources, even resources the State clearly owns, must be exercised in a manner consistent with the human rights of indigenous peoples. . . .* (emphasis added)
50. The principle of this case, that *even lawful State authority must be exercised in a manner that protects and respects human rights, is a general and widely understood principle in the field of human rights. Its application in regard to indigenous peoples' rights to natural resources suggests that States' legal authority over lands and resources of indigenous peoples may be sharply limited where these lands and resources are critical to the human rights of the indigenous peoples.* (emphasis added)
54. As a general matter, in the absence of any prior, fair and lawful disposition of the resources, indigenous peoples are the owners of the natural resources on or under their lands and territories. In the case of shared lands and territories, a particularized inquiry is necessary to determine the extent and character of the indigenous ownership interests.
55. Though indigenous peoples' permanent sovereignty over natural resources has not been explicitly recognized in international legal instruments, this right may now be said to exist. That is, the Special Rapporteur concludes that the right exists in international law by reason of the positive recognition of a broad range of human rights held by indigenous peoples, most notably the right to own property, the right of ownership of the lands they historically or traditionally use and occupy, the rights to self-determination and autonomy, the right to development, the right to be free from discrimination, and a host of other human rights.
56. The right of indigenous peoples to permanent sovereignty over natural resources may be articulated as follows: 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.

Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples (UN Human Rights Special Rapporteur Erica-Irene Daes)

- “heritage can never be alienated, surrendered or sold, except for conditional use.”²
- It is clear that existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate for the protection of indigenous peoples' heritage but inherently unsuitable. Existing legal measures provide protection of limited duration, and are designed to promote the dissemination and use of ideas through licensing and sale. Subjecting indigenous peoples to such a legal scheme would have the same effect on their identities, as the individualization of land ownership in many countries, has had on their territories – that is fragmentation into pieces, until nothing remains.³

² ERICA IRENE DAES, STUDY ON THE PROTECTION OF THE CULTURAL AND INTELLECTUAL PROPERTY OF INDIGENOUS PEOPLES, E/CN/SUB.2/28 (28 July 1993) 9, para. 31.

³ ERICA IRENE DAES, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLES (SPECIAL RAPPORTEUR OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES AND CHAIRPERSON OF THE WORKING GROUP OF INDIGENOUS POPULATIONS), UNITED NATIONS, NEW YORK/GENEVA (1997) 4.



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