

# Policy & Global Change Series

## Trade and Biodiversity

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### Informal Notes

**Vision of Indigenous Peoples in the context of the decisions pertaining Access to Genetic Resources and Benefit Sharing (ABS) and Article 8j: An Analysis of the Impacts of CBD/COP Decisions with respect to WIPO's IGC Mandate**

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### 1. General context of traditional knowledge.

Traditional knowledge refers to a whole variety of practices within indigenous and local communities, amongst which we can mention the following:

- Natural sciences (biology, botany, zoology...), astronomy, geography, geology, meteorology.
- Linguistics, ceremonial language, rhetoric, chants.
- Rituals, dance, songs, sounds, rhythms.
- Healing, medicine, pharmacology.
- Architecture, handicrafts, pottery, weavings.
- Ecology, biodiversity management, sustainable development, associated crops, agro-forestry, ecosystem management, forestry management, watershed management.
- Knowledge of the present, past or future use of species, of plants and animals, as well as of soils and minerals, recognized by a cultural group.
- Knowledge of preparation, processing and storage of useful species.
- Knowledge of formulas which involve more than one ingredient.
- Selective knowledge about a particular species: plantation methods, care, selection criteria etc.
- Knowledge about the conservation of ecosystems (which involve special protection as a commercial element, even if this was not specifically thought of as such by the local community or the culture under consideration).
- Ceremonies and healings carried out both in and out of the cultural circle.
- Systems of customary rights and moral values.

Currently we can witness not only a high level of interest in traditional knowledge, but also a high level of benefits which can be retrieved from them. However, not indigenous peoples but other sectors of society tend to be the ones who claim the benefits but other sectors, as will be explained below. In fact, we have now come to a point where the main negotiators who define the best strategies to gain access to indigenous people's knowledge are governments and the private sector. This becomes evident by looking at international negotiations and decision making processes such as the Convention on Biological Diversity (CBD), the World Intellectual Property Organization (WIPO), the United Nations Commission for Trade and Development (UNCTAD), and other global forums related to environment and trade. The end point is how to negotiate a way of sharing and gaining access to this traditional knowledge, bearing in mind that the decisions are not being taken by the actual owners of this knowledge: indigenous peoples and the local communities.

Bio-prospectors and pharmaceutical companies clearly have a great interest in gaining access to traditional knowledge as it results in an enormous saving of both time and money, otherwise spent in bio-prospecting. It is argued that in a random sample only one out of 10,000 samples has actually the potential to enter the marketplace. A modern laboratory can analyze approximately 150,000 samples a year. However, when a "native specialist" is consulted, the opportunities to find a "valuable" molecule pass to one out of two samples (RAFI, 1996a:32). If three communities use the same plant for the treatment

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of the same disease, Shaman Pharmaceutical, for example, will systematically examine the same plant.

It is worth mentioning that almost 100% of the biodiversity “refuges” are either in areas maintained by indigenous communities and/or agriculturalists in the South, or are adjacent to them. 90% of the land and water with the highest levels of biodiversity have no governmental protection and are exclusively maintained by rural communities. 99% of experts in biodiversity practices are indigenous or belong to rural communities. 80% of the world’s population depends on traditional medicine and medicinal plants for their health. 90% of plant breeders and other agricultural researchers live in rural communities. On the other hand we can see that more than 95% of the respective intellectual property rights, especially patents, are owned by large companies or government institutions, particularly those of the industrialized North.<sup>2</sup> Thus, the primary material from biological resources is found in the South but the respective technology is found in the North.

While scientific knowledge is protected, traditional knowledge of the indigenous and local communities has no appropriate protection. An aggravating situation is the fact that traditional knowledge is deteriorating, because of environmental, social and cultural impacts. The new generations are rapidly losing their culture due to all kinds of external reasons. Because of this there is now a greater importance attached to preserving, recuperating and protecting traditional knowledge related to biodiversity. But it has been stated that such protection must involve the recognition of the fundamental spirituality of the ancestral systems, the protection of the indigenous territories and their collective character and also the recognition that the ancestral practices of knowledge acquisition of the indigenous peoples are different, and that they are not necessarily something which can or should be incorporated into the scientific norms of western society.

Protection of traditional knowledge in relation to biodiversity appeared as a new topic which began to gain relevance because of its importance in the conservation and sustainable use of biodiversity. This has resulted in indigenous communities adopting strategic positions in multilateral forums, looking for forms of protection for this wisdom, and avoiding its unjust appropriation, without the prior informed consent of the respective communities.

### **2. Participation of indigenous peoples.**

The participation of indigenous peoples in the negotiation processes surrounding traditional knowledge became more consistent and substantive after the Third Conference of the Parties (COP3) of the CBD, which took place in Buenos Aires, Argentina in November 1996.

Since then participation has been continuous in both, COPs and inter-sessional meetings, for the Working Groups on Art. 8j and questions surrounding Access to Genetic Resources.

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<sup>2</sup> Rural Advancement Foundation International (RAFI). Conservación de Conocimientos Autóctonos: Integración de dos sistemas de innovación. New York, septiembre 1994.

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One relevant event, which formalized the participation of indigenous peoples, occurred in COP5 in Nairobi, (Kenya), where the official recognition of the IIFB was established. The forum then developed into a space for debate and assessment of the COP and the Secretariat for the Convention on Biological Diversity in general.

Now indigenous peoples meet at the IIFB before and during official government meetings. Here individual positions can be defined and strategies for the participation on the global level developed.

Indigenous peoples, through the IIFB, are suggesting that protection, control and administration of traditional knowledge must be managed by indigenous peoples themselves. If the only feasible form of protection is via a system of international legal frameworks, then this has to be a different system of what has been used in the past, something which is usually referred to as a *sui generis* system. Unfortunately the present system of intellectual property only protects private rights for inventions, with the sole aim of providing exclusive commercial rights. Traditional knowledge on the other hand is a collective property of peoples and communities, who in many cases have no commercial interest.

We are aware the fact, that the search for mechanisms to protect traditional knowledge cannot only be found in the spaces provided by CBD, but also have to come through other organizations such as WIPO, UNCTAD, FAO, the WTO and UNESCO. All these organizations have also been developing work on this topic.

### **3. Reasons to protect Traditional Knowledge - from an indigenous point of view<sup>3</sup>**

There are many reasons for protecting traditional knowledge. Some mention the importance of avoiding cultural clashes between different societies – the indigenous and the western societies - others attempt to establish clear rules to allow indigenous peoples to participate in the benefits produced from the access to their own wisdom; the indigenous peoples themselves ask for secure mechanisms to protect their own intellectual property as part of their integrity as a people. The increasing loss of this knowledge due to outside forces is another factor.

#### **A. General reasons.**

##### **a. Protection of a fundamental human right**

The knowledge systems associated to indigenous knowledge are a fundamental part of their integrity and existence as peoples. This goes beyond economic and social rights of peoples, as it is a matter which affects their very existence. Because of this, it has been stated that traditional knowledge is closely tied to the rights of self-determination.

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<sup>3</sup> Rodrigo de la Cruz y Enrique Sánchez. Presentation in the Andean Regional Workshop (CAN/CAF), “Herramientas de Protección de los Sistemas Indígenas de Conocimiento sobre la Biodiversidad”. Santa Cruz de la Sierra, 20-21 September, 2003

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### **b. The intrinsic value of Traditional Knowledge**

Traditional knowledge should not only be protected for its economic value, but also for its intrinsic value. We are dealing with something that is part of the cultural identity of indigenous peoples and reflected by the immense cultural diversity of the countries in this region.

### **c. Reasons of equity**

To correct an unjust and unequal relation between indigenous peoples and biotechnology companies, which benefit commercially from the use of traditional knowledge without any contribution/compensation to the communities.

### **d. As a defensive strategy against a system of Intellectual Property Rights (IPRs) which attempts to protect monopoly rights over knowledge.**

The use of traditional knowledge by third parties has resulted in monopolies, steered by the use of IPRs, thus distorting the collective and trans-generational nature of intellectual patrimony and the indigenous cultures.

## **B. Specific reasons**

### **a. Affirmation of Traditional Knowledge in the face of economic threats.**

The economic importance of Traditional Knowledge was acknowledged by WIPO at their 20<sup>th</sup> session on October 3<sup>rd</sup>, 2000, the same meeting in which the Intergovernmental Committee was formed: "Because of the appearance of modern biotechnological sciences, genetic resources have acquired an economic, scientific and commercial importance that keeps growing in a greater variety of areas. At the same time, traditional knowledge related to these resources are also the object of growing interest. Other works derived from these traditions, such as folklore expressions have also started to acquire a new economic and cultural importance in the framework of the new society of worldwide information" (WO/GA/26/6).

### **b. The value of Traditional Knowledge in the use and management of Biodiversity.**

The older generations and specialists in traditional wisdom, through their ancestral practices, play an important role in conservation and function as the transmitters of traditional knowledge to the younger generations. This is in accordance with their own cultural rules, which is something fundamental for the survival of the communities. In this way, for example, they have adapted and improved both plant and animal species, making their own gardens into experimental *in situ* plots.

### **c. Unauthorized uses or incorrect appropriation of Traditional Knowledge**

There is a long chain of incorrect appropriation of biological resources as well as the intellectual heritage of indigenous peoples, which has been used without their permission,

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principally by companies involved in pharmaceuticals, cosmetics, the cultural industry and design, amongst others.

### **d. Unsuitability of rights over intellectual property**

The incorrect use of traditional knowledge has caused discussions about the suitability of the current IPR system and the protection it offers indigenous peoples.

Incorrect use of traditional knowledge frequently occurs in:

- unauthorized copies of indigenous cultural expressions
- simulations of indigenous images by non indigenous creators
- indigenous images and themes used in a culturally offensive manner
- unauthorized use and diffusion of indigenous literary and musical expressions
- use and publication of indigenous knowledge out of a traditional context.

### **e. Development of patents and other IPRs connected to indigenous knowledge, practices and innovations.**

As mentioned above, for quite a few years now Traditional Knowledge has been highly valued by bio-prospecting companies and institutions, as they realized that this input could considerably increase their chances of finding plants with medicinal properties. However, the monopoly which was resulted over these products, based on plants identified solely through the help from traditional wisdom, never recognized the legitimate rights to compensation for their use or a just and equal distribution of the benefits.

## **Conclusion**

Legitimate reasons exist to protect the systems of indigenous knowledge, but it is necessary to establish minimum standards and guidelines which can give direction to the implementation of protection strategies and mechanisms. Equally, protection strategies for traditional knowledge must be the result of a collective process of construction based on the consultation and participation of the indigenous peoples and their representatives.

### **4. Critical aspects of the proposal from indigenous peoples in relation to Art.8(j) and ABS.**

#### **4.1. Negotiation of a future International Regime on Access and Benefit Sharing**

This question has been amply analyzed on in the Working Group of ABS (Montreal/12.03) and the Indigenous Peoples manifested their concern that the future International Regime on Access and Benefit Sharing could be developed in the framework of the WIPO. If this occurs there is a risk of the Regime being developed in the context of Intellectual Property Rights, and this would misrepresent the three basic objectives of the Convention on Biological Diversity. Because of this, indigenous peoples propose that this future international instrument should be developed within the framework of the CBD, under supervision of the Working Group on ABS. This should be in collaboration with the Working Group for Art.8(j) and related provisions, assuring the full and effective

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participation of the indigenous peoples as owners of this traditional knowledge and in agreement with our own priorities.

With reference to the nature of any future International Regime on Access and Benefit Sharing, the indigenous peoples would like to insist that this should be consistent with their customary rights and traditional cultural practices. It should promote the safeguarding of the fair and equitable distribution of the benefits arising from the use of this knowledge and the genetic resources of the local and indigenous communities relevant to biological diversity.

Concerning the proposal for an International Certificate specifying origin or source of genetic material and associated traditional knowledge, or certification of legal source of the material, indigenous peoples would like to indicate agreement, but at the same time insist on the fact that the certificate must be provided by the owners of the respective genetic resources or traditional knowledge.

As indigenous peoples we have also stressed the importance of a clear establishment of the principles of prior informed consent, for the success of any future International Regime on Access and Benefit Sharing. The PIC must be given collectively by the owners of the respective traditional knowledge.

Concerning the equitable distribution of benefits, this continues to be a pipe dream for indigenous peoples because there are no clearly established rules on procedures, even in the Bonn Guidelines. As indigenous peoples, we consider that participation in the distribution of benefits must also include derivatives. The benefits must be used towards the security of our lands and indigenous territories, strengthening initiatives towards economic self development, consolidation of our organizational structures and priorities for food security and health in our communities.

Finally, as a key point towards the application of an international regime, we consider that if indigenous peoples or any of the countries of origin are to move forward with any negotiation under equal conditions, the development of their capacities is of paramount importance.

#### **4.2 *Sui generis* systems in the protection of the knowledge, innovations and practices of the indigenous and local communities.**

Aspects of great importance that have been presented are:

A firm position must be taken towards the focus on the development of elements for a *sui generis* protection system for the knowledge, innovations and traditional practices of indigenous and local communities. This must be directed towards the protection of traditional knowledge, and not towards access and commercialization of this knowledge. It must also be developed in the framework of the CBD and not that of WIPO, bearing in mind that this latter organization is not the appropriate arena for the development of *sui generis* systems to protect indigenous knowledge. WIPO should not duplicate the work that is already been carried out in other fora.

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*“...we, the indigenous peoples do not take part in these debates with the idea of facilitating access to our knowledge or to the genetic resources found in our territories. On the contrary, we participate as a way of guaranteeing the recognition and the safeguarding of our rights. We plead for the integration, the strengthening and the development of protection methods for our collective rights...”<sup>4</sup>*

The recognition of indigenous peoples own systems such as customary rights, are fundamental for the preservation of traditional knowledge and thus must be considered as a basic element in any protection system. Furthermore, the collective and inter-generational character of traditional knowledge should also be included.

*“ The establishment of the use of registers and data bases to document indigenous knowledge without the prior informed consent of indigenous peoples could be used to facilitate access for foreign entities and make our knowledge more vulnerable to exploitation. Indigenous knowledge is dynamic and cannot be documented and fixed in such a tangible manner, just to favor rules and laws of intellectual property”.<sup>5</sup>*

Data bases or registers of traditional knowledge can only be considered as an approach towards the protection of traditional knowledge, but not as a requirement for their protection and even less so for the recognition of the rights of indigenous peoples.<sup>6</sup>

The recognition of and respect for the principle of prior informed consent of indigenous and local communities is a fundamental requisite for the use of traditional knowledge and a key aspect of the proposals put forward from world wide indigenous peoples. As indigenous peoples we consider ourselves owners of the genetic resources which exist in our lands, our territories and waters. Therefore, the principle of PIC must be a basic irreversible right, since traditional knowledge is considered part of the intangible, cultural heritage of the indigenous peoples.

Finally, even if the development of a *sui generis* system for the protection of the indigenous peoples knowledge, innovations and traditional practices takes place, this is an initial phase. The indigenous peoples, in all fora where this topic has been discussed, have manifested that a protection system of this sort must be developed while considering the following elements:

- Policies for the rescue, conservation and sustainable use of biodiversity resources and associated knowledge.
- Recognition as peoples.
- The collective and inter-generational character of the knowledge, innovations and traditional practices.
- Relation with the indigenous lands and territories.
- Respect for and recognition of indigenous institutions and organizations.
- Mechanisms for internal control in agreement with customary practices.
- Non commercial exchange of traditional knowledge

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<sup>4</sup> Declaration at the opening of the International Indigenous Forum on Biodiversity on the topic of 19.8, Art. 8(j) and connected decrees, in COP7, CDB (Kuala Lumpur, Malaysia).

<sup>5</sup> Ibid

<sup>6</sup> Position of FIIB in the GT concerning Art. 8(J). Montreal - Canada

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- Prevention of socio-environmental impact to preserve traditional knowledge
- The protection and administration of traditional knowledge to be carried out by the owners of the knowledge.
- Guarantee of prior informed consent
- Access to genetic resources must not imply the use of traditional knowledge. The treatment must be distinct and explicit.
- Participation in any benefits, including derivatives, monetary and non monetary benefits must be decided by the indigenous peoples.

### **Other considerations**

We, as indigenous peoples have been participating in all negotiations concerning ABS and Art. 8 (j), in the framework of CBD, and this has been widely recognized by the COPs, the respective Working Groups and other relevant organizations. This type of democratic and geographically equal participation is what has been affected in the framework of the WIPO IGC, where the levels of participation of indigenous peoples have been limited.

Another aspect which must be considered and resolved in forums that address vital issues for indigenous peoples, are the mechanisms related to our participation. We have proposed the establishment of a voluntary fund to ensure the full and effective participation of indigenous peoples. This proposal should also be considered by WIPO as so far the organization does not have clear strategies concerning financial assistance for our participation.

Quito, 5<sup>th</sup> March, 2004