Indigenous Peoples and Intellectual Property Rights

The focus of the struggles for indigenous peoples rights against colonisation has always been the protection of life: of all peoples and all our relations in the natural world, what is called biodiversity and cultural diversity.

The capacity of life to reproduce and be freely available for human use, is the main problem posed by nature to commercial interest. Different attempts have been made to deal with this problem of the commodification of nature: the bio-technological one through the production of hybrids; and the legal one through to extension of Intellectual Property Rights over life forms: e.g. Plant Breeders Rights, and today to allow IPRs to enter the realm of nature, agriculture and food production, and biodiversity in all its forms. The present campaign for the extension of intellectual property rights is to supplant this respect for life, with new and enforceable legal arrangements to secure economic control over life: over seeds, genetic material and new life forms expropriated and manipulated through modern biotechnology. All these changes represent a profound restructuring of the utilization of life and the protection and promotion of cultural and biological diversity.

Historically, the human rights processes have taken central stage in the discussion of cultural rights, now overtaken by the global trade and environmental negotiations. The expert study by Madame Erica-Irene Daes on the Protection of the Cultural Heritage of Indigenous Peoples is a good statement of basic principles in this field. Dr. Erica-Irene Daes has suggested that the term indigenous heritage is more simple and appropriate than "indigenous cultural and intellectual property". She notes:

"Heritage is everything that belongs to the distinct identity of a people which is theirs to share, if they wish with other peoples. It includes all those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritance from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a peoples has been associated."

Central to these principles is the understanding that the protection of the cultural and intellectual rights of Indigenous Peoples is fundamentally connected with the realization and exercise of their territorial rights and right to self-determination. If there is to be reinforcement of indigenous cultural rights, there must also be enforcement of all indigenous rights in recognition of the interdependence and interconnectedness of all these rights. These
integrated and complementary rights are recognized in the UN Draft Declaration on the Rights of Indigenous Peoples. Among indigenous peoples, priority has been given to working for its adoption by the UN General Assembly, and its reflection in national legislation on the rights of indigenous peoples. Supportive governments can move in this direction, notwithstanding the pending discussions on the Draft Declaration, and the ongoing discussions within the CBD and WIPO.

The CBD as such, affords indigenous peoples very limited and weak protection for their cultural and intellectual property. The CBD does not seek to challenge the legitimacy or operation of intellectual property law, merely recognizing that intellectual property rights can act to assist governments in the conservation of biological diversity. A main principle within the CBD is the strong emphasis on national sovereignty over biodiversity, which requires co-recognition by parties of indigenous lands, territories and resources. Provisions for benefit-sharing would also rely on governments to recognize and enforce this right.

In pursuance of CBD obligations, some advances have already been made primarily through national legislation and regional frameworks (e.g. Andean Pact). Other advances include strengthening of prior informed consent of indigenous peoples, and raising awareness and understanding of sui generis arrangements to strengthen control of indigenous peoples. Of course, these positive steps can be taken regardless of the CBD, by governments serious about indigenous peoples rights.

The CBD should debate about the coherence between environmental negotiations and trade negotiations e.g. the CBD and the WTO.

**World Trade Organisation and Trade-Related Intellectual Property Rights**

The TRIPs agreement within the WTO, which is intended to internationalize current intellectual property laws (and the mechanisms and institutions associated with their implementation) constitutes a major threat to the cultural integrity and rights of indigenous peoples, including territorial and resource rights.

The essence of intellectual property law remains its ability to create government sponsored monopolies over knowledge, processes, products and so on, which without government intervention could not be monopolized. The application of intellectual property laws, which provides "protection" for individual owners over a limited period of time, are designed to facilitate the dissemination and use of ideas and knowledge through licensing or sale. Under these regimes, there are real dangers relating to the misuse, appropriation and exploitation of so-called indigenous "intellectual property". As Erica-Irene Daes has noted,

"subjecting indigenous peoples to (existing intellectual property laws) would have the same effect on their identities as the individualisation of land ownership in many countries has had on their territories - that is fragmentation into pieces, and the sale of the pieces, until nothing remains."

The fundamental flaw in existing international and most national legal regimes in relation to the protection of intellectual property is their failure to acknowledge the very existence of indigenous cultural and intellectual property, as well as the laws and practices developed by indigenous peoples themselves to protect and manage such property. These are currently
under study by the World Intellectual Property Organisation (WIPO).

In contrast to existing Western legal systems, indigenous cultural heritage cannot be owned or monopolized by an individual, just as it cannot be alienated, surrendered or sold on an unconditional basis. Rather the cultural heritage of indigenous peoples is both a collective and individual right, and as such, the responsibility for its use and management in accordance with indigenous laws and traditions is borne by the community as a whole.

In view of these criticisms, the application of the customary tools of intellectual property (patents, copyright, trade marks, trade secrets, plant variety protection and know-how) to indigenous knowledge and cultural heritage is not simply inappropriate, but is also likely to do more harm than good. As many indigenous peoples have warned, it could eventually deny indigenous peoples' rights to biological resources they have managed for thousands of years, and grant legal monopolies to corporations over the knowledge and other aspects of indigenous cultural heritage.

Related activities of WIPO to identify new holders of intellectual property rights are bound to be in service of the trade agenda, thus the access and benefit-sharing dimensions of the CBD, rather than the conservation and sustainable use of biological and cultural diversity, which are the priorities identified by indigenous peoples in the work programme of this working group.

A Rights-based approach to culture.

To develop a rights-based approach to culture, it would be necessary to distinguish between standards which can be directly enforced through laws restraining governments or private infringements of rights, and programmes and strategies requiring positive measures and approaches. Programmes developed by indigenous peoples and based on their legal systems, which are designed to support and develop their cultures and to enable their transmission (e.g. language and education programs) may be of greater importance to the longer term protection of culture than laws or procedures developed and imposed by governments to deal with immediate threats.

The essential element of a successful sui generis system to protect and manage indigenous cultural and intellectual property lies in indigenous peoples rights to shape that system - to say what they want protected, how they want it protected, and how they wish to continue to use it.

This approach does not necessarily mean the creation of "laws". Rather it leaves open to those framing this new approach the option of developing processes, structures or institutions which are responsible for the enforcement of certain types of behaviour, or for the resolution of disputes, rather than the articulation of laws codified in statutes.

What is required is formal recognition by the non-indigenous legal systems of the sovereignty of indigenous political and social structures and institutions, which are recognised by indigenous peoples as having authority to implement and enforce indigenous laws and customs.
On Free, Prior and Informed Consent

The Philippine Indigenous Peoples Rights Act (IPRA, 1998) requires project developers affecting ancestral lands and traditional resources to obtain free, prior and informed consent of the concerned indigenous peoples and communities. This also applies to the draft Executive Order 247 on access to genetic resources.

Other access-legislation is already in force or in draft form include the proposal of a Peoples' Biodiversity Register in India, the regional framework of the Andean Pact countries for access to genetic resources (Decision 391), the Peruvian proposal for a protection regimen for indigenous knowledge, and the Draft Legislation on Community Rights and Access to Biological Resources of the Organization of African Unity.

In the coming years, this broad range of international initiatives on intellectual property rights and traditional knowledge will result in national legislation with far-reaching implications for indigenous communities. It is imperative that indigenous peoples and communities are strengthened to deal with these challenges as they unfold, to ensure their full and effective participation in the relevant policy negotiations, and especially to strengthen community understanding and informed choices about the threats and opportunities posed by the new biotechnologies and bio-colonialism.

We look to the Convention on Biological Diversity to partner indigenous peoples in these tasks.

Turning to the Document under discussion (UNEP/CBD/WG8J/2/7) and its recommendations, I wish to make the following points:

1. The CBD welcome the establishment of the UN Permanent Forum on Indigenous Issues, as a high-level body with a mandate to discuss many of the issues relevant to the CBD. Other UN bodies such as the human rights bodies and UNESCO must also be supported.
2. Indigenous customary law are precisely sui generis systems for the protection of traditional knowledge evolving at local level. Customary law must be legally recognised and strengthened by national legislation. These can also be supported through the adoption of the UN Declaration on the Rights of Indigenous Peoples, and by State parties promoting indigenous peoples rights.