# Safeguarding Indigenous Knowledge:

## Intellectual Property Rights and the Search for a New Framework

by Darrell A. Posey

Safeguarding traditional knowledge and biogenetic resources has become a central struggle in the expression of Indigenous self-determination. While it is a growing awareness of the scale of past and present misappropriation by science, industry and other commercial interests that has provoked this concern, traditional resources are also increasingly seen as the basis for greater political autonomy and economic self-sufficiency.

Intellectual Property Rights, or IPR, has been proposed as a legal instrument under which Indigenous peoples could seek protection for knowledge and resources. IPR developed as a western concept to protect individual, technological and industrial inventions. The dangers lying within the IPR debate are well recognized by Indigenous peoples, who, along with many other researchers, think that IPR is not an appropriate mechanism to strengthen and empower traditional and Indigenous peoples.

The term Traditional Resource Rights, or TRR, has emerged from the debate around IPR to describe a broader, human-rights based concept composed of the "bundles of rights" taken from other international instruments and agreements (including IPR). TRR is a first attempt to define and identify to what extent existing international customary law and practice can be used to defend Indigenous knowledge and biogenetic resources, and then to build upon these "bundles" to achieve Indigenous peoples' goals. Indigenous people will lead the process of developing this framework according to their specific needs and practices.

*Dr. Darrell Posey has many years' experience working on IPR and biodiversity issues, and is currently with the Working Group on Traditional Resource Rights at the Oxford Centre for Environment, Ethics, and Society at Oxford University.*

### Biodiversity Prospecting and Economic Activities

To understand why the safeguarding of knowledge has recently become a major issue for Indigenous peoples, consider the following points:

**a) Global funding for exploitation:** First, the Earth Summit (United Nations Conference on Environment and Development), held in Rio de Janeiro in June, 1992, dealt in large part with how biological diversity conservation could be economically exploited through biotechnological development, and effectively highlighted the economic potential of traditional knowledge and resources. The Convention on Biological Diversity which emerged from the Summit calls for the study, use, and application of "traditional knowledge, innovations, and practices." Its accompanying document, Agenda 21, actually outlines funding priorities to implement this process. As a result, considerable global funding will be directed toward the exploitation of Indigenous knowledge and biogenetic resources.

**b) Bioprospecting:** Second, an increasingly large number of companies are "biodiversity prospecting"—that is, looking for biogenetic resources (plants, animals, bacteria, etc.), including human genes, that can be used in the biotechnology industry. Quinine and

curare are familiar examples of this phenomenon. Never before, however, have there been so many companies and collecting organizations interested in those biogenetic resources that have been nurtured, protected and even improved by Indigenous peoples. The Guajajara people of Brazil use a plant called *Philocarpus jaborandi* to treat glaucoma. Although Brazil now earns $25 million a year from exporting the plant, the Guajajara have suffered from debt peonage and slavery at the hands of agents of the company involved in the trade. Furthermore, Pilocarpus populations have nearly been wiped out by ravenous, unsustainable collecting practices.

**c) Economic possibilities for Indigenous peoples:** Lastly, many Indigenous communities need and are looking for economic alternatives. In the tropics, there are often few economic options other than timber extraction, mining, and ranching. Yet, the tropical ecosystems are constantly touted as being one of the richest in biodiversity, with a huge potential for discoveries of new medicines, foods, dyes, fertilizers, essences, oils, and molecules of prime biotechnological use. In summary, the problem of knowledge and genetic resource exploitation now experienced by Indigenous communities is only the start of a huge avalanche.

## The Right to Say "NO," and Categories of Protection

The first concern stated by Indigenous peoples in every international forum is their right not to sell, commoditize, or have expropriated certain domains of knowledge and certain sacred places, plants, animals, and objects. Subsequent decisions to sell, commoditize, or privatize are only possible if this basic right can be exercised.

At least nine categories of traditional resources/Indigenous intellectual property can be identified which a people or community may be concerned to protect from misappropriation: 1. Sacred property (images, sounds, knowledge, material culture, or anything that is deemed sacred). 2. Knowledge of current use, previous use, potential use of plant and animal species, as well as soils and minerals, known to the cultural group; 3. Knowledge of preparation, processing, storage of useful species; 4. Knowledge of formulations involving more than one ingredient; 5. Knowledge of individual species (planting methods, caring for, selection criteria, etc.); 6. Knowledge of ecosystem conservation (that protects commercial value, although not specifically used for that purpose or other practical purposes by the local community or the culture); 7. Biogenetic resources that originate (or originated) on indigenous lands and territories; 8. Cultural heritage (images, sounds, crafts, arts, performances); 9. Classificatory systems of knowledge.

Quite clearly, knowledge is a thread common to all these categories. Many Indigenous groups have expressed their desire that all of these be protected as part of the larger need to protect land, territory, resources and to stimulate self-determination. Control over cultural, scientific and intellectual property is de facto self-determination—although only after rights to land and territory are secured by law and practice (i.e., boundaries are recognized, protected, and guaranteed by law). But, as many Indigenous peoples have discovered, even guaranteed demarcation of land and territory does not necessarily mean free access to the resources on that land or territory, nor the right to exercise their own cultures or even to be compensated for the biogenetic resources that they have kept, conserved, managed, and molded for thousands of years.

## The Search for an Alternative Framework: Starting points for a new system

A wide range of international agreements, declarations, and draft documents have relevance for building a newly designed system to protect Traditional Resource Rights. These are labor law; human rights laws and agreements; economic and social agreements; intellectual property and plant variety protection; farmers' rights; environmental conventions and law; religious freedom acts; cultural property and cultural heritage: customary law, and traditional practice. Highlights from each of these areas are described below.

### Labor Law: IPR and ILO

The International Labor Organization (ILO) was the first UN organization to deal with Indigenous issues, establishing a Committee of Experts on Native Labor in 1926 to develop international standards for the protection of native workers. In 1957, the ILO produced the *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (107). This was rewritten in 1987 as the *Convention Concerning Indigenous Peoples in Independent Countries* (Convention 169) with much of the original's "integrationist language" removed. The convention's key contribution is to guarantee Indigenous peoples' rights to determine and control their own economic, social and cultural development. It also recognizes the collective aspect of Indigenous possessions, which is of obvious importance to IPR issues, since collectivity is fundamental to transmission, use and protection of traditional knowledge. Until now, Convention 169 has not been sufficiently used with implementation of IPR in mind.

### Human Rights and Intellectual Property

International human rights laws offer some mechanisms for cultural protection. The principal problem is that these are oriented toward nation-states and do not easily "provide a basis for claims against multinational companies or individuals who profit from traditional knowledge." The 1948 *Universal Declaration of Human Rights* and the

photo: Tirso Gonzales

Hundreds of potato varieties are grown and preserved by Andean peoples

1966 *International Covenant on Economic, Social and Cultural Rights* guarantee fundamental freedoms of personal integrity and action; political rights; social and economic rights; cultural rights and equal protection under the law. Within this guarantee is the right of self-determination, including the right to dispose of natural wealth and resources. This also implies the right to protect and conserve resources, including intellectual property.

Significantly, these human rights laws also protect the right to own collective property, as well as guaranteeing the right to just and favorable remuneration for work—which can be interpreted as work related to traditional knowledge. Finally, they provide for "recognition of interest in scientific production, including the right to the protection of the moral and material interests resulting from any scientific literary or artistic production."

This language is echoed in the *Draft Declaration on the Rights of Indigenous Peoples* which states:

*Indigenous peoples have the right to the protection and, where appropriate, the rehabilitation of the total environment and productive capacity of their lands and territories, and the right to adequate assistance including international cooperation to this end.*

*It is clear that IPR should to be seen as a basic human right, worthy of incorporation in the campaigns of human rights organizations.*

**Economic and Social Agreements**

In 1972, the United Nations Economic and Social Council formed a special human rights Sub-Commission to study the problem of discrimination against Indigenous peoples. After releasing a lengthy report that found inadequate protection of Indigenous peoples' rights within existing international instruments, the Sub-Commission released various resolutions recommending that the UN "Provide explicitly for the role of Indigenous peoples as resource users and managers, and for the protection of Indigenous peoples' right to control of their own traditional knowledge of ecosystems." It also requested the Secretary-General to prepare a concise report on the extent to which existing international standards and mechanisms serve Indigenous people in the protection of their intellectual property. The human rights commission has played an important role in pressuring other UN agencies to take action through these calls for protection of, and protection for, Indigenous peoples' IPR.

**Folklore and Plant Variety Protection**

The United Nations Educational, Scientific and Cultural Organization (UNESCO) should be a logical forum for IPR discussion; yet, while UNESCO has heard "petitions" of complaints by native peoples related to the fields of education, science, culture and information, Indigenous questions remain marginal to UNESCO's agenda.

The World Intellectual Property Organization (WIPO) in Geneva has 123 member states that have reached

broad agreements on the terms "industrial property" and "copyright." However, within the WIPO framework Indigenous IPR, as collective property, would be considered folklore and not protectable.

In 1984, however, UNESCO and WIPO developed *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, which recognized individual and collective folklore traditions. Though never ratified, these provisions–backed up by criminal penalties–proposed protection of folklore, including material which has not been written down. Their second important contribution was to provide for copyright protection of folkloric performances.

Within WIPO's jurisdiction, the Union for the Protection of new Varieties of Plants provides protection to breeders of new plant varieties that are "clearly distinguishable," suficiently homogeneous," and "stable in essential characteristics."

The critical factor here is to link folklore and plant genetic resources with intellectual property. It is this complicated legal linkage that allows for expansion of the concept of IPR to include traditional knowledge, not only about species use, but also about species management. Thus, ecosystems that are molded or modified by a human presence are a product of Indigenous intellectual property as well, and, consequently, are products themselves–or offer products–that are protectable. Furthermore, "wild," "semi-domesticated" (or "semi-wild"), and domesticated plant and animal species are products of human activity and should also be protectable.

### Farmers' Rights and the FAO

The UN Food and Agriculture Organization (FAO) has worked to find ways for developing countries and "Third World farmers" to get a share in the huge global seed market. The questions of "farmers' rights" and "breeders' rights" have been extensively debated in this context. In 1987 FAO established a fund for plant genetic resources, with the idea that seed producers would voluntarily contribute according to the volume of their seed sales in order to finance projects for sustainable use of plant genetic resources in the Third World. Unfortunately, major seed producers like the USA opposed mandatory contributions to the fund, and it has turned out to be totally inadequate.

### Environmental Law: Life after the Earth Summit

The *Rio Declaration* which emerged from the Earth Summit highlighted the central importance Indigenous peoples have in attaining sustainable development. The Summit's legally binding "Convention on Biological Diversity" (CBD) does not explicitly recognize IPR for Indigenous peoples, but its language can easily be interpreted to call for such protection. Following effective lobbying by Indigenous organizations, signatories to the Convention have pledged to: 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 to promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices as well as to encourage the equitable sharing of the benefits arising from the use of such knowledge, innovations and practices. Agenda 21, which accompanies the Convention, specifically includes Indigenous peoples and traditional knowledge in its "priorities for action" toward sustainable development.

## Religious Freedom

In a seminar on IPR at the United Nations Human Rights Convention in Vienna, June, 1993, Ray Apoaka of the North American Indian Congress suggested that IPR is essentially a question of religious freedom for indigenous peoples. "Much of what they want to commercialize is sacred to us. We see intellectual property as part of our culture—it cannot be separated into categories as [Western] lawyers would want." Pauline Tangipoa, a Maori leader, agrees: "Indigenous peoples do not limit their religions to buildings, but rather see the sacred in all life."

## Cultural Property

In recent years, Indigenous peoples have been increasingly successful in reclaiming the tangible aspects of their cultures, or "cultural property," from museums and institutions. This term has yet to be clearly defined, but has come to refer to everything from objects of art to archaeological artifacts, traditional music and dance, and sacred sites. The concept of "cultural heritage" has appeared as a related "legal instrument" to link knowledge and information to the cultural artifact, and has been used successfully as a legal tool in Australia.

## Customary Law and Traditional Practice

During informal hearings for the 1992 Earth Summit in Rio de Janeiro, Indigenous representatives pointed out several basic problems with the concepts of intellectual and cultural property: 1) The divisions between cultural, intellectual, and physical property are not as distinct and mutually exclusive for Indigenous peoples as in the Western legal system. 2) Knowledge generally is communally held, and, although some specialized knowledge may be held by certain ritual or society specialists (such as shamans), this does not give the specialists the right to privatize communal heritage. 3) Even if legal IPR regimes were put in place, most Indigenous communities would not have the financial means to implement, enforce, or litigate them. It was clear that under some circumstances commercialization of knowledge and plant genetic resources

continued on pg. 37

# Biodiversity, Community Integrity and the Second Colonialist Wave

(Continued from pg.12)

might be desirable, but the prime desire for Indigenous peoples was an IPR regime that supports their right to say "NO" to privatization and commercialization.

Indigenous delegates meeting in Rio de Janeiro released the *Kari-Oca Declaration* and *Indigenous Peoples' Earth Charter*. Clause 95 states that "Indigenous wisdom must be recognized and encouraged," but warns in Clause 99 that "Usurping of traditional medicines and knowledge from Indigenous peoples should be considered a crime against peoples." Clause 102 of the Kari-Oca Declaration is explicit about indigenous peoples' concern on IPR issues:

*As creators & carriers of civilizations which have given & continue to share knowledge, experience & values with humanity, we require that our right to intellectual & cultural properties be guaranteed & that the mechanism for each implementation be in favor of our peoples & studied in depth & implemented. This respect must include the right over genetic resources, gene banks, biotechnology & knowledge of biodiversity programs.*

Since the Earth Summit, dozens of conferences, seminars and workshops have been held by Indigenous peoples to discuss the evolving IPR debate. During the 1993 UN Year for the World's Indigenous Peoples, intellectual and cultural property rights were on the agenda of nearly every major Indigenous encounter.

One of the most lacking areas of IPR research is that of non-western IPR regimes. Up to now, the debate has centered around UN and Western concepts of intellectual and genetic property. But what about the property regimes of Indigenous peoples themselves? A synthesis and analysis of non-Western systems would be very helpful in finding creative solutions to IPR protection.

## Conclusion

It is fundamental that IPR/TRR should not be used simply to reduce traditional knowledge into Western legal and conceptual frameworks: Indigenous legal systems and concepts of property rights should guide the debate. The role of scientists, scholars and lawyers should be to provide information and ideas; it will be Indigenous and traditional peoples themselves who will, in many different ways, define Traditional Resource Rights through practice and experimentation.

# Guatemala Peace Talks

(Continued from pg.26)

ator to work with both parties.

On January 4, 1995, *Siglo Veintiuno* reported that President Ramiro de Leon plans to sign a peace agreement on February 24. The more direct intervention of the UN Secretary General appears to be producing results, but it remains to be seen.

It is interesting to note that neither the Government nor the URNG has clearly presented its respective position to the Maya community or to the Guatemalan populace. Each of the two seem to have used the Maya community as a pretext to drag out the process toward a peace that didn't suit either one. In times of peace, you cannot justify the existence of a repressive military, nor of a radical guerrilla movement. That is why we must continue to reassert the final words of Secretary General Ghali: "The participants in the Guatemalan peace process must renew their commitment to a dynamic negotation that provides clear direction towards a quick and just resolution to the conflict." Along with Mr. Ghali, the Maya, the principal–and numerous–victims of this conflict, request "a just resolution" for themselves, for their children and for Guatemala.