CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES OF THE PACIFIC

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Suva, Fiji 4 September 1996

Mr. Chairman, on behalf of Maori Congress I would like to convey to the Prime Minister, the Government and people of Fiji, the Planning Committee, resource people and indigenous participants from throughout Te Moana-Nui-A-Kiwa, our deepest respect. It is indeed a great honour to be invited to participate in this historical regional meeting on the UN Draft Declaration on the Rights of Indigenous Peoples.

Before I begin my discussion on cultural and intellectual property rights, I would like to make some brief observations about a few of the issues that were raised at this workshop yesterday**.** On my first day here in Suva, it was my birthday. My age is reaching a stage where a birthday is not necessarily a celebration anymore, it is more a commemoration, a time for reflection. So on my birthday I reflected on the fact that in the year I was born there were 63 member states in the United Nations. Now, in 1996, there are 185, which means that in my short but ever lengthening life, 122 new countries have realised their right to self-determination, their right to decolonisation and to independence. Nothing in current world events suggests that 185 countries is the final number. Indeed I expect that within the rest of my lifetime, that number will surpass 200 and many of the new states will be indigenous from here in the Pacific basin. This is not a dream it is an inevitable reality.

The right to self-determination of Pacific indigenous peoples will in some cases mean the creation of new UN member states, but it does not mean that this is what all indigenous peoples are seeking. For some, their right to self-determination means a re-negotiation of the system of governance to enable greater autonomy for them in political, economic, social and cultural decision-making. We must respect the different visions of indigenous peoples, acknowledge there are differences, identify the commonalties and work towards constructive agreements that do not predetermine how indigenous peoples throughout the world will realise their right to self-determination. The fundamental area of commonality, is the experience of colonisation and the wish therefore to de-colonise, but the journey of de-colonisation will be different according to the needs and aspirations of respective indigenous peoples and of how they view their future relationship with colonising governments.

INTRODUCTION

From its inception, the United Nations has regarded the question of decolonisation as an important aspect of its purposes and functions. The 1945 Charter of the United Nations proclaimed the principles of self-determination of all peoples in Article 1 and Article 55. In 1960, the General Assembly adopted as Resolution 1514 (XV) The Declaration on the Granting of Independence to Colonial Countries and Peoples. known as the Decolonisation Declaration. The declaration states that *"the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of United Nations and is an impediment to promotion of world peace and co-operation"*.

The UN Draft Declaration on the Rights of Indigenous Peoples takes this one step further by proclaiming that all peoples, including specifically indigenous peoples, have the right to self-determination (Article 3) and uses precisely the same wording as the 1960 De-Colonisation Declaration to clarify that *"by virtue of which they freely determine their political status and freely pursue their economic, social and cultural developments.*

It is within this fundamental context of self-determination that I will be speaking on issues of *cultural and intellectual property rights* of indigenous peoples as it is becoming increasingly obvious that our right to *"freely pursue economic, social and cultural development"* appropriate to us, is severely threatened. Political independence from a colonising power is, and will continue to be, a shallow victory if on the other side of independence, one is confronted with an even greater power of dominance and oppression, that being economic globalisation.

Cultural and Intellectual Property rights is fast becoming one of the most contentious issues of our time. It is an area that challenges our every understanding and vision of self-determination, sovereignty and independence. The future ability of peoples and countries alike to protect their heritage and assets will further diminish as the multilateral agreements which have been enacted over the past decade are implemented globally. People are now beginning to realise that such agreements, based on western legal norms and standards will not bring about significant benefits for indigenous peoples or for developing countries, in fact there is every indication that we will lose more of our heritage in the next two decades than was lost during the immediate post-colonial times of last century.

Colonial powers are still in the infancy stages of looking back at the first wave of colonisation and acknowledging that their violent acts of seizing foreign lands and territories in order to develop settlements and secure resources, such as gold and other minerals, food crops, were calculated acts of genocide which resulted in the

extermination of millions of indigenous peoples[1], as well as the alienation of millions of others from their traditional homelands.

While the pace of acknowledging past wrongs is a fairly slow one, the drive to legalise to the greatest extent possible a continuation of the same behaviours is accelerating. Some regard *cultural and intellectual property rights* as the second wave of colonisation because the principles that underpin western legal perceptions of particularly *intellectual property* are seen as a continuation of the ideologies of foreign conquest and domination.

For the purposes of this paper, I will very briefly discuss the understandings implicit in the terms *cultural and intellectual property rights*. I do not profess to offer a culturally neutral analysis of these terms. I am an indigenous person committed to the realisation of self-determination of all indigenous peoples and that is the framework of my analysis. I also reject the notion that western trained scholars and scientists are culturally neutral and therefore objective. We are all affected by our cultural world views. I will then offer some examples to illustrate why *cultural and intellectual property rights* are important for indigenous peoples of the Pacific Finally, I would like to suggest a number of strategies for your consideration as a means to focus our plenary discussion.

CULTURAL vs INTELLECTUAL PROPERTY

It is important to note that western law distinguishes *cultural property* from that of *intellectual property*, in that it regards cultural property as being tangible physical expressions of culture, such as music, dance and art forms, whereas *intellectual property* is seen as the outcomes, both tangible and intangible of ideas or processes that have been the result of human intervention. I wish to emphasise the term <u>human intervention</u> as I will be speaking further on this point later. Land and water rights are not acknowledged within these legal constructs, nor is customary ownership or collective heritage.

The distinguished Chairperson of the UN Working Group on Indigenous Populations (WGIP), Professor Daes has produced several reports, first on the issue of cultural

[1] Todorov estimated that in 1500 the world population was approximately 400 million of whom 80 million inhabited the Americas. *"By the middle of the 16th Century out of these 80 million there remained ten. Or limiting ourselves to Mexico, on the eve of conquest its population was about 25 million, in 1600 it was 1 million. If the word genocide has ever been applied to a situation with some accuracy, this is here the case. It constitutes a record not only in relative terms (a destruction in the order of 90% or more) but also in absolute terms since we are speaking of a population diminution estimated at 70 million human lives. None of the great massacres of the 20th Century can be compared to this hecatomb."* (Tzvetan, Todorov, <u>The Conquest of</u> America (Harper & Row, New York:1982),133) Add to Todorov's account, figures for Australia, New Zealand, Asia and the Pacific and one would have a greater understanding of the gross carnage that indigenous peoples have suffered.

property and then on the combined issues of cultural and intellectual property. I invite Professor Daes to discuss her Reports later in the plenary discussion.[2]

By way of background to the partnering of *cultural and intellectual property*, the following might be helpful. In resolution 1990/25 of 31 August, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities entrusted Professor Daes to prepare a working paper on the question of the ownership and control of *cultural property* of indigenous peoples for submission to the ninth session of the WGIP. A number of indigenous peoples and organisations[3], submitted that the western legal distinction between *cultural property* and *intellectual property* was superficial in that indigenous cultures did not separate culture from intellect or intellect from culture. The indigenous group asked that any further research into this area be progressed as a duality. In 1992, the Sub-Commission at its forty fourth session expressed the conviction in its resolution 1992/35 of 27 August 1992, that

> *"there is a relationship, in the laws or philosophies of indigenous peoples, between* cultural property *and* intellectual property, *and that the protection of both is essential to the indigenous peoples' cultural and economic survival and development."*

Accordingly, the Sub-Commission recommended that the title of the study Professor Daes was to undertake should be revised to "Protection of the *cultural and intellectual property* of indigenous peoples." All subsequent reports by Professor Daes reflect this inter-relationship. While it was important to combine the two areas for the purpose of enabling the western legal system and states to acknowledge the flaws in current legislation, it is equally important to separate the two to enable indigenous peoples to better understand how these terms are made distinguishable within western norms and standards.

CULTURAL PROPERTY

Cultural property includes all tangible forms of culture and therefore heritage. It is a term used mostly to describe items of cultural and spiritual significance that were

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[2] E/CN.4/Sub.2/1991/34 3 July 1991 Working Paper on the question of the Ownership and Control of the Cultural Property of Indigenous Peoples; E/CN.4/Sub.2/1992/30, 6 July 1992 Intellectual property of Indigenous Peoples:Concise Report of the Secretary General; E/CN.4/Sub.2/1993/28 28 July 1993, Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples; E/CN.4/Sub.2/1994/31 8 July 1994, Preliminary Report:Protection of the Heritage of Indigenous Peoples; E/CN.4/Sub.2/1995/26, 15 June 1995 Final Report on the Protection of the Heritage of Indigenous Peoples; and E/CN.4/Sub.2/1996/22, 24 June 1996 Supplementary Report: Protection of the Heritage of Indigenous Peoples

[3] 1991 intervention by Ngati Awa and Ngati Te Ata (Aotearoa), National Aboriginal and Islanders Legal Service (Australia) and the National Indian Youth Council (USA) to the UN-WGIP.

misappropriated in the early periods of post-colonisation. Items such as burial objects, and human remains. It also includes tangible aspects of heritage, such as language. *Cultural property* is also referred to as 'folklore'.

The existing sources of international protection for cultural property and folklore include *inter alia*; The Berne Convention (Paris Act-1971), WIPO Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Action (1982) and UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

Articles 12 and 14 of the Draft Declaration on the Rights of Indigenous Peoples pertain to *cultural property* and *folklore* provisions.

Article 12

Indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 14

Indigenous peoples have the right to revitalise, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literature and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other means.

Article 12 mentions restitution. Implicit in this is repatriation and an acknowledgement that many properties have been taken in violation of traditional customary laws and/or traditional customs have been subjugated through colonisation. Therefore within the sphere of *cultural property*, the debate tends to focus on redress as being the return of misappropriated items to the original indigenous owners or their descendants, and the revitalisation of cultural traditions, including language, that were previously denied. Issues such as; protection and use of sacred sites, repatriation and reburial of human remains, recovery of scared and ceremonial objects and resurgence of indigenous languages including placenames.

Indigenous peoples argue that all heritage, intangible and tangible, including lands, waters and resources constitutes *cultural property* but as can be seen, western norms simply cannot accommodate such a world view within the parameters of 'culture'. So entrenched is the separation of culture from a western capitalist world view that natural resources are

regarded only as tradeable commodities and not as an expression of cultural identity. Hence, much of what indigenous peoples would regard as *cultural property* has been transferred into the legal construct of *intellectual property.*

INTELLECTUAL PROPERTY[4]

Intellectual property relates more to development rights. Its genesis is from the period known as the industrial revolution where the advent of technology created a radical societal transformation. An age where wood was replaced with metals, where inventions included, glass, electricity, the wireless, the telephone, steel bolts and screws. A time when human intervention was obvious and formed the major component of a product, an invention. Patents and trademarks were used by individuals to protect their inventions from commercial exploitation at a time when their inventions were in fact the first of their kind in the history of the world. [Early patents include: Germany, 1903 Reinhold Burger Thermos Flask; USA, 1844 Linus Yale Sr. and 1861 Linus Yale Jr. Yale Security Locks; USA, 1886 George Parker, Parker Ballpoint Pen; USA, 1901 King Camp Gillette, Gillette Razor Blades protected by a Patent and company Trademark]

Since the industrial revolution, intellectual property has extended its sphere of coverage and influence to a point where the lines of distinguishing the degree to which human intervention forms the major component of a product is extremely blurred. In particular, *intellectual property* rights has come to encompass issues such as; authenticity of indigenous artforms, communal rights to traditional designs, performing arts, and tourism. Within the Pacific region these are significant issues as so many traditional designs are being misapporpriated by foreign companies and reproduced on fabrics and souvenirs for tourism. But the most controversial area of *intellectual property* coverage is that associated with genetic resources and biological diversity. This includes, indigenous knowledge, science and technology particularly in the areas of taxonomy (plant and animal classification systems), environmental management, traditional medicines and healing practices, biological and human genetic diversity. *Intellectual property* now also includes products of nature, modified plants and animals, fish, and indeed products based on genetic materials of humans.

To appreciate the concerns of indigenous critics of intellectual property rights mechanisms, is to delve into the history of partnerships amongst western commerce, science and the law and the complimentary role these three doctrines have played in colonisation and so-called modernisation. Peter Donigi from Papua New Guinea writes "*I subscribe to a very liberal interpretation of the term 'terrorism'. It is not limited to acts of violence. In its most liberal sense it applies to threats - by multinational companies or*

[4]Intellectual property is in fact a collection of legal mechanisms (copyrights, patents, trademarks, plant breeders rightsand trade secrets) which accords on a first come first served basis, exclusive ownership rights over products (including ideas) for a defined period of time, where the applicant is able to demonstrate their intellectual contribution to that product, and the commercial viability (industrial application) of that same product.

their respective industry organisations - issued to governments of developing countries to coerce them to adopt legislative policies to benefit the companies in their continued exploitation of the resources of those countries at the expense of the interests of the indigenous peoples." [5]

Intellectual Property rights, for instance can be interpreted as a legitimising of the acquisition of goods by nationals of one state from nationals of other sovereign states, such 'goods' include genetic materials of citizens. In the past, this is what caused wars. It was seen as 'invasion and conquest'. By legalising the acquisition within a framework of commerce and *intellectual property rights*, the same act is seen as a 'market transaction' where the major consideration is the market price and ethical/cultural considerations are dismissed as anti-development and conspiracy theory. The process used is the western scientific paradigm of reductionism. Instead of looking at a whole country and its territorial boundaries, one reduces the country to a grid of eco-systems (terrestrial biodiversity, marine and coastal, agricultural biodiversity, deserts, marshlands) and then further reduces those eco-systems to plant/marine species and then again to genetic resources of all living things within a state's territory. Each level of reduction presents an increased commercial opportunity.

But there is a *terra nullius*[6] perspective implicit in the *intellectual property* requirement to demonstrate human intervention or innovation (value-added) in that *intellectual property rights* laws do not acknowledge existent customary indigenous knowledge or indigenous ownership. Nor do they agree that indigenous knowledge and processes are scientific and technological. Nor do they accommodate a connection between indigenous peoples and their lands and heritage. In short, they do not regard existent indigenous knowledge as being an *intellectual property* and deserving of protection, rather they consider such knowledge as 'common' and define human intervention based on what non-indigenous peoples 'add' to what has existed for generations.

At the July meeting of the World Trade Organisation's Trade & Environment Committee, states considered the importance of linking the Trade Related Intellectual Property Rights (TRIPs) agreement to the Convention on Biological Diversity. In a discussion on the issue of traditional and indigenous knowledge, it was reported that Canada and the US progressed the view that "*From a legal standpoint, traditional and indigenous knowledge*

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[5] Peter Donigi is a prominent lawyer who has practised law in PNG for 20 years. From the Badeabus clan in the Sepil Province of Papua New Guinea he is currently the PNG Ambassador to Germany with accreditation to the Holy See, Peter Donigi, Indigenous or Aboriginal Rights to Property: A PNG Perspective (International Books, The Netherlands:1994),14

[6] a Latin legal term meaning *'territory belonging to no one'*. The general rule of the English common law system was that ownership could not be acquired by occupying land already occupied by another, hence settler governments evoked *terra nullius* in the new colonies thereby refusing to acknowledge existent indigenous inhabitants. See Mabo Vs State of Queensland, High Court of Australia Decision, F.C.92/014, 3 June 1992. I have co-opted the term to describe a mindset of colonisers and their descendants.

was not an 'intellectual property' and cannot be treated as such" Both favoured an approach where "*traditional and indigenous knowledge could be recognised and rewarded through benefit sharing approaches which entail voluntary contractual arrangements on mutually agreed terms. Such private contractual arrangements did not require multilateral disciplines, nor would an international* ***sui generis*** *system be established to protect or grant some right of compensation for this type of subject matter."*[7]

Some states therefore are also clearly beginning to advocate a position that traditional knowledge is not scientific, therefore it cannot be afforded legal protection through existing mechanisms, does not require agreements across countries as to access rights or equitable sharing of benefits, and should be left to voluntary contractual arrangements between indigenous communities and multinational companies. For instance, a hypothetical case would see Ciba-Geigy of Switzerland with its 83,980 employees and a 1994 revenue of US$16,381 million[8] negotiate a voluntary contract directly with a village of 80 people in Vanua Levu (Fiji). Preferences for direct negotiations, company to community, without national or international guidelines do not acknowledge an enormous resource disparity in such negotiations. Without national or international guidelines to direct companies to observe basic social justice principles such as 'informed consent' the potential for abuse by companies is substantial.

TRADITIONAL MEDICINES

Article 24 of the Draft Declaration on the Rights of Indigenous Peoples relates to the right of indigenous peoples to access and utilise their traditional medicines and health practices as well as to access protection for vital medicinal flora and fauna. The WTO Trade & Environment Committee discussions are already indicating that some states will have grave difficulty with this provision.

Article 24

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

An all too frequent experience of traditional healers of the Pacific, is that they are not accorded status, either as health experts, people of wisdom, or even as traditional owners

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[7] WTO Trade & Environment Committee Report, PRESS/TE010, 8 July 1996. To receive complimentary copies of the WTO Trade and Environment Committee reports write to: Information and Media Relations Division, World Trade Organisation, Centre William Rappard, 154 rue de Lausanne CH-1211 Geneva 21, Switzerland or Internet: webmaster@wto.org

[8] **Ciba-Geigy** 83,980 employees, 1994 revenue $16,131.8 million, **Merck** 47,500 employees, 1994 revenue $US14,969.8 mil and **Monsanto** 29,354 employees, 1994 revenue $US8,272mil are currently negotiating for access rights in the Pacific region, ranked 188, 210 478 and respectively on the Global List of the Top 500 World's Largest Corporations. (Fortune, No.15, 7 August 1995)

of lands and knowledge. Many are forced to offer their services 'underground' and many patients are reluctant to admit that they use and trust traditional healing practices. This is the case not only in Pacific developed countries such as Australia and NZ, but also in other Pacific states where health 'standards' (which are really western norms and values rather than universal standards) are set as preconditions in order to access regional and international development funding. While most indigenous peoples are still fighting for the right to recognition of the validity of traditional knowledge and healing, foreigners are taking over that knowledge at a faster pace than communities are able to re-establish and promote their traditional healing. Because of the *intellectual property* requirement to demonstrate human intervention, foreigners are taking over the knowledge of traditional medicines that has existed for generations, adding value to it through western scientific explanation and using *intellectual property rights* to claim exclusive ownership of the processes and products that arise from utilising the indigenous knowledge. Protocols that require acknowledgement of the primary source of information, or the sharing of any benefits with the traditional owners of that knowledge are not observed. If developed states continue to marginalise indigenous knowledge as not meeting standards of *intellectual property* this creates a no-win situation for indigenous healers. The risks of sharing information outweigh any potential benefits.

HUMAN GENE PATENTING

The most profound example of the coverage of intellectual property laws is in the area of human gene patenting. On 14 March 1995, the US National Institutute of Health granted itself a patent (US Patent No. 5,397,696) on genetic qualities of a Hagahai citizen of Papua New Guinea. The Patent is called Papua New Guinea Human T-Lymphotropic Virus. The US also attempted to assert a worlwide patent through the World Intellectual Property Organisation (WIPO) Patent Cooperation Treaty (WO93/03759). The Hagahai patent has raised to the forefront the very worst case scenario that indigenous peoples feared about human genetic research in general.

Appended to this paper **(Appendix 1)** is an article entitled Genes, Sacredness and the Commodities Market which I recently published in the US quarterly, Cultural Survival (Vol.20, Issue 2, Summer 1996). The entire edition is devoted to the consideration of human genetic research and human gene patenting, particularly in the Pacific. I urge you to locate a copy as the edition offers the perspective of those who advocate human gene patenting and the Human Genetic Diversity Project (HGDP) as well as those who reject it.. As the issues in human genetic research are in themselves highly complex, I am appending my article as a means to ensure coverage of this area, but I prefer to use this opportunity to talk with you about other pressing concerns.

FOOD SECURITY

An additional concern that many indigenous peoples raise is the rising prominence of *intellectual property rights* as a *bona fide* business practice of the food industry. There have been a number of recent global meetings on food security that have highlighted the

earnest attempts by particularly US and European based companies to assert *intellectual property laws* over the world's basic food supply; Soya bean, rice, maize, wheat, potato[9]. You might ask why would they want to do that, it is quite simple, money/profit/greed. Why is it important in this region? Any attempt by outsiders to genetically modify Pacific crops, be they agricultural or marine resources, and in so doing assert an *intellectual property right* would be devastating to Pacific economies. According to the Asia Development Bank 'Asian Development Outlook Report' (April 1996), the ADB predicts that only two South Pacific developing countries will be financially viable by the end of the next decade, Fiji and Papua New Guinea. A plant variety right taken out for instance on a modified coconut palm, or a patent taken out on a traditional process for extracting coconut oil would enable foreign based companies to replicate the plants, the process and the product anywhere in the world and in so doing prevent Pacific states from continuing to produce and trade in customary produce. This places Pacific states and Pacific indigenous peoples equally in a highly vulnerable position.

Within the consideration of food security issues, it is important for us to ponder the implications of private ownership of the world's food staples. I realise this sounds a bit science fiction, conspiracy theory, anti-development and anti-science, but there is just cause for healthy scepticism. Need I remind you of the technological advancements that have been made in our own lifetime (television, videos, computers, walkmans, photocopy machines, voice mail, CDs, Fax machines to name but a few). The telecommunications industry has made possible what most of us considered impossible in the space of 20-30 years. The biotechnology industry is considered the 'boom industry' of the 1990's. In the space of a decade, it has not only introduced technology to identify an individual based on DNA samples from minute fragments of hair, blood or semen, but in some states laws have been developed to make DNA testing of suspected criminals mandatory (NZ's Criminal Investigations Blood Sample Act 1995) The technology is capable of achieving things that we cannot possibly comprehend. Biotechnology is advancing well ahead of societal comfort zones and unfortunately ahead of cultural, ethical and even political concerns.

As a scenario, should a company be successful in asserting for instance a global species patent on potatoes, it would mean that in the future small scale farmers would be prevented from retaining their seed stocks from one harvest for plantation the following year. To store seed stocks would become an illegal activity. Instead, farmers would have to purchase seeds every year from a company. Through biotechnology, an increasing number of seed strains are being developed precisely in order that they <u>do not generate new seeds</u>. Because patents are for a finite period of time, usually 20 years, companies are required to continually modify their products so as to meet the requirement for innovation, human intervention and industrial application. Transgenic seeds are

[9] in 1994 a species patent was granted in Europe on the soyabean crop - the first time a species patent had been granted on a food crop.

becoming a popular method for companies to keep their commercial competitiveness operational[10].

If this continues within the Pacific one can see that it will become increasingly difficult and expensive for small farmers to continue to farm. If biotechnology extends into the ocean as it is beginning to do[11], it will also become increasingly difficult for fishermen to fish. Species will no longer be customary. Fishermen will find themselves having to pay access rights, in fact the current fisheries quota systems already requires this, but in this scenario access rights will be paid to foreign companies, not to states. Customary access and harvesting rights will be lost.

The biotechnology industry is going to great lengths to convince people that these new modified and transgenic seed strains are for our benefit because they will make crops grow twice as big and twice as fast, and therefore we are asked to believe that this is a good thing. But with the improved strains of seeds, come higher seed stock prices and specially designed herbicides/pesticides which will not be offered at competitive prices. The crops themselves will be pre-purchased by companies who will set strict standards for growing and harvesting and require contractual agreements that might preclude a grower from selling their crop to a higher bidder. An increased reliance on genetically modified crops will mean a loss of traditional biodiversity. Instead of an indigenous community growing 7 varieties of potatoes, they would grow only one or two hybrids because of market demands. While a patent on a hybrid seed might last 20 years, pests rejuvinate and buildup resistances within a much shorter timeframe. If pests wiped out a hybrid crop and communities had lost their traditional varieties, the community would end up with no food and no income not because of a natural disaster but due to the failure of science and the greed of commerce. What I'm trying to build up here is a picture where you can see that every aspect of what used to be a customary activity will in the future become a series of commercial transactions, the land, the seeds, the pesticides, the markets. That fatal mix of western science, commerce and through *intellectual property* rights, law. Is this really what Pacific indigenous peoples want?

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[10] According to NZ's Minstry for the Environment, at least 40 applications for field tests of genetic changes to plants and animals are before the Ministry's Interim Assessment Committee, including **Zeneca Seeds Inc**. 30/8/96 application to field-trial Canola containing the **Monsanto Corporation's** Roundup Ready (TM) Genes for Glyphosate Herbicide Resistance **Ciba-Geigy** have already been granted approval to field trial transgenic maize. "A scientist from Wellington's Safe Food Campaign said a form of soya bean spiked with a gene from a brazil nut caused severe allergies among people in the US recently. Also in 1989 a genetically altered food supplement was implicated in the deaths of 37 people and 1500 hospitalisations in the US." (Evening Post, 21 September 1996:1)

[11] "the sea's economic potential is enormous. Majestically swirling ocean currents influence much of our world's weather patterns;figuring out how they operate could save trillions of dollars in weather related disasters. The oceans also have vast resources of commercially valuable minerals...pharmaceutical and biotechnological companies are alrealy analysing deep sea bacteria, fish and marine plants looking for substances that they might someday turn into mirac drugs.(Ocean Frontiers, *Time Magazine* No.32, 14 August 1995:48)

Social commentator David Loy suggests that science and commerce are steadily replacing religious/spiritual values as core values determining development "*Religion is notoriously difficult to define. If however we understand religion as what most fundamentally grounds us by teaching us what the world is and what our role in the world is, two facts become obvious; traditional religions are fulfilling this function less and less; and that is because this function is being supplanted - or overwhelmed- by other belief systems and value systems. Today the most powerful alternative explanation of the world is science and the most attractive value-system has become consumerism."* [12]

At a recent public consultation in Wellington, New Zealand, a panel of sixteen reached the following conclusions about the ethical considerations of plant biotechnology and *intellectual property* rights. *"Ownership means different things to different people. The results of genetic modification to plants must be considered an invention, which, because it is a novel use, means a person or company can have intellectual rights. Notwithstanding this, we accept that* ***intellectual property*** *rights of current NZ legislation differs from the views of Maoridom....while we accept the ethics involved and the perspective of various cultural groups, we believe that plant ownership is a reality and issues of practicality seem to take precedence over ethics."*[13] The Panel called for a moratorium on the importation of any genetically modified organisms into New Zealand until the Environmental Risk Management Authority was set up to monitor the issue and concluded that the potential for catastrophe was great. It is a pity therefore that they also considered 'issues of practicality to take precendence over ethics.'

It is also a matter of concern that an increasing number of food products are being developed are transgenic, including comprising human genetic materials. The Health Research Council of NZ in its report 'The Clinical And Research Use of Human Genetic Material: Guidelines for Ethical, Cultural and Scientific Assessment' noted that '*transfer of copy human genes into other organisms, ranging from fish to farm animals is now a widespread practice (1994, xi)*'. The United Kingdom Report on the Ethics of Genetic Modification and Food Use recommended that *'organisms containing copy genes of human origin may be used in the food chain subject to the necessary safety assessment."*

So the direction that intellectual property rights and biotechnology is taking us therefore is not only one that is systematically alienating our traditional resources, it is also threatening our livelihoods and the economies of our Pacific communities and countries. It is imposing on us a value system that is absolutely contrary to indigenous Pacific world views, and beliefs in the integrity of nature and concepts of what is sacred and what is profane. It also places Pacific indigenous peoples in a competitve framework where we

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[12] David Loy, The Religion of the Market, reprinted in JUST World Trust Commentary No.30/August 1996. For further information on JUST write to: Dr. Chandra Muzaffar, Director, JUST World Trust, PO Box 448, 10760 Penang, Malaysia: E/Mail: core@just.po.my

[13] Plant Biotechnology: Interim Report, Talking Technology Conference, Wellington 22-24 August 1996 (Ministry of Agriculture)

fear that if we don't take out a Patent first, someone else will. Imagine the regional divisiveness that would result if one Pacific country took out a Patent on ***kava*** thereby preventing any other Pacific state from producing ***kava*** themselves, or at a community level if an artist copyrighted a traditional song or sold a traditional art design to a foreign company who in turn copyrighted the design.

These issues are why there are a growing number of indigenous peoples,non-governmental organisations and governments striving to develop *sui generis* systems which better protect collective heritage, as well as to have removed from inclusion in *intellectual property rights* mechanisms, all lifeforms. The Congress of Ecuador for instance, recently passed a mini-law on biological diversity. The text is as follows:

LEY DE BIODIVERSIDAD EN ECUADOR

Article One

The Ecuadorian State is the holder of the property rights regarding species that make up the biodiversity of the country, which are considered as national property and for public use.

Their commercial exploitation will be subject to regulation, and toward this end the President of the Republic will issue precepts guaranteeing the ancestral rights of indigenous communities regarding knowledge and intangible components of biodiversity and genetic resources and to give orders regarding them.

Article Two

This present proposed law will enter into effect upon its being recorded in the Official Register. Set forth in Quito, 2 September 1996.[14]

In 1995, Pacific indigenous peoples established the Treaty for a Lifeforms Patent Free Pacific (at a Suva conference sponsored by UNDP and hosted by the Pacific Concerns Resource Centre). The Treaty (**APPENDIX 2)** does not prevent research and development projects, but asserts that it is not necessary to use *intellectual property* rights in order to develop policy and products to improve human and environmental conditions. he Pacific Treaty calls for a moratorium on bioprospecting in the Pacific region until appropriate protection mechanisms are in place.

The Pacific Treaty was developed through a round of regional workshops (Latin America, Asia, Pacific) sponsored by UNDP. Refer to **APPENDIX 3** for the list of outcomes of all three regional workshops.

With all these issues as background, I now wish to draw your attention to Article 29 of the Draft Declaration. Article 29 attempts to bring together all the issues inherent in

[14] for further information contact: Acci'on Ecol'ogia, Correo General, Quito, Ecuador, E/Mail:verde@acecol.ecx.apc.org

cultural and intellectual property rights even though some of the points are covered in other Articles as well. Article 29 was deliberately drafted as an all-inclusive provision in order that states did not seize upon the separation of components of *cultural property* as meaning that indigenous peoples therefore did not regard them to be *intellectual property*.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, design and visual and performing arts.

Some governments regard this Article as tantamount to heresy as these provisions present a direct contradiction to all that is happening in the biotechnology industry and in regard to the Trade Related Intellectual Property Rights Agreement (TRIPs). To retain this Article in its current form will present as great or perhaps an even greater battle as Article 3 on the right to self-determination. We need to be clear that commerce rules politics, it always has.

In 1993, the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples was developed by indigenous peoples from throughout the world. **(APPENDIX 4)** It represents one of the first articulations of global indigenous concerns and aspirations on these issues.

THE CONVENTION ON BIOLOGICAL DIVERSITY[15]

The Draft Declaration includes strong provisions such as Article 29, but as well as the ensuing battle we will encounter to try and hold on to these provisions, even when the Declaration is finalised and agreed to by the General Assembly it will not be a legally binding document. Therefore it is important that indigenous peoples participate in relevant discussions held in other fora, particularly those that involve legally binding Conventions.

For instance, the Convention on Biological Diversity (1992) was one of two legally binding Conventions agreed to through the UN Conference on Environment and Development (UNCED) process. [The other is the Convention on Climate Change] 145 countries have ratified the Convention on Biological Diversity (CBD) including most countries of the Pacific. Within the Convention, there is specific provision, Article 8(j) which relates

[15] to seek accreditation for attendance at all CBD related meetings, and to receive documentation, write to: Secretariat, Convention on Biological Diversity, World Trade Centre, 413 St. Jacques St., Office 630, Montreal, Quebec, Canada H2Y 1N9 or Email: biodiv@mtl.net

specifically to indigenous knowledge and requires of states the development of policies that outline access, utilisation, protection, sharing of benefits.

"Subject to national legislation, respect, preserve, maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices." (Article 8(j) In-situ conservation, Convention on Biological Diversity[16]

Article 8(j) will be discussed at the next meeting of the Conference of the Parties, November 5-14 in Buenos Aires, Argentina. It is an extremely important meeting for indigenous peoples to participate in because it is at this meeting that states will reach legally binding agreements on the issues implicit in Article 8(j). The outcomes will also influence how states ultimately consider the Articles of the Draft Declaration as they relate to cultural and intellectual property rights.

At the September meeting of the SBSTTA, the Subsidiary body which provides scientific and technological advice to the CBD, some states attempted to even further marginalise the rights of indigenous peoples and their communities by moving to adopt the term 'local communities' rather than 'indigenous and local communities.'The use of the term 'local communities'applies to every rural community in the world. It refers to a group who have no status in international law, unlike indigenous peoples who do.

At the meeting of the CBD, other agenda items include: agricultural biological diversity (food security), terrestrial biological diversity (forests and forestry), economic valuation of biological diversity (the process to accommodate global trade) and coastal and marine biological diversity which includes special consideration of bioprospecting of genetic resources of the deep sea bed. Already some states are calling for a review of the UN Convention on the Law of the Sea to exclude the deep sea bed from inclusion within a state's economic zone.

OTHER MULTILATERAL AGREEMENTS

Through multilateral agreements such as the GATT[17] and regional agreements such as NAFTA there is a strong push to harmonise intellectual property laws of all states so that it becomes easier for nationals of one state to access and assert ownership of materials and resources derived from other states. It is significant that Australia indicated its intention to withdraw from the South Pacific Regional Trade and Economic Co-operation

[16] other relevant Articles of the CBD include; 8(a) protected areas, 10(d) remedial action in degraded areas, 16 technology transfer, 18 scientific cooperation 28 adoption of Protocols

[17] General Agreement on Tariffs and Trade, The Final Act (also known as the Uruguay Round), finalised in 1994.

Agreement (SPARTECA) and that New Zealand has also indicated its intention to do likewise (Source: Fiji Daily Post, 3 September 1996) NZ, Australia and Fiji are the only South Pacific countries to have ratified the GATT. Few Pacific nations have in place the full spectrum of intellectual property rights laws and a withdrawal from SPARTECA can be interpreted as a move to force Pacific countries to ratify the GATT and submit their intellectual property rights laws to global harmonisation.

CONCLUSION

In conclusion, I would like to say that although the Draft Declaration on the Rights of Indigenous Peoples does not present for me the ideal of how I would wish to see provisions written to protect indigenous cultural and intellectual property rights, there is nothing in my opinion that suggests that these Articles in their current form would necessarily hinder what indigenous peoples are trying to achieve. While the articles take into consideration potential threats to traditional resources, they do not encompass the threat to economic survival that the current intellectual property rights regime poses. Although Article 29 states that indigenous peoples have rights to 'special measures', given the developments in negotiations of the WTO Trade & Environment Committee and the Convention on Biological Diversity, where states are moving to towards 'voluntary contractual arrangements' rather than **sui generis** legal instruments, stronger wording would be preferable.

It is important that the Articles of the Draft Declaration be retained in their current form as they represent minimum standards for states to observe. We must follow the Inter-governmental negotiations on the Draft Declaration to ensure the spirit and intentions of the Articles are upheld. But it is equally important that we also expand our energies into some of the other relevant international fora such as, the World Trade Organisation Trade & Environment Committee, the Convention on Biological Diversity, Law of the Sea, FAO and UNESCO Bioethics Committee. Developments in these fora should be closely monitored to ensure that nothing that is expressed in the Draft Declaration is compromised through agreements reached in other international mechanisms.

APPENDICES

1. Aroha Mead, Genes, Sacredness and the Commodities Market *in* Cultural Survival, Vol.20, Issue 2, Summer 1996

2. Treaty for a Lifeforms Patent-Free Pacific and Related Protocols
   28 August 1995, Suva, Fiji

3. Statements of the Regional Meetings of Indigenous Representatives on the Conservation & Protection of Indigenous Knowledge (sponsored by the United Nations Development Programme)

4. Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples (1993)

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STRATEGIES FOR FUTURE ACTION

CULTURAL AND INTELLECTUAL PROPERTY RIGHTS OF INDIGENOUS PEOPLES OF THE PACIFIC

1. LOCAL LEVEL

* empower indigenous communities with the knowledge they need to negotiate with foreign researchers and companies particularly bioprospectors and health researchers.

2. NATIONAL LEVEL -

* develop and/or amend intellectual property laws to exclude all lifeforms from patentability

* develop copyright and *sui generis* systems to protect traditional material culture

3. REGIONAL LEVEL -

* sign and implement the Treaty on the Life-Forms Patent-Free Pacific and Related Protocols as a commitment to Pacific indigenous communities and to the Region

* lobby Pacific governments to sign the Treaty

* network with other interested indigenous peoples and NGOs

* develop and promote a Pacific regional profile and position on *cultural and intellectual property rights* issues

* develop and promote regional indigenous trade networks

4. INTERNATIONAL LEVEL

* sign and implement the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples

* monitor relevant international agreements and negotiations including:

  Convention on Biological Diversity, Law of the Sea, FAO Understanding, WTO Trade & Environment, Working Group on Indigenous Peoples, Inter-sessional meeting on the UN Draft Declaration on the Rights of Indigenous Peoples

* encourage one or several Pacific governments to take a case to the International Court of Jurists (World Court) to seek an opinion on the legality of including lifeforms in intellectual property rights mechanisms