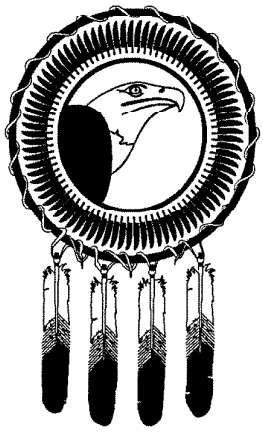
Malcolm Wiener Center for Social Policy

Towards a Declaration for the Protection of the Intellectual and Cultural Property Rights of Native Peoples: An Attempt at a Framework for a Model Tribal Law

by

Amita Paul

PRS98-12



Harvard Project on
American Indian Economic Development

John F. Kennedy School of Government
Harvard University

TOWARDS A DRAFT DECLARATION FOR THE PROTECTION OF THE INTELLECTUAL AND CULTURAL PROPERTY RIGHTS OF NATIVE PEOPLES:

AN ATTEMPT AT A FRAMEWORK FOR A MODEL TRIBAL LAW

EXECUTIVE SUMMARY

This Project has been written for the Morning Star Institute, a national non-profit Indian Rights organization, devoted to Native Peoples' traditional and cultural rights and the arts, headquartered in Washington DC, USA, under the auspices of the PED 502 course on 'Native Americans in the 21st Century: Nation Building II', at the John F. Kennedy School of Government , Harvard University, during the Spring Semester, 1998, as a part of the course requirement.

The Project aims to create a basic framework for a Draft Declaration for the Protection of the Intellectual and Cultural Property Rights of Native Peoples in the United States of America, by placing in the broadest possible international context, with special efforts to connect it with related issues in developing countries in general, and India in particular. The present paper may be seen as the first step in a multi-tiered attempt to frame such a draft declaration in an international context, and to get it recognized and implemented at the level of tribal governments, country government/s, and at the international level through agencies of the United Nations.

The thesis of the Project can be summarized under three main headings :

1. The Basic Framework 2. Recommendations 3. Plan of Action

THE BASIC FRAMEWORK

A Basic Framework for a Draft Declaration of the Intellectual and Cultural Property Rights of Native Peoples, can be derived from the conclusions of the Conceptual, Legal, and Economic Frameworks, as follows :

CONCEPTUALLY, the Draft Declaration must address the issues of

- What should be EXCLUDED from being patented
- What should be PATENTED but NOT COMMERCIALIZED
- What should be PATENTED AND COMMERCIALIZED

LEGALLY, the Draft Declaration must address the issues of

- INCLUSION of Indigenous Peoples IPR issues in WTO, TRIPS, and WIPO
- EXCLUSION of undocumented intellectual and cultural resources from exploitation
- RECOGNITION of COMMUNITY RIGHTS in intellectual/cultural property
- RESPECT for tradition, privacy, and the spiritual dimension of IPRs
- INTRODUCTION of the concept of Intergenerational Equity
- USE of GEOGRAPHICAL LOCATION as a means of identification and protection
- EMPHASIS on HUMANITARIAN, NOT COMMERCIAL considerations

ECONOMICALLY, the Draft Declaration must address issues of

- CONTROL over the commercialization of Native Peoples IPRs
- COMMERCIALIZATION of selected areas through tribal enterprises,esp.NA MNEs
- COMPENSATION for commercialization through non-tribal entities/MNEs

Top priority must be given to control, followed by commercialization by the Native Peoples themselves. Non-tribal commercialization must be considered, for adequate compensation, only as a last resort. Possibilities for Joint Ventures and Strategic Alliances with non-tribal entities could be explored.

RECOMMENDATIONS

Indigenous Peoples all over the world have **a vast resource base of Intellectual and Cultural Resources.** This resource base, **accumulated over many centuries, or even over milleniums, is often undocumented in any formal sense**, unlike the limited achievements of modern, technology-based cultures and societies. The new world order of international trade, with its highly commercial, often exploitative, perspectives on Intellectual and Cultural Property regimes, poses **a serious and immediate threat to the rich heritage** of Native peoples. As such, there is an urgent need for a Universal Declaration of the Intellectual and Cultural Property Rights of Indigenous and Tribal People/peoples, which should be applicable in tandem with the World Trade organization's(WTO) Agreement on Trade- Related Applications of Intellectual Property Rights (TRIPS) (1995) and the World Intellectual Property Organization's (WIPO) International Patents Classification (IPC)(1971) and Patents Cooperation Treaty (PCT), as well as the Berne Convention (1886) for the Protection of Literary and Artistic Works, and the United Nations Educational, Social and Cultural Organization's (UNESCO) Hague Convention (1954)and should be binding on all countries. As such it is recommended that:

1. **A Universal Declaration of the Intellectual and Cultural Property Rights of Indigenous and Tribal People/Peoples should be framed , for which a Draft Declaration by Native American Nations should form the starting point.**
2. The Universal Declaration of the Intellectual and Cultural Property Rights of Indigenous and Tribal People/Peoples should be applicable in tandem with the

WTO's TRIPS, WIPO's IPC and PCT, as well as the Berne Convention for the Protection of Literary and Artistic Works, and UNESCO's Hague Convention, on all member countries of the UN).

3. The Draft Declaration must therefore be recognized and endorsed by all UN bodies and agencies.
4. .Protection and promotion of the IPRs of Indigenous Peoples must be written into the Charters of the World Trade Organization (WTO) and the World Intellectual Property Organization, and should be added as a detailed and binding Clause of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).
5. WTO and WIPO should launch special programs for research, training, and awareness generation on this subject , and provide financial and technical assistance to help indigenous people to protect such rights and to make the best possible use of them.
6. Sanctions should be imposed on countries whose firms violate tribal IPRs, and MNEs responsible for such exploitation should be tried in the International Court of Justice.
7. .Countries and Governments should enunciate a clear policy for the protection of the IPRs of Indigenous peoples.
8. Some harmony should be achieved between local , national, and international laws and policies on such subjects, through coordination and cooperation.
9. . The unwritten traditions of tribes on IPR ownership should be recognized and respected at all levels in the legal process.
10. In 1984, the World Intellectual Property Organization (WIPO) recognized that indigenous people were not being compensated for the uses made of their folklore

traditions. WIPO then developed **"MODEL PROVISIONS FOR NATIONAL LAWS on Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Action".** No country has adopted the measure so far. WIPO should actively pursue this issue with national governments.

11. In **1991, the UN General Assembly** passed a resolution appealing to States:"to cooperate closely with the inter-governmental Committee for **Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, and to conclude bilateral agreements for this purpose". The UN Working Group on the Rights of Indigenous Populations** has requested a further study, to be conducted in cooperation with indigenous people, on a comprehensive analysis of the laws and traditions of indigenous peoples regarding the definition, ownership, and control of cultural property. This study should be completed quickly, and Native American people should participate actively in its conduct. The results of this study should be made public soon, and its recommendations used to frame International Laws on the subject, which should be justiciable in the International Court of Justice.

12. **There is a strong need to incorporate the concept of group/community/tribal/ collective IPRs.** Tribes should not have to register as corporations to exercise rights as unified entities for IPR protection and for economic activity generated by such rights.

13. Communities accumulate knowledge over generations, and have a right to protect and use such knowledge, and to pass it on to future generations. The contributions of past generations must be recognized; the rights of present and future generations must be

equitably protected. For creating just and sustainable development, **intergenerational rights in IPRs must be respected, and incorporated into IPR law and instruments.**

14. Legal instruments of **Estoppel /Exclusion /Exceptions /Savings** etc. should apply automatically to protect the vast store of undocumented/unregistered intellectual and cultural resources of tribes. A concept of **Prior Informed Consent** must be incorporated into laws at all levels, so that Native communities can utilize traditional knowledge after identifying utility, usages, derivatives, costs and benefits.
15. **Geographical location** should be used as a means of identifying tribal IPRs and protecting them against piracy.
16. TRIPS and national patent/copyright legislation should contain binding clauses that **primary registration must be in the nearest Patent/Copyright office**. Offices found in violation, encouraging piracy, should have to forfeit their powers till just restitution has been made.
17. At the same time, issues of geography in terms of **jurisdiction** should not prevent tribal people from getting **redressal through their nearest courts** for violation of their IPRs, as groups or as individuals. The place of violation may not be material, unless plaintiffs prefer to file complaints there. **Choice-of-law** principles must operate in such cases for maximum convenience and least expense to Native people/peoples.
18. . Besides protecting undocumented resources, laws should also provide protection FROM patenting that which has spiritual significance; whatever adversely affects the

honor, dignity, privacy, and tradition of tribes and individuals; that which must remain in the common domain for humanitarian reasons.

19. **The Human Genome Project**, which treats primitive tribes like laboratory specimens, and 'steals' their DNA samples for future use, without working for the survival of these vanishing and endangered tribes, is offensive to human dignity. A view has to be taken on these issues after fully informed consultation with the concerned tribes.
20. Hence **CONTROL** over what should or should not be patented must be vested in each tribe itself for its own resources, and should be recognized as a more basic need and right, than **COMMERCIALIZATION.**
21. Tribes should have the right to PATENT BUT NOT COMMERCIALIZE that which they see as non-commercial, for spiritual and humanitarian reasons, such has traditional healing methods. These could be shared with all mankind at no financial profit, but with recognition for the originating tribe.
22. Tribes should have **the right to select what they wish to commercialize, and how to** do it. Country governments and International Agencies should provide **technical and financial assistance** to tribes that wish to found enterprises to commercialize their Intellectual and Cultural Property resources, but lack the means. Commercialization by tribes themselves is preferable to licensing tribal IPRs to non-tribal entities, which should be done only as a last resort, for fair and adequate compensation.
23. The time is ripe for forming **Indigenous Peoples' Multinational Enterprises (MNEs)**, given their vast intellectual and cultural resources on a global scale, which

can be easily coordinated through global networking in this age of the information revolution. **Native American Nations are best equipped to give a lead in this sphere, and Biomedicine is the most appropriate and profitable area to begin with.**

24. Global Networking should also take the form of **maintaining a Global Registry of Native Peoples' Intellectual and Cultural Resources**, both patented and unpatented, to prevent piracy in the globalized economy. This responsibility should be taken up by WIPO, in collaboration with national governments and tribal people/peoples.

25. There is **an urgent need for Community Based and Non-Governmental Organizations (NGO's and CBO's) who should work at the grassroots level among tribal people the world over, to generate awareness about their IPRs, to help inventorize and document Intellectual and Cultural Resources, to facilitate patenting, to gather information on violations, and to help initiate legal action against violations.**

STEP-BY-STEP PLAN OF ACTION FOR THE CLIENT

IPRs of Native Peoples
SUGGESTED PLAN OF ACTION

1. Create a Broad International Framework.
2. Fit in Documentation of National Issues.
3. Hold a Conference of Experts and Tribal Leaders to frame a Draft Declaration.
4. Publicize Draft for an Open Debate,with MSI as Coordinator for Suggested Changes
5. Finalize and Adopt Joint Declaration for all Native American Nations.
6. Ensure Recognition by US Govt.and UNHRC, and inclusion in all NA Constitutions/Law Codes.
7. Monitor Implementation and make Amendments whenever necessary.

In this paper, a start has been made on Point 1 , through an attempt at creating a broad framework in an international perspective. To move on to Point 2 in the multi-step process of framing a Draft Declaration of the Intellectual and Cultural Property rights of Native Peoples, it is suggested that a Conference of Experts, Members of Tribal Governments, Native Rights Activists, and NGOs may be held on the subject. The Conference could be jointly hosted by the Morning Star Institute and the Harvard University Native Americans Program (HUNAP), and /or the Harvard Project on American Indian Economic Development (HPAIED). A tentative list of experts on relevant subjects is given in the final section of the paper. This could form a basis for the Experts portion of invitees for the proposed conference.

Intellectual Property Rights of Native Peoples

"I am going to venture that the man who sat on the ground in his tipi, meditating on life and its meaning, accepting the kinship of all creatures, and acknowledging unity with the universe of things, was infusing into his being the true essence of civilization".

Luther Standing Bear (1868-1939) Oglala Sioux Chief

IPRs of Native Peoples

"The cultures of the Indigenous Peoples are a part of the Cultural Heritage of mankind ...The traditions and cultures of Indigenous Peoples must be respected by all states, and recognized as a fundamental source of law".

Declaration of Principles of Indigenous Rights in the 4th General Assembly of the World Council of Indigenous Peoples, Panama, September1984(UN Doc.1985)

IPRs of Native Peoples

1. Existing Law --

Declarations -- UN,EU,OAS

Agreements -- TRIPS,WTO

Conventions -- Hague Convention, Berne Convention, CBD, ILO169

2. Country Experiences -- India, China, Thailand, Bangladesh

3. Case Law -- Crazy Horse, Redskins,Cleveland Indians

4. Interviews -- Experts in Law, Trade, MNEs, Culture, Economics

IPRs of Native Peoples
ORGANIZATION OF DATA

- The CONCEPTUAL framework
- The LEGAL framework
- The ECONOMIC framework

IPRs of Native Peoples
CONCEPTUAL FRAMEWORK

- What should be excluded from being patented
- What should be patented but not commercialized
- What should be patented and commercialized

IPRs of Native Peoples
LEGAL FRAMEWORK

- *INCLUSION* in TRIPS, WTO, WIPO
- *EXCLUSION* of undocumented knowledge
- *USE* of geography for identification
- *CHOICE-OF- LAW* in jurisdiction
- *RECOGNITION* of community rights
- *INTRODUCTION* of intergenerational equity
- *RESPECT* for tradition and privacy
- *EMPHASIS* on the humanitarian dimension

IPRs of Native Peoples
ECONOMIC FRAMEWORK

- Top Priority: CONTROL
- Second Priority: COMMERCIALIZATION through Native Enterprises
- Third Priority: COMPENSATION through licensing to non-tribal entities
- Important Options: Tribal MNEs, Joint Ventures, Strategic Alliances

IPRs of Native Peoples

KEY GLOBAL ISSUES

- Community/Group Rights in Intellectual Property
- Geography and Jurisdiction
- Respect for Tradition,Privacy and the Spiritual Dimension
- Humanitarian Considerations
- Issues of Access - Financial, Technical, and Administrative problems

IPRs of Native Peoples

IMPORTANT AREAS

1. BIODIVERSITY (Plants,Animals,Humans)
2. BIOTECHNOLOGY and BIOMEDICINE
3. LITERATURE AND THE ARTS
4. CRAFT TECHNIQUES AND PRODUCTS
5. TEXTILES (Fabrics and Designs)
6. ARCHITECTURE(Layouts and Materials)
7. METALLURGY (Techniques and Alloys)

IPRs of Native Peoples
RECOMMENDATIONS

- **CONSULT** (Tribes, Lawyers, Financial Analysts)
- **INVENTORIZE** (Resources, Laws, Cases)
- **WATCH** (Patents Offices,Market,Internet,WTO)
- **CREATE** (Network for awareness & action)
- **CONVENE** (Conferences and Powwows)
- **SEED** (Native Patent-Based Businesses)
- **NETWORK** (Indigenous Peoples Worldwide)

IPRs of Native Peoples

SUGGESTED PLAN OF ACTION

1. Create a Broad International Framework.
2. Fit in Documentation of National Issues.
3. Hold a Conference of Experts and Tribal Leaders to frame a Draft Declaration.
4. Publicize Draft for an Open Debate,with MSI as Coordinator for Suggested Changes.
5. Finalize and Adopt Joint Declaration for all Native American Nations.
6. Ensure Recognition by US Govt. and UNHRC, and inclusion in all Native American Constitutions and Legal Codes.
7. Monitor Implementation and make Amendments whenever necessary.

IPRs of Native Peoples

Table 1 FRAMEWORK FOR DECISION MAKING ON IPRs/PATENTS

(An illustrative, not exhaustive, list)

Key Areas	Conceptual Options Yes	Conceptual Options No	Legal Options Individual Rights	Legal Options Group Rights	Commercial Options Tribal (Own)	Commercial Options MNE (Licensed)
BIODIVERSITY (Human , Animal, Plant)	Some Cases	Human DNA, Foods, etc.	Rare Cases	Most Cases	Preferable in future	Feasible at present
MEDICINE (Biomedicine, Traditional Healing Practices)	Most Cases	Humanitarian and Spiritual Considerations		✓	Preferable	Practical at present
CRAFT (Designs and Products)	✓		Rare Cases	Most cases	✓	
TEXTILES	✓		,,	,,	✓	
ARCHITECTURE (Layouts , Designs, Materials)	✓		,,	,,	✓	
METALLURGY (Processes and Products)	✓		,,	,,	✓	
LITERATURE & ART (FOLKLORE, ORAL TRADITION)	Some Cases	Exclude the Sacred, and in general undocumented		✓ Protect Exclusions	✓	
LITERATURE & ART (Individual, esp. modern Creations)	✓		✓		✓	
NAMES & LOGOS	For Tribal use only	For reasons o privacy, honor, spiritual significance	Rare Cases	Most Cases	Commercialize only in exceptional cases	
CEREMONIES		✓ Reasons as above		✓ (if the question ever arises)	Avoid commercialization as far as possible	Avoid outside commercialization at all costs

IPRs of Native Peoples

"Let one of you help the other ;
Let one stand by the other.
All of you, working together,help
This speech of mine to succeed".

(Hymn from the Rig Veda, the most ancient Indian Religious Text)

TOWARDS A DECLARATION FOR THE PROTECTION OF THE INTELLECTUAL AND CULTURAL PROPERTY RIGHTS OF NATIVE PEOPLES: *AN ATTEMPT AT A FRAMEWORK FOR A MODEL TRIBAL LAW*

"When a* man *does a piece of work which is admired by all, we say that it is wonderful; but when we see the changes of day and night, the sun, the moon, and the stars in the sky, and the changing seasons upon the earth, with their ripening fruits, anyone must realize that it is the work of someone more powerful than man".

(Chased-by-Bears (1843-1915),Santee-Yanktonai Sioux, quoted in 'Native American Wisdom', edited and published by Running Press, Philadelphia, 1994)

"In the beginning of all things, wisdom and knowledge were with the animals, for Tirawa, the one above, did not speak directly to man. He sent certain animals to tell men that he showed himself through the beasts, and that from them, and from the stars and the sun and the moon should man learn...all things tell of Tirawa."

(Eagle Chief [Letakots-Lesa] (late 19th century) Pawnee, ibid)

"I am trying to save the knowledge that the forests and this planet are alive, to give it back to you who have lost the understanding."

(a Kayapo Indian leader from Brazil, quoted in 'Intellectual Property Rights and the Tribals', edited by Bhupinder Singh and Neeti Mahanti, published by Inter-India Publications, New Delhi,1997)

"Among the Indians, there have been no written laws. Customs handed down from generation to generation have been the only laws to guide them. Every one might act different from what was considered right did he choose to do so, but such acts would bring upon him the censure of the Nation....This fear of the Nation's censure acted as a mighty band, binding all in one honorable social compact."

(George Copway[Kah-ge-gah-bowh](1818-1863)Ojibwa Chief,Native American Wisdom,ibid)

" One of the most difficult tasks that an indigenous person undertakes in articulating our rights is the discussion concerning our legal system. The non-indigenous peoples immediately refer to custom, or the customary legal system. Our legal systems may be built upon custom, but so, too, are most other peoples' legal systems. For example, no one refers to the English Parliamentary System as a customary system. The British have no written constitution. Likewise, our legal system is not written, and our laws are just as valid and principled as the non-indigenous laws."

(Submission before the UN Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the Human Rights Commission of ECOSOC, by a spokesperson of the Cree Nation of Canada,1992)

"The Cultures of the Indigenous Peoples are part of the Cultural Heritage of Mankind...The traditions and cultures of indigenous people must be respected by all states, and recognized as a fundamental source of law."

(Principles 3 and 4 of the Declaration of Principles of Indigenous Rights, adopted by the 4th General Assembly of the World Council of Indigenous Peoples, Panama, September 1984.)

INTRODUCTION

THE CLIENT

This Project Report has been written at the request of the Morning Star Institute, a national, non-profit Indian Rights organization, devoted to Native Peoples' traditional and cultural rights and the arts. Founded in 1984 and headquartered in Washington D.C, the Morning Star Institute is governed by a national board, whose director are tribal and spiritual leaders and cultural rights specialists.

The author is grateful to Ms. Suzan Harjo, President of the Morning Star Institute, and to Dr. Manley A. Begay, Jr., Member of the Board of Directors of the Institute, and Co-Director of the Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University, for their guidance, encouragement and support in the carrying out of this Project.

SUPERVISION

The author acknowledges with gratitude the supervision and support of Faculty Adviser, Professor William L. Fash of the Department of Anthropology, under the Faculty of Arts and Sciences, Harvard University.

SUPPORT

The author is grateful for the inputs, feedback, and support of all the Faculty Members and fellow-students participating in the Nation Building II class (PED502) of Spring 1998 at the Kennedy School of Government, Harvard University.

THE PURPOSE OF THE PROJECT

The purpose of this project is to develop a framework for a Model Tribal Law and related authorities for a Declaration of Intellectual and Cultural Property Rights for the Native

American Nations of the United States of America, by placing the issue in an ideological and international context ; to suggest a series of logical steps towards the attainment of this goal, and to identify some of the relevant resources for taking these steps in terms of a select list of contact persons working on the subject/ related subjects in concerned disciplines/areas, as well existing treaties, declarations, case law, newspaper articles, and other available documentation.

Modifications in the original purpose of the Project

The Draft Declaration of the Intellectual and Cultural Property Rights of Native Peoples, as ultimately framed , would include the assertion of the rights, statement of the basis of the authorities, scope of the covered property, and notice of remedies to be pursued in cases where the rule of respect and recognition is not accorded and where such rights are unfairly appropriated. To this end, the project was initially aimed at researching options for Native Peoples to protect cultural property under existing Tribal Law, and supporting Federal and International authorities.

However, upon discussion with the clients, it was agreed that to reach the point of actually framing a draft declaration, they would need **a multi-step, multi-layered project**, and that **this report could be seen as a first step towards obtaining an overview, and of placing the issue in its broadest possible context, with an eye on the latest international developments regarding the TRIPS (Trade Related Intellectual Property Rights) Agreement in the WTO (the World Trade Organization)**. It was felt that it would help the client to know what resources could be garnered for a preliminary conference on the subject, and what experts could be called upon in the fields of :

- Law
- Commerce/ International Trade
- Multinational Enterprises
- Business (Domestic) and Services
- Management
- Culture
- Science
- Agriculture
- Medicine
- Cybertechnology
- Tribal Government

Thus **the multiple steps to be taken towards a framing a Draft Declaration for the Protection of the Intellectual and Cultural Property Rights of Native American Nations** would be:

1. An International Overview of the Subject
2. Documentation and Analysis of National Issues, Existing Case Law, and Existing/ Proposed laws in NA constitutions/ law codes on IPR (Intellectual Property Rights) related matters.
3. A Conference on a Draft Joint Declaration for all NA Nations
4. Finalization of the Draft after open debate
5. Adoption of the Joint Declaration by all NA Nations, Recognition/Adoption of the Declaration by the US Government, and its effective implementation.

The present report would hopefully form the first step in this multi-tiered project.

PROBLEM DEFINITION

When the Final Act embodying the results of the Uruguay Round of Multilateral Trade Agreements was adopted at Marrakesh in Morocco on 15 April 1994, the world entered into **the era of a new Intellectual Property Regime**. This Act contained, in its Annex 1C, **the Agreement on Trade- Related Aspects of Intellectual Property Rights (TRIPS).** Close on its heels, on 1 January 1995, came the creation of the World Trade Organization (WTO), which replaced the old system of GATT (the General Agreement on Trade and Tariffs), and became responsible, *inter alia,* for supervising the implementation of TRIPS by member countries, and for the resolution of disputes arising from its non-implementation/ faulty implementation. With 132 member countries, WTO became a very powerful body for securing implementation. WTO's Charter itself commits it to the provision of technical assistance and training for developing countries. The World Intellectual Property Organization (WIPO), a specialized UN Agency, founded in 1967, headquartered in Geneva, Switzerland, with 161 countries as members, helps to develop cooperation among member-states for promoting the protection of intellectual property throughout the world, and has a special program to help developing countries to hold their own in the world IPR regime dominated by rich industrialized countries. **Neither WTO nor WIPO has any special provisions for indigenous people, who face problems very similar to those of developing countries in terms of the lack of financial, technical, and qualified manpower resources for dealing with this new IPR regime which favors Multinational Corporations and big business functioning in the style typical of the industrialized economies of western civilization and the old colonial powers.**

The TRIPS Agreement covers the following areas:

1. Copyright and Related Rights
2. Trademarks
3. Geographical Indications
4. Industrial Designs
5. Patents
6. Layout Designs of Integrated Circuits
7. Protection of Undisclosed Information
8. Control of Anti-Competitive Practices in Contractual Licences.

Unfortunately, there are still many lacunae in the TRIPS agreement, such as the absence of clear provisions about group or community rights as well as about traditional knowledge, especially among tribal and indigenous people around the world. These lacunae reflect gaps/loopholes/anomalies in the laws of the member-nations of the WTO, from which the WTO's TRIPS framework ultimately derives.

As the commercialization of knowledge, and even of culture, increases, the intellectual and cultural traditions and wisdom of rural communities in developing countries and tribal communities everywhere become sources of attraction for exploitative market forces. In the United State of America, the Morning Star Institute, the national non-profit Indian rights organization devoted to Native People's traditional and cultural rights, based in Washington D.C., which is the client for this report, has identified this as a problem for Native communities, whose names, symbols, icons, histories and other units of cultural property, are being

increasingly, and often exploitatively and unfairly, appropriated for commercial use.

In the light of these developments, it has become increasingly important for Native American nations, clans, societies and communities with Native group property to develop effective ways of asserting and guarding against misappropriation of collective intellectual and cultural property under existing U.S. and International law and other authorities through forums such as the U.S.Patent and Trademark Office, the Federal Trade Commission and the Library of Congress, as also through organs of the United Nations such as the WTO.

Before one can get to grips with the issue of achieving this end, however, one needs to place the issue in a broad policy frame work . In order to develop such a framework, one needs to define the problem as broadly, and yet as precisely as possible. To achieve this end , **the problem can be defined at three levels**: the Philosophical, Conceptual or Ideological level ; the Legal , Judicial or Constitutional level; and the Commercial, Financial or Economic level. The questions here would be:

1. **THE CONCEPTUAL PROBLEM** : How should Native People, in the US and throughout the world, approach the issue of the protection of intellectual and cultural property rights ?
2. **THE LEGAL PROBLEM**: What is the appropriate level and instrumentality to frame protection for Native Peoples IPRs ,such that it may be effectively enforced ?
3. **THE ECONOMIC PROBLEM**: How can Native Peoples ensure full compensation, and in fact get the best financial returns for the use of their intellectual and cultural property , old or new, held by individuals, or by communities?

POLICY OPTIONS

Many of the questions raised in the Problem Definition would no doubt be answered once a Draft Declaration or Model Law for Protection of IPRs of Native American Nations has been framed. Since, however, the framing of a draft Declaration/ Model was not feasible in the limited time available to a single researcher, research was conducted on the range of options available under international laws and authorities, for the protection individual and group cultural and intellectual rights, so that a basis for the declaration could be provided. Policy options were explored along the following lines:

1. At the client's request, the project work was concentrated on placing the issue in an international perspective , by studying **an array of international and regional draft declarations**/treaties/agreements/ laws/ cases/ and related developments , and on trying **to isolate important clauses/articles/ principles** for the Native American IPR situation.
2. **The nexus between group intellectual/cultural property rights on the one hand, and individual rights on the other, was studied**, with a view to offering recommendations for Native Peoples on ways to protect artistic/intellectual rights and works, and traditional wisdom , against violations and appropriations.
3. The important issue of the **geographical location/origin** of patentable processes and products, and the embeddedness of indigenous knowledge in its native soil, was studied as a possible pointer towards protection.
4. The policy option of studying the problem in the context of **the research already conducted in developing countries like India, Bangladesh, China and other less industrialized nations, who are facing similar issues vis-à-vis the developed**

world, was also explored, in order to derive possible action options from such study.

5. **Policy options on the Conceptual, Legal, and Economic questions were studied to provide a basic Framework for the Draft declaration,** along the following lines:

    - **CONCEPTUALLY**, it is possible for NA Nations **to oppose** IPR regulations, or to support them and to adopt them. In doing either, they would be providing **important precedents for Indigenous/Tribal people in other countries of the world.**
    - **LEGALLY,** it is as important to **protect by exception/exclusion as by patenting or "inclusion",** especially where traditional community rights are concerned and where spiritual and humanitarian considerations, and respect for departed ancestors or tribal pride or honor is involved.
    - **ECONOMICALLY,** it can be more profitable **to license patents out** to other propagators in some circumstances, and **to take up entrepreneurship on one's own or as a tribe** in other circumstances. A framework has to be developed for decision-making on this issue, and new options, unheard of before, may have to be explored.

A DETAILED FRAMEWORK OF POLICY OPTIONS AND RECOMMENDATIONS IS GIVEN AT THE END OF THE REPORT.

RESEARCH METHODS

The methods of research that were used were:

1. **Collecting, Reading and Analyzing** relevant policy documents
2. **Researching** the latest developments on the subject through the Internet, especially through search engines like Lexis-Nexis, etc.
3. **Interviewing** people working on these issues from different points of view
4. **Preparing a framework** for analyzing the problem and understanding the subject
5. **Drafting recommendations** for a step-by-step Plan of Action towards a model law / Draft Declaration.

Details of the work done through the first three methods are given below, while the results of the last two are given in the final sections of the report.

Brief Details of Work Done: Research, Reading and Interviews

1. & 2. Researching as well as Collecting, Reading and Analyzing relevant policy documents , such as:

(i) the TRIPS agreement (downloaded on 27 March 1998 from Internet Website http://www.wto.org)

(ii) Basic Information about WTO (source-as above)

(iii) Intellectual Property Protection and Enforcement in the WTO (as above)

(iv) Information on the WTO Ministerial Conference at Singapore (9-13 December,1996) (as above)

(v) Singapore Ministerial Declaration (Adopted on 13 December 1996)(as above)

(vi) Press Brief from the Singapore Conference of the WTO summarizing the Report of the Council for TRIPS to the Singapore Ministerial Conference (as above)

(vii) Basic Facts on the World Intellectual Property Orgainzation (WIPO) (downloaded on 27 March 1998 from Internet Website http://www.wipo.org)

(viii) International Protection of Copyright and Neighboring Rights (source: as above)

(ix) Basic Facts about the Patent Cooperation Treaty (source: as above)

(x) General Information on International Patent Classification (source: as above)

(xi) WIPO – Cooperation with Developing Countries (source: as above)

(xii) Basic Facts on the UN International Decade for Indigenous People (1995-2004) (Information downloaded on 27 March 1998 from Internet Website http://www.un.org/ecosocdev/indigens/dpi1608e.)

(xiii) Basic Facts of UN Documentation on Indigenous Women: Taking Control of their Destiny (source :as above, dpi 1717e)

(xiv) Intellectual Property and Sovereignty: Notes towards a New Geography of Authorship (Keith Aoki) (48 Stan.L. Rev 1293) (Downloaded on 27 March 1998 from Lexis-Nexis)

(xv) Recommendations of the Workshop on Intellectual Property Rights of Tribals held in New Delhi on 23 January 1996 ('Intellectual Property Rights and the Tribals', edited by B.Singh and N.Mahanti, Inter-India Publications, New Delhi, 1997)

INTERNATIONAL DECLARATIONS

(UN, EU, and OAS Documents, all to be found at the Appendix to 'Indigenous Peoples in International Law', by S. James Anaya, OUP, Oxford, 1996)

(Details of relevant clauses with selected abstracts may be seen in the Section on the Legal Framework further in this Paper)

I. **DRAFT DECLARATION OF THE PRINCIPLES FOR THE DEFENSE OF INDIGENOUS NATIONS AND PEOPLES OF THE WESTERN HEMISPHERE (1977)**

II. **DECLARATION OF PRINCIPLES ON THE RIGHTS OF INDIGENOUS PEOPLE (1985,87)**

III. **DECLARATIONOFPRINCIPLESOFINDIGENOUS RIGHTS (1984)**

IV. **DECLARATION OF SAN JOSE (1981)**

V. **CONVENTION NO. 169 CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES (1989-91)**

VI. **AGENDA 21 of the UNCED: CHAPTER 26: on the Role of Indigenous People and their Communities (1992)**

VII. **DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (1993-1994)**

VIII. **RESOLUTION ON ACTION REQUIRED INTERNATIONALLY TO PROVIDE EFFECTIVE PROTECTION FOR INDIGENOUS PEOPLES (1994)**

IX. **DRAFT OF THE INTER-AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (1995)**

3. **Interviewing** people working on these issues from different points of view, such as:

(i) Ms. Suzan Harjo, President, the Morning Star Institute, Washington,D.C. (Native Rights Activist, who proposed this project on behalf of the Institute.)

(ii) Prof. Joseph Kalt of the Kennedy School of Government (Economics)

(iii) Prof. Joseph W. Singer of the Harvard Law School (Tribal Law)

(iv) Professor Laurie Graham of the Harvard Law School (Native American Law)

(v) Professor Lucy White of the Harvard Law School (Law for Minorities)

(vi) Professor William Fisher of the Harvard Law School (Intellectual Property Law)

(vii) Prof. William L. Fash of the Department of Anthropology, Harvard University (Culture)

(viii) Dr. Manley A. Begay Jr. of the Harvard Project on American Indian Economic Development, Kennedy School of Government, Harvard university.(Native American traditions and Economic Development)

(ix) Prof. Robert Lawrence at the Center for Business and Government, Kennedy School of Government, Harvard University (WTO and International Trade)

(x) Prof. Raymond Vernon at the Center for Business and Government, Kennedy School of Government, Harvard University (Multinational Corporations.)

(xi) Dr. Jean Camp of the Kennedy School of Government (Computers, Commerce and Convergence, or Development and Digital Technology)

(xii) Professor Keith Aoki, Assistant Professor of Law, University of Oregon School of Law (Philosophy of Intellectual Property Protection)

(xiii) Mr .Dev Vardhan, Senior Engagements Manager, Mckinsey and Co., Management Consultants, Chicago (Management)

(xiv) Ms. Angela Riley, Third Year Law Student at Harvard Law School, writing her Final Paper on Native Americans and Intellectual Property (Case Law)

THE PRESENT SITUATION: WTO AND TRIPS

The justification for Intellectual Property Protection and Enforcement given in the WTO's basic documents (Internet Website http://www.wto.org, downloaded on 27 March 1998) is as follows:

" When an inventor or creator is granted patent or copyright protection, he obtains the right to stop people from making unauthorized copies. Society at large sees this temporary protection as an incentive to encourage the development of new technology and creations, which will eventually be available to all. The TRIPS Agreement recognizes the need to strike a balance. It says intellectual property protection should contribute to technical innovation and the transfer of technology. Both producers and users should benefit, and economic and social welfare should be enhanced."

Ever since the Uruguay Round of Multilateral Trade Negotiations was completed in 1994, and the WTO (the World Trade Organization) was established to administer GATT (the General Agreement on Trade and Tariffs) , the issue of Intellectual Property Rights (IPRs) has gained vital importance. The Final Act emerging from the negotiations contains, *inter alia*, **the Agreement on Trade Related Intellectual Property Rights (TRIPs)** as Annexure IC of the main Act. The World Trade Organization (WTO) has a separate Council for TRIPs which oversees the functioning of this Agreement.

The TRIPS Agreement: Copyright, Trademarks,and Patents

The TRIPs Agreement covers the following areas -

i) Copyright and Related Rights

ii) Trademarks

iii) Geographical Indications i.e. indications which identify a good as originating in the territory of a Member, or a region or locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin e.g. in the case of Wines and Spirits etc.

iv) Industrial Designs.

v) Patents

vi) Layout Designs of Integrated Circuits.

vii) Protection of Undisclosed Information, and

viii) Control of Anti-Competitive Practices in Contractual Licenses.

Out of the above areas of the jurisdiction of TRIPS, **the most important areas from the point of view of the protection of the IPRs of Tribes are Copyrights, Trademarks, and Patents. Copyrights, which apply mainly to books, art, and literature come into force immediately upon the creation of an original work, whereas patents and trademarks come into force only after they have been duly registered.**

Patents as an example to conceptualize IPRs: Patents in TRIPS(Article27)

Conceptually, it is easiest to approach the entire issue of protection of IPRs through the concept of Patents. According to **Article 27 of TRIPS, patents will be available for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step, and are capable of industrial application. Patent rights shall be enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally**

produced. However, members of the WTO may exclude from patentability, inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *'ordre publi'* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

Members may also exclude from patentability:

a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

However, Member countries are required to provide for the protection of plant varieties either by patents or by an effective *sui generis* system ,or by a combination the two.

Patents : HISTORY AND PHILOSOPHY

Let us now go back into the history and philosophy of patents, and see why developing countries / less industrialized societies feel threatened by the new international patents regime. According to Michael A. **Santoro**, Research Associate at the Harvard Business School, in his Paper, " Pfizer : Global Protection of Intellectual Property,"(HBS Case No. 9-392-073, 1992,Rev.1995), **the world's first patent laws dated back to 1474, when the Republic of Venice granted 10-year patents to inventors of new devices.** Santoro (ibid) writes:

"The social justification for patent protection was rooted in several ideas. One was promoting innovation. **The United States Constitution, for example, provided for a system of copyrights and patents to " encourage the progress of science and the useful arts"[U.S. Constitution, Art.1(8)].**A period of exclusivity provided inventors an opportunity to recoup and profit from their investment in expensive and time consuming research. By limiting the duration of the patent, governments attempted to achieve an appropriate balance between the social benefits of increased innovation, and the increased costs to consumers of patented products.

"Some patents were justified as **the inventor's "natural right**" or proper reward for inventive activity. **According to this view associated with the 17th century English philosopher, John Locke, the inventor acquired exclusive rights to an invention by virtue of having labored to produce it. Other members of society were morally obliged to recognize the rights of authors and inventors by not copying their creative works without their permission**. Still others saw the inventor's rights as a *quid pro quo* for disclosing an invention to the public. One Pfizer executive saw **patents as**

resting on principles of liberal democracy and reflecting a "social contract among citizens, governments and innovators". In his view, countries like Canada abrogated this social contract when they passed laws taking away intellectual property rights."

THE GLOBAL POLITICS OF IPRs: THE WEST VERSUS THE REST

THE DEVELOPED WORLD

The US Patent Law (35U.S.C.[101]) states that whoever "invents or discovers any new or useful process, machine, manufacture, or composition of matter" is entitled to obtain a patent. The invention has to be "novel" and not obvious to a person with ordinary skills in the concerned discipline. In return for disclosing the invention to the public, the inventor is granted for a specified period (initially, in the US, 17 years) the exclusive right to "exploit" the invention commercially, and / or to license it to others for a fee. By 1991, most of the "fully industrialized countries" had put in place, under their legal systems, patent regimes similar to those of the US, though the period of protection, the scope of a patent, conditions for licensing, and procedures for challenging a patent, and other details varied from country to country. Moreover, the US and the Philippines awarded patents to the ***first to invent***, while other nations awarded them to the ***first to file.***

DEVELOPING COUNTRIES

Most of **the developing countries, who had less to gain in terms of profits for individuals through industrial exploitation, and more to lose through patenting of products required by masses of people who lay outside the conventional industrialized economy, such as food and medicines, had minimal or no systems for patent protection, until they were rudely jolted, by the TRIPS agreement, into the stark choice of joining or being subjected to many forms of loss, including the**

'legalized piracy' of their traditional medicines or healing techniques, seeds, plants, textiles, designs, names, and so forth being registered as patents by individuals in western countries. The United States, which has the strongest Patent Office in the world, (and by no accident, is also the home of by far the largest number of Multinational Enterprises or MNEs, who thrive on patented technology) has harbored the most notorious of these 'legalized piracies', such as the patenting of the medicinal uses of Neem *(Azadirachta Indica)* and Turmeric, used for centuries for such purposes in India , which have been licensed for commercial exploitation to US-based MNEs like W.G.Grace. However, these cases are seldom reported as such in the Western Press: what the developed world hears is the voice of the MNEs who accuse developing countries of "stealing" their intellectual property, when they are only trying to give to their people, essential drugs at affordable prices.

ETHICS, ECONOMICS AND POLITICS

The Case of Pharmaceutical Patents:

MNE/Developed Country perspective v Developing Country views

To take an example from patents in pharmaceuticals , to contrast with the " legalized piracy" from developing countries(referred to above), and to see what happens in the reverse case, one may quote once more from **the Pfizer case by Santoro**(ibid). Here is a sample of the conflicting views from the developed world of the MNE, and the developing world of people in need:

Edmund Pratt, CEO, Pfizer, USA,1995 : " The Indian Government was forcing us to licence our products to local companies, and **the government was also controlling prices**....There were some within the company who argued that we should shut down the operations and take a write-off. I was not one of them...**We had a responsibility to the community ....which really needed our products**. And there was always a possibility that the situation would turn around, and India remained a very large potential market for us."

Report of the Indian National Working Group on Patent Laws, India, 1995 : "As a result of revisions in the Indian Patents Act in1970 to encourage domestic production and reasonable prices, **Indian drug prices went down from the highest in the world to the lowest** in 1991, ...[and]India was nearly self-sufficient in the manufacture of bulk pharmaceuticals."

An Appeal issued by C.I.L.F.A. (Centro Industrial de Laboratorios Farmaceuticos Argentinos), Buenos Aires , Argentina,1995 : " Today, the US Pharmaceutical Manufacturers Association, representing many major drug producers, is lobbying for swift introduction of restrictive patents. If they succeed at GATT, or succeed by exerting pressure in bi-lateral negotiations, the PMA's MNEs will have an effective monopoly on pharmaceutical production and sales in Argentina. Drug prices will skyrocket. The strains on the healthcare system will be even more acute—similar action in other countries has bankrupted healthcare systems. **People who need drugs won't be able to afford them**, and Argentine unemployment will increase."

A Chinese Government Official at the WIPO (World Intellectual Property Organization) and GATT negotiations: " China's Patent Law was adopted in 1984,

but **patent law in China could not have been imagined before 1979. In those days, knowledge was in the public domain. It would have been wrong to grant a patent.....Pharmaceuticals are currently excluded from our patent law, along with foods,** beverages, scientific discoveries, rules and methods for mental activities, methods for diagnosing and treating disease, and plant and animal varieties. **We didn't include pharmaceuticals because we were concerned that prices would be too high**. We were not sure what would happen. We have studied countries like Japan, Italy and India to see the effects of protecting pharmaceuticals. We want to see more country experiences".

Ethics, Economics and Logic

Another interesting exchange quoted in the Pfizer case (ibid), showing the victory of **Greed over Need** in the MNEs fight against developing countries in the IPR battle, describes the reservations of no less a person than Arthur Dunkel, the Secretary-General of GATT, about the **inclusion of IPR protection in the World Trade Agenda :**

" Arthur Dunkel, the Secretary-General of GATT, was unhappy over the inclusion of intellectual property on the Uruguay Round agenda. He was particularly upset about implications for pharmaceuticals. He spoke frequently about the importance of access to healthcare in developing countries, the high cost of drugs, and the sovereignty of nations to regulate cost and access to drugs."

The rejoinder from Lillian Fernandez, Director of International Affairs at Pfizer(also quoted in Santaro's paper (ibid) shows how utter callousness towards humanitarian considerations can pervert logic, and win the day in an unequal world, where MNEs of developed countries rule the roost:

"I calmly explained to Mr. Dunkel that granting patent protection was not the same thing as eliminating price control for drugs and that many nations in Europe had both... I also said that it was inappropriate to single out drugs for the problems of medical access in developing countries, and that it was lack of healthcare delivery system that was the problem. Finally, I asked him to consider whether stealing drugs was any more acceptable than stealing food. We certainly don't condone stealing food as a means of dealing with the hunger problem."

On this cruel note, ended humanitarian qualms about the impact of pharmaceutical patents on developing countries, and the bargaining table tilted again towards the developed world.

Patent Laws and the Internal Politics of Developing Countries

MNEs backed by the US Department of Commerce pressurized developing countries under threats of sanctions to accept GATT/WTO IPR standards, and to pass corresponding patent laws /amendments in their own countries. **Mexico** did so under pressure during its economic crisis in 1991, as a condition of the US bailout, but met with severe domestic criticism. In May 1988, an otherwise strong and long-lasting Thai government was toppled after it introduced a compromise Bill on Patents in the Thai National assembly. When **the Philippine Congress** declined to pass a bill removing patent protection from drug products in 1991, there was strong dissatisfaction among the masses. The Patent Amendment Bill, 1995, to bring India's Patent Law into conformity with the TRIPS agreement failed, and Indian intellectuals hailed this "as a victory of democracy in **the Indian Parliament**"(Singh and Mahanti, ibid). Under popular

pressure, **the Brazilian government** in 1990 filed a complaint against the US in GATT for threatening Brazil with sanctions for not respecting US Drug Patents. Even **Canada** has preferred to stick to its Bill C-22, passed in 1987, which makes licensing compulsory by foreign pharmaceutical companies on payment of a 4% royalty, and can restrict an innovators' rights if Canada's Patented Medicines Prices Review Board finds the price of a patented drug excessive.

THE FUNDAMENTAL CONCEPTUAL QUESTION

Are Intellectual Concepts a form of individual Property, and should they be protected for private gain? To put it in the words of Prof. William Fisher of the Harvard Law School (in an interview given to this author on March8, 1998):

> ***"The central question, in my view, is what -- in particular socioeconomic contexts -- justifies conferring on particular people artificial monopolies in the form of exclusive rights to engage in particular kinds of activities vis-a-vis particular sorts of information? Such justifications exist, but they don't apply in all circumstances. Where they are inapplicable, intellectual-property rights are illegitimate."***

Vandana Shiva, a biodiversity expert from India, in her book "Future of our Seeds: Future of our Farmers"(Research Foundation for Science, Technology and Natural Resource Policy, New Delhi, 1996), a study of Agricultural Biodiversity, IPRs and Farmers Rights, writes:

"The US IPR orthodoxy is based on a fallacious idea that people do not innovate or generate knowledge unless they can derive private profits. However, greed is NOT a "fundamental fact of human nature", but a dominant tendency in societies that reward it. In the area of plant genetic resources, innovation of both the 'formal' and 'informal' systems has so far been guided by the larger human good."

<u>Seeds and Seminal issues:CommunityRights,Intergenerational Rights, Fundamental HumanRights v.IPRs</u>

Shiva (ibid) further justifies her stand by quoting US Agriculture Scientist and Nobel Prize Winner, **Norman Borlaug** at a press conference at the Indian Agricultural Research Institute, New Delhi, on February 8, 1996, as he expressed concern about MNEs gaining control over Plant Genetic Resources and seeds, and patenting plants:

"We battled against patenting. I and the late Glen Andersen (of the International Wheat and Maize Research Institutes) went on record in India as well as other forums against patenting and always stood for exchange of germplasm."

Borlaug (ibid) saw IPRs of Plant Genetic Resources as a prescription for famine. Commenting on the US demand for patents he said:

"God help us if that were to happen. We would all starve".

Large scale movements against plant and seed patenting have been occurring in India ever since the developed countries raised this issue, which is of special interest to tribes in India, since many of the minor millets, medicinal plants and herbs grown exclusively in tribal areas , are products of generations of effort by particular tribes. The issue of seeds puts **the idea of community rights in Intellectual Property**, and of **the rights of past and future generations** in perspective: farmers rights arise from their past and future contribution as communities to the conservation, modification and exchange of plant genetic resources: **innovation in seeds and plants takes place collectively and cumulatively, between communities and generations, between man and Nature.** Even if a scientist builds one more block on this pyramid in a laboratory, does it become his personal intellectual property? And even if it does, is this something to be used for squeezing profit out of starving millions? **Would society be justified in putting**

individual gain over the common welfare even in foodgrains? And if not, then why so in life-saving drugs? And so the argument proceeds.

Challenge from Cyberspace:Are IPRs already osbolete and unimplementable?

Another extreme of the spectrum of arguments against the dominant paradigm of IPR protection, comes from the new world of Computers and Virtual Reality. **John P. Barlow** of the Kennedy School of Government, Harvard University, created quite a stir at the World Economic Forum in Davos , Switzerland on February 8, 1996, through his **Declaration of the Independence of Cyberspace** (downloaded on February 2,1998 from his Internet Website, http:/www.eff.org/barlow) wherein he challenges the **"Governments of the Industrial World"** from **"Cyberspace, the new home of the Mind"**, which does not lie within the borders of so-called sovereign states that administer so-called "Intellectual Property Rights":

"We are forming our own Social Contract. This governance will arise from our world, not yours. Our world is different...**Your concepts of property, expression, identity,** movement, and context **do not apply to us. They are based on matter. There is no matter here**....We believe that from ethics, enlightened self- interest, and the commonweal, our governance will emerge...**You are terrified of your own children, since they are natives of a world where you will always be immigrants. Because you fear them, you entrust your bureaucracies with parental responsibilities you are too cowardly to confront yourselves**.

"Your increasingly obsolete information industries would perpetuate themselves by proposing **laws, in America and elsewhere, that claim to own speech itself** throughout

the world. **These laws would declare ideas to be another industrial product, no more noble than pig iron**. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.

"These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self determination who had to reject the authorities of distant, uninformed powers . We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rule over our bodies. We will spread ourselves across the planet so that no one can arrest our thoughts.

"We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before."

Bill Gates, Chairman of Microsoft, in his testimony before the US Congress on March3, 1998,(heard by the author on WB56 Evening News), echoed Barlow's sentiments while denying charges of anti-competitive business practices in Internet Access Provision:

"Any company can remake the world's requirement of such software in a day. These programs are based on ideas, and no company owns the Factory for Ideas".

Thus, even before the developing world and non-industrialized world has been pushed into catching up with the developed, industrialized world's favored paradigm of IPR protection, has that paradigm not already become obsolete and unimplementable/ unenforceable in any but the crudest forms? In fact, one is tempted to ask, was it ever really or completely valid, in the moral, legal or even intellectual sense?

KEY LESSONS FOR THE NATIVE AMERICAN IPR DECLARATION

The entire discussion on concepts of IPR protection as seen from the perspective of developing countries on the one hand, and that of cyberspace on the other contains some important lessons for Native American Nations contemplating a framework for their own Draft Declaration on IPRs.

1. **The dominant paradigm** among Western industrialized Nations and their profit-seeking MNEs **may not, everywhere and at all times be the most appropriate** form of understanding , encouraging and preserving intellectual and cultural achievement and innovation for the greater good of mankind as a whole, today and in times to come, as opposed to encouraging and protecting the excessive and often exploitative profit-seeking of a privileged few. **Therefore it should not be uncritically accepted, if it is accepted at all, by NA Nations.**
2. **The dominant paradigm of IPRs in today's world derives largely from the concepts developed on patents in Euro- US society and polity, a relatively young culture compared to world civilizations that form the basis of culture in developing countries, and the even older and more mature indigenous cultures.** Only a young society, based on packageable and individually identifiable increments in a limited body of largely scientific and technological knowledge, and rigid Anglo-Saxon jurisprudential ideas of individual property, could unquestioningly deem

intellect, ideas and imaginative constructs, as "property", that can actually be owned, protected and exploited by or on behalf of individuals, rather than as an incremental and constantly dynamic, symbiotic interpersonal, inter-community, inter- generational, even inter-generic flow, owned to a great extent by all mankind—what this world-view bifurcates as "the public domain". In older civilizations, a more realistic, more generous, more philanthropic and more constructive attitude prevails towards intellectual and cultural constructs and flows, which are seen as an organic whole, often cutting across times immemorial. (If, for instance, the man who discovered wheat,(with great effort and ingenuity, no doubt) or his direct descendants can not be given exclusive rent on wheat today, why should Monsanto (a US MNE) get rents for particular varieties of wheat seed today, when millions are starving for foodgrains?).Native American Nations belong to an older civilization, and their values and instincts and traditions, as well as those of indigenous and rural communities throughout the world must be given recognition and weight in deciding whether the present dominant paradigm of IPRs needs to be modified.

3. In view of the above facts, **Native American Nations may decide afresh,(and influence world opinion by their decision)**
   a. **Whether to accept the dominant IPR regime , totally or in part**
   b. **What to exclude from IPR regimentation, and how to preserve the integrity of what is excluded.**
   c. **What weight to give to individuals and to communities, to past, present and future generations** in their decision/s on IPR protection

d. **Whether or not to classify intellectual/cultural attainment/innovation as "property"**, and if not, how else to classify and preserve it

e. How to achieve **the maximum welfare** of each Native Nation, each member of each Nation, and of humanity as a whole through intellectual and cultural tradition and innovation occurring within NA Nations

f. **How to state the Native position on IPRs, and how to defend it**

g. **How to assimilate the challenges posed by Virtual Reality** to conventional wisdom, in framing a response to the currently dominant IPR regime in the world

4. **Native Americans are in a unique position among the indigenous people of the world to help indigenous communities globally to protect their Intellectual and Cultural rights, values, and traditions because of three important factors :**

- **Their association with the US Government, which has the most powerful Patents Office and the strongest IPR regime in the world**
- **Their Sovereign Status, and the ability to frame and implement their own laws**
- **Their financial resources, in terms of BIA grants, compensation for lost lands, and some very lucrative businesses**

The direction that Native American Nations decide to take in terms of IPR protection, recognition, or exploitation can have far reaching global effects : for instance, they could decide to beat MNEs at their own game by networking globally to create indigenous peoples' MNEs, based on indigenous technology or systems of medicine. Hence they should be aware that their decisions on IPR issues will not influence them alone, but that they also have a global responsibility.

(B) THE LEGAL FRAMEWORK

The legal framework for the Draft Declaration could be based on 7 essential elements:

- INCLUSION in WTO, TRIPS and WIPO
- EXCLUSION of unpatented knowledge from exploitation
- RECOGNITION of COMMUNITY IPRs
- RESPECT for tradition, privacy, and spirituality
- USE of GEOGRAPHY as a means of trademarking
- INTRODUCTION of INTERGENERATIONAL justice
- EMPHASIS on HUMANITARIAN, not commercial, considerations

These elements have been derived by analysing the following sets of information:

- RELEVANT DOCUMENTS such as the TRIPS Agreement, the Charters of WTO, WIPO, UNESCO, etc.
- INTERNATIONAL DECLARATIONS since1977 on the Rights of Indigenous Peoples
- RELEVANT U.S. LAWS
- CASE LAW and EXAMPLES

Details of these analyses are given in subsequent pages, along with a discussion of key issues.

THE RELEVANT DOCUMENTS

Some of the relevant policy documents, for providing an appropriate legal framework for a Draft Declaration of the Intellectual and Cultural Property Rights of Native American Nations,are :

(i)The TRIPS agreement (downloaded on 27 March 1998 from Internet Website http://www.wto.org)

(ii)Basic Information about WTO (source-as above)

(iii) Intellectual Property-protection and enforcement in the WTO (as above)

(iv) Information on the WTO Ministerial Conference at Singapore (9-13 December,1996) (as above)

(v) Singapore Ministerial Declaration (Adopted on 13 December 1996)(as above)

(vi) Press Brief from the Singapore Conference of the WTO summarizing the Report of the Council for TRIPS to the Singapore Ministerial Conference (as above)

(vii) Basic Facts on the World Intellectual Property Organization (WIPO) (downloaded on 27 March 1998 from Internet Website http://www.wipo.org)

(viii) International Protection of Copyright and Neighboring Rights (source: as above)

(ix) Basic Facts about the Patent Cooperation Treaty (source: as above)

(x) General Information on International Patent Classification (source: as above)

(xi) WIPO – Cooperation with Developing Countries (source: as above)

(xii) Basic Facts on the UN International Decade for Indigenous People (1995-2004) (Information downloaded on 27 March 1998 from Internet Website http://www.un.org/ecosocdev/indigens/dpi1608e.)

(xiii) Basic Facts of UN Documentation on Indigenous Women: Taking Control of their Destiny (source :as above, dpi 1717e)

(xiv) Intellectual Property and Sovereignty: Notes towards a New Geography of Authorship (Keith Aoki) (48 Stan.L. Rev 1293) (Downloaded on 27 March 1998 from Lexis-Nexis)

(xv) Recommendations of the Workshop on Intellectual Property Rights of Tribals held in New Delhi on 23 January 1996 ('Intellectual Property Rights and the Tribals', edited by B.Singh and N.Mahanti, Inter-India Publications, New Delhi, 1997)

(xvi) A Declaration of Independence for Cyberspace (John P. Barlow, at the World Economic Forum in Davos , Switzerland on February 8, 1996) (downloaded on February 2,1998 from his Internet Website, http:/www.eff.org/barlow)

(xvii) Basic Facts on UNESCO (Internet Website http:// www.unesco.org downloaded on 27 March 1998)

(xviii) The Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention,1954) (UNESCO document)

(xix) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970)

(xx) Convention concerning the Protection of World Culture and Natural Heritage (UNESCO, 1972)

(xxi) Convention on Biological Diversity (UNCED, 1993)

(xxii) Ethnic Team Names and Logos: Is there a Legal solution? (Cathryn N. Claussen) (Marquette Sports Law Journal, Marquette University,1996)

INTERNATIONAL DECLARATIONS

(Listed Chronologically, showing relevant clauses, with abstracts of important clauses)

1.Draft Declaration of Principles for the Defense of the Indigenous People Nations and Peoples of the Western Hemisphere (1977)

(Developed and Circulated by NGO Conference on Discrimination against Indigenous Populations, **Geneva, 1977)**

(Reprinted as U.N. Doc.E/CN.4/Sub.2/476/Add.5,Annex 4,1981)

(Relevant Clauses: Preamble, 3,5,and10;Clause 10:National and Cultural Integrity)

2.Declaration of Principles on the Rights of Indigenous People (1985,87)

(Adopted by representatives of indigenous peoples and organizations in Geneva ,July 1985, in preparation of the 4th Session of the U.N. Working Group on Indigenous Populations; as reaffirmed and amended in meeting in Geneva in July 1987,in preparation for the 5th Session)

(Reprinted in U.N. Doc.E/ CN.4/Sub.2/1987/22 Annex 5,1987)

(Relevant Clauses:11,13,21; Clause 11 deals with culture, knowledge, works of art; Clause 21 with traditional medicine)

3.DECLARATION OF PRINCIPLES OF INDIGENOUS RIGHTS (1984)

(Adopted by the 4th General Assembly of the World Council of Indigenous Peoples, Panama, September 1884)

(Reprinted in U.N. Doc.E/CN.4/1985/22, Annex 2, 1985)

(Relevant Principles:

3:The culture of the indigenous people are the cultural heritage of mankind

4: The traditions and customs of indigenous people must be respected by states, and recognized as a fundamental source of law

13:The original rights to their material culture, including archaeological sites, artifacts, designs, technology,and works of art lie with the indigenous people.)

4.DECLARATION OF SAN JOSE (1981)

(Adopted by the UNESCO Meeting of Experts on Ethno-Development and Ethnocide in Latin America, San Jose, December 11,1981)

(UNESCO Doc.FS 82/WF.32,1982)

(Relevant Clauses: Preamble, Clause 8 on Cultural Heritage, Clause10 on forms of internal organization as part of cultural and legal heritage contributing to cohesion and maintaining of socio-cultural traditions)

5.CONVENTION NO. 169 CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES (1989-91)

(Adopted by the General Conference of the International Labor Organization, Geneva, 27th June 1989.Entered into force 5th September 1991)

(Relevant Clauses: Preamble, Articles 1,5,7,8,23,30,32; Article7 refers to the right to decide own priorities for the process of development and to exercise control on their own social, economic and cultural development)

6. AGENDA 21: Chapter 26 (1992) Recognizing and Strengthening the Role of Indigenous People and their Communities

(Adopted by the U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992)

(U.N.Doc.A/CONF.151/26 (vol.3),at 16 Annex 2,1992)

(Relevant Clauses:26.1,26.3,26.4,26.5 and 26.6;

Clause26.4(b)enjoins upon signatory governments to adopt/strengthen policies/legal instruments to protect indigenous intellectual and cultural property, and the right to preserve customary systems and practices; clause 26.5(c)(i) talks about achieving a better understanding of indigenous peoples' knowledge and management experience related to the environment and applying this to contemporary development challenges)

7. DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (1993-1994)

(As agreed upon by the members of the U.N. Working Group on Indigenous Populations at its 11th Session in Geneva, July 1993.)

(Adopted by the U.N. Sub- Commission on Prevention of Discrimination and Protection of Minorities by its Resolution 1994/45, August 26, 1994.)

(U.N. Doc.E/CN.4/Sub.2/1994/56, at 105,1994)

(Relevant Clauses: Preamble, Articles 12 (protection of past, present, and future manifestations of cultures), 13(spiritual and religious traditions, cultural sites and human remains),16 (education),24(medicine),and 29(full ownership, control, and

protection of cultural and intellectual property) 30,31,3(laws and standard),38(assistance)and 39(enforcement))

8. RESOLUTION ON ACTION REQUIRED INTERNATIONALLY TO PROVIDE EFFECTIVE PROTECTION FOR INDIGENOUS PEOPLES (1994)

(Adopted by the European Parliament in its Plenary Session, Strasbourg, the 9th of February ,1994)

(Eur.Parl.Doc.PV 58 (II), 1994)

(Relevant Clauses: C(on social and cultural development)

4 (on right to a separate culture, protection of tangible and intangible features of culture), 6 (marketing of craft products), 11(heritage))

9.DRAFT OF THE INTER-AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (1995)

(Approved by the Inter-American Commission on Human Rights at the 1278th session held on September 18, 1995)

(O.A.S. Doc. OEA/Ser/L/V/II.90, Doc. 9, rev.1, 1995)

(Relevant Clauses: Preamble, 3 Indigenous Culture and Ecology, 5 Enjoyment of Community Rights, Section Three on Cultural Development—Art. VII. Right to Cultural Integrity, Art. VIII. Philosophy, Outlook and Language,Art. IX Education, Art.X Spiritual and Religious Freedom, Art.XII Health and Well-Being (respect for indigenous medicine and health practices),Art.XIII Environmental Protection---

Section Five on Social, Economic and PropertyRights: Art.XX Intellectual Property Rights:

"1. Indigenous people shall be entitled to the full ownership, control, and protection of such intellectual property rights as they have in their cultural and artistic heritage, as well as special measures to ensure for them legal status and institutional capacity to develop, share, market and bequeath that heritage to future generations.

2.Where circumstances so warrant, indigenous people shall have the right to special measures to control, develop, and protect, and full compensation for the use of their sciences and technologies, including their human and genetic resources in general, seeds, medicines , knowledge of plant and animal life, original designs and procedures".)

EXPERTS

Interviews were conducted by the author with the following legal experts, whose views form the basis of the legal framework posited here:

1. Prof. Joseph W. Singer of the Harvard Law School (Tribal Law)
2. Professor Laurie Graham of the Harvard Law School (Native American Law)
3. Professor Lucy White of the Harvard Law School (Law for Minorities)
4. Professor William Fisher of the Harvard Law School (Intellectual Property)
5. Dr. Jean Camp of the Kennedy School of Government (IPR Protection on the Internet—Encryption)
6. Professor Keith Aoki, Assistant Professor of Law, University of Oregon School of Law (IPRs of Indigenous People)
7. Ms. Angela Riley, Third Year Law Student at Harvard Law School, writing her Final Paper on Native Americans and Intellectual Property (Case Law)

THE TRIPS AGREEMENT AND THE WTO

Ever since the Uruguay Round of Multilateral Trade Negotiations was completed in 1994, and the WTO (the World Trade Organization) was established to administer GATT (the General Agreement on Trade and Tariffs), the issue of Intellectual Property Rights (IPRS) has gained vital importance. The Final Act emerging from the negotiations contains, *inter alia*, the Agreement on Trade Related Intellectual Property Rights (TRIPs) as Annexure IC of the main Act. The World Trade Organization (WTO) has a separate Council for TRIPs which oversees the functioning of this Agreement.

2. The TRIPs Agreement covers the following areas -

i) Copyright and Related Rights

ii) Trademarks

iii)Geographical Indications i.e. indications which identify a good as originating in the territory of a Member, or a region or locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin e.g. in the case of Wines and Spirits etc.

iv) Industrial Designs.

v) Patents

vi) Layout Designs of Integrated Circuits.

vii) Protection of Undisclosed Information ,and

viii) Control of Anti-Competitive Practices in Contractual Licenses.

3. Out of the above areas of the jurisdiction of TRIPS, perhaps the most important area from the point of view of the protection of the IPRs of Scheduled Tribes is Section 5 dealing with Patents. According to Article 27 of TRIPS, patents will be available for

any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step, and are capable of industrial application. Patent rights shall be enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. However, members of the WTO may exclude from patentability, inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *'ordre publi'* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

4. Members may also exclude from patentability:

a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.

However, Member countries are required to provide for the protection of plant varieties either by patents or by an effective *sui generis* system ,or by a combination the two.

The provisions of this paragraph are to be reviewed every four years after the date of entry of into force of the WTO Agreement.

THE SINGAPORE REVIEW (December 1996)

The WTO reviewed the progress made under TRIPS at its first Ministerial Conference at Singapore in December 1996, when the 1 year period given to developed countries to bring their IPR/ Patent Laws in line with TRIPS provisions had passed. These countries have taken on full TRIPS obligations since 1 January1996.Developing countries have been given time until 1-1-2000, and least developed countries until 1-1-2006 to start application of most of the provisions under TRIPS. The next review of the implementation of TRIPS will be held in the year 2000, though the provisions on the protection of plant and animal inventions will be reviewed in 1999 (cloning could be a big issue here.) The Singapore Review on IPRs concentrated on the issue of Geographical Indications, about which a large number of complaints have been received in WTO, and invited suggestions on improvement of implementation.

CULTURAL PROPERTY RIGHTS

History

In **ancient days**, the only cultural property respected by communities, by being given a privileged position ,was religious property. In **the Middle ages** it became a part of the booty of war, with winners enjoying ownership. It was only during **the Renaissance** that the notion of rights in what we now call cultural property began to be recognized. In fact, **the term "Cultural Property" was coined in 1954 by the United Nations Educational, Scientific and Cultural Organization (UNESCO), in the process of framing the Convention on the Protection of Cultural Property in the event of Armed Conflict, now famous as " the Hague Convention".**

Definition

The Hague Convention defined Cultural Property as "***Property which, on religious or secular grounds, is specifically designated by each State as being of importance for archeology, prehistory, history, literaure, art, or science".*** It did not make any specific mention of indigenous or tribal communities.

Conventions

The landmark conventions on this issue at the international level have been:

1. **The Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention,1954) (UNESCO document)**
2. **Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970)**

3. Convention concerning the Protection of World Culture and Natural Heritage (UNESCO, 1972)

These conventions have focussed on repatriation of cultural property to the place of its origin. The 1970 Convention dealt only with stolen property. The conventions do not deal with skeletal remains, which are often displayed in museums in a manner seen by Indigenous People as undignified and sacrilegious. **The US law, NAGPRA (Native American Graves Protection and Repatriation Act), 1990, is a much more progressive and effective legislation than is available to indigenous people in most other parts of the world.**

The UNESCO Conventions have, however, strengthened the hands of indigenous peoples to some extent. **The Kwakiutl Indians of Canada** were able to invoke the 1970 Convention to secure the return of atrefacts stolen when police broke up a Potlatch Ceremony (banned in Canada from 1884 to 1951) in 1922. It has also given support to **the Aymara community of Bolivia**, for recovering sacred weavings taken away by US Antique dealers in 1978.In **New Zealand, the Maori Court** was given jurisdiction over artefacts including objects recovered from graves.The **Australian Minister for Aboriginal Affairs** has agreed to work on a strategy to retrieve aboriginal cultural material, including skeletal remains from abroad.The **Ainu people of Japan** recently reached an agreement with a Japanese university medical department providing for the return of the remains of more than 1000 skeletons for proper burial.

Violations and Remedies

However, **violations of Native Peoples cultural rights are rife** in the area of songs, dances, name uses, and folklore. One of the ways to prevent this could be through **recognition of traditional indigenous ways of assigning ownership of cultural** property. For instance, in **the Brazilian Suya Indian Community**, a song belongs to the person who first sings it. Such traditions could be compiled and codified, or at least legally recognized, as a first step towards protection.

Non –Indigenous film-makers have filmed, in secret, the traditional ceremonies of **North American Hopi Indians**. The legends, songs, and lore of Indigenous Peoples, passed down orally for many generations, are written, recorded and sold by others. Cultural appropriation or the depiction in fiction and non-fiction of cultures other than one's own has become a serious issue within **Canada's literary community**. The discussion raises questions about indigenous culture, and under what circumstances non-indigenous writers should seek permission from those about whom they write.

UN Responses

In **1984,** the World Council of Indigenous Peoples, an association of indigenous organizations from various countries, adopted the **Declaration of Principles of Indigenous Rights**. Principle 13 of the Declaration says:

"The original right to their material culture, including archeological sites, artefacts, designs, technology and works of art lie with the indigenous people".

However, it had little political weight. Also in **1984**, the World Intellectual Property Organization **(WIPO)** recognized that indigenous people were not being compensated for the uses made of their folklore traditions. WIPO then developed **"MODEL PROVISIONS FOR NATIONAL LAWS on Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Action".** These provisions, if adopted, would protect individual and collective folklore, regardless of whether it has ever been written down. These Model Provisions provide that the community concerned should fix and collect fees for the uses made of their folklore. However, no country has adopted the measure so far. In **1991, the UN General Assembly** passed a resolution appealing to States: "to cooperate closely with the inter-governmental Committee for **Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, and to conclude bilateral agreements for this purpose". The UN Working Group on the Rights of Indigenous Populations** has requested a further study, to be conducted in cooperation with indigenous people, on a comprehensive analysis of the laws and traditions of indigenous peoples regarding the definition, ownership, and control of cultural property. **The UN Draft Declaration on the Rights of Indigenous Peoples** calls for protection of cultural property and its restitution if taken without free and informed consent. It state *inter alia,* that indigenous people have **" the right to the use and control of ceremonial objects; and the right of the repatriation of human remains."**(Material in this Section has been summarised from 'IPRs and the Tribals', ed. **Singh and Mahanti**, ibid).

THE U.S . LEGAL SITUATION ON IPRs OF NATIVE PEOPLES

The US IPR regime is perhaps the strongest in the world, and the US Patent Office, the most powerful. Yet the situation on the ground regarding the protection of the IPRs of Native Americans is not very good at all. Two acts relevant to the subject are:

1. **The Omnibus Trade and Competitiveness Act of 1988**
2. **The Indian Arts and Crafts Act, 1990**

The first law requires markings for "Indian Style" imports to be more stringent than for marking all other products. The second law established criminal and civil penalties for offering, displaying or selling goods in a manner that falsely suggests that they are American Indian products, with **criminal penalties** up to $250,000, and five years in prison.

The second law also requires **the Indian Arts and Crafts Board** to assist tribal associations, and individual members with free registration of trademarks. Trademarks have an enormous potential to control the use of tribal names and traditional designs, as well as protecting contemporary designs by tribal artists.

Native American Law on IPRs

No information is available of any IPR or Patent protection law included in any Native American Constitution, or legal code. In fact, no comprehensive documentation is available even on the number of NA nations who have, and administer, their own legal codes.

Now let us take a few examples of the actual problems and how they play out against this backdrop.

1. The Case of the Forgery of Native American Art

In the cover story of the American Indian Report (a monthly news magazine), February 1998 issue, titled "Genuine Indian Art? Tribal Artisans feel the effects of the Global Economy", **Rea K. Howarth** writes about the widespread sale in the US itself of fake NA jewelry and handicrafts—plastic beads instead of shell and bone, fake alloys instead of silver, mass-produced in the Philippines or other Asian countries, offered for sale on the Internet by agencies like 'Buck-a-Gram' and sold at unbeatable prices even at NA powwows! She says that the US Commerce department estimated losses worth $850 million annually even in 1985 on this count, while the US Customs Bureau finds itself helpless in checking vast quantities of goods that cross the border everyday. According to **Susan McGuire** of the Indian Arts and Crafts Association, based in Albuquerque, New Mexico, the hardest hit are **the Hopis, Navajos, and Zunis**, whose distinctive styles have inspired the most imitation. **Andy Abeita**, Honorary President of IACA, and himself an **Iselta Pueblo silversmith**, says that the average income for Indian artists has come down by 30% in the last 5 years due to competition from forgeries.

Raymond Smith, Executive Director of the Navajo Arts and Crafts Enterprise has had his cottage industry group protected by the Horned Moon Trademark obtained from the Federal Trade Commission, but says many tribal artisans cannot afford the $1000 fee it costs to register a trademark—something the Indian Arts and Crafts Board should have been able to see was waived. Acting Board Director, **Meredith Stanton** however, has troubles of her own, with the US House of Representatives voting in 1996 and again in 1997 to wipe out the agency by zeroing in on its budget.

The Navajo Nation Tribal Council has approved, in principle, a plan to establish a trademark symbol that could then be licensed out to individual artisans, but so far, it remains unimplemented. The Pueblo Zuni also are working on developing a tribal trademark on the same lines.

To date, no complaints on the forgery of NA Arts and Crafts have been referred to the FBI, or the U.S. Attorney General.

2. The Estate of Tasunke Witko a.k.a. Crazy Horse v. G.Heileman Brewing Co.

(Rosebud Sioux Tr. Ct., Sept. 21, 1993) (Civ.No. 93-204)

Professor Joeseph W. Singer of the Harvard Law School has reviewed this case in the South Dakota Law Review (Vol.41, Issue 1,1996). In this case, the Hornell Brewing Company applied for a Certificate of Label Approval to name a liquor " The Original Crazy Horse Malt Liquor". **Tasunke Witko or Crazy Horse was a revered spiritual and political leader of the Sioux Nation, who preached sobriety among his tribe.** Because of the offensive use of his name, the US Congress passed a federal statute barring anyone from using the name Crazy Horse for an alcoholic beverage. Hornell sued the federal government, for violating their freedom of speech, and the US District court ruled in their favor holding that the name was protected commercial speech. The descendents of Tasunke Witco brought a suit against the company in the Rosebud Sioux Tribal Court, and lost because the company was not located in the jurisdiction of the Tribal Court.

Professor Singer has argued that this is **a case of inheritable publicity rights** and that **choice-of-law** principles should be adopted to adjudicate such cases to provide relief to complainants under one of the following alternatives of **law and jurisdiction**:

(a) As between the law of the person's domicile at the time of death and that of the place of sale or infringement

(b) When only one of the two places has a relevant law , the place where the law exists may be chosen

(c) To apply the law of domicile **when the plaintiff asserts the right to prevent all commercial use of the name or image of the person in question(i.e. when he has a personal rather than commercial interest in the matter)**

3. The Case of 'Ethnic Team Names and Logos—Is there a legal solution?'

In an article under the above title in the Marquette Sports Law Journal, (Marquette University, Spring 1996), Cathryn L. Claussen points out that Native American names and symbols are most frequently and persistently used by sporting teams in the US, and that such use creates a tension between two cherished principles:

1. The teams' right to free speech
2. The right of ethnic minorities to live free from discrimination.

The unfortunate conclusion she comes to , is that US Courts will not rule against use of names like the **Redskins** or the **Cleveland Indians**, because there is **no sufficient cause to believe that continued use of such names will pose a serious threat to the maintenance of public order, or cause racial unrest**. It appears that if teams earned

less, or Native Americans were more prone to violent protests, this violation of Native Cultural Property Rights could well be curbed by the US Government. It is sad to see the commercial motive so predominant in an affluent society, that there is **nothing sacred** anymore—unless it can be so established by violence.

However, the case of **'Harjo v. Pro Football Inc.'** on a related subject is still pending, and one can still hope for a favorable judgement. If not, the fight for the dignity and honor of Native American Nations will just have to continue, in this field, as it continues in so many other aspects of life.

ISSUES FOR A LEGAL FRAMEWORK

1. **WTO, TRIPS, and WIPO make no mention of Tribal People or Indigenous Peoples**, though they do talk about developing and least developed countries. Special Programs and Provisions for the protection Indigenous Peoples' Intellectual and Cultural Property should be made in all of them. The right time would be in the year 2000, when the next TRIPS Review is due, for which lobbying and paperwork must start at once.
2. **Issues of geography** and jurisdiction are occupying the WTO and the TRIPS Review council, but at the moment it is MNEs that sell French Wines or Swiss Chocolates who are raising these issues. Given **the local embeddedness of tribal knowledge** and crafts, identification by geographical origin can become an important criterion for tribal IPR protection.
3. At the same time, the issue of **geography as jurisdiction** for trying offences against tribal publicity rights has to give way for a choice- of -law principle, if tribal people with meager resources are to get any real relief. There is a real **problem of access** to judicial relief to be addressed, for tribal people, the world over.
4. **Exclusion, Estoppel, Exception, Saving** --- whatever legal remedy is possible should be applied to stop commercial looting of vast stores of unpatented traditional as well as modern intellectual, cultural, and spiritual resources of indigenous peoples which the neo-colonial global freebooters, big business and MNEs are treating like the new ***terra nullius,*** so much so, that there seems to be nothing sacred when it comes to the profit motive – a respectable name for the pure, unadulterated greed and rapacity of the dominant cultures and their "Engines of Economic Growth".

5. **International Declarations of the rights of Indigenous People are hopelessly clumsy and out of date. They continue to concentrate (one hopes in ignorance, and not from playing into the hands of MNEs) on protection and compensation for lands and forests, already lost in many cases to rapid urbanization. They make only perfunctory references to the terra nullius of the mind—the IPRs of Indigenous people. It is high time for the UN Human Rights Commission to come out with an up-to-the-minute, state-of-the-art, Declaration of the Intellectual, Cultural, and Spiritual Rights of the Indigenous People/Peoples of the World.**
6. The idea that knowledge can belong to groups is not a strange one in law: laws recognize whole corporations as legal persons. Yet TRIPS has no provision for community rights – and patent laws do not recognize tribes as applicants. A tribe is one of the oldest entities on earth – it should not have to register itself as a company or corporation for it to have protection of its traditional or tradition based collective knowledge. **Laws must be reframed if necessary to recognize community rights in intellectual and cultural rights.** No single individual should be able to claim credit for community knowledge.
7. Tribes are ancient entities. They can appreciate intergenerational rights because of their rich heritage and long history. The world of lawmakers must learn from tribes the **principles of intergenerational justice--- the secret of millenia of "sustainable development"—built on foundations of thrift, not greed: of respect for other modes of being.** The spiritual and timeless dimension of "intellectual property protection" must not remain an airy-fairy notion – it must be built into the law as part

of the rights of other generations, other species, and other modes of being—as environmental law has just begun to do.

8. The legal framework of the Draft Declaration of NA Nations on IPRs must be based **primarily on humanitarian , and only secondarily on commercial considerations**. NA nations should use this Declaration **as a means of establishing a global network and for showing their solidarity with developing countries** who, like them, were the victims of colonial powers, and continue to get an unfair deal at the hands of the neo-colonial powers of global commerce.
9. The Draft Declaration must aim at **establishing effective IPR protection in every tribal government, with some common factors linking tribal IPR laws with Federal and International Laws on the subject**. Where it is felt that Federal and International Laws and treaties need to be modified, vigorous efforts should be made to create a climate of opinion for such changes—for which indeed there is a lot of scope in any case.

(C) THE ECONOMIC FRAMEWORK

The Economic Framework of the Draft Declaration can be summarized by prioritizing among 3 basic options, in the order given below :

- CONTROL
- COMMERCIALIZATION
- COMPENSATION

These priorities have been arrived at by:

- COUNTING the COSTS
- COMPARING the OPTIONS
- CHECKLISTING the KEY AREAS

COSTS OF IPR PROTECTION

In Section 1, we had seen **the heavy social and political costs of IPR protection** as per the MNE- dictated new TRIPS and Patents Regimes. No tribal government would rush in to embrace the regime after seeing the fate of the Thai Government, and the popular protests in Mexico, the Philippines and India. **The reason is that IPR Protection immediately raises the price of the protected articles, and puts restraints on their use, not only for "others" or foreigners, but also for one's own people**. By taking out of the common domain things that have been freely available, governments impose hardships on their own people, which can be really backbreaking and unfair on rural and indigenous communities. That is why most developing countries had so far kept foods and drugs, especially **life- saving drugs, outside patent regimes, for humanitarian and welfare reasons**. But the richer you are, the greedier you get. The predominance of the profit motive in an affluent society is baffling to third world observers, as for instance in not providing universal healthcare, but catering to the minutest needs of those who can pay high prices.

The Ethical and Legal Conundrum of IPR – induced price rises

Mark Twain in his Notebook381(1939) , wrote:

"Only one thing is impossible under God, to find any sense in any copyright law on this planet".

Keith Aoki in his essay "Surveying Law and Borders: Intellectual Property and Sovereignty",(Stanford Law Review, May 1996) echoes Twain in describing the conundrum of IPR pricing:

"The current legal argument runs: One who by the ingenuity of his advertising, or the quality of his product, has induced customer responsiveness to a particular name, symbol, form of packaging etc., has thereby created a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties who seek to deprive him of his property.

" The vicious circle in this argument is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic sales value of a sales device depends upon the extent to which it will be legally protected."

Aoki calls this process " the divorce of legal reasoning from questions of social fact and ethical value", and reveals the fallacy of **the prejudice which "identifies the interests of business with the interests of society."**

The curse of democracy is that politicians depend on big business for election funds, and spend most of their time and powers in office in furthering their profit-motives against consumers and the poor, all in the name of the highest principles: like raising prices under the noble guise of IPR protection.

Colonial Lessons for the Neo-Colonial IPR Wars

The British Colonial Government in India collected tax from people who used sea-water to make Salt, till **Gandhi** marched out with hundreds of his followers on the famous **Dandi March** to the Arabian Sea, and they all made salt together, openly, without paying the notorious Salt Tax. He did the same with **Indigo in Bihar.** Such simple defiance sounded the death knell of the financially exploitative colonial government on the economic front.

This example shows **why things of daily necessity, found in Nature, or made for domestic consumption, must not be included in IPR protection**--- the very falseness of the exclusivity may expose it to simple defeat, and in any case it goes against the commonweal. **Yet seeds, plants, and even the DNA of endangered tribes are being patented by MNEs to cater to the rich few at the cost of the poor many**. This is possible because of their widespread neo-colonial power against the poor, be they in developed or developing countries.

Honor v. Money: the Crazy Horse Case: Is Nothing Sacred Anymore?

In the case of Crazy Horse or the Redskins, the plaintiff Native Americans were not seeking economic gain through IPR protection: they were seeking to protect their honor, and the honor of their tribes , their ancestors and their people.They did not want to take over the commercialization of the names in question: they wanted to put an end to the commercialization of what was sacred to them.

The plaintiffs in these cases were defeated, as the developing countries were defeated in the TRIPS Negotiations, or as Argentina lost in the Pfizer case cited in Section A of this paper. They had to accept the rules of the game laid down by those who have greater power and influence, and more money. If the playing field continues to remain so tilted, they will always be defeated.

The Opportunity

The Draft Declaration of the IPRs of NA Nations is an opportunity for NA Nations to incorporate clauses which will help to level the playing field by:

1. Showing **solidarity with poor people in the developing world** , likely to be harmed by patenting of food and drugs, by pressing for their exclusion
2. Pressing for **exclusion and protection of things unlisted in patents, but patently belonging to the tribes, or to communities in developing countries, especially things spiritual and sacred.**

The Importance of Control

To recall and develop the framework of Section A, tribes and developing countries must have **sovereign CONTROL** over

- what they wish to **exclude** from patenting (e.g. for reasons of honor)
- what they would like to **patent and propagate , but not commercialize** i.e. what they would like to share with mankind at large, on humanitarian considerations, and to earn goodwill (e.g some ancient healing techniques)
- what they would like **to patent and commercialize**, by either **licensing out** to others against royalty/ and or dividends, or **by manufacturing it themselves**, such as handicrafts, textiles etc. based on tribal designs.

At the moment, they are on the defensive, as others aggress into their intellectual and cultural territory: **they need to take a PRO-ACTIVE, not REACTIVE stance**, and this can be done by gaining control. Control in turn will come from **information, and legal backing**, which the Draft Declaration would move towards.

Having CONTROL over their IPRs also means that they can apply TRIPS or US Patent Law, selectively, not completely; that consent must be

informed, not ignorant; that they can negotiate and not simply have to accept what is laid down by others to serve their best interests; that the dominant powers should modify existing international regimes where tribal interests are shown to be harmed.

COUNTING THE ADMINISTRATIVE COSTS OF IPR PROTECTION: The Case of Bangladesh

The United Nations Conference on Trade and Development **(UNCTAD)**, in the Supporting Papers to its Trade and Development Report , 1994, has reported that **the cost of adapting to outdated, and virtually non –existent, National IPR laws and Institutional Arrangements to TRIPS Provisions in the case of one among the Least Developed Countries, Bangladesh, will involve a cost of over US$1 billion per annum and that the cost will keep rising over time.** The calculations are as follows:

1. Establishment of an Expert Committee (5 Experts,5 Supporting Staff),for amending existing laws and procedures : US$ 150,000 p.a
2. Strengthening the Judiciary to cope with the new work (4 trained judges, 4 arbitrators,10 supporting staff) : US$ 200,000 p.a.
3. Upgrading the existing IPR related bodies to monitor the new regime (a threefold increase in professional staff): US$ 500,000 p.a.
4. Upgrading Equipment and Procedures for 3 above : US$200,000
5. Setting up Special Enforcement Units for investigation of complaints and taking prompt action: US$200,000p.a.
6. Strengthening Custom Authorities for Special Requirements for Border Measures : US$ 50,000 p.a.
7. Substantial resources for training the staff

The cost would rise as the country becomes more industrialized. Since Bangladesh has a perpetual fiscal deficit in any case, it would require more loans than ever to implement the TRIPS provisions.

Who would gain from this exercise ? The starving millions of Bangladesh, who cannot afford to buy, leave alone discriminate and choose among the meager imports ? Or the shareholders and managers of MNEs based in developed countries, for whom this may be just 10% of one firm's annual R&D budget?

Before any Native American Nation accepts the TRIPS regime, it should take a look at the plight of a few less developed countries like Bangladesh, who have been forced to accept an alien and inappropriate IPR regime, which will add to their poverty, not to the fabled wealth of "free trade".

It may be appropriate to limit and focus a nations IPR regime only to a few relevant areas instead <u>of trying to re-inventorize the entire universe</u> within the territorial jurisdiction of each nation.

CAUTIOUS ACCEPTENCE : COMPARING THE OPTIONS

Discussions in Section A (The Conceptual Framework) highlighted the unfairness of the International IPR Regime, while Section B (The Legal Framework) focussed on the harm caused to Indigenous People by violations of their IPRs. In this section, we have seen so far the price and cost economics of IPRs, and concluded again that the playing field is heavily tilted towards rich MNEs. However, for maximum safety and advantage, we have decided to accept selectively and to be pro-active to change the dominant paradigm through our deliberations and declarations on IPR protection. We have opted for **control**, so that we can decide what to exclude, what to patent for non-commercial use, and what to patent for commercial use. Besides identifying key areas of competitive advantage where patenting for commercial use would be rewarding, so that NA IPR Regimes can focus on those areas, **we now have to consider the options of commercializing independently or licensing IPRs to others against compensation in the shape of fees /royalty /share in profits, etc.**

Since technology or intellectual property, rather than heavy machinery has become the biggest profit-spinner for multinationals after the information revolution, and since indigenous communities all over the world are rich in intellectual property, the idea of **Native American Nations-led global tribal MNEs** may be mooted as the most exciting strategy, to be developed in a later section of this paper. However, many Intellectual Property patents/copyrights/trademarks may be suited to small enterprises, and although there may be **some areas in which licensing out may be a better option**, it seems that domestic manufacturing/propagation by the tribe may usually be a better idea, given **the high rates of unemployment among many tribes, and on many reservations**. Thus,

having counted the cost, compared the options, cautiously accepted selective Intellectual Property Protection (IPP), and also having chosen the areas to be brought into the commercial domain, Native American Nations may be able to best exercise control over their commercially viable IPRs by preferring to set up their own enterprises to exploit their Intellectual Property, rather than by getting compensated for IPRs licensed out to others. **Given an option therefore, the Native American Nations' Economic framework might well give top priority to control, second priority to independent commercialization within the Nation, and only third priority to compensation, to prevent economic wastage where the tribe is unable to exploit its own patent for reasons of scale, capital, equipment, sales network, market accesss, or other reasons**.

THE COMMERCIAL FRAMEWORK OF A TRIUMPHANT DECLARATION:

MOOTING THE IDEA OF A NATIVE AMERICAN MULTINATIONAL ENTERPRISE WITH GLOBAL NETWORKING AMONG INDIGENOUS PEOPLES

Native Americans are in a unique position among the indigenous peoples of the world to help indigenous communities across the globe to protect their Intellectual and Cultural Property Rights , because the US has the strongest and most aggressive Patents Office in the world, besides being the home of the largest number of Multinational Enterprises, who are the most avid collectors and developers of "technology"(or Intellectual Property) for maximum commercial advantage.

At the same time, Native American Nations enjoy **sovereign status and the freedom to frame and implement their own laws**, which is an important power to have for the protection of Intellectual Property. Furthermore, some Native American Nations are **increasingly becoming major players in the economies of their regions in the US**, and can use this power to create new patterns and paradigms for the preservation, recognition, and the best possible utilization (from the utilitarian as well as the humanitarian points of view) of the Intellectual and Cultural Property of Indigenous People all over the world.

To take a concrete example, **the Pequot Nation** , which has built up considerable amounts of capital from various sources over the last few years, is buying up abandoned **shipbuilding yards in the New London Harbor in Connecticut**, to start a major Shipbuilding Industry of their own. It is not difficult imaginatively to project **this spirit of enterprise , backed by many Native Nations' new-found economic power** , into

the creation and management of major commercial enterprises, national as well as multi-national, to take control of the preservation as well judicious propagation of tribal knowledge, and patronage of tribal arts, for commercial gain or for the greater good of mankind as a whole. One can also imagine **a global networking of MNEs, tying indigenous peoples' knowledge**, in areas like bio-medicine, textiles, music, literature, craft products, etc., **into commercial as well as philanthropic paradigms**, which are **culturally appropriate to tribal ways of thought**, rather than to the exploitative patterns of commerce that tend to prevail, currently. One can envision a few strong and successful tribal MNEs bringing **a new culture of progress through cooperation rather than competition** among nations, as well as among firms that cut across national boundaries.

INDIGENOUS INTELLECTUAL PROPERTY AS TECHNOLOGY: THE LOGIC BEHIND TRIBAL MNEs

The UN Center for the study of TransNational Corporations (UNCTC) in its World Investment Report, 1992, describes TNCs (or MNEs) as the strongest engines of economic growth in today's world, and sees Technology as the power behind this engine. The study says, that to find productive ideas, many large MNEs spend billions of dollars on Research and Development every year. **The study sees R&D expenditures as inputs, and Patents as the output on which the competitive advantage of successful MNEs is based. Many indigenous people carry these billion-dollar ideas from generation to generation without ever having exploited them on such a grand scale, for lack of scope, information, and funds.**

For instance, the Indian newsmagazine, INDIA TODAY (published fortnightly fron New Delhi, India), in its August 1996 issue, describes the case of a primitive tribal community in the **Bihar State of India,** called **"Lohars", or ironsmiths**, who have traditionally smelted an iron alloy in fire- clay ovens for centuries. It took the American Blacksmiths' Association and the University of Iowa's Department of Metallurgy to realize that they were actually making a highly malleable, low-carbon-content variety of **high quality steel**, which the US Researchers described as **" a magic steel, the metal of King Arthur's Sword"**, which can have many productive industrial and commercial uses.

Once tribes start patenting their knowledge, they will find that they are sitting on billions of dollars worth of ideas, which only Multinationals can commercialize to their fullest extent. Hence, as Native American Nations take stock of their Intellectual and Cultural Property, and send out a clarion call in the form of a Draft Declaration, they should also be thinking seriously of investing some of the money they may have accumulated from Casino businesses, or as lump sum payments of compensation against lost land, or from other sources, into their own global MNEs, based on their own native intellectual property.

THE SPECIAL CASE OF BIO-MEDICINE : A CASE RIPE FOR GLOBAL NETWORKING AMONG INDIGENOUS PEOPLES

Pharmaceuticals have traditionally provided fertile ground for flourishing MNEs, such as **Hoescht, Pfizer, ICI**, etc. In recent times, interest in **herbal/ bio- medicine** has grown exponentially , alongwith interest in alternative systems of medicine. Naturally, firms

spend a lot of money researching new drugs, to keep their competitive advantage in the global market. According to **Dr. Joseph DiMasi of Tufts University, it takes an average cost of $231 million and more than 10 years to bring a new pharmaceutical product to the market**.(Santoro, ibid **).** According to **Singh and Mahanti** (ibid), the annual value of pharmaceutical products derived from medicinal plants discovered by indigenous peoples exceeds US$ 43 billion, but the profits are rarely shared with indigenous people. They also quote **a California company, Shaman International, which wrote recently of indigenous people:**

"They have the knowledge that will help bring new medicine to our pharmacoepia. It is time to recognize the gift that they have provided to the world"

The nomadic **Punan people of Indonesia** discovered that the root of the 'jileng' plant could be boiled and used as a cure for tuberculosis. This discovery is being pursued for drug production in the US and in Britain. Pharmaceutical companies are working to develop a new anticoagulant based on the 'tikuiba' plant used by **the Uru-eu-Waw-Wau people of the Brazilian Amazon**.(Singh and Mahanti, ibid)

The author pursued with the Indian Ministry of Health the theft by US companies of a cure for malaria through processing the leaves and bark of the ' neem' tree exclusively known to **the Onge tribe of the Andaman Islands**.

The Wall Street Journal dated 26 February 1998 carried a news item titled , "The Making of a Herbal Superstar: Presenting Kava, Next Herbal Star" :

"In 1995, Mr. Kilham persuaded the owners of Pure World Inc. , a New Jersey herbal manufacturer, to send him to **the Republic of Vanuatu in the South Pacific** to line up a source of 'kava'. Things must have gone well: He later became an honorary tribal chief

there. Since then, with Mr. Kilham's help as a paid consultant, Pure World Inc. has become one of the biggest Kava suppliers in the US".

One wonders what pittance, if any, is being paid to the tribe in Vanuatu.

According to Singh and Mahanti (ibid), most of the 7000 natural compounds used in modern medicine have been employed by traditional healers for years, and 25% of American prescription drugs contain active ingredients derived from plants.

Thus **the area of ethno-pharmacology , or bio-medicine, is open and most appropriate for the creation of the first global networking MNE made up of, and owned by, Indigenous Peoples. Native Americans could well take the lead in this sphere, and help to protect the IPRs of Indigenous Peoples the world over, in this important area, besides earning a healthy profit.**

CHECKLISTING THE KEY AREAS

The key areas to watch for commercial exploitation of IPRs of Indigenous People are:

1. BIODIVERSITY (Seeds, Germplasm, Plants, Animals, even Human DNA, as in the Genome Project)
2. BIOTECHNOLOGY AND BIOMEDICINE (Herbal Medicine, Traditional Healing Practices)
3. LITERATURE AND THE ARTS(I)(TRADITIONAL COMMUNITY HERITAGE) (Folklore, Mythology, Oral Tradition, Ceremonials)
4. LITERATURE AND THE ARTS(II) (INDIVIDUAL, especially MODERN, CREATIONS)
5. CRAFTS (Designs, Techniques, and Products)
6. TEXTILES (Fabrics and Designs)
7. ARCHITECTURE (Layouts and Materials)
8. METALLURGY (Processes and Products)(Techniques and Alloys)
9. NAMES AND LOGOS (used in/ for promotional purposes, as in Advertisements, Brand Names, Trademarks, Sports Teams, etc.)
10. ARTEFACTS AND CEREMONIES (Sites, Remains, Museum Displays; Written and Audio-Visual Documentation and Representation).

In a background paper for the Ministry of Welfare, Government of India on this subject, written in August 1996, the author had tried to checklist all commercially important IPR related issues for Indigenous People in India (officially referred to as the Scheduled tribes, or STs) as follows:

"5..... details in respect of modifications required in TRIPs under WTO can only be made available by concerned departments in respect of IPRs in their respective fields. For example, the Ministry of Environment & Forests would provide necessary inputs in respect of **Bio-diversity**, the Ministry of Agriculture for **Plant/Seed varieties**, the Ministry of Health in respect **of diagnostic, therapeutic and surgical methods** and processes, the Department of Bio-Technology in respect of **biological processes for production of plants, animals** etc., the Ministry of Culture in respect of **literature, music, the plastic and performing arts** etc., the Ministry of Industry for **industrial designs** and so forth. Similarly, Ministry of Welfare, being the nodal Ministry for Tribal Welfare may be expected to provide the necessary inputs relating to IPRs of Scheduled Tribes.

6.However, even a perfunctory study of **the IPRs of Scheduled Tribes shows that they cover all the fields mentioned above and perhaps a few more also. For example, in the field of bio-diversity, there are many medicinal plants, herbs, oilseeds, mushroom varieties and other fungal organisms, about the occurrence and propagation of which detailed information is traditionally known only to particular tribes living in the specific geographical areas where these plants and organisms are to be found, or can grow in Nature. Knowledge about the possible medicinal or other usage of these plants, herbs, fungi etc. is part of the traditional wisdom of tribal communities. Sometimes, it is focussed in the Medicine-man or *Ojha, Pahan, Baiga* or *Bhagat* of specific tribes. The processes of turning these natural products into medicine, the dosage and the methods of administration of these medicines are also exclusively known to a only few tribes, or a few persons in a few tribes, in**

respect of particular medicines, plants etc. The use of a plant derivative by the Onge tribes of the Andaman and Nicobar Islands for combating malaria, is a case in point.

7. Many of the minor millets and other agricultural plants and seeds exclusively grown in tribal areas are the products of traditional knowledge and generations of effort on the part of particular tribe. In the field of industry, it has been found that tribal techniques of extracting iron from iron ore have attracted the interest of researchers looking for better quality steel. In the field of culture also, tribes possess rich and unique intellectual property. Different tribes have also developed, over centuries, different methods of construction, design, and layout of houses/temples/functional or ceremonial buildings.

8. All these things need protection, so that tribes do not lose their intellectual property because of their ignorance about, and/or inability to fight the new world order of trade and IPRs. For this, what is needed, is a combination of technical expertise in every field, and an attitude of sympathy for the Scheduled Tribes. The Ministry of Welfare, therefore, proposes to form an Expert Group under its aegis to get advice on the subject for being placed before the Ministry of Commerce so that the IPRs of the tribes can be guarded in international forums.

9. Tribes normally hold their knowledge as communities and not as individuals. Therefore, any regime in which rights are given to individuals for intellectual property belonging to a whole tribe would be inimical to the interests of the Scheduled Tribes. A system of community rights would be more suitable in respect of the intellectual property of the Scheduled Tribes. The Ministry of Welfare will also

take different State Governments into confidence, for ensuring the protection the IPRs of the Scheduled Tribes inhabiting respective States.

9. The Working Group for Development and Welfare of the Scheduled Tribes during the 9th Five Year Plan has taken special note of the subject of IPRs of Scheduled Tribes. Paragraph 1 of Chapter 2 of the Report states as follows :-

"(The) issue of intellectual property rights in regard to the process and product relating to various medicinal plants has assumed urgency in the new liberalized economic scenario in the country and in the world context. **Measures, including legislative measures must be taken to protect the IPRs of tribes in this sphere. Further, they should be made partners and stakeholders by giving them 50% of the license fee and at least 2% of the royalty on the sale of the drug developed out of indigenous knowledge of the tribe (in question) about the plants/medicines.**"

(from :INTELLECTUAL PROPERTY RIGHTS OF TRIBES, a Background Paper for the First Meeting of the Inter-Ministerial and Expert Group on Intellectual Property Rights of Scheduled Tribes, prepared by Ms. Amita Paul, Director (TDA), in the Tribal Development Division of the Ministry of Welfare, Government of India, on the 7th of August, 1996)

(D) RECOMMENDATIONS AND PLAN OF ACTION

A consideration of the Conceptual, Legal and Economic Frameworks gives us an interlocking grid in the shape of a Basic Framework towards formulating a Draft Declaration of the Intellectual and Cultural Property Rights of Native Peoples, from which we can derive the following concrete conclusions:

- A set of RECOMMENDATIONS
- A step-by-step PLAN OF ACTION
- A FRAMEWORK FOR DECISION-MAKING IN KEY AREAS in tabular form.

These conclusions alongwith the Basic Framework are given in the following pages.

THE BASIC FRAMEWORK

A Basic Framework for a Draft Declaration of the Intellectual and Cultural Property Rights of Native Peoples, can be derived from the conclusions of the Conceptual, Legal, and Economic Frameworks, as follows :

CONCEPTUALLY, the Draft Declaration must address the issues of

- What should be EXCLUDED from being patented
- What should be PATENTED but NOT COMMERCIALIZED
- What should be PATENTED AND COMMERCIALIZED

LEGALLY, the Draft Declaration must address the issues of

- INCLUSION of Indigenous Peoples IPR issues in WTO, TRIPS, and WIPO
- EXCLUSION of undocumented intellectual and cultural resources from exploitation
- RECOGNITION of COMMUNITY RIGHTS in intellectual/cultural property
- RESPECT for tradition, privacy, and the spiritual dimension of IPRs
- INTRODUCTION of the concept of Intergenerational Equity
- USE of GEOGRAPHICAL LOCATION as a means of identification and protection
- EMPHASIS on HUMANITARIAN, NOT COMMERCIAL considerations

ECONOMICALLY, the Draft Declaration must address issues of

- CONTROL over the commercialization of Native Peoples IPRs
- COMMERCIALIZATION of selected areas through tribal enterprises,esp.NA MNEs
- COMPENSATION for commercialization through non-tribal entities/MNEs

Top priority must be given to control, followed by commercialization by the Native Peoples themselves. Non-tribal commercialization must be considered, for adequate compensation, only as a last resort. Possibilities for Joint Ventures and Strategic Alliances with non-tribal entities could be explored.

RECOMMENDATIONS

1. Indigenous Peoples all over the world have **a vast resource base of Intellectual and Cultural Resources.** This resource base, **accumulated over many centuries, or even over milleniums, is often undocumented in any formal sense**, unlike the limited achievements of modern, technology-based cultures and societies. The new world order of international trade, with its highly commercial, often exploitative, perspectives on Intellectual and Cultural Property regimes, poses **a serious and immediate threat to the rich heritage** of Native peoples. As such, there is **an urgent need for a Universal Declaration of the Intellectual and Cultural Property Rights of Indigenous and Tribal People/peoples, which should be applicable in tandem with the WTO Agreement on Trade- Related Applications of Intellectual Property Rights and the WIPO's International Patents Classification, as well as the Berne Convention for the Protection of Literary and Artistic Works, and should be binding on all countries.**
2. **The culture of the New World Economic Order, with its emphasis on individual rights in patents, commercialization and competition, is often alien or even offensive, to tribal cultures (as well as other rural cultures in developing countries),** with their emphasis on collective welfare, emphasis on cooperative rather than competitive modes of social behavior, and premium on spiritual and humanitarian values. There is an urgent need for the recognition of this contrast as a backdrop for global economic activity, and its standards, procedures, and legal instruments. **The Draft Declaration must therefore be recognized and endorsed by all UN bodies and agencies, and its provisions used, not only as a**

counterpoint to the existing world economic order, but also as elements of reform, to make the world economic order more culturally appropriate to the vast majority of people in non-industrialized societies, who are becoming the victims of a system that benefits the privileged few at the cost of the deprived majority of humankind.

3. **Protection and promotion of the IPRs of Indigenous Peoples must be written into the Charters of the World Trade Organization (WTO) and the World Intellectual Property Organization, and should be added as a detailed and binding Clause of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). WTO and WIPO should launch special programs for research, training, and awareness generation on this subject , and provide financial and technical assistance to help indigenous people to protect such rights and to make the best possible use of them.** Sanctions should be imposed on countries whose firm violate tribal IPRs, and MNEs responsible for such exploitation should be tried in the International Court of Justice.
4. Countries and Governments should enunciate a clear policy for the protection of the IPRs of Indigenous peoples. Some harmony should be achieved between local , national, and international laws and policies on such subjects. The unwritten traditions of tribes on IPR ownership should be recognized and respected at all these levels in the legal process.
5. In **1984**, the World Intellectual Property Organization **(WIPO)** recognized that indigenous people were not being compensated for the uses made of their folklore traditions. WIPO then developed "**MODEL PROVISIONS FOR NATIONAL**

LAWS on Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Action". These provisions, if adopted, would protect individual and collective folklore ,regardless of whether it has ever been written down. These Model Provisions provide that the community concerned should fix and collect fees for the uses made of their folklore. However, no country has adopted the measure so far.WIPO should actively pursue this issue with national governments.

6. In **1991, the UN General Assembly** passed a resolution appealing to States:

   "to cooperate closely with the inter-governmental Committee for **Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, and to conclude bilateral agreements for this purpose".The UN Working Group on the Rights of Indigenous Populations** has requested a further study, to be conducted in cooperation with indigenous people, on a comprehensive analysis of the laws and traditions of indigenous peoples regarding the definition, ownership, and control of cultural property. This study should be completed quickly, and Native American people should participate actively in its conduct. The results of this study should be made public soon, and its recommendations used to frame International Laws on the subject, which should be justiciable in the International Court of Justice.

7. **There is a strong need to incorporate the concept of group/community/tribal/ collective IPRs.** Laws recognize firms and corporations as owners of property: why not tribes? Tribes should not have to register as corporations to exercise rights as unified entities for IPR protection and for economic activity generated by such rights.

8. Communities accumulate knowledge over generations, and have a right to protect and use such knowledge, and to pass it on to future generations. The contributions of past generations must be recognized; the rights of present and future generations must be equitably protected. For just and sustainable development, **intergenerational rights in IPRs must be respected, and incorporated into IPR law and instruments.**

9. Legal instruments of Estoppel/Exclusion/Exceptions/Savings etc. should apply automatically to protect the vast store of undocumented/unregistered intellectual and cultural resources of tribes. A concept of Prior Informed Consent must be incorporated into laws at all levels, so that Native communities can utilize traditional knowledge after identifying utility, usages, derivatives, costs and benefits.

10. Given the local embeddedness of tribal knowledge, **geographical location** can be an effective means of identifying tribal IPRs and protecting them against piracy. Developing countries have suffered huge losses as their traditional knowledge was patented in USA or Europe. **Hence TRIPS and national patent/copyright legislation should contain binding clauses that primary registration must be in the nearest Patent/Copyright office. Offices found in violation, encouraging piracy, should have to forfeit their powers till just restitution has been made.**

11. At the same time, geography/ jurisdiction should not prevent tribal people from getting redressal in the strongest possible way through their nearest courts for violation of their IPRs, as groups or as individuals. The place of violation may not be material, unless plaintiffs prefer to file complaints there. Choice-of-law principles

must operate in such cases for maximum convenience and least expense to Native people/peoples.

12.The entire body of the Intellectual and Cultural Property rights can be seen in terms of what can and should be patented, and what should not. Besides protecting undocumented resources, **laws should also provide protection FROM patenting that which has spiritual significance; whatever adversely affects the honor, dignity, privacy, and tradition of tribes and individuals; that which must remain in the common domain for humanitarian reasons. The Human Genome Project, which treats primitive tribes like laboratory specimens, and 'steals' their DNA samples for future use, without working for the survival of these vanishing and endangered tribes, is offensive to human dignity**. A view has to be taken on these issues after full informed consultation with the concerned tribe. Hence CONTROL over what should or should not be patented must be vested in each tribe itself for its own resources, and should be recognized as a more basic need and right, than COMMERCIALIZATION.

13.Tribes should have **the right to PATENT BUT NOT COMMERCIALIZE that which they see as non-commercial, for spiritual and humanitarian reasons, such has traditional healing methods.** These could be shared with all mankind at no financial profit, but with recognition for the originating tribe.

14.Tribes should have **the right to select what they wish to commercialize, and how to do it. Country governments and International Agencies should provide technical and financial assistance to tribes that wish to found enterprises to commercialize their Intellectual and Cultural Property** resources, but lack the means.

15.Commercialization by tribes themselves is preferable to licensing tribal IPRs to non-tribal entities, which should be done only as a last resort, for fair and adequate compensation.

16.The time is ripe for forming Indigenous Peoples' Multinational Enterprises(MNEs), given their vast intellectual and cultural resources on a global scale, which can be easily coordinated through global networking in this age of the information revolution. **Native American Nations are best equipped to give a lead in this sphere, and Biomedicine is the most appropriate and profitable area to begin with.**

17.Global Networking should also take the form of **maintaining a Global Registry of Native Peoples' Intellectual and Cultural Resources**, both patented and unpatented, to prevent piracy in the globalized economy. This responsiblity should be taken up by WIPO, in collaboration with national governments and tribal people/peoples.

18.There is **an urgent need for Community Based and Non-Governmental organizations, who should work at the grassroots level among tribal people the world over, to generate awareness about their IPRs, to help inventorize and document Intellectual and Cultural Resources, to facilitate patenting, to gather information on violations, and to help initiate legal action against violations.**

PLAN OF ACTION

The recommendations can now be distilled into the following action strategies:

I. A GENERAL STRATEGY FOR ACTION ON IPR PROTECTION

II. A STEP-BY-STEP PLAN OF ACTION FOR THE CLIENT

III. A DECISION- MAKING FRAMEWORK FOR KEY AREAS

These options for specific action are described in the following pages.

THE GENERAL STRATEGY

Indigenous Peoples worldwide could use the following strategy to protect their Intellectual and Cultural Property Rights:

1. INVOLVE : Tribal Communities, Tribal Governments, Community Based Organizations(CBOs),(Non-Governmental Organizations) NGOs, Local, State and National Governments, and UN agencies
2. CREATE: Networks for awareness generation, vigilance, facilitation, at Community, National, Regional, and International Levels
3. CONSULT : Legal Experts, Management Consultants, Financial Analysts, Academicians in related disciplines.
4. CONVENE : Conferences, Meetings, Powwows, at all levels
5. WATCH : Patents Offices and Notices, Newspapers,the Internet, Markets, and the WTO for developments, and for maintaining local, national and global directories of resources, and preventing piracy.
6. SEED : Native Enterprises, domestic and multinational, based on patents and copyrights of Native Peoples' Intellectual and Cultural Property.
7. NETWORK : With Indigenous People/Peoples, Governments, Enterprises, NGOs and CBOs, worldwide.

STEP-BY-STEP PLAN OF ACTION FOR THE CLIENT

IPRs of Native Peoples
SUGGESTED PLAN OF ACTION

1. Create a Broad International Framework.
2. Fit in Documentation of National Issues.
3. Hold a Conference of Experts and Tribal Leaders to frame a Draft Declaration.
4. Publicize Draft for an Open Debate,with MSI as Coordinator for Suggested Changes
5. Finalize and Adopt Joint Declaration for all Native American Nations.
6. Ensure Recognition by US Govt.and UNHRC, and inclusion in all NA Constitutions/Law Codes.
7. Monitor Implementation and make Amendments whenever necessary.

A start has been made on Point 1. An attempt at creating a broad framework has been made in this paper.

To move on to Point 2 in the multi-step process of framing a Draft Declaration of the Intellectual and Cultural Property rights of Native Peoples, it is suggested that a Conference of Experts, Members of Tribal Governments, Native Rights Activists, and NGOs may be held on the subject. The Conference could be jointly hosted by the Morning Star Institute and the Harvard University Native Americans Program (HUNAP)and/or the Harvard Project on American Indian Economic Development (HPAIED). A tentative list of experts on relevant subjects is given on the following page. This could form a basis for the Experts portion of invitees for the proposed conference.

TENTATIVE LIST OF EXPERTS

(i) Ms. Suzan Harjo, President, the Morning Star Institute, Washington,D.C. (Native Rights Activist, who proposed this project on behalf of the Institute.)

(ii) Prof. S. James Anaya, University of Iowa College of Law, Iowa City, Iowa (Indigenous Peoples and International Law).

(iii) Prof. Joseph W. Singer of the Harvard Law School (Tribal Law)

(iv) Professor Laurie Graham of the Harvard Law School (Native American Law)

(v) Professor Lucy White of the Harvard Law School (Law for Minorities)

(vi) Professor William Fisher of the Harvard Law School (Intellectual Property Law)

(vii) Professor Rosemary Coombe, University of Toronto Law School, Toronto, Canada (IPRs of Indigenous Peoples)

(viii) Prof. William L. Fash of the Department of Anthropology, Harvard University (Culture)

(ix) Prof. Ron Neissen, Department of Anthropology, Faculty of Arts and Sciences, Harvard University (Culture and Representation at the UN)

(x) Prof. Joseph Kalt of the Kennedy School of Government ,Harvard University (Economics)

(xi) Dr. Manley A. Begay Jr. of the Harvard Project on American Indian Economic Development, Kennedy School of Government, Harvard University.(Native American traditions and Economic Development)

(xii) Prof. Robert Lawrence at the Center for Business and Government, Kennedy School of Government, Harvard University (WTO and International Trade)

(xiii) Prof. Raymond Vernon at the Center for Business and Government, Kennedy School of Government, Harvard University (Multinationals)

(xiv) Dr. Jean Camp of the Kennedy School of Government , Harvard University (Computers, Commerce and Convergence, or Development and Digital Technology)

(xv) Prof. John P. Barlow of the Institute of Politics, Kennedy School of Government , Harvard University (Intellectual Property in Cyberspace)

(xvi) Professor Keith Aoki, Assistant Professor of Law, University of Oregon School of Law (Philosophy of Intellectual Property Protection)

(xvii) Professor Michael Porter of the Harvard Business School (Innovation, Competitive Advantage).

(xviii) Prof. Amar Bhide of the Harvard Business School (Starting New Enterprises)

(xix) Prof. Jim Austin of the Harvard Business School (Project Assessment and Management in Tribal and Developing Country contexts)

(xx) Prof. Lynne Payne of the Harvard Business School (Globalization and Culture)

(xxi) Prof. Deborah Spar of the Harvard Business School (Human Genome Project-the Business Aspect)

(xxii) Prof. Jon Beckwith, Department of Microbiology, Harvard School of Public Health (Human Genome Project – Scientific and Legal Implications)

(xxiii) Mr .Dev Vardhan, Senior Engagements Manager, Mckinsey and Co., Management Consultants, Chicago (Management)

(xxiv) Ms. Angela Riley, Third Year Law Student at Harvard Law School, writing her Final Paper on Native Americans and Intellectual Property (Case Law)

IPRs of Native Peoples

Table 1 FRAMEWORK FOR DECISION MAKING ON IPRs/PATENTS

(An illustrative, not exhaustive, list)

Key Areas	Conceptual Options Yes	No	Legal Options Individual Rights	Group Rights	Commercial Options Tribal (Own)	MNE (Licensed)
BIODIVERSITY (Human , Animal, Plant)	Some Cases	Human DNA, Foods, etc.	Rare Cases	Most Cases	Preferable in future	Feasible at present
MEDICINE (Biomedicine, Traditional Healing Practices)	Most Cases	Humanitarian and Spiritual Considerations		✓	Preferable	Practical at present
CRAFT (Designs and Products)	✓		Rare Cases	Most cases	✓	
TEXTILES	✓		,,	,,	✓	
ARCHITECTURE (Layouts , Designs, Materials)	✓		,,	,,	✓	
METALLURGY (Processes and Products)	✓		,,	,,	✓	
LITERATURE & ART (FOLKLORE, ORAL TRADITION)	Some Cases	Exclude the Sacred, and in general undocumented		✓ Protect Exclusions	✓	
LITERATURE & ART (Individual, esp. modern Creations)	✓		✓		✓	
NAMES &LOGOS	For Tribal use only	For reasons of privacy, honor, spiritual significance	Rare Cases	Most Cases	Commercialize only in exceptional cases	
CEREMONIES		✓ Reasons as above		✓ (if the question ever arises)	Avoid commercialization as far as possible	Avoid outside commercialization at all costs

CONCLUSION

"I am going to venture that the man who sat on the ground in his tipi, meditating on life and its meaning, accepting the kinship of all creatures, and acknowledging unity with the universe of things was infusing into his being the true essence of civilization".

(Luther Standing Bear (1868?-1939) Oglala Sioux Chief, 'Native American Wisdom'[ibid])

"Out of the Indian approach to life, there came a great freedom—an intense and absorbing love of nature; a respect for life; enriching faith in a Supreme Power; and principles of truth, honest , generosity, equity, and brotherhood, as a guide to mundane relations."

(Luther Standing Bear [1868-1939] Oglala Sioux Chief, 'Native American Wisdom',[ibid])

"O ye people, be ye healed;
Life anew I bring unto ye.
O ye people, be ye healed;
Life anew I bring unto ye.
Through the Father over all
Do I thus.
Life anew I bring unto ye."

(Good Eagle [Wanbli-Waste] [late 19th Century], Dakota Sioux Holy Man,[ibid])

ıbjects of International Law

:nous groups not meeting the requirements of nationhood are hereby declared to be :ts of international law and are entitled to the protection of this Declaration, provided re identifiable groups having bonds of language, heritage, tradition, or other common ty.

uarantee of Rights

digenous nation or group shall be deemed to have fewer rights, or lesser status for the :ason that the nation or group has not entered into recorded treaties or agreements with tate.

ccordance of Independence

:nous nations or groups shall be accorded such degree of independence as they may in accordance with international law.

reaties and Agreements

ies and other agreements entered into by indigenous nations or groups with other States, ıer denominated as treaties or otherwise, shall be recognized and applied in the same er and according to the same international laws and principles as the treaties and agree- ; entered into by other States.

brogation of Treaties and Other Rights

ies and agreements made with indigenous nations or groups shall not be subject to uni- l abrogation. In no event may the municipal law of any State serve as a defence to the e to adhere to and perform the terms of treaties and agreements made with indigenous ıs or groups. Nor shall any State refuse to recognize and adhere to treaties or other agree- ; due to changed circumstances where the change in circumstances has been substan- caused by the State asserting that such change has occurred.

ırisdiction

tates shall assert or claim or exercise any right of jurisdiction over any indigenous n or group or territory of such indigenous nation or group unless pursuant to a valid / or other agreement freely made with the lawful representatives of the indigenous n or group concerned. All actions on the part of any State which derogate from the in- [illegible] shall be the proper concern

8. Claims to Territory

No State shall claim or retain, by right of discovery or otherwise, the territories of an indigenous nation or group, except such lands as may have been lawfully acquired by valid treaty or other cession freely made.

9. Settlement of Disputes

All States in the Western Hemisphere shall establish through negotiation or other appropriate means a procedure for the binding settlement of disputes, claims, or other matters relating to indigenous nations or groups. Such procedures shall be mutually acceptable to the parties, fundamentally fair, and consistent with international law. All procedures presently in existence which do not have the endorsement of the indigenous nations or groups concerned, shall be ended, and new procedures shall be instituted consistent with this Declaration.

10. National and Cultural Integrity

It shall be unlawful for any State to take or permit any action or course of conduct with respect to an indigenous nation or group which will directly or indirectly result in the destruction or disintegration of such indigenous nation or group or otherwise threaten the national or cultural integrity of such nation or group, including, but not limited to, the imposition and support of illegitimate governments and the introduction of non-indigenous religions to indigenous peoples by non-indigenous missionaries.

11. Environmental Protection

It shall be unlawful for any State to make or permit any action or course of conduct with respect to the territories of an indigenous nation or group which will directly or indirectly result in the destruction or deterioration of an indigenous nation or group through the effects of pollution of earth, air, water, or which in any way depletes, displaces or destroys any natural resource or other resources under the dominion of, or vital to the livelihood of an indigenous nation or group.

12. Indigenous Membership

No State, through legislation, regulation, or other means, shall take actions that interfere with the sovereign power of an indigenous nation or group to determine its own membership.

13. Conclusion

All of the rights and obligations declared herein shall be in addition to all rights and obliga-

ECLARATION OF PRINCIPLES OF INDIGENOUS RIGHTS

ted by the Fourth General Assembly of the World Council of Indigenous Peoples, na, Sept. 1984. Reprinted in U.N. Doc. E/CN.4/1985/22, Annex 2 (1985).

ciple 1

idigenous peoples have the right of self-determination. By virtue of this right they may determine their political status and freely pursue their economic, social, religious and ral development.

ciple 2

ates within which an indigenous people lives shall recognize the population, territory nstitutions of the indigenous people.

ciple 3

ultures of the indigenous peoples are part of the cultural heritage of mankind.

ciple 4

radition and customs of indigenous people must be respected by the states, and recog as a fundamental source of law.

ciple 5

idigenous peoples have the right to determine the person or groups of persons who are led within its population.

ciple 6

indigenous people has the right to determine the form, structure and authority of its utions.

ciple 7

nstitutions of indigenous peoples and their decisions, like those of states, must be in

Principle 8

Indigenous peoples and their members are entitled to participate in the political life of the state.

Principle 9

Indigenous people shall have exclusive rights to their traditional lands and its resources: Where the lands and resources of the indigenous peoples have been taken away without their free and informed consent such lands and resources shall be returned.

Principle 10

The land rights of an indigenous people include surface and subsurface rights, full rights and interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law.

Principle 11

All indigenous peoples may, for their own needs, freely use their natural wealth and resources in accordance with Principles 9 and 10.

Principle 12

No action or course of conduct may be undertaken which, directly or indirectly, may result in the destruction of land, air, water, sea ice, wildlife, habitat or natural resources without the free and informed consent of the indigenous peoples affected.

Principle 13

The original rights to their material culture, including archaeological sites, artifacts, designs, technology and works of art lie with the indigenous people.

Principle 14

The indigenous peoples have the right to receive education in their own language or to establish their own educational institutions. The languages of the indigenous peoples are to be respected by the states in all dealings between the indigenous people and the state on the basis of equality and non-discrimination.

Principle 15

The indigenous peoples and their authorities have the right to be previously consulted and

ıcted within their territories and to be informed and have full access to the results of the vestigation.

rinciple 16

digenous peoples have the right, in accordance with their traditions, to move freely and con- ıct traditional activities and maintain kinship relationships across international boundaries.

rinciple 17

reaties between indigenous nations or peoples and representatives of states freely entered to, shall be given full effect under national and international law.

hese principles constitute minimum standards which States shall respect and implement.

)ECLARATION OF PRINCIPLES ON THE RIGHTS)F INDIGENOUS PEOPLES

dopted by representatives of indigenous peoples and organizations meeting in Geneva, July)85, in preparation for the fourth session of the United Nations Working Group on Indig- ïous Populations; as reaffirmed and amended by representatives of indigenous peoples and rganizations meeting in Geneva, July 1987, in preparation for the working group's fifth ssion. Reprinted in U.N. Doc. E/CN.4/Sub.2/1987/22, Annex 5 (1987).

1. Indigenous nations and peoples have, in common with all humanity, the right to life, ıd to freedom from oppression, discrimination, and aggression.

2. All indigenous nations and peoples have the right to self-determination, by virtue of hich they have the right to whatever degree of autonomy or self-government they choose. his includes the right to freely determine their political status, freely pursue their own eco- ɔmic, social, religious and cultural development, and determine their own membership and/ r citizenship, without external interference.

3. No State shall assert any jurisdiction over an indigenous nation and people, or its ter- tory, except in accordance with the freely expressed wishes of the nation and people con- ɛrned.

4. Indigenous nations and peoples are entitled to the permanent control and enjoyment f their aboriginal ancestral-historical territories. This includes air space, surface and subsur- ıce rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and ıe economies based on these resources.

5. Rights to share and use land, subject to the underlying and inalienable title of the ıdigenous nation or people, may be granted by their free and informed consent, as evidenced ı a valid treaty or agreement.

6. Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation re never legitimate bases for States to claim or retain the territories of indigenous nations or eoples.

7. In cases where lands taken in violation of these principles have already been settled, ıe indigenous nation or people concerned is entitled to immediate restitution, including com- ensation for the loss of use, without extinction of original title. Indigenous peoples' right to

8. No State shall participate financially or militarily in the involuntary displacement of indigenous populations, or in the subsequent economic exploitation or military use of their territory.

9. The laws and customs of indigenous nations and peoples must be recognized by States' legislative, administrative and judicial institutions and, in case of conflicts with State laws, shall take precedence.

10. No State shall deny an indigenous nation, community, or people residing within its borders the right to participate in the life of the State in whatever manner and to whatever degree they may choose. This includes the right to participate in other forms of collective action and expression.

11. Indigenous nations and peoples continue to own and control their material culture, including archaeological, historical and sacred sites, artefacts, designs, knowledge, and works of art. They have the right to regain items of major cultural significance and, in all cases, to the return of the human remains of their ancestors for burial according with their traditions.

12. Indigenous nations and peoples have the right to education, and the control of education, and to conduct business with States in their own languages, and to establish their own educational institutions.

13. No technical, scientific or social investigations, including archaeological excavations, shall take place in relation to indigenous nations or peoples, or their lands, without their prior authorization, and their continuing ownership and control.

14. The religious practices of indigenous nations and peoples shall be fully respected and protected by the laws of States and by international law. Indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of sacred sites in accordance with their own laws and customs, including the right of privacy.

15. Indigenous nations and peoples are subjects of international law.

16. Treaties and other agreements freely made with indigenous nations or peoples shall be recognized and applied in the same manner and according to the same international laws and principles as treaties and agreements entered into with other States.

17. Disputes regarding the jurisdiction, territories and institutions of an indigenous nation or people are a proper concern of international law, and must be resolved by mutual agreement or valid treaty.

18. Indigenous nations and peoples may engage in self-defence against State actions in conflict with their right to self-determination.

19. Indigenous nations and peoples have the right freely to travel, and to maintain economic, social, cultural and religious relations with each other across State borders.

20. In addition to these rights, indigenous nations and peoples are entitled to the enjoyment of all the human rights and fundamental freedoms enumerated in the International Bill of Human Rights and other United Nations instruments. In no circumstances shall they be subjected to adverse discrimination.

21. All indigenous nations and peoples have the right to their own traditional medicine, including the right to the protection of vital medicinal plants, animals and minerals. Indigenous nations and peoples also have the right to benefit from modern medical techniques and services on a basis equal to that of the general population of the States within which they are located. Furthermore, all indigenous nations and peoples have the right to determine, plan, implement, and control the resources respecting health, housing, and other social services affecting them.

22. According to the right of self-determination, all indigenous nations and peoples shall not be obligated to participate in State military services, including armies, paramilitary or

DECLARATION OF SAN JOSÉ

Adopted by the UNESCO Meeting of Experts on Ethno-Development and Ethnocide in Latin America, San José, Dec. 11, 1981. UNESCO Doc. FS 82/WF.32 (1982).

For the past few years, increasing concern has been expressed at various international forums over the problems of the loss of cultural identity among the Indian populations of Latin America. This complex process, which has historical, social, political and economic roots, has been termed *ethnocide*.

Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually. This involves an extreme form of massive violation of human rights and, in particular, the right of ethnic groups to respect for their cultural identity, as established by numerous declarations, covenants and agreements of the United Nations and its Specialized Agencies, as well as various regional intergovernmental bodies and numerous non-government organizations.

In response to this demand, UNESCO organized an international meeting on ethnocide and ethno-development in Latin America, in collaboration with FLACSO, which was held in December 1981 in San José, Costa Rica.

The participants in the meeting, Indian and other experts, made the following Declaration:

1. We declare that ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948.
2. We affirm that ethno-development is an inalienable right of Indian groups.
3. By ethno-development we mean the extension and consideration of the elements of its own culture, through strengthening the independent decision-making capacity of a culturally distinct society to direct its own development and exercise self-determination, at whatever level, which implies an equitable and independent share of power. This means that the ethnic group is a political and administrative unit, with authority over its own territory and decision-making powers within the confines of its development project, in a process of increasing autonomy and self-management.
4. Since the European invasion, the Indian peoples of America have seen their history denied or distorted, despite their great contributions to the progress of mankind, which has led to the negation of their very existence. We reject this unacceptable misrepresentation.
5. As creators, bearers and propagators of a civilizing dimension of their own, as unique and specific facets of the heritage of mankind, the Indian peoples, nations and ethnic groups of America are entitled, collectively and individually, to all civil, political, economic, social and cultural rights now threatened. We, the participants in this meeting, demand universal recognition of all these rights.
6. For the Indian peoples, the land is not only an object of possession and production. It forms the basis of their existence, both physical and spiritual, as an independent entity. Territorial space is the foundation and source of their relationship with the universe and the mainstay of their view of the world.
7. The Indian peoples have a natural and inalienable right to the territories they possess as well as the right to recover the land taken away from them. This implies the right to the natural and cultural heritage that this territory contains and the right to determine freely how it will be used and exploited.
8. An essential part of the cultural heritage of these peoples is their philosophy of life their experience, knowledge and achievements accumulated throughout history in the cultural, social, political, legal, scientific and technological sphere. They therefore have a right access to and use, dissemination and [illegible]

9. Respect for the forms of autonomy required by the Indian peoples is an essential condition for guaranteeing and implementing these rights.
10. Furthermore, the Indian peoples' own forms of internal organization are part of their cultural and legal heritage which has contributed to their cohesion and to maintaining their socio-cultural traditions.
11. Disregard for these principles constitutes a gross violation of the right of all individuals and peoples to be different, to consider themselves as different and to be regarded as such, a right recognized in the Declaration on Race and Racial Prejudice adopted by the UNESCO General Conference in 1978, and should therefore be condemned, especially when it creates a risk of ethnocide.
12. In addition, disregard for these principles creates disequilibrium and lack of harmony within society and may incite the Indian peoples to the ultimate resort of rebellion against tyranny and oppression, thereby endangering world peace. It therefore contravenes the United Nations Charter and the Constitution of UNESCO.

As a result of their reflections, the participants appeal to the United Nations, UNESCO, the ILO, WHO, and FAO, as well as to the Organizations of American States and the Inter-American Indian Institute, to take the necessary steps to apply these principles in full.

The participants address their appeal to Member States of the United Nations and the above-mentioned Specialized Agencies, requesting them to give special attention to the application of these principles, and also to collaborate with international, intergovernmental and non-governmental organizations, both universal and regional including, in particular, Indian organizations, in order to ensure observance of the fundamental rights of the Indian peoples of America.

This appeal is also addressed to officials in the legislative, executive, administrative and legal branches, and to all public servants concerned in the countries of America, with the request that in the course of their daily duties they will always act in conformity with the above principles.

The participants appeal to the conscience of the scientific community, and the individuals comprising it, who have the moral responsibility for ensuring that their research, studies and practices, as well as the conclusions they draw, cannot be used as a pretext for misrepresentation or interpretations which could harm Indian nations, peoples and ethnic groups.

Finally, the participants draw attention to the need to provide for due participation by genuine representatives of Indian nations, peoples and ethnic groups in any activity that might affect their future.

CONVENTION (No. 169) CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES

Adopted by the General Conference of the International Labour Organisation, Geneva, June 27, 1989. Entered into force Sept. 5, 1991.

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimi-

)nsidering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

:cognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

oting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

alling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

oting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

laving decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

laving determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

dopts this twenty-seventh day of June of the year one thousand nine hundred and eighty-ine the following Convention, which may be cited as the Indigenous and Tribal Peoples :onvention, 1989:

'art I. General Policy

\rticle 1

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion or determining the groups to which the provisions of this Convention apply.

3. The use of the term "peoples" in this Convention shall not be construed as having ny implications as regards the rights which may attach to the term under international

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, good faith and in a form appropriate to the circumstances, with the objective of achieving reement or consent to the proposed measures.

rticle 7

1. The peoples concerned shall have the right to decide their own priorities for the pro- ss of development as it affects their lives, beliefs, institutions and spiritual well-being and e lands they occupy or otherwise use, and to exercise control, to the extent possible, over eir own economic, social and cultural development. In addition, they shall participate in e formulation, implementation and evaluation of plans and programmes for national and gional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and educa- n of the peoples concerned, with their participation and co-operation, shall be a matter of iority in plans for the overall economic development of areas they inhabit. Special projects r development of the areas in question shall also be so designed as to promote such provement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in -operation with the peoples concerned, to assess the social, spiritual, cultural and environ- ntal impact on them of planned development activities. The results of these studies shall considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect d preserve the environment of the territories they inhabit.

rticle 8

1. In applying national laws and regulations to the peoples concerned, due regard shall had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where se are not incompatible with fundamental rights defined by the national legal system and h internationally recognised human rights. Procedures shall be established, whenever nec- ary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of se peoples from exercising the rights granted to all citizens and from assuming the corre- nding duties.

rticle 9

1. To the extent compatible with the national legal system and internationally recognised man rights, the methods customarily practised by the peoples concerned for dealing with ences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consider- n by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

Part II. Land

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources ghts to other resources pertaining to lands, governments shall establish or maintain pro- res through which they shall consult these peoples, with a view to ascertaining whether o what degree their interests would be prejudiced, before undertaking or permitting any rammes for the exploration or exploitation of such resources pertaining to their lands. peoples concerned shall wherever possible participate in the benefits of such activities, shall receive fair compensation for any damages which they may sustain as a result of activities.

icle 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be ved from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional mea- such relocation shall take place only with their free and informed consent. Where their ent cannot be obtained, such relocation shall take place only following appropriate pro- res established by national laws and regulations, including public inquiries where opriate, which provide the opportunity for effective representation of the peoples con- ed.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, on as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of agreement, through appropriate procedures, these peoples shall be provided in all pos- cases with lands of quality and legal status at least equal to that of the lands previously pied by them, suitable to provide for their present needs and future development. Where eoples concerned express a preference for compensation in money or in kind, they shall compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

cle 17

1. Procedures established by the peoples concerned for the transmission of land rights ig members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to capacity to alienate their lands or otherwise transmit their rights outside their own com- ty.
3. Persons not belonging to these peoples shall be prevented from taking advantage of customs or of lack of understanding of the laws on the part of their members to secure wnership, possession or use of land belonging to them.

cle 18

dequate penalties shall be established by law for unauthorised intrusion upon, or use e lands of the peoples concerned, and governments shall take measures to prevent such ces.

cle 19

lational agrarian programmes shall secure to the peoples concerned treatment equiva- o that accorded to other sectors of the population with regard to:

(a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
(b) the provision of the means required to promote the development of the lands which these peoples already possess.

Part III. Recruitment and Conditions of Employment

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

(a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
(b) equal remuneration for work of equal value;
(c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
(d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3. The measures taken shall include measures to ensure:

(a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
(b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
(c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

Part IV. Vocational Training, Handicrafts and Rural Industries

Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

Part V. Social Security and Health

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be co-ordinated with other social, economic,

Part VI. Education and Means of Communication

Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use

ırticle 31

Educational measures shall be taken among all sections of the national community, nd particularly among those that are in most direct contact with the peoples concerned, with ıe object of eliminating prejudices that they may harbour in respect of these peoples. To ıis end, efforts shall be made to ensure that history textbooks and other educational materi-ls provide a fair, accurate and informative portrayal of the societies and cultures of these eoples.

'art VII. Contacts and Co-operation Across Borders

ırticle 32

Governments shall take appropriate measures, including by means of international greements, to facilitate contacts and co-operation between indigenous and tribal peoples cross borders, including activities in the economic, social, cultural, spiritual and environ-ıental fields.

'art VIII. Administration

ırticle 33

1. The governmental authority responsible for the matters covered in this Convention hall ensure that agencies or other appropriate mechanisms exist to administer the programmes ffecting the peoples concerned, and shall ensure that they have the means necessary for the roper fulfillment of the functions assigned to them.
2. These programmes shall include:

(a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
(b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

'art IX. General Provisions

ırticle 34

The nature and scope of the measures to be taken to give effect to this Convention shall e determined in a flexible manner, having regard to the conditions characteristic of each ountry.

ırticle 35

The application of the provisions of this Convention shall not adversely affect rights and ıenefits of the peoples concerned pursuant to other Conventions and Recommendations, nternational instruments, treaties, or national laws, awards, custom or agreements.

Part X. Final Provisions

Article 36

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention, and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides—

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;
(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.

AGENDA 21: CHAPTER 26

Adopted by the U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992. U.N. Doc. A/CONF.151/26 (vol. 3), at 16, Annex 2 (1992).

Chapter 26
Recognizing and Strengthening the Role of Indigenous People and Their Communities

Programme Area

Basis for action

26.1. Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

26.2. Some of the goals inherent in the objectives and activities of this programme area are already contained in such international legal instruments as the ILO Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on indigenous rights, being prepared by the United Nations working group on indigenous populations. The International Year for the World's Indigenous People (1993), proclaimed by the General Assembly in its resolution 45/164 of 18 December 1990, presents a timely opportunity to mobilize further international technical and financial cooperation.

Objectives

26.3. In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

(a) Establishment of a process to empower indigenous people and their communities through measures that include:

(i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;
(ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;
(iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
(iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;
(v) Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;
(vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;
(vii) Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;

(b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;

(c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

Activities

26.4. Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:

(a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;

(b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.

26.5. United Nations organizations and other international development and finance organizations and Governments should, drawing on the active participation of indigenous people and their communities, as appropriate, take the following measures, *inter alia*, to incorporate their values, views and knowledge, including the unique contribution of indigenous women, in resource management and other policies and programmes that may affect them:

(a) Appoint a special focal point within each international organization, and organize annual interorganizational coordination meetings in consultation with Governments and indigenous organizations, as appropriate, and develop a procedure within and between operational agencies for assisting Governments in ensuring the coherent and coordinated incorporation of the views of indigenous people in the design and implementation of policies and programmes. Under this procedure, indigenous people and their communities should be informed and consulted and allowed to participate in national decision-making, in particular regarding regional and international cooperative efforts. In addition, these policies and programmes should take fully into account strategies based on local indigenous initiatives;

(b) Provide technical and financial assistance for capacity-building programmes to support the sustainable self-development of indigenous people and their communities;

(c) Strengthen research and education programmes aimed at:

(i) Achieving a better understanding of indigenous people's knowledge and management experience related to the environment, and applying this to contemporary development challenges;

(ii) Increasing the efficiency of indigenous people's resource management systems, for example, by promoting the adaptation and dissemination of suitable technological innovations;

(d) Contribute to the endeavours of indigenous people and their communities in resource management and conservation strategies (such as those that may be developed under appropriate projects funded through the Global Environmental Facility and Tropical Forestry Action Plan) and other programme areas of Agenda 21, including programmes to collect, analyse and use data and other information in support of sustainable development projects.

26.6. Governments, in full partnership with indigenous people and their communities should, where appropriate:

(a) Develop or strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them;

(b) Cooperate at the regional level, where appropriate, to address common indigenous issues with a view to recognizing and strengthening their participation in sustainable development.

Means of implementation

(a) Financing and cost evaluation

26.7. The Conference secretariat has estimated the average total annual cost (1993–2000) of implementing the activities of this programme to be about $3 million on grant or concessional terms. These are indicative and order-of-magnitude estimates only and have not been reviewed by Governments. Actual costs and financial terms, including any that are non-concessional, will depend upon, *inter alia*, the specific strategies and programmes Governments decide upon for implementation.

(b) Legal and administrative frameworks

26.8. Governments should incorporate, in collaboration with the indigenous people affected, the rights and responsibilities of indigenous people and their communities in the legislation of each country, suitable to the country's specific situation. Developing countries may require technical assistance to implement these activities.

(c) Human resource development

26.9. International development agencies and Governments should commit financial and other resources to education and training for indigenous people and their communities to develop their capacities to achieve their sustainable self-development, and to contribute to and participate in sustainable and equitable development at the national level. Particular attention should be given to strengthening the role of indigenous women.

DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

As agreed upon by the members of the U.N. Working Group on Indigenous Populations at its eleventh session, Geneva, July 1993. Adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, August 26, 1994. U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994).

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable, and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also, that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

Part I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty, and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;

(b) Recruit indigenous children into the armed forces under any circumstances;

(c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;

(d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

Part III

Article 12

Indigenous peoples have the right to practise and revitalize 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, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to 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 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and

in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, 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 appropriate means.

Part IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

Part V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

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.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

Part VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

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, literatures, designs and visual and performing arts.

Article 30

ndigenous peoples have the right to determine and develop priorities and strategies for the evelopment or use of their lands, territories and other resources, including the right to equire that States obtain their free and informed consent prior to the approval of any project ffecting their lands, territories and other resources, particularly in connection with the levelopment, utilization or exploitation of mineral, water or other resources. Pursuant to agreenent with the indigenous peoples concerned, just and fair compensation shall be provided or any such activities and measures taken to mitigate adverse environmental, economic, ocial, cultural or spiritual impact.

Part VII

Article 31

ndigenous peoples, as a specific form of exercising their right to self-determination, have he right to autonomy or self-government in matters relating to their internal and local ffairs, including culture, religion, education, information, media, health, housing, emloyment, social welfare, economic activities, land and resources management, environnent and entry by non-members, as well as ways and means for financing these autonomous unctions.

Article 32

ndigenous peoples have the collective right to determine their own citizenship in accordance vith their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

ndigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

ndigenous peoples have the collective right to determine the responsibilities of individuals o their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

Part VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

Part IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

8

RESOLUTION ON ACTION REQUIRED INTERNATIONALLY TO PROVIDE EFFECTIVE PROTECTION FOR INDIGENOUS PEOPLES

Adopted by the European Parliament in its plenary session, Strasbourg, Feb. 9, 1994. Eur. Parl. Doc. PV 58(II) (1994).

The European Parliament,

having regard to the motion for a resolution by Mr. Christiansen and others on the implementation of effective international legislation on the environment and the rights of indigenous peoples in the world in order to protect our planet and all its inhabitants (B3–1519/91),

having regard to its numerous resolutions on the protection of human rights,

having regard to its resolution of 12 March 1992 on 1992, indigenous peoples and the quincentenary,[1]

having regard to Rule 45 of its Rules of Procedure,

having regard to the report of the Committee on Foreign Affairs and Security and the opinion of the Committee on Development and Cooperation (A3–0059/94),

A. whereas the most commonly used definition of indigenous peoples is that given in ILO Convention No. 169; whereas, according to UN estimates, such communities represent 300 million individuals spread over almost 4000 peoples,

B. convinced that all peoples contribute to the diversity and richness of the civilizations and cultures which constitute mankind's common heritage,

C. whereas many international texts, in particular the UN Charter, the Universal Declaration of Human Rights and ILO Convention No. 169, set out in detail the inalienable basic rights of all human beings, including that of determining their political status by freely choosing their way of economic, cultural and social development,

D. whereas the United Nations Organization, despite its name, represents only states and not peoples, and solutions to many problems concerning peoples, particularly indigenous peoples, are therefore difficult to find within it,

E. regretting that, in general, international treaties quite simply neglect the rights of indigenous peoples, even if it is they who must bear the direct or indirect consequences thereof,

F. noting that certain states have concluded treaties with indigenous peoples in the past and that some of those treaties have been shamelessly violated; whereas in this connection, in the context of increasing impoverishment, indigenous peoples are often the first to be dispossessed of rights, land and resources,

G. dismayed by the violence of every kind to which indigenous peoples have been subjected in the past, and still are; whereas, in this connection, the UN has recognized the right to intervene when fundamental human rights are under serious threat,

1. Adopts the definition of indigenous peoples given by the ILO in its Convention No. 169 and believes that this convention together with the Kari Oca Declaration (Rio, June 1992) and the declaration of the UN conference in Vienna on the rights of indigenous peoples (June 1993) are the benchmark texts in this regard;

2. Declares that pursuant to UN provisions, and in the context of a non-violent and fully democratic procedure with due regard for the rights of other citizens, indigenous peoples have the right to determine their own destiny by choosing their institutions, their political status and that of their territory;

3. Takes the view that the UN must take advantage of its 50th anniversary to make its bodies more democratic and more effective by enabling peoples without a state, in particular indigenous peoples, to be better represented, especially by involving them in the work of the General Assembly;

4. Solemnly reaffirms that those belonging to indigenous peoples have, just as any other human being has, the right to life, to respect, the right to freedom of thought and action, to physical security, to health, to justice and to equality concerning the right to work, to housing, to education and to culture; this right to a separate culture must involve the right to use and disseminate their mother tongue and to have the tangible and intangible features of their culture protected and disseminated and to have their religious rights and their sacred land respected;

5. Calls for censuses to be taken of indigenous peoples in the states in which they are established;

6. Calls for indigenous peoples to be given help in marketing the craft products made by indigenous peoples, with verification of origin;

7. Declares that indigenous peoples have the right to the common ownership of their traditional land sufficient in terms of area and quality for the preservation and development of their particular ways of life, such land to be placed at their disposal free of charge; it will therefore be indivisible, non-transferable, imprescriptible and cannot be rented;

8. Takes the view that, with regard to legal matters, those belonging to indigenous peoples have the right to a qualified defence lawyer and to full information about their rights, with the assistance of an interpreter if necessary, and that, as far as is compatible with the Universal Declaration of Human Rights, preference should be given to the use of customary law to judge their offences;

9. Declares that indigenous peoples who have been robbed of their rights must be able to obtain fair compensation; if deprivation involves the loss of land, this will be made good, first and foremost, by returning the land in question or, alternatively, by providing land at least equal in terms of quality and size to that which has been lost;

). Calls in the strongest possible terms on states which in the past have signed treaties with indigenous peoples to honour their undertakings, which remain imprescriptible, and in this connection gives its firm backing to the UN special rapporteur responsible for studying and resolving this problem;
1. Reaffirms the positive contribution of indigenous peoples' civilizations to mankind's common heritage and the essential role which they have played and which they must continue to play in the conservation of their natural environment;
2. Considers that the European Union, but also the United Nations, should take all possible steps to ensure that international treaties, policies and the activities of commercial undertakings do not, either directly or indirectly, adversely affect the rights of indigenous peoples; calls in this connection for the Council and the Commission to make a precise political statement on indigenous peoples;
3. Calls on the Commission and the Council to make a tangible contribution to the International Year of Indigenous Peoples and to this end calls for:
   criteria to be drawn up for the financing of Community projects in the light of the rights of indigenous peoples,
   indigenous peoples to be directly involved, as part of development and cooperation policy, in projects concerning them,
   European officials to be given special training and assigned for following-up questions concerning indigenous peoples,
   the technical and legal information intended for indigenous peoples' representatives to be enhanced,
   appropriate budget lines to be clearly allocated for the defence of the rights of these peoples;
4. Undertakes to set up, at the beginning of the next parliamentary term, an interparliamentary delegation composed of Members of this Parliament and representatives of indigenous peoples and instructs its Subcommittee on Human Rights to monitor questions concerning their rights very closely;
5. Calls on the Member States of the European Union to show their determination to provide tangible protection for indigenous peoples by acceding to ILO Convention No. 169 and by calling on other states to do the same;
6. Instructs its President to forward this resolution to the Council, the Commission, the Secretary-General of the UN, the Secretary of the UN Subcommittee on Sustainable Development and the Secretary of the UN Commission on Human Rights.

DRAFT OF THE INTER-AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Approved by the Inter-American Commission on Human Rights at the 1278th session held on September 18, 1995. O.A.S. Doc. OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995).

Preamble

1. Indigenous Institutions and the Strengthening of Nations

The Member States of the Organization of American States (hereafter the States),

Recalling that the indigenous peoples of the Americas constitute an organized, distinct [illegible] of their population and are entitled to be part of the countries' national identity, and have a special role to play in strengthening the institutions of the State and in establishing national unity based on democratic principles; and,

Further recalling that some of the democratic institutions and concepts embodied in the Constitutions of American States originate from institutions of the indigenous peoples, and that in many instances their present participatory systems for decision-making and the internal authority of the indigenous peoples contribute to improving democracies in the Americas.

2. Eradication of Poverty

Recognizing the severe and widespread poverty afflicting indigenous peoples in many regions of the Americas, and that their living conditions and social services are generally deplorable; and concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting *inter alia* in their colonization and the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

Recalling that in the Declaration of Principles issued by the Summit of the Americas, in December 1994, the Heads of State and Governments declared that in observance of the International Decade of the World's Indigenous People, they will focus their energies on improving the exercise of democratic rights and the access to social services by indigenous peoples and their communities.

3. Indigenous Culture and Ecology

Appreciating the respect for the environment accorded by the cultures of indigenous peoples of the Americas, and considering the special relationship between the indigenous peoples and the land on which they live.

4. Harmonious Relations, Respect and the Absence of Discrimination

Mindful of the responsibility of all the States and peoples of the Americas to participate in the struggle against racism and racial discrimination.

5. Enjoyment of Community Rights

Recalling the international recognition of rights that can only be enjoyed when exercised in community with other members of a group.

6. Indigenous Survival and Control of Their Territories

Considering that in many indigenous cultures, traditional collective systems for control and use of land and territory, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being; and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the States in which they live.

7. Demilitarization of Indigenous Areas

Noting the presence of armed forces in many areas of the lands and territories of the indigenous peoples, and emphasizing the importance of withdrawing them from where they are not strictly needed for their specific functions.

8. Human Rights Instruments and Other Advances in International Law

Recognizing the preeminence and applicability of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and international human rights law, to the States and peoples of the Americas; and

Mindful of the progress achieved by the States and indigenous organizations in codifying indigenous rights, especially in the sphere of the United Nations and the International Labor Organization, and in this regard recalling the ILO Agreement 169 and the Draft U.N. Declaration on the subject.

Affirming the principle of the universality and indivisibility of human rights, and the application of international human rights to all individuals.

9. Advances in the Provisions of National Instruments

Noting the constitutional and legislative progresses achieved in some countries of the Americas in guaranteeing the rights and institutions of indigenous peoples.

Declare:

Section One. Indigenous Peoples

Art. I. Definition

1. In this Declaration indigenous peoples are those who embody historical continuity with societies which existed prior to the conquest and settlement of their territories by Europeans. (alternative 1) [, as well as peoples brought involuntarily to the New World who freed themselves and re-established the cultures from which they have been torn]. (alternative 2) [, as well as tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations].

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Declaration apply.

3. The use of the term "peoples" in this Instrument shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law.

Section Two. Human Rights

Art. II. Full Observance of Human Rights

1. Indigenous peoples have the right to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and international human rights law; and nothing in this Declaration shall be construed as in any way limiting or denying those rights or authorizing any action not in accordance with the instruments of international law including human rights law.

2. The States shall ensure for all indigenous peoples the full exercise of their rights.

3. The States also recognize that the indigenous peoples are entitled to collective rights insofar as they are indispensable to the enjoyment of the individual human rights of their members. Accordingly they recognize the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs and to use their languages.

Art. III. Right to Belong to an Indigenous Community or Nation

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Art. IV. Legal Status of Communities

The States shall ensure that within their legal system personality is attributed to communities of indigenous peoples.

Art. V. No Forced Assimilation

The States shall not take any action which forces indigenous peoples to assimilate and shall not endorse any theory, or engage in any practice, that imports discrimination, destruction of a culture or the possibility of the extermination of any ethnic group.

Art. VI. Special Guarantees against Discrimination

1. The States recognize that, where circumstances so warrant, special guarantees against discrimination may have to be instituted to enable indigenous peoples to fully enjoy internationally and nationally-recognized human rights; and that indigenous peoples must participate fully in the prescription of such guarantees.

2. The States shall also take the measures necessary to enable both indigenous women and men to exercise, without any discrimination, civil, political, economic, social and cultural rights. The States recognize that violence exerted against persons because of their gender prevents and nullifies the exercise of those rights.

Section Three. Cultural Development

Art. VII. Right to Cultural Integrity

1. States shall respect the cultural integrity of indigenous peoples, their development in their respective habitats and their historical and archeological heritage, which are important to the identity of the members of their groups and their ethnic survival.

2. Indigenous peoples are entitled to restitution in respect of property of which they have been dispossessed, or compensation in accordance with international law.

3. States shall recognize, and respect, indigenous life-styles, customs, traditions, forms of social organization, use of dress, languages and dialects.

Art. VIII. Philosophy, Outlook and Language

1. States recognize that indigenous languages, philosophy and outlook are a component f national and universal culture, and as such shall respect them and facilitate their dissemiation.

2. The States shall take measures to see to it that broadcast radio and television programs re broadcast in the indigenous languages in the regions where there is a strong indigenous resence, and to support the creation of indigenous radio stations and other media.

3. The States shall take effective measures to enable indigenous peoples to understand dministrative, legal and political rules and procedures and to be understood in relation to hese matters. In areas where indigenous languages are predominant, States shall endeavor to stablish the pertinent languages as official languages and to give them the same status that is given to non-indigenous official languages.

4. When indigenous peoples wish, educational systems shall be conducted in the indigenous languages and incorporate indigenous content, and that shall also provide the necessary training and means for complete mastery of the official language or languages.

Art. IX. Education

1. Indigenous peoples shall be entitled to a) establish and set in motion their own educational programs, institutions and facilities; b) to prepare and implement their own educational plans, programs, curricula and materials; c) to train, educate and accredit their teachers and administrators. The States shall endeavor to ensure that such systems guarantee equal educational and teaching opportunities for the entire population and complementarity with national educational systems.

2. States shall ensure that those educational systems are equal in all ways to that provided to the rest of the population.

3. States shall provide financial and any other type of assistance needed for the implementation of the provisions of this Article.

Art. X. Spiritual and Religious Freedom

1. Indigenous peoples have the right to liberty of conscience, freedom of religion and spiritual practice for indigenous communities and their members, a right that implies freedom to conserve them, change them, profess and propagate them, both publicly and privately.

2. States shall take necessary measures to ensure that attempts are not made to forcibly convert indigenous peoples or to impose on them beliefs against the will of their communities.

3. In collaboration with the indigenous peoples concerned, the States shall adopt effective measures to ensure that their sacred sites, including burial sites, are preserved, respected and protected. When sacred graves and relics have been appropriated by state institutions, they shall be returned.

Art. XI. Family Relations and Family Ties

1. Families are a natural and basic component of societies and must be respected and protected by the State. Consequently the State shall protect and respect the various established forms of indigenous organizations relating to family and filiation.

2. In determining the child's best interest in matters relating to the protection and adop- [illegible] of indigenous peoples, and in matters of breaking of ties and

other similar circumstances, consideration shall be given by Courts and other relevant institutions to the views of those peoples, including individual, family and community views.

Art. XII. Health and Wellbeing

1. The States shall respect indigenous medicine, pharmacology, health practices and promotion, including preventive and rehabilitative practices.

2. They shall facilitate the dissemination of those medicines and practices of benefit to the entire population.

3. Indigenous peoples have the right to the protection of vital medicinal plants, animals and minerals.

4. Indigenous peoples shall be entitled to use, maintain, develop and manage their own health services, and they shall also have access, without any discrimination, to all health institutions and services and medical care.

5. The states shall provide the necessary means to enable the indigenous peoples to eliminate such health conditions in their communities which fall below international accepted standards.

Art. XIII. Right to Environmental Protection

1. Indigenous peoples are entitled to a healthy environment, which is an essential condition for the enjoyment of the right to life and well-being.

2. Indigenous peoples are entitled to information on the environment, including information that might ensure their effective participation in actions and policies that might affect their environment.

3. Indigenous peoples shall have the right to conserve, restore, and protect their environment, and the productive capacity of their lands, territories and resources.

4. Indigenous peoples shall participate fully in formulating and applying governmental programmes of conservation of their lands and resources.

5. Indigenous peoples shall be entitled to assistance from their states for purposes of environmental protection, and may request assistance from international organizations.

Section Four. Organizational and Political Rights

Art. XIV. Rights of Association, Assembly, Freedom of Expression and Freedom of Thought

1. The States shall promote the necessary measures to guarantee to indigenous communities and their members their right of association, assembly and expression in accordance with their usages, customs, ancestral traditions, beliefs and religions.

2. The States shall respect and enforce the right of assembly of indigenous peoples and to the use of their sacred and ceremonial areas, as well as the right to full contact and common activities with sectors and members of their ethnic groups living in the territory of neighboring states.

Art. XV. Right to Self-Government, Management and Control of Internal Affairs

1. States acknowledge that indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development, and that

accordingly they have the right to autonomy or self-government with regard to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by nonmembers; and to the ways and means for financing these autonomous functions.

2. Indigenous populations have the right to participate without discrimination, if they so decide, in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny. They may do so through representatives elected by them in accordance with their own procedures. They shall also have the right to maintain and develop their own indigenous decision-making institutions, as well as equal opportunities to access to all national fora.

Art. XVI. Indigenous Law

1. Indigenous law is an integral part of the States' legal system and of the framework in which their social and economic development takes place.

2. Indigenous peoples are entitled to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems pertaining to ownership of real property and natural resources, resolution of conflicts within and between indigenous communities, crime prevention and law enforcement, and maintenance of internal peace and harmony.

3. In the jurisdiction of any State, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of the native language.

Art. XVII. National Incorporation of Indigenous Legal and Organizational Systems

1. The States shall promote the inclusion, in their national organizational structures, of institutions and traditional practices of indigenous peoples.

2. The institutions of each state in areas that are predominantly indigenous or that are serving in those communities, shall be designed and adapted as to reflect and reinforce the identity, culture and organization of those populations, in order to facilitate their participation.

Section Five. Social, Economic and Property Rights

Art. XVIII. Traditional Forms of Ownership and Ethnic Survival. Rights to Land and Territories

1. Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property by indigenous peoples.

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

3. Where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible. This shall not limit the right of indigenous peoples to attribute ownership within the community in accordance with their customs, tradilions, uses and traditional practices, nor shall it affect

any collective community rights over them. Such titles may only be changed by mutual consent between the State and respective indigenous people when they have full knowledge and appreciation of the nature or attributes of such property.

4. The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to the use, management and conservation of such resources.

5. In the event that ownership of the minerals or resources of the subsoil pertains to the State or that the State has rights over other resources on the lands, the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interest of these people would be adversely affected and to what extent, before undertaking or authorizing any program for tapping or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation in accordance with international law, for any damages which they may sustain as a result of such activities.

6. The States shall not transfer or relocate indigenous peoples except in exceptional cases, and in those cases with the free, genuine and informed consent of those populations, with full and prior indemnity and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist.

7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated occupied, used or damaged, or the right to compensation in accordance with international law when restitution is not possible.

8. The States shall take all measures, including the use of law enforcement personnel, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons or by persons who take advantage of indigenous peoples or their lack of understanding of the laws, to take possession or make use of them. The States shall give maximum priority to the demarcation of properties and areas of indigenous use.

Art. XIX. Workers' Rights

1. Indigenous peoples shall have the right to full enjoyment of the rights and guarantees recognized under international labor law or domestic labor law; they shall also be entitled, where circumstances so warrant, to special measures to correct, redress and prevent the discrimination to which they have historically been subject.

2. Where circumstances so warrant, the States shall take such special measures as may be necessary to:

a. protect effectively the workers and employees who are members of indigenous communities in respect of fair and equal hiring and terms of employment, insofar as general legislation governing workers overall does not provide;

b. to improve the work inspection service in regions, companies or paid activities involving indigenous workers or employees;

c. ensure that indigenous workers:

i. enjoy equal opportunity and treatment as regards all conditions of employment, job promotion and advancement;

ii. are not subjected to racial, sexual or other forms of harassment;

iii. are not subjected to coercive hiring practices, including servitude for debts or any other form of servitude, even if they have their origin in law, custom or a personal or collective arrangement which shall be deemed absolutely null and void in each instance;

iv. are not subjected to working conditions that endanger their health, particularly as a result of their exposure to pesticides or other toxic or radioactive substances;
v. receive special protection when they serve as seasonal, casual or migrant workers in agriculture or in other activities and also when they are hired by labor contractors in order that they benefit from national legislation and practice which must, itself be in accordance with firmly established international human rights standards in respect of seasonal workers, and
vi. ensure that indigenous workers or employees are provided with full information on their rights, consistent with such national legislation and international standards, and on recourses available to them in order to protect those rights.

t. XX. Intellectual Property Rights

1. Indigenous peoples shall be entitled to recognition of the full ownership, control and lection of such intellectual property rights as they have in their cultural and artistic heri-, as well as special measures to ensure for them legal status and institutional capacity to elop, use, share, market and bequeath, that heritage on to future generations.
2. Where circumstances so warrant, indigenous peoples have the right to special mea-s to control, develop and protect, and full compensation for the use of their sciences and nologies, including their human and genetic resources in general, seeds, medicine, knowl-e of plant and animal life, original designs and procedures.

t. XXI. Right to Development

1. The states recognize the right of indigenous peoples to decide democratically what ues, objectives, priorities and strategies will govern and steer their development course, n if they are different from those adopted by the national government or by other seg-nts of society. Indigenous peoples shall be entitled to obtain on a non-discriminatory basis ropriate means for their own development according to their preferences and values, and contribute by their own means as distinguishable societies, to national development and rnational cooperation.
2. The States shall take necessary measures to ensure that decisions regarding any plan, gram or proposal affecting the rights or living conditions of indigenous people are not de without the free and informed consent and participation of those peoples, that their ferences are recognized and that no such plan, program or proposal that could have harm-effects on the normal livelihood of those populations is adopted. Indigenous communities e the right to restitution or compensation in accordance with international law, for any nage which, despite the foregoing precautions, the execution of those plans or proposal y have caused them; and measures taken to mitigate adverse environmental, economic, ial, cultural or spiritual impact.

ction Six. General Provisions

t. XXII. Treaties, Agreements and Other Implied Arrangements

ligenous peoples have the right to the recognition, observance and enforcement of treaties, reements and other arrangements concluded with States or their successors, according to ir spirit and intent, and to have States honor and respect such treaties, agreements and other

constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies (agreed to by all parties concerned).

Art. XXIII

Nothing in this instrument shall be construed as diminishing or extinguishing existing or future rights indigenous people may have or acquire.

Art. XXIV

Nothing in this instrument shall be construed as granting any rights to ignore boundaries between States.

Annexure

Convention on Biological Diversity

PREAMBLE

The Contracting Parties,

Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components.

Conscious also of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere.

Affirming that the conservation of biological diversity is a common concern of humankind.

Reaffirming that States have sovereign rights over their own biological resources.

Reaffirming also that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner.

Concerned that biological diversity is being significantly reduced by certain human activities.

Aware of the general lack of information and knowledge regarding biological diversity and of the urgent need to develop scientific, technical and institutional capacities to provide the basic understanding upon which to plan and implement appropriate measures.

Noting that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source.

Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

Noting further that the fundamental requirement for the conservation of biological diversity is the *in-situ* measures, preferably in the country of origin, also have an important role to play.

Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional life-styles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

Recognizing also the vital role that women play in the conservation and sustainable use of biological diversity and affirming the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation.

Stressing the importance of, and the need to promote, international, regional and global cooperation among states and intergovernmental organizations and the non-governmental sector for the conservation of biological diversity and the sustainable use of its components.

Acknowledging that the provision of new and additional financial resources and appropriate access to relevant technologies can be expected to make a substantial difference in the world's ability to address the loss of biological diversity.

Acknowledging further that special provision is required to meet the needs of developing countries, including the provision of new and additional financial resources and appropriate access to relevant technologies.

Noting in this regard the special conditions of the least developed countries and small island states.

Acknowledging that substantial investments are required

to conserve biological diversity and that there is the expectation of a broad range of environmental, economic and social benefits from those investments.

Recognizing that economic and social development and poverty eradication are the first and overriding priorities of developing countries.

Aware that conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population, for which purpose access to and sharing of both genetic resources and technologies are essential.

Noting that, ultimately, the conservation and sustainable use of biological diversity will strengthen friendly relations among States and contribute to peace for humankind.

Desiring to enhance and complement existing international arrangements for the conservation of biological diversity and sustainable use of its components, and

Determined to conserve and sustainably use biological diversity for the benefit of present and future generations. Have agreed as follows:

Article 1: Objectives.

The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.

Article 2. Use of Terms

For the purposes of this Convention:

"Biological diversity" means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

"Biological resources" include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

"Biotechnology" means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

"Country of origin of genetic resources" means the country which possesses those genetic resources in *in-situ* conditions.

"Country providing genetic resources" means the country supplying genetic resources collected from *in-situ* sources, including populations of both wild and domesticated species, or taken from ex-*situ* sources, which may or may not have originated in that country.

"Domesticated or cultivated species" means species in which the evolutionary process has been influenced by humans to meet their needs.

"Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

"Ex-situ conservation" means the conservation of components of biological diversity outside their natural habitats.

"Genetic resources" means any material of plant, animal, microbial or other origin containing functional units of heredity.

"Genetic resources" means genetic material of actual or potential value.

"Habitat" means the place or type of site where an organism or population naturally occurs.

"In-situ conditions" means conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

"In-situ conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

"Protected area" means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.

"Regional economic integration organization" means an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it.

"Sustainable use" means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

"Technology" includes biotechnology.

*Article 3. **Principle***

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

*Article 4. **Jurisdictional Scope***

Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:

(*a*) In the case of components of biological diversity, in areas within the limits of its national jurisdiction, and

(*b*) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.

*Article 5. **Cooperation***

Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

*Article 6. **General Measures for Conservation and Sustainable Use***

Each Contracting Party shall, in accordance with its particular conditions and capabilities:

(*a*) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned; and

(*b*) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

*Article 7. **Idemnification and Monitoring***

Each Contracting Party shall, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:

(*a*) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I;

(*b*) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those

which offer the greatest potential for sustainable use;
(*c*) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and
(*d*) Maintain and organize, by any mechanism data, derived from identification and monitoring activities pursuant to subparagraphs (*a*), (*b*) and (*c*) above.

*Article 8. **In-situ Conservation***

Each Contracting Party shall, as far as possible and as appropriate:
(*a*) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
(*b*) Develop, where necessary, guidelines for the selection, establishment and management of protected areas where special measures need to be taken to conserve biological diversity;
(*c*) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use.;
(*d*) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
(*e*) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;
(*f*) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies;
(*g*) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts

that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health;
(*h*) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;
(*i*) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;
(*j*) Subject to its national legislation, 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 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 utilization of such knowledge, innovations and practices;
(*k*) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;
(*l*) Where a significant adverse effect on biological diversity has been determined pursuant to article 7, regulate or manage the relevant processes and categories of activities; and
(*m*) Cooperate in providing financial and other support for *in-situ* conservation outlined in subparagraph (a) to (l) above, particularly to developing countries.

*Article 9. **Ex-Conservation***

Each Contracting Party shall, as far as possible and as appropriate, and predominantly for the purpose of complementing in-situ measures:
(*a*) Adopt measures for the ex-situ conservation of components of biological diversity, preferably in the country of origin of such components;
(*b*) Establish and maintain facilities for ex-situ conservation

of and research on plants, animals and micro-organisms, preferably in the country of origin of genetic resources;

(*c*) Adopt measures for the recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions;

(*d*) Regulate and manage collection of biological resources from natural habitats for ex-situ conservation purpose so as not to threaten ecosystems and *in-situ* populations of species, except where special temporary ex-situ measures are required under subparagraph (c) above; and

(*e*) Cooperate in providing financial and other support for ex-situ conservation outlined in subparagraphs (*a*) to (*d*) above and in the establishment and maintenance of ex-situ conservation facilities in developing countries.

*Article 10. **Sustainable Use of Components of Biological Diversity***

Each Contracting Party shall, as far as possible and as appropriate:

(*a*) Integrate consideration of the conservation and sustainable use of biological resources into national decision-marking;

(*b*) Adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity;

(*c*) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

(*d*) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced; and

(*e*) Encourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.

*Article 11. **Incentive Measures***

Each Contracting Party shall, as far as possible and as appropriate, adopt economically and socially sound measures

that act as incentives for the conservation and sustainable use of components of biological diversity.

*Article 12. **Research and Training***

The Contracting Parties, taking into account the special needs of developing countries, shall:

(*a*) Establish and maintain programmes for scientific and technical education and training in measures for the identification, conservation and sustainable use of biological diversity and its components and provide support for such education and training for the specific needs of developing countries;

(*b*) Promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, *inter alia*, in accordance with decisions of the conference of the Parties taken in consequence of recommendations of the Subsidiary Body on Scientific, Technical and Technological Advice; and

(*c*) In keeping with the provisions of Articles 16, 18 and 20, promote and cooperate in the use of scientific advances in biological diversity research in developing methods for conservation and sustainable use of biological resources.

*Article 13. **Public Education and Awareness***

The Contracting parties shall :

(*a*) Promote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity, as well as its propagation through media, and the inclusion of these topics in educational programmes; and

(*b*) Cooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity.

*Article 14. **Impact Assessment and Minimizing Adverse Impacts***

1. Each Contracting Party, as far as possible and as appropriate, shall:

(*a*) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

(*b*) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;

(*c*) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate;

(*d*) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage; and

(*e*) Promote national arrangements for emergency responses to activities or events, whether caused naturally or otherwise, which present a grave and imminent danger to biological diversity and encourage international cooperation to supplement such national efforts and, where appropriate and agreed by the States or regional economic integration organizations concerned, to establish joint contingency plans.

2. The Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter.

Article 15. Access to Genetic Resources

1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2. Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

3. For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.

4. Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

5. Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

6. Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.

7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

Article 16. Access to and Transfer of Technology

1. Each Contracting Party, recognizing that technology includes biotechnology, and that both access to and transfer

of technology among Contracting Parties are essential elements for the attainment of the objectives of this Convention, undertakes subject to the provisions of this Article to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity or make use of genetic resources and do not cause significant damage to the environment.

2. Access to and transfer of technology referred to in paragraph 1 above to developing countries shall be provided and/or facilitated under fair and most favourable terms, including on concessional and preferential terms where mutually agreed, and, where necessary, in accordance with the financial mechanism established by Articles 20 and 21. In the case of technology subject to patents and other intellectual property rights, such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights. The application of this paragraph shall be consistent with paragraphs 3,4 and 5 below.

3. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties, in particular those that are developing countries, which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights, where necessary, through the provisions of Articles 20 and 21 and in accordance with international law and consistent with paragraphs 4 and 5 below.

4. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that the private sector facilitates access to, joint development and transfer of technology referred to in paragraph 1 above for the benefit of both governmental institutions and the private sector of developing countries and in this regard shall abide by the obligations included in

paragraphs 1,2 and 3 above.

5. The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.

Article 17. Exchange of Information

1. The Contracting Parties shall facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.

2. Such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1. It shall also, where feasible, include repatriation of information.

Article 18. Technical and Scientific Cooperation

1. The Contracting Parties shall promote international technical and scientific cooperation in the field of conservation and sustainable use of biological diversity, where necessary, through the appropriate international and national institutions.

2. Each Contracting Party shall promote technical and scientific cooperation with other Contracting Parties, in particular developing countries, in implementing this Convention, *inter alia*, through the development and implementation of national policies. In promoting such cooperation, special attention should be given to the development and strengthening of national capabilities, by means of human resources development and institution building.

3. The Conference of the Parties, at its first meeting, shall determine how to establish a clearing-house mechanism to promote and facilitate technical and scientific cooperation.

4. The Contracting Parties shall, in accordance with national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this Convention. For this purpose, the Contracting Parties shall also promote cooperation in the training of personnel and exchange of experts.

5. The Contracting Parties shall, subjects to mutual agreement, promote the establishment of joint research programmes and joint ventures for the development of technologies relevant to the objectives of this Convention.

*Article 19. **Handling of Biotechnology and Distribution of its Benefits***

1. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, to provide for the effective participation in biotechnological research activities by those Contracting Parties, especially developing countries, which provide the genetic resources for such research, and where feasible in such Contracting Parties.

2. Each Contracting Party shall take all practicable measures to promote and advance priority access on a fair and equitable basis by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties. Such access shall be on mutually agreed terms.

3. The Parties shall consider the need for and modalities of a protocol setting out appropriate procedures, including, in particular, advance informed agreement, in the field of the safe transfer, handling and use of any living modified organism resulting from biotechnology that may have adverse effect on the conservation and sustainable use of biological diversity.

4. Each Contracting Party shall, directly or by requiring any natural or legal person under its jurisdiction providing the organisms referred to in paragraph 3 above, provide any available information about the use and safety regulations

required by that Contracting Party in handling such organisms, as well as any available information on the potential adverse impact of the specific organisms concerned to the Contracting Party into which those organisms are to be introduced.

*Article 20. **Financial Resources***

1. Each Contracting Party undertakes to provide, in accordance with its capabilities, financial support and incentives in respect of those national activities which are intended to achieve the objectives of this Convention, in accordance with its national plans, priorities and programmes.

2. The developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of this Convention and to benefit from its provisions and which costs are agreed between a developing country Party and the institutional structure referred to in Article 21, in accordance with policy, strategy, programme priorities and eligibility criteria and an indicative list of incremental costs established by the Conference of the Parties. Other Parties, including countries undergoing the process of transition to a market economy, may voluntarily assume the obligations of the developed country Parties. For the purpose of this Article, the Conference of the Parties, shall at its first meeting establish a list of developed country Parties and other Parties which voluntarily assume the obligations of the developed country Parties. The Conference of the Parties shall periodically review and if necessary amend the list. Contributions from other countries and sources on a voluntary basis would also be encouraged. The implementation of these commitments shall take into account the need for adequacy, predictability and timely flow of funds and the importance of burden-sharing among the contributing Parties included in the list.

3. The developed country Parties may also provide, and developing country Parties avail themselves of, financial

resources related to the implementation of this Convention through bilateral, regional and other multilateral channels.
4. The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.
5. The Parties shall take full account of the specific needs and special situation of least developed countries in their actions with regard to funding and transfer of technology.
6. The Contracting Parties shall also take into consideration the special conditions resulting from the dependence on, distribution and location of, biological diversity within developing country Parties, in particular small Island States.
7. Consideration shall also be given to the special situation of developing countries, including those that are most environmentally vulnerable, such as those with arid and semi-arid zones, coastal and mountainous areas.

*Article 21. **Financial Mechanism***

1. There shall be a mechanism for the provision of financial resources to developing country Parties for purposes of this Convention on a grant or concessional basis the essential elements of which are described in this Article. The mechanism shall function under the authority and guidance of, and be accountable to, the Conference of the Parties for purposes of this Convention. The operations of the mechanism shall be carried out by such institutional structure as may be decided upon by the Conference of the Parties at its first meeting. For purposes of this Convention, the Conference of the Parties shall determine the policy, strategy, programme priorities and eligibility criteria relating to the access to and utilization of such resources. The contributions shall be such as to take into account the need for predictability,

adequacy and timely flow of funds referred to in Article 20 in accordance with the amount of resources needed to be decided periodically by the Conference of the Parties and the importance of burden-sharing among the contributing Parties included in the list referred to in Article 20, paragraph 2. Voluntary contributions may also be made by the developed country Parties and by other countries and sources. The mechanism shall operate within a democratic and transparent system of governance.
2. Pursuant to the objectives of this Convention, the Conference of the Parties shall at its first meeting determine the policy, strategy and programme priorities, as well as detailed criteria and guidelines for eligibility for access to and utilization of the financial resources including monitoring and evaluation on a regular basis of such utilization. The Conference of the Parties shall decide on the arrangements to give effect to paragraph 1 above after consultation with the institutional structure entrusted with the operation of the financial mechanism.
3. The Conference of the Parties shall review the effectiveness of the mechanism established under this Article, including the criteria and guidelines referred to in paragraph 2 above, not less than two years after the entry into force of this Convention and thereafter on a regular basis. Based on such review, it shall take appropriate action to improve the effectiveness of the mechanism if necessary.
4. The Contracting Parties shall consider strengthening existing financial institutions to provide financial resources for the conservation and sustainable use of biological diversity.

*Article 22. **Relationship with Other International Conventions***

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

2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.

Article 23. Conference of the Parties

1. A Conference of the Parties is hereby established. The first meeting of the Conference of the Parties shall be convened by the Executive Director of the United Nations Environment Programme not later than one year after the entry into force of this Convention. Thereafter, ordinary meetings of the Conference of the Parties shall be held at irregular intervals to be determined by the Conference at its first meeting.

2. Extraordinary meetings of the Conference of the Parties shall be held at such other times as may be deemed necessary by the Conference, or at the written request of any Party, provided that, within six months of the request being communicated to them by the Secretariat, it is supported by at least one third of the Parties.

3. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules governing the funding of the Secretariat. At each ordinary meeting, it shall adopt a budget for the financial period until the next ordinary meeting.

4. The Conference of the parties shall keep under review the implementation of this Convention, and, for this purpose, shall:

(*a*) Establish the form and the intervals for transmitting the information to be submitted in accordance with Article 26 and consider such information as well as reports submitted by any subsidiary body;

(*b*) Review scientific, technical and technological advice on biological diversity provided in accordance with Article 25;

(*c*) Consider and adopt, as required, protocols in accordance with Article 28;

(*d*) Consider and adopt, as required, in accordance with Articles 29 and 30, amendments to this Convention and its annexes;

(*e*) Consider amendments to any protocol, as well as to any annexes thereto, and, if so decided, recommend their adoption to the parties to the protocol concerned;

(*f*) Consider and adopt, as required, in accordance with Article 30, additional annexes to this Convention;

(*g*) Establish such subsidiary bodies, particularly to provide scientific and technical advice, as are deemed necessary for the implementation of this Convention;

(*h*) Contact, through the Secretariat, the executive bodies of conventions dealing with matters covered by this Convention with a view to establishing appropriate forms of cooperation with them; and

(*i*) Consider and undertake any additional action that may be required for the achievement of the purposes of this Convention in the light of experience gained in its operation.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not Party to this Convention, may be represented as observers at meetings of the Conference of the Parties. Any other body or agency, whether governmental or non-governmental, qualified in fields relating to conservation and sustainable use of biological diversity, which has informed the Secretariat of its wish to be represented as an observer at a meeting of the Conference of the Parties, may be admitted with the approval of at least one third of observers subject to the rules of procedure adopted by the Conference of the Parties.

Article 24. Secretariat

1. A secretariat is hereby established. Its functions shall be:

(*a*) To arrange for and service meetings of the Conference of the Parties provided for in Article 23;

(*b*) To perform the functions assigned to it by any protocol;

(*c*) To prepare reports on the execution of its functions under this Convention and present them to the Conference of the Parties;

(*d*) To coordinate with other relevant international bodies and, in particular to enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions; and

(*e*) To perform such other functions as may be determined by the Conference of the Parties;

2. At its first ordinary meeting, the Conference of the Parties shall designate the secretariat from amongst those existing competent international organizations which have signified their willingness to carry out the secretariat functions under this Convention.

*Article 25. **Subsidiary Body on Scientific, Technical and Technological Advice***

1. A subsidiary body for the provision of scientific, technical and technological advice is hereby established to provide the Conference of the Parties and, as appropriate, its other subsidiary bodies with timely advice relating to the implementation of this Convention. This body shall be open to participation by all Parties and shall be multidisciplinary. It shall comprise government representatives competent in the relevant field of expertise. It shall report regularly to the Conference of the Parties on all aspects of its work.

2. Under the authority of and in accordance with guidelines laid down by the Conference of the Parties, and upon its request, this body shall:

(*a*) Provide scientific and technical assessments of the status of biological diversity;

(*b*) Prepare scientific and technical assessments of the effects of types of measures taken in accordance with the provisions of this Convention;

(*c*) Identify innovative, efficient and state-of-the-art technologies and know-how relating to the Conservation and sustainable use of biological diversity and advise on the ways and means of promoting development and/or transferring such technologies;

(*d*) Provide advice on scientific programmes and international cooperation in research and development

related to conservation and sustainable use of biological diversity; and

(*e*) Respond to scientific, technical, technological and methodological questions that the Conference of the Parties and its subsidiary bodies may put to the body.

3. The functions, terms of reference, organization and operation of this body may be further elaborated by the Conference of the Parties.

*Article 26. **Reports***

Each Contracting Party shall, at intervals to be determined by the Conference of the Parties, present to the Conference of the Parties, reports on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention.

*Article 27. **Settlement of Disputes***

1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.

2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization my declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:

(*a*) Arbitration in accordance with the procedure laid down in Part 1 of Annex II;

(*b*) Submission of the dispute to the International Court of Justice.

4. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.

5. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.

Article 28. Adoption of Protocols

1. The Contracting Parties shall cooperate in the formulation and adoption of protocols to this Convention.
2. Protocols shall be adopted at a meeting of the Conference of the Parties.
3. The text of any proposed protocol shall be communicated to the Contracting Parties by the Secretariat at least six months before such a meeting.

Article 29. Amendment of the Convention or Protocols

1. Amendments to this Convention may be proposed by any Contracting Party. Amendments to any protocols may be proposed by any Party to that protocol.
2. Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties. Amendments to any protocol shall be adopted at a meeting of the Parties to the Protocol in question. The text of any proposed amendment to this Convention or to any protocol, except as may otherwise be provided in such protocol, shall be communicated to the Parties to the instrument in question by the secretariat at least six months before the meeting at which it is proposed for adoption. The secretariat shall also communicate proposed amendments to the signatories to this Convention for information.
3. The Parties shall make every effort to reach agreement on any proposed amendment to this Convention or to any protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a two-third majority vote of the Parties to the instrument in question present and voting at the meeting, and shall be submitted by the Depositary to all Parties for ratification, acceptance or approval.
4. Ratification, acceptance or approval of amendments shall be notified to the Depositary in writing. Amendments adopted in accordance with paragraph 3 above shall enter into force

among Parties having accepted them on the ninetieth day after the deposit of instruments of ratification, with the acceptance or approval by at least two thirds of the Contracting Parties to this Convention or of the Parties to the protocol concerned, except as may otherwise be provided in such protocol. Thereafter the amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendments.
5. For the purposes of this Article, "Parties present and voting" means Parties present and casting an affirmative or negative vote.

Article 30. Adoption and Amendment of Annexes

1. The annexes to this Convention or to any protocol shall form an integral part of the Convention or of such protocol, as the case may be, and, unless expressly provided otherwise, a reference to this Convention or its protocols constitutes at the same time a reference to any annexes thereto. Such annexes shall be restricted to procedural, scientific, technical and administrative matters.
2. Except as may be otherwise provided in any protocol with respect to its annexes, the following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Convention or of annexes to any protocol:

(*a*) Annexes to this Convention or to any protocol shall be proposed and adopted according to the procedure laid down in Article 29;

(*b*) Any Party that is unable to approve an additional annex to this Convention or an annex to any protocol to which it is Party shall so notify the Depositary, in writing, within one year from the date of the communication of the adoption by the Depositary. The Depositary shall without delay notify all Parties of any such notification received. A Party may at any time withdraw a previous declaration of objection and the annexes shall thereupon enter into force for that Party subject to subparagraph (c) below;

(*c*) On the expiry of one year from the date of the

communication of the adoption by the Depositary, the annex shall enter into force for all Parties to this Convention or to any protocol concerned which have not submitted a notification in accordance with the provisions of subparagraph (b) above.

3. The proposal, adoption and entry into force of amendments to annexes to this Convention or to any protocol shall be subject to the same procedure as for the proposal, adoption and entry into force of annexes to the Convention or annexes to any protocol.

4. If an additional annex or an amendment to an annex is related to an amendment to this Convention or to any protocol, that additional annex or amendment shall not enter force until such time as the amendment to the Convention or to the protocol concerned enters into force.

*Article 31. **Right to Vote***

1. Except as provided for in paragraph 2 below, each Contracting Party to this Convention or to any protocol shall have one vote.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States which are Contracting Parties to this Convention or the relevant protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs, and vice versa.

*Article 32. **Relationship between this Convention and Its Protocols***

1. A State or a regional economic integration organization may not become a Party to a protocol unless it is, or becomes at the same time, a Contracting Party to this Convention.

2. Decisions under any protocol shall be taken only by the Parties to the protocol concerned. Any Contracting Party that has not ratified, accepted or approved a protocol may participate as an observer in any meeting of the parties to that protocol.

*Article 33. **Signature***

This Convention shall be open for signature at Rio de Janeiro by all States and any regional economic integration organization from 5 June 1992 until 14 June 1992, and at the United Nations Headquarters in New York from 15 June 1992 to 4 June 1993.

*Article 34. **Ratification, Acceptance or Approval***

1. This Convention and any protocol shall be subject to ratification, acceptance or approval by States and by regional economic integrating organizations. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. Any organization referred to in paragraph 1 above which becomes a Contracting Party to this Convention or any protocol without any of its member States being a Contracting Party shall be bound by all the obligations under the Convention or the protocol, as the case may be. In the case of such organizations, one or more of whose member States is a Contracting Party to this Convention or relevant protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention or protocol, as the case may be. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention or relevant protocol concurrently.

3. In their instruments of ratification, acceptance or approval, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Convention or the relevant protocol. These organizations shall also inform the Depositary of any relevant modification in the extent of their competence.

*Article 35. **Accession***

1. This Convention and any protocol shall be open for accession by States and by regional economic integration organizations from the date on which the Convention or the protocol concerned is closed for signature. The instruments of accession shall be deposited with the Depositary.

2. In their instruments of accession, the organizations referred to in paragraph 1 above shall declare the extent of their competence with respect to the matters governed by the Convention or the relevant protocol. These organizations shall also inform the Depositary of any relevant modification in the extent of their competence.
3. The provisions of Article 34, paragraph 2, shall apply to regional economic integration organizations which accede to this Convention or any protocol.

Article 36. Entry Into Force

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession.
2. Any protocol shall enter into force on the ninetieth day after the date of deposit of the number of instruments of ratification, acceptance, approval or accession, specified in that protocol, has been deposited.
3. For each Contracting Party which ratifies, accepts or approves this Convention or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, it shall enter into force on the ninetieth day after the date of deposit by such Contracting Party of its instrument of ratification, acceptance, approval or accession.
4. Any protocol, except as otherwise provided in such protocol, shall enter into force for a Contracting Party that ratifies, accepts or approves that protocol or accedes thereto after its entry into force pursuant to paragraph 2 above, on the ninetieth day after the date on which that Contracting Party deposits its instrument of ratification, acceptance, approval or accession, or on the date on which this Convention enters into force for that Contracting Party, whichever shall be the later.
5. For the purposes of paragraph 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

Article 37. Reservations

No reservations may be made to this Convention.

Article 38. Withdrawals

1. At any time after two years from the date on which this Convention has entered into force for a Contracting Party, that Contracting Party may withdraw from the Convention by giving written notification to the Depositary.
2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.
3. Any Contracting Party which withdraws from this Convention shall be considered as also having withdrawn from any protocol to which it is party.

Article 39. Financial Interim Arrangements

Provided that it has been fully restricted in accordance with the requirements of Article 21, the Global Environment Facility of the United Nations Development Programme, the United Nations Environment Programme and the International Bank for Reconstruction and Development shall be the institutional structure referred to in Article 21 on an interim basis, for the period between the entry into force of this Convention and the first meeting of the Conference of the Parties or until the Conference of the Parties decides which institutional structure will be designated in accordance with Article 21.

Article 40. Secretariat Interim Arrangements

The secretariat to be provided by the Executive Director of the United Nations Environment Programme shall be the secretariat referred to in Article 24, paragraph 2, on an interim basis for the period between the entry into force of this Convention and the first meeting of the Conference of the Parties.

Article 41. Depositary

The Secretary-General of the United Nations shall assume the functions of Depositary of this Convention and any protocols.

Article 42. Authentic Texts

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at Rio de Janeiro on this fifth day of June, one thousand nine hundred and ninety-two.

Annex I

IDENTIFICATION AND MONITORING

1. Ecosystems and habitats: containing high diversity, large number of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance; or, which are representative, unique or associated with key evolutionary or other biological processes;
2. Species and communities which are: threatened; will relatives of domesticated or cultivated species; of medicinal, agricultural or other economic value; or social, scientific or cultural importance; or importance for research into the conservation and sustainable use of biological diversity, such as indicator species; and
3. Described genomes and genes of social, scientific or economic importance.

Annex II

Part 1

ARBITRATION

Article 1

The claimant party shall notify the secretariat that the parties are referring a dispute to arbitration pursuant to Article 27. The notification shall state the subject-matter of arbitration and include, in particular, the articles of the Convention or the protocol, the interpretation or application of which are at issue. If the parties do not agree on the subject matter of the dispute before the President of the tribunal is

designated, the arbitral tribunal shall determine the subject matter. The secretariat shall forward the information thus received to all Contracting Parties to this Convention or to the protocol concerned.

Article 2.

1. In disputes between two parties, the arbitral tribunal shall consist of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the President to the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his or her usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.
2. In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.
3. Any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 3.

1. If the President of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the Secretary-General of the United Nations shall, at the request of a party, designate the President within a further two-month period.
2. If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the Secretary-General who shall make the designation within a further two-month period.

Article 4

The arbitral tribunal shall render its decisions in accordance with the provisions of this Convention, any protocols concerned, and international law.

Article 5

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.

Article 6

The arbitral tribunal may, at the request of one of the parties, recommend essential interim measures of protection.

Article 7

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(*a*) Provide it with all relevant documents, information and facilities; and

(*b*) Enable it, when necessary, to call witnesses or experts and receive their evidence.

Article 8

The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

Article 9

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the costs of the tribunal shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.

Article 10

Any Contracting Party that has an interest of a legal nature in the subject-matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 11

The tribunal may hear and determine counterclaims arising directly out of the subject-matter of the dispute.

Article 12

Decisions both on procedure and substance of the arbitral tribunal shall be taken by a majority vote of its members.

Article 13

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings

and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

Article 14

The tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time-limit for a period which should not exceed five more months.

Article 15

The final decision of the arbitral tribunal shall be confined to the subject-matter of the dispute and shall state the reasons on which it is based. It shall contain the names of the members who have participated and the date of the final decision. Any member of the tribunal may attach a separate or dissenting opinion to the final decision.

Article 16

The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

Article 17

Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the final decision may be submitted by either party for decision to the arbitral tribunal which rendered it.

Part 2

CONCILIATION

Article 1

A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall, unless the parties otherwise agree, be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members.

Article 2

In disputes between more than two parties, parties in the same interest shall appoint their members of the

commission jointly by agreement. Where two or more parties have separate interests or there is a disagreement as to whether they are of the same interest, they shall appoint their members separately.

Article 3

If any appointments by the parties are not made within two months of the date of the request to create a conciliation commission, the Secretary-General of the United Nations shall, if asked to do so by the party that made the request, make those appointments within a further two-month period.

Article 4

If a President of the conciliation commission has not been chosen within two months of the last of the members of the commission being appointed, the Secretary-General of the United Nations shall, if asked to do so by a party, designate a President within a further two-month period.

Article 5

The conciliation commission shall take its decisions by majority vote of its members. It shall, unless the parties to the dispute otherwise agree, determine its own procedure. It shall render a proposal for resolution of the dispute, which the parties shall consider in good faith.

Article 6

A disagreement as to whether the conciliation commission has competence shall be decided by the commission.

Signatories of the Convention on Biological Diversity at the Time of the United Nations Conference on Environment and Development (RIO DE JANEIRO, 3-14 JUNE 1992)

	Signatory	*Date of signature*
1.	Antigua and Barbuda	5 June 1992
2.	Australia	5 June 1992
3.	Bangladesh	5 June 1992
4.	Belgium	5 June 1992
5.	Brazil	5 June 1992
6.	Finland	5 June 1992
7.	India	5 June 1992
8.	Indonesia	5 June 1992
9.	Italy	5 June 1992
10.	Liechtenstein	5 June 1992
11.	Republic of Moldova	5 June 1992
12.	Nauru	5 June 1992
13.	Netherlands	5 June 1992
14.	Pakistan	5 June 1992
15.	Poland	5 June 1992
16.	Romania	5 June 1992
17.	Bostwana	8 June 1992
18.	Madagascar	8 June 1992
19.	Sweden	8 June 1992
20.	Tuvalu	8 June 1992
21.	Yugoslavia	8 June 1992
22.	Bahrain	9 June 1992
23.	Ecuador	9 June 1992
24.	Egypt	9 June 1992
25.	Kazakhstan	9 June 1992
26.	Kuwait	9 June 1992
27.	Luxemburg	9 June 1992
28.	Norway	9 June 1992
29.	Sudan	9 June 1992
30.	Uruguay	9 June 1992

31.	Vanuatu	9 June 1992
32.	Cote d' Ivoire	10 June 1992
33.	Ethiopia	10 June 1992
34.	Iceland	10 June 1992
35.	Malawi	10 June 1992
36.	Mauritius	10 June 1992
37.	Oman	10 June 1992
38.	Rwanda	10 June 1992
39.	San Marino	10 June 1992
40.	Seychelles	10 June 1992
41.	Sri Lanka	10 June 1992
42.	Belarus	11 June 1992
43.	Bhutan	11 June 1992
44.	Burundi	11 June 1992
45.	Canada	11 June 1992
46.	China	11 June 1992
47.	Comoros	11 June 1992
48.	Congo	11 June 1992
49.	Croatia	11 June 1992
50.	Democratic People's Republic of Korea	11 June 1992
51.	Israel	11 June 1992
52.	Jamaica	11 June 1992
53.	Jordan	11 June 1992
54.	Kenya	11 June 1992
55.	Latvia	11 June 1992
56.	Lesotho	11 June 1992
57.	Lithuania	11 June 1992
58.	Monaco	11 June 1992
59.	Myanmar	11 June 1992
60.	Niger	11 June 1992
61.	Qatar	11 June 1992
62.	Trinidad and Tobago	11 June 1992
63.	Turkey	11 June 1992
64.	Ukraine	11 June 1992
65.	United Arab Emirates	11 June 1992

66.	Zaire	11 June 1992
67.	Zambia	11 June 1992
68.	Afghanistan	12 June 1992
69.	Angola	12 June 1992
70.	Argentina	12 June 1992
71.	Azerbaijan	12 June 1992
72.	Bahamas	12 June 1992
73.	Barbados	12 June 1992
74.	Bulgaria	12 June 1992
75.	Burkina Faso	12 June 1992
76.	Cape Verde	12 June 1992
77.	Chad	12 June 1992
78.	Colombia	12 June 1992
79.	Cook Islands	12 June 1992
80.	Cuba	12 June 1992
81.	Cyprus	12 June 1992
82.	Denmark	12 June 1992
83.	Estonia	12 June 1992
84.	Gabon	12 June 1992
85.	Gambia	12 June 1992
86.	Germany	12 June 1992
87.	Ghana	12 June 1992
88.	Greece	12 June 1992
89.	Guinea	12 June 1992
90.	Guinea-Bissau	12 June 1992
91.	Lebanon	12 June 1992
92.	Liberia	12 June 1992
93.	Malaysia	12 June 1992
94.	Maldives	12 June 1992
95.	Malta	12 June 1992
96.	Marshall Islands	12 June 1992
97.	Mauritania	12 June 1992
98.	Micronesia	12 June 1992
99.	Mongolia	12 June 1992
100.	Mozambique	12 June 1992
101.	Namibia	12 June 1992

102.	Nepal	12 June 1992
103.	New Zealand	12 June 1992
104.	Paraguay	12 June 1992
105.	Peru	12 June 1992
106.	Philippines	12 June 1992
107.	Saint Kitts and Nevis	12 June 1992
108.	Samoa	12 June 1992
109.	Sao Tome and Principe	12 June 1992
110.	Swaziland	12 June 1992
111.	Switzerland	12 June 1992
112.	Thailand	12 June 1992
113.	Togo	12 June 1992
114.	Uganda	12 June 1992
115.	United Kingdom of Great Britain and Northern Ireland	12 June 1992
116.	United Republic of Tanzania	12 June 1992
117.	Venezuela	12 June 1992
118.	Yemen	12 June 1992
119.	Zimbabwe	12 June 1992
120.	Algeria	13 June 1992
121.	Armenia	13 June 1992
122.	Austria	13 June 1992
123.	Belize	13 June 1992
124.	Benin	13 June 1992
125.	Bolivia	13 June 1992
126.	Central African Republic	13 June 1992
127.	Chile	13 June 1992
128.	Costa Rica	13 June 1992
129.	Djibouti	13 June 1992
130.	Dominican Republic	13 June 1992
131.	El Salvador	13 June 1992
132.	European Economic Community	13 June 1992
133.	France	13 June 1992
134.	Guatemala	13 June 1992
135.	Guyana	13 June 1992

136.	Haiti	13 June 1992
137.	Hungary	13 June 1992
138.	Honduras	13 June 1992
139.	Ireland	13 June 1992
140.	Japan	13 June 1992
141.	Mexico	13 June 1992
142.	Morocco	13 June 1992
143.	Nicaragua	13 June 1992
144.	Nigeria	13 June 1992
145.	Panama	13 June 1992
146.	Papua New Guinea	13 June 1992
147.	Portugal	13 June 1992
148.	Republic of Korea	13 June 1992
149.	Russian Federation	13 June 1992
150.	Senegal	13 June 1992
151.	Slovenia	13 June 1992
152.	Solomon Islands	13 June 1992
153.	Spain	13 June 1992
154.	Surinam	13 June 1992
155.	Tunisia	13 June 1992
156.	Cameroon	14 June 1992
157.	Iran	14 June 1992

Item 17

ANNEX 1C
AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Table of Contents

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Members,

Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

Recognizing, to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and

(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as "WIPO") as well as other relevant international organizations;

Hereby agree as follows:

PART I

GENERAL PROVISIONS AND BASIC PRINCIPLES

Article 1

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members.[1] In respect of the relevant intellectual

1. When "nationals" are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who

property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions.[2] Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the "Council for TRIPS").

Article 2

Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection[3] of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including

are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

2. In this Agreement, "Paris Convention" refers to the Paris Convention for the Protection of Industrial Property; "Paris Convention (1967)" refers to the Stockholm Act of this Convention of 14 July 1967. "Berne Convention" refers to the Berne Convention for the Protection of Literary and Artistic Works; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971. "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. "Treaty on Intellectual Property in Respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. "WTO Agreement" refers to the Agreement Establishing the WTO.

3. For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Article 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;

(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;

(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

Article 5

Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article 6

Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Article 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8

Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

PART II

STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: COPYRIGHT AND RELATED RIGHTS

Article 9

Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6 *bis* of that Convention or of the rights derived therefrom.

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10

Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11

Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their succes-

sors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Article 12

Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Article 14

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a

period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

SECTION 2: TRADEMARKS

Article 15

Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

Article 16

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing

prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6 *bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

3. Article 6 *bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

Article 17

Exceptions

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Article 18

Term of Protection

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

Article 19

Requirement of Use

1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.

Article 20

Other Requirements

The use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other

undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

Article 21

Licensing and Assignment

Members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs.

SECTION 3: GEOGRAPHICAL INDICATIONS

Article 22

Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10 *bis* of the Paris Convention (1967).

3. A Member shall, *ex officio* if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

Article 23

Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is

indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.[4]

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, *ex officio* if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 24

International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a

4. Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.

continuous manner with regard to the same or related goods or services in the territory of that Member either (*a*) for at least 10 years preceding 15 April 1994 or (*b*) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

SECTION 4: INDUSTRIAL DESIGNS

Article 25

Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide

that such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

Article 26

Protection

1. The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

2. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

3. The duration of protection available shall amount to at least 10 years.

SECTION 5: PATENTS

Article 27

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[5] Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than

5. For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Article 28

Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing[6] for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

Article 29

Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

Article 30

Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Article 31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use[7] of the subject matter of a patent without the authorization of the right holder, including use by the

6. This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.

7. "Other use" refers to use other than that allowed under Article 30.

government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of

authorization if and when the conditions which led to such authorization are likely to recur;

(*l*) where such use is authorized to permit the exploitation of a patent ("the second patent") which cannot be exploited without infringing another patent ("the first patent"), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

Article 32

Revocation/Forfeiture

An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.

Article 33

Term of Protection

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.[8]

Article 34

Process Patents: Burden of Proof

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

(a) if the product obtained by the patented process is new;

(b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

8. It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.

SECTION 6: LAYOUT-DESIGNS (TOPOGRAPHIES) OF INTEGRATED CIRCUITS

Article 35

Relation to the IPIC Treaty

Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as "layout-designs") in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.

Article 36

Scope of the Protection

Subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder: [9] importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.

Article 37

Acts Not Requiring the Authorization of the Right Holder

1. Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.

2. The conditions set out in subparagraphs (a) through (k) of Article 31 shall apply *mutatis mutandis* in the event of any non-voluntary licensing of a layout-design or of its use by or for the government without the authorization of the right holder.

Article 38

Term of Protection

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a

9. The term "right holder" in this Section shall be understood as having the same meaning as the term "holder of the right" in the IPIC Treaty.

period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.

SECTION 7: PROTECTION OF UNDISCLOSED INFORMATION

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10 *bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices[10] so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

SECTION 8: CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

10. For the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by the other Member under the same conditions as those foreseen in paragraph 3.

PART III

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

SECTION 2: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

Article 42

Fair and Equitable Procedures

Members shall make available to right holders[11] civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 43

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

11. For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

Article 44

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

Article 45

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in

exceptional cases, to permit release of the goods into the channels of commerce.

Article 47

Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 48

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 49

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3: PROVISIONAL MEASURES

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4: SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES [12]

Article 51

Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures[13] to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods[14]

12. Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

13. It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.

14. For the purposes of this Agreement:

(a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 52

Application

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

Article 54

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51.

(b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

Article 55

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

Article 56

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

Article 57

Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

Article 58

Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed:

(a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;

(b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the

suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55;

(c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60

De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5: CRIMINAL PROCEDURES

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

PART IV

ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS AND RELATED *INTER-PARTES* PROCEDURES

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.

2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the proce-

dures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

3. Article 4 of the Paris Convention (1967) shall apply *mutatis mutandis* to service marks.

4. Procedures concerning the acquisition or maintenance of intellectual property rights and, where a Member's law provides for such procedures, administrative revocation and *inter partes* procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraphs 2 and 3 of Article 41.

5. Final administrative decisions in any of the procedures referred to under paragraph 4 shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures.

PART V

DISPUTE PREVENTION AND SETTLEMENT

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6 *ter* of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in

writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 64

Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

PART VI

TRANSITIONAL ARRANGEMENTS

Article 65

Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application

of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.

5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Article 66

Least-Developed Country Members

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.

2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Article 67

Technical Cooperation

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

PART VII

INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

Article 68

Council for Trade-Related Aspects of Intellectual Property Rights

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one

year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

Article 69

International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

Article 70

Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.

2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.

3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization

of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

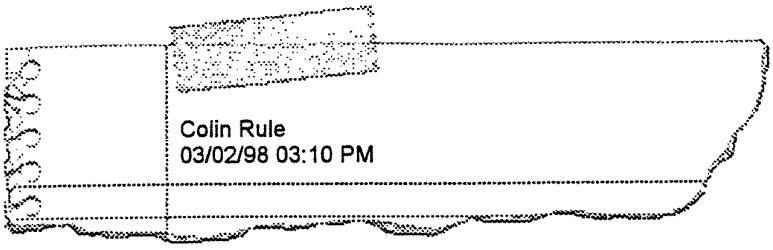
9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

Article 71

Review and Amendment

1. The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in



To: STP-307
cc:
Subject: Barlow Study Group

If I may add my two cents, I attended the Barlow Study Group last Wednesday and found it very provocative and interesting. Barlow is one of the few people in the KSG community who is thinking about how the information infrastructure will change governance, law, business, and society. I encourage you to check out his background at

http://www.eff.org/~barlow/

A copy of his Delcaration of Independence for Cyberspace Follows

+++++++

A Declaration of the Independence of Cyberspace
John Perry Barlow

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.

You have not engaged in our great and gathering conversation, nor did you create the wealth of our marketplaces. You do not know our culture, our ethics, or the unwritten codes that already provide our society more order than could be obtained by any of your impositions.

You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract . This governance will arise according to the conditions of our

world, not yours. Our world is different.

Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live.

We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.

We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.

Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter, There is no matter here.

Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge . Our identities may be distributed across many of your jurisdictions. The only law that all our constituent cultures would generally recognize is the Golden Rule. We hope we will be able to build our particular solutions on that basis. But we cannot accept the solutions you are attempting to impose.

In the United States, you have today created a law, the Telecommunications Reform Act, which repudiates your own Constitution and insults the dreams of Jefferson, Washington, Mill, Madison, DeToqueville, and Brandeis. These dreams must now be born anew in us.

You are terrified of your own children, since they are natives in a world where you will always be immigrants. Because you fear them, you entrust your bureaucracies with the parental responsibilities you are too cowardly to confront yourselves. In our world, all the sentiments and expressions of humanity, from the debasing to the angelic, are parts of a seamless whole, the global conversation of bits. We cannot separate the air that chokes from the air upon which wings beat.

In China, Germany, France, Russia, Singapore, Italy and the United States, you are trying to ward off the virus of liberty by erecting guard posts at the frontiers of Cyberspace. These may keep out the contagion for a small time, but they will not work in a world that will soon be blanketed in bit-bearing media.

Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.

These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty, even as we continue to

consent to your rule over our bodies. We will spread ourselves across the Planet so that no one can arrest our thoughts.

We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.

Davos, Switzerland
February 8, 1996

Protection of Intellectual Property Rights and Indigenous Knowledge and resource Base of Tribal People

A NATIONAL workshop was organised by Jigyansu Tribal Research in collaboration with the Tribal Development Division, Ministry of Welfare, Govt. of India on the 22nd and 23rd of January, 1996 at the India International Centre, New Delhi. The workshop had the following business sessions apart from the formal Inaugural and Valedictory Sessions. The workshop was inaugurated by Prof. M. Kamson, Union Minister of State for Home Affairs and Internationally renowned scientist. Dr. M.S. Swaminathan delivered the key-note address.

Session-I : "Intellectual Property Rights—The Regime and Policy of Govt. of India".

Session-II : Agriculture, Water Resource as Indigenous

Knowledge and Resource Base".

Session-III: "Environment, Ecology and Intellectual Property Rights".

Session-IV: "Traditional Medicine, Medicinal Herbs and Intellectual Property Rights".

Session-V : Preservation, Protection and Development of Performing Arts, Tribal Literature, Plastic Crafts and Traditional Crafts".

Session-VI: "Impact of Technology on Traditional Skill, Role of Mass Media in communicating with the Tribals regarding Intellectual Property Rights".

Recommendations

Session-I

The Intellectual Property Rights regime including GATT, TRIPS and other trade negotiations related to IPR were discussed at length in the workshop. The participants unanimously recommanded that:

(i) Govt. of India should declare a clear policy regarding protection of Intellectual Property Rights for its people in area specific and resource specific pattern.

(ii) There is a strong need to guard the indigenous knowledge and resource base of tribal people at the grass-roots level.

(iii) Govt. of India should decide on an infrastructure based at the grass-roots level for identification, benefit sharing and protection of knowledge and resource base of indigenous materials and resources.

(iv) There is also an urgent need to create an appropriate legal infrastructure to decide on the legal aspect of Intellectual Property Rights for the community and for

benefit sharing by individuals, communities as well as NGOs or research institutions responsible for such knowledge and resources.

(v) Tribal people or indigenous people usually live closer to the nature and hence are associated with the traditional knowledge base and resource base. Most of the informations regarding Minor Forest Produces, agricultural produces, water resources, as well as medicinal herbs are acquired and many times discovered as well as developed through generations of hard work by these simple tribal people. Hence, the grass-roots institutions should have simple method of identifying these individuals and communities for benefit sharing, developing and researching on such resources for patenting.

Session-II

A detailed discussion was initiated regarding the role and importance of environment, ecology and all environmental related issues with the Intellectual Property Rights.

(i) It was strongly felt by the participants that Intellectual Property Rights should be made into a national legislation by all the signatories of the GATT, FAO and other global bio-diversity conventions; which will go beyond the ideal of national sovereignty on bio-diversity.

(ii) In order to protect the third world innovators, a global registry should be maintained on group specific rights like concepts of farmers rights, in terms of local community exercising claim over wealth accruing from exploitation of local bio-diversity and knowledge asociated with it.

(iii) There should also be group specific recognition of the rights of tribal

innovators and protection of such knowledge and resource base which have to be organised by an adequate profit sharing mechanism for tribal groups, individuals, institutions etc. on financial benefit as well as research and development facilities.

(iv) A concept of prior informed consent will have to be incorporated into law on prospective bio-diversity so that local communities can utilise this traditional knowledgte after identifying the usage, benefit and cost.

(v) A productive linkage system with tribal corporations, forest corporations, managers of wild life and sanctuaries, NGOs working with tribal communities etc should be established, in order to spearhead a systematic and continuous programme of documentation of local ecological knowledge and medicinal herbs, plants etc. with names and addresses of local communities; so that profit sharing of these communities or individuals should be safeguarded and protected. Research and continuous resource development should be created for innovative findings by scientists or scientific institutions.

(vi) Sustainable development should be linked with bio-diversity and cultural and institutional diversity by linking sustainable technologies and institutions developed by the people particularly identified as disadvantaged groups like tribals, rural women, farmer innovators etc.

(vii) NGOs and other educational institutions should be encouraged to establish *ex situ* and *in situ* gene bank at the indigenous resources base and through local communities in order to encourage benefit sharing mechanism arising from such knowledge, innovations and practices.

(viii) Networking of such institutions and individuals as well as developing entrepreneurial ability in such grassroots level innovators should also be encouraged in order to generate economic returns from this knowledge and enriching the cultural and institutional bases of such resource and knowledge.

(ix) The profit sharing of the community or individuals of the traditional and indigenous knowledge base could be ensured by collective ownership rights or declaring custodianship of knowledge collectively or individually as well as commerical utilisation of the knowledge with the consent of the innovators community.

(x) Proof of claim should be a simple system of declaration by the elders, tribal headman as well as members of a community/duly recognised individuals or representatives of the community; in manner and form accepted by the cultural practices of that community which shall be sufficient evidence of the existence of the right to that knowledge.

Session-III

A detailed discussion was initiated regarding indigenous knowledge and resource base concerned with agriculture, water resources etc. It was strongly recommended by the participants that:

(i) Reservation of farmers rights on innovations of many new seeds, variety of highbreed and perennial research should be adequately safeguarded.

(ii) It should be recognised that tribal people especially tribal women have invented and produced many new genes in genetic products and other Minor Forest Produces including animal products. Their

traditional rights and patenting on these products should be recognised by a national policy by each nation state. A profit sharing and research and development mechanism should be properly planned for protecting these rights.

(iii) Water resources and aqua products have a variety of issues related to water resources, aqua products, biodiversity as well as minerals and other ground water resources. Hence, a clear policy is necessary to define these subjects and issue.

(iv) There is a need for regular and multidisciplinary research in this field in order to create a proper infrastructure for research and development of this kind of knowledge and resource system in our country; before we take up the IPR issue.

Session-IV

A detailed discussion regarding traditional medicine, medicinal herbs and intellectual property rights was held during the above workshop. It was recommended by the participants that:

(i) Since the sources of traditional medicines, medicinal herbs etc. being basically a knowledge system always held by tribal people/indigenous people living in and around the forests, there should be area specific and community based rights (CBR) for manipulation of intellectual property rights based on bio-diversity.

(ii) A tribal medicinal research system practised by NGOs like Regional Research and Study Centre at Midnapore and various Ayurvedic indigenous herbal medicine systems all over the country should be strongly supported, which has an integrated system of documentation, operational Akhara and herbal gardens maintained by such NGOs.

(iii) Research including innovation and patenting of traditional sources of medicines should be properly encouraged by the concerned governments on a regular basis.

Session-V

This session was extremely controversial due to lack of proper connotation of preservation, protection and development of tribal art, literature plastic crafts and traditional crafts. It was strongly felt by the participants that proper understanding of tribal art and craft should be made by studying local culture, art forms, whether it is performing art, tribal literature, plastic craft and traditional craft.

(i) It was unanimously agreed that these folk arts, traditional crafts and other forms of traditional art forms are required for depiction of life syle of the tribal people. Unless proper understanding of the above objects is made properly and legitimately, no policy decision could be taken in preservation of such art forms.

(ii) It was also felt that these art forms and tribal culture are not only commercially viable objects and hence their preservation should be dealt with in a completely different process including protection of IPR for commericial usage of such art forms.

(iii) It was also felt that these art forms and tribal culture are not only commercially viable objects and hence its preservation should be dealt with in a completely different process including protection of IPR for commercial usage of such art forms.

(iv) It was also strongly suggested that regular research and documentation facilities should be evolved to undertake a process of proper preservation of such art forms.

Session-VI

A very interesting discussion was conducted in this session regarding impact of technology on traditional skill, role of mass media in communicating with the tribals regarding intellectual property rights. The participants strongly felt that:

(i) There has been a positive impact of globalisation and technology inputs on traditional skill as well as traditional knowledge and resource base. Hence, a clear policy should be implemented regarding preservation and development of such skills and knowledge and resource base for each country.

(ii) It was unanimously recognised that role of mass media is very important in communicating these issues and problems to the tribal people and innovators in the rural communities. The mass media like television, radio and printed media should take up this challenge and make a nation-wide campaign for community based innovators all over the country.

(iii) Local NGOs and research institutions should be encouraged to organise such forums locally involving the tribal and rural inventors at the traditional resource base.

(iv) It was also emphasised that gene-therapy is coming in a big way during the next decade for preventive and promotive health care in a global manner. Multinationals are conducting research on rare community based people including tribal people to create a data base for this kind of research. At present this is happening in India and other developing countries through NGOs sponsored by European, American and other countries through multinational drug

companies. Govt. of India should watch out for these genetic research activities and create an infrastructure to veto this kind of activity if it is acting against the interests of its community based tribal or rural people.

(v) There should also be a clear policy including grassroots infrastructure and a viable legal base in order to create an atmosphere where this kind of research would benefit local tribal community in profit sharing and commercial utilisation of the resources.

List of Contributors

Dr. K.K. Chatterjee,
Regional Research,
Study Centre,
Mirzabazar, Midnapore,
West Bengal

Dr. B.N. Sahay,
Adviser, Planning
Commission (Retd.)
13, Mirdard Road, (Near
CGHS Dispensary)
Minto Road,
New Delhi-110002.

Prof. B.K. Roy Burman
1779, Chittaranjan Park
New Delhi-110019

Dr. Anil K. Gupta
Indian Institute of
Management
Vastrapur
Ahmedabad-480015
Gujarat

Dr. Girish Chandra Gaur
Technical Advisor (Ay.)
Ministry of Health &
Family Welfare
Govt. of India
Nirman Bhawan
New Delhi-110001

Dr. L.N. Balaji
Chief Planning
UNICEF
71-Lodhi Estate
New Delhi-110003

Dr. K.P.S. Chauhan
Ministry of Environment &
Forests
Govt. of India
Paryavaran Bhawan
CGO Complex,
Lodhi Road
New Delhi-110003

Dr. Neeti Mahanty
Secretary General-cum-
Director
Jigyansu Tribal Research
Centre
New Delhi

Dr. M.S. Swaminathan,
Chairman, M.S.
Swaminathan Research
Foundation,
3rd Cross Street, Taramani
Institutional Area, Madras-
600113

G.V. Sarat Babu,
Ministry of Environment and
Forests, Govt. of India,
C.G.O. Complex, Lodhi
Road,
New Delhi-110003

Sujata Arora
Ministry of Environment and
Forests,
Govt. of India,
C.G.O. Complex, Lodhi Road
New Delhi-110003