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**MIND THE GAPS: Identifying Commonalties and
Divergencies Between Indigenous Peoples and Farmers
Groups**

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1. INTRODUCTION

Indigenous peoples have struggled to achieve international recognition of their right to a distinct status and identity, but their knowledge, culture and resources are still not adequately protected from appropriation by outside interests. Many farmers, and farming communities, who are still operating outside the major commercial arena are also socially, politically and economically marginalised. Indigenous peoples and farming communities are implicitly referred to in the Convention on Biological Diversity (CBD) as "Indigenous and local communities embodying traditional lifestyles". Examining areas of overlapping interest and concern where they may usefully work together may be a means of drawing them to the centre of policy making on biodiversity conservation, compensation and benefit sharing for the benefit of both. Both Indigenous peoples and local communities have a common interest in working for decentralization of control and the recognition within the state of the right to multiple identity: Indigenous peoples through their demand for self-determination and local communities through their demand for control over their traditional knowledge and resources.

This paper¹ examines the fundamental concerns of Indigenous peoples and farmers.

It looks at international law and statements from international meetings to see what rights have been determined and for whom, and elaborates areas for cooperation as well as potential danger areas.

2. INDIGENOUS AND LOCAL COMMUNITIES EMBODYING TRADITIONAL LIFESTYLES

The wording in the Convention on Biological Diversity referring to the men and women in the world whose "knowledge, innovations and practices" play a vital role in the conservation of biological diversity - Indigenous and local communities embodying traditional lifestyles - is inaccurate and evasive.. Firstly, Indigenous peoples are more than communities, and their battle for rights is considerably weakened by being referred to as communities in a document as important as the CBD, which thereby avoids recognizing issues fundamental to Indigenous peoples such as the right to self-definition. Secondly, as

¹ Much of the material in this paper is drawn from a series of meetings attended by members of Non-Governmental Organisations working for Indigenous peoples and farming communities, researchers and government representatives, which were held in London and Oxford in early 1996 to examine issues relevant to the FAO 4th International Technical Conference on Plant Genetic Resources, and the 3rd meeting of the Conference of the Parties to the Convention on Biological Diversity. These were: NGO Participation at the FAO 4th International Technical Conference on Plant Genetic Resources and Beyond, Gaia Foundation, London, 27.1.96; Expansion of Farmers' Rights, WGTRR, Oxford Centre for the Environment, Ethics & Society, Oxford, 10.2.96; Stakeholders Workshops, Environmental Resource Management (ERM), Regent's College, London, 12-13 February 1996; NGO Meeting, Interchurch House, London, 14 February 1996.

noted in Glowka and Burhenne-Guilmin (1994), the use of the word "traditional" implies that those not embodying traditional lifestyles are excluded from the legislation. It is extremely important that the word traditional should be defined in such a way that it conveys its living reality.

In a survey conducted by the Working Group on Traditional Resource Rights of statements made by Indigenous and non-Indigenous groups² analysis was made of use of "traditional". There were two distinct understandings of the word. On the one hand tradition is assumed to be tied to the past and antithetic to change. However, in more recent discussions on "traditional" there is a shift to interpreting tradition as a filter through which innovation occurs. For instance, Vijayalakshmi (1994) writes that technological changes do not simply lead to modernization and loss of traditional practice but that technological changes are merely "additional inputs in a traditional agriculture system". Similarly, innovations can fit into tradition, according to Hunn (1994), but they are slotted into traditional understanding and practices.

A report submitted to the Secretariat of the CBD by the Four Directions Council of Canada (1996) suggests:

Thus what is "traditional" about traditional knowledge is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each Indigenous culture, lies at the very heart of its "traditionality". Much of this knowledge is actually quite new, but it has a social meaning, and legal character, entirely unlike the knowledge Indigenous people acquire from settlers and industrialized societies. (original emphasis)

Pereira and Gupta (Pereira & Gupta, 1993) claim that "it is the traditional methods of research and application, not always particular pieces of knowledge" and call it a 'tradition of invention'. The people they describe in the publication *The Honey Bee* are called traditional innovators to emphasize that traditional does not mean resistant to change.

Allowing for the imperfect wording of the CBD, this may be a way of using the word traditional without assuming any lack of dynamism or resistance to innovation.

Further research is needed to analyze legal, political and anthropological definitions of "local communities embodying traditional lifestyles" so that comparisons of principles and strategies can be made of indigenous peoples' and farmers' movements, and other peoples' organizations, for example, fishing cooperatives or extractive reserve communities. A better understanding of the diversity of peoples and communities and their needs will facilitate the development of appropriate *sui generis* models for protection of their knowledge, innovations and practices, and enable appropriate mechanisms for benefit sharing to be applied to the wider use and application of their technologies. Failure to

² Survey carried out by the Working Group on Traditional Resource Rights, February 1996.

examine the diversity of non-Western property, tenure, and stewardship concepts will only result in the creation of inappropriate mechanisms.

3. FARMERS

3.1. Defining Farmers

At a Technical Consultation on an Implementation Framework for Farmers' Rights organized by the M.S. Swaminathan Foundation in January this year the following definition of a farmer was suggested³:

The farmer should be defined as a person engaged in the cultivation of crops. Crops will include annual crops, perennial crops, fruit crops, forest trees etc.

This is an inadequate definition as it does not qualify the scale of farming taking place, or exclude the farmer who is a business person with high levels of capital input and turnover. Its applicability is limited to the realization of Farmers' Rights (Resolution 5/89 of the FAO International Undertaking on Plant Genetic Resources (IUPGR)) which defines a farmer as a person engaged in "conserving, improving, and making available plant genetic resources", and its relevance is limited to the issue of patenting of plant material and varieties in the context of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) annex on Patents of the 1994 GATT and the needs of collectors and plant breeders. At the ERM Stakeholders' Workshop session on ex situ resources and plant genetic resources for food and agriculture the consensus of the meeting was:

"While the benefits of free access and streamlined systems are clear to collectors and plant breeders, the benefits to contributors to collections need to be developed - a supporting fund will probably be required. The balance of advantages between such a fund and rights (e.g. IPRs and farmers' rights) as incentives to exchange of plant genetic resources for agriculture were discussed."

In other words, the "contributors to collections", or farmers, are seen as the suppliers to "collectors and plant breeders" and peripheral to the main industrial process, rather than as breeders in their own right. As farmers in India supply about seventy per cent of the seed traded within the country (Shiva & Holla, 1996) this appears to be a misconception of their role in the industry.

Farmers are far more diverse than just "crop cultivators". They are part of a continuum of rural societies dependent on and managing their immediate environment (Programme for

³ Agrobiodiversity and Farmers' Rights: the Final Milestone, Technical Consultation on an Implementation Framework for Farmers' Rights: Suggestions on the Way Forward, M.S. Swaminathan Research Foundation, Madras, India, 15-18 January 1996

Traditional Resource Rights, 1996). In the context of this paper farmers - or alternatively, small farmers or resource-poor farmers (Scoones & Thompson, 1994) - are individuals (frequently women) and family groups, working small land holdings. They may not be reliant on a single crop or crop variety for their subsistence, and may be self-sufficient and largely independent of the wider market for their livelihood. They are not necessarily solely engaged in the cultivation of crops but may also farm livestock, extensively or intensively. In fact they may be as dependent on their livestock as they are on crop cultivation, whilst augmenting their livelihoods by hunting and fishing, and using semi-domesticated species of trees and non-woody plants for fuel, food supplements, medicines and other domestic needs. Above all, they are innovators because they carry out selective breeding of their crops and stock.

3.2 The misconception of “wilderness” and “wild plants”

In addition to farmers being cultivators, breeders, herders, hunters, fishers etc., they are also landscape managers through their historic role in modifying ecosystems. As such they are critical to the maintenance of biological diversity and the sustainable management of not only cultivated ecosystems, but forests and apparently non-cultivated landscapes. The UNESCO World Heritage Convention by adding the “cultural landscapes” category to its list (UNESCO WHC/2/Revised) thereby acknowledged human modification of some of the most cherished landscapes in the world:

Cultural landscapes often reflect specific techniques of sustainable land-use considering the characteristics and limits of the natural environment they are established in, and a specific spiritual relation to nature. Protection of cultural landscapes can contribute to modern techniques of sustainable land-use and can maintain or enhance natural values in the landscape. The continued existence of traditional forms of land-use supports biological diversity in many regions of the world. The protection of traditional cultural landscapes is therefore helpful in maintaining biological diversity. (Item 38)

This illustrates an essential point that aboriginal peoples are making, that it may be impossible to draw a line between wild and cultivated species and landscapes. The colonial countries of the developed world who have driven the industrialization of agriculture have largely ignored precolonial land management systems and their impact on biological diversity. But archaeological evidence of disappeared settlements, and increasing understanding of ecosystems and vegetation cycles, demonstrate that these systems and their descendants should not be ignored. Use of the terms “wilderness” and “wild” are being criticized as inaccurate. For example, a Resolution issued for the 9th Ecopolitics Conference⁴ declared:

Noting the changes which have occurred in statements from some conservation agencies, Ecopolitics IX reiterates the inacceptability of the term wilderness as it is popularly used,

⁴ Ecopolitics IX: Perspectives On Indigenous Peoples' Management Of Environmental Resources, Northern Territory University, Darwin, Australia, September 1995.

and related concepts such as wild resources, wild foods, etc. These terms have connotations of Terra Nullius and, as such, all concerned people and organizations should look for alternative terminology which does not exclude Indigenous history and meaning.

The inappropriateness of the use of “wild” is illustrated by the Hidden Harvest programme of the International Institute for Environment and Development which evaluates the “importance of wild plant and animal resources in agricultural systems and to rural livelihoods” (Guijt et al, 1995). The importance of the programme in publicizing and documenting the wide variety of off-farm plant and animal resources used in rural areas should not be ignored. Every day throughout the world not only species are being lost but traditional knowledge, and such a programme may help to reinforce the value of local knowledge for future food security. But the programme in its title and description does not acknowledge that the resources are only “hidden” and “wild” to outsiders. Those who use these resources know of them. The loss of this knowledge results from external interference and influences and it is these threats that need to be curtailed by placing control in the hands of those who use the resources, the continuum of rural communities which include farmers and Indigenous peoples.

3.3 Farmers' needs

There are an estimated 1.5 billion peoples in the world reliant on “resource poor” farming who have contributed greatly to landscape and ecosystem diversity, but politically they are a disadvantaged group. Common needs which link all resource-poor farmers are:

- Control over their produce, e.g. the right to save and exchange seed in accordance with customary practice;
- The right to benefit from others' use of their traditional knowledge and expertise;
- Security of tenure on the lands they farm or occupy.

The self-reliance of farmers was weakened by the Green Revolution. By making them dependent on store-bought seeds whose high yields could only be maintained with applications of store-bought fertilizers and pesticides, the Green Revolution - and commercial monopolies held by seed and chemical companies - curtailed traditional farming practices, particularly in developing countries, and devalued the use of locally-adapted seeds and traditional methods of saving seed, planting and cropping (Cordeiro, 1993, p.166).

Customary practices such as the saving and exchanging of seed at the farm gate have been further eroded through trade restrictions such as those imposed in the European Union⁵. These are highly regulated and limited (Commandeur et al, 1996). By requiring plant varieties to be protected by patents or an alternative (*sui generis*) system TRIPs, in Section 5 Patents, Article 27.3.b, fails to recognize farming traditions and puts pressure on

⁵ EU Regulation on Community Plant Variety Rights, June 1994 allows farmers' privilege on saving and using seed for some food and fodder crops.

countries to adopt controls which restrict the exchange of germplasm and inhibit local innovation. The *sui generis* system called for in TRIPs is implicitly one modeled on the UPOV Conventions (UPOV, 1992) requiring some kind of patent-like protection. As long as only UPOV-type alternatives are envisaged, TRIPs can offer no solution, in fact it will further exacerbate the loss of control that farmers have suffered unless funds are made available to enable farmers themselves to patent their innovations, as Anil Gupta has suggested⁶. If the outcome of the examination of the issue of Farmers' Rights by the Conference of the Parties to the CBD is some form of fund, use of those funds for patenting would strengthen local communities against the power of the transnational companies (TNCs).

In the search for workable solutions to the question of Farmers' Rights recognition of "community rights" as equal to individual rights is a major platform (GRAIN, 1995). A draft Farmers' Rights Charter from India, based on farmers' demands and presently in circulation, calls for "fundamental and inalienable rights" to: communal ownership of plant genetic diversity and domestic animal breeds.

Other demands in the Charter include:

- full participation in any benefits derived from the improved use of these genetic resources;
- control of access to land, water and genetic resources needed to sustain their livelihoods and provide for universal food security;
- determination of their own diverse production and consumption patterns; and
- rejection of patents on food plants and domestic animal breeds, and of genetically engineered food plants and domestic animal breeds.

At present through Resolution 3 of the 1992 Conference for the Adoption of the Agreed Text of the CBD and Farmers' Rights, questions of benefit-sharing and protection of knowledge focus on plant genetic resources and their potential in the international commercial market for plant germplasm. It is necessary to extend this protection to include knowledge and "resources" (a general term to include not only plant genetic resources but livestock and even ecosystems where their structure is the result of human manipulation) under the control of "farmers" in their wider definition.

Whilst the CBD supports the maintenance of biological diversity and restated at the Second Conference of the Parties⁷ that "plant genetic resources for food and agriculture are critical components of biological diversity", neither the CBD nor FAO Farmers' Rights are likely to restore to farmers control over their plant germplasm. The CBD does not do so because the Preamble reaffirms that States have sovereign rights over their own

⁶ Oxford Centre for the Environment, Ethics & Society, Mansfield College, Oxford, UK, October 1995.

⁷ Decision II/16, Statement to the International Technical Conference on the Conservation and Utilisation of Plant Genetic Resources for Food and Agriculture, UNEP/CBD/COP/2/19, Jakarta, Indonesia, November 1995.

biological resources, which effectively places control at government level, and FAO will not because it vests control in the international community as “trustees for present and future generations of farmers” (FAO Resolution 5/89).

This straitjacket for farmers has to be released by extending and expanding the role of resource-poor farmers in such ways that both national and international policy makers have to acknowledge that their vital role in biodiversity conservation cannot continue without their receiving targeted support and freedom of action.

4. INDIGENOUS PEOPLES

4.1 Defining Indigenous Peoples

Indigenous peoples have provided their own definitions of who Indigenous peoples are. The following example comes from the World Council of Indigenous Peoples:

Indigenous peoples are such population groups who from ancient times have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others.

According to the Final Statement of the Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights, Suva (Pacific Concerns Resource Centre, 1995):

We assert our inherent right to define who we are. We do not approve of any other definition.

Definitions of Indigenous peoples do exist in intergovernmental forums and even in international law. A definition which has gained broad international acceptance is that of the Special Rapporteur of the UN Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities (EC/CN.4/Sub.2/1986/7/Add.4, paras.379-82).

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This historical continuity is characterized by:

- a) occupation of ancestral lands, or at least of part of them;
- b) common ancestry with the original occupants of these lands;
- c) culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an Indigenous community, dress, means of livelihood, life-style, etc.);
- d) language (whether used as the only language, as mother tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- e) residence in certain parts of the country, or in certain regions of the world;
- f) other relevant factors.

The International Labour Organization Convention 169 (ILO 169), the so-called Indigenous and Tribal Peoples Convention (ILO, 1989), is the only international legal agreement specifically on Indigenous peoples. ILO 169 states that peoples are considered Indigenous if they are:

- a) Tribal peoples in 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 countries who are regarded by themselves or others 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 colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain, or wish to retain, some or all of their own social, economic, spiritual, cultural and political characteristics and institutions.

After providing the above definition of Indigenous peoples ILO169 supports the right to self-identification as "Indigenous" by adding:

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

The imposition of definitions by others on indigenous peoples is rejected by Erica-Irene Daes of the UN Working Group on Indigenous Populations in her 1995 report for the Subcommission on Prevention of Discrimination and Protection of Minorities (E.-I. Daes, 1995). She believes that justice is best served by allowing the terms of reference of peoples who are indigenous to evolve flexibly over time. Her view is consistent with that of many indigenous peoples who regard self-definition as indigenous as a fundamental right, and feel that an imposed rigorous definition would therefore be an unacceptable imposition.

What should be noted at this point is that the distinction between Indigenous and non-Indigenous peoples is not as clear-cut as it might seem. There is no single accepted definition of Indigenous peoples and as already mentioned one of the key rights of Indigenous peoples is the right of self-definition, making an external definition less significant. As the definitions cited above show, there are some common features of Indigenous peoples but not all are true for each situation. While a group may claim to be Indigenous, there must be some process of acceptance by other Indigenous peoples. An example of a self-professed Indigenous people who have not been recognized as such is the Boers of South Africa. Thus, while self-definition is a fundamental right, it is not enough. Moreover, some people may be able to call themselves Indigenous but do not do so because it is more advantageous for them not to be classified as Indigenous. The two groups, Indigenous and non-Indigenous should not be seen as mutually exclusive; being able to shift identity when advantageous is a positive point of having two categories.

4.2 Indigenous peoples and the right to self-determination

For Indigenous peoples the use of terms like Indigenous people (without the "s") and the phrase used in Article 8(j) of the Convention on Biological Diversity: "indigenous and local communities embodying traditional lifestyles", are problematic. This is because whilst "peoples" have the right to self determination under international law, "people" and "communities" do not. The "s" distinction symbolizes land, territorial and collective rights subsumed under the right to self-determination, in addition to the basic human rights to which all individuals are entitled. In contrast, the use of terms like "people", "populations", "communities" and "minorities" implicitly denies territorial rights.

According to international law (the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights)⁸ all peoples have the right to self-determination, and by virtue of that right, may freely determine their political status and pursue their economic, social, and cultural development. Therefore, if Indigenous peoples are accepted as "peoples" their right to self determination is undeniably a part of international law. This is why they are not demanding the right to self-determination but that this right be recognized. Indigenous peoples are not seeking privileged treatment from the international community or national governments just the rights taken away from them through an historical process of colonization and marginalisation. Generally they do not aim to establish an ethnically homogeneous state, but to establish a cultural and political niche within existing frameworks that enables them to exercise their rights to self-determination and self-organization. Nevertheless, while Indigenous peoples insist that they be recognized as "peoples", some governments consider that such recognition undermines sovereignty and deliberately choose to refer to them as "populations" or "people".

⁸ Article 1(1) of both these documents states: All 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.

What do Indigenous peoples mean by the right to self-determination? In the Kari-Oka Declaration, proclaimed at UNCED in 1992, self-determination is understood as:

The right to decide our own forms of government, to use our own laws to raise and educate our children, to our own cultural identity without interference.

The 1993 Mataatua Declaration states that:

Indigenous peoples of the world have the right to self determination: and in exercising that right must be recognized as the exclusive owners of their cultural and intellectual property.

According to the Statement from the conference on Intellectual Property Rights and Biodiversity, organized by the Co-ordinating Body of Indigenous Peoples of the Amazon Basin (COICA) in Bolivia in 1994, self-determination also subsumes rights to intangible cultural, scientific and intellectual resources:

All aspects of the issue of intellectual property (determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation) are aspects of self-determination. For Indigenous peoples, accordingly, the ultimate decision on this issue is dependent on self-determination.

ILO 169 supports the view that Indigenous self-organization is the starting point for any exercise in self-determination, stating that:

Indigenous peoples shall be able to exercise control over their own economic, social, and cultural development.

4.3 Indigenous Peoples' Needs

As stated earlier the CBD does not separate Indigenous peoples from local communities so there is no indication of different needs between Indigenous peoples and local communities. The survey carried out by the Working Group on Traditional Resource Rights looked for ways to identify the two groups and to compare and contrast their concerns through their own statements about themselves. The 63 statements made by Indigenous peoples include statements of individual Indigenous organizations and those resulting from conferences which purport to represent the views of all Indigenous peoples present.

From these statements 80 common demands were extracted which covered the six main topic areas listed below:

1. **Self determination.** This category includes the right of self-definition, self-government, to make laws and maintain economic, cultural and social relations across political borders. There are 29 related demands in this area.
2. **Territory.** This group contains eight demands relating to land and resource rights.

3. **Prior informed consent.** In this section the demands are related to respect for Indigenous knowledge, protection of medicinal plants etc. and the right to determine standards for development.
4. **Human rights.** There are 14 related demands in this area; connected with freedom from discrimination and oppression, rule of law, the right to life and liberty.
5. **Cultural rights.** These cover the right to have and express distinct culture, right to language, access to sacred sites, and to practice religion freely.
6. **Treaties.** There are only three demands in this category all relating to treaties made between colonial rulers and Indigenous peoples. In addition to two calls for the recognition of extant treaties there is a demand for the re-negotiation of treaties.

As far as we can tell from the statements studied, the most important demands of Indigenous peoples centre around the rights to self-determination and territory. Farmers groups do not claim to be distinct peoples; their demands for land rights concentrate on land tenure rather than rights to territory.

The statements were ordered according to geographic region and put in chronological order; however, there were few if any regional or temporal trends. Those statements made by international gatherings of different Indigenous peoples make a more comprehensive list of demands but other than that there is little to distinguish the different types of statements. Commonly the statements refer to Indigenous philosophy, particularly with reference to the relationship between land and people, but this is a feature of Indigenous statements from all over the world.

Although this survey was intended as a way of using Indigenous peoples own "words" to define them and elucidate their common demands, there is a problem. Such Statements from Indigenous peoples, which are destined for international forums like the UN Working Group on Indigenous Populations, are likely to use the appropriate international language and to demand the rights which already appear in international documentation. There is, therefore, a certain circularity to using these demands as a way of formulating the debate in the words of Indigenous peoples because the words may in fact be international jargon and not "Indigenous" in the first place.

While this research aimed to compare the statements of Indigenous and non-Indigenous peoples in an attempt to ascertain any similarities or differences between their demands, it is not easy to find statements made by non-Indigenous peoples. This may be because Indigenous and non-Indigenous peoples are trying to work within different forums. It may be that Indigenous peoples' battle for rights is an international one, represented by international forums, one of which was the source of many of our statements. Indigenous peoples are hoping to impact upon governments through national and international spheres. On the other hand, non-Indigenous peoples may be trying to improve the quality of their lives within the nation state, and therefore are using forums such as unions to obtain their desired rights which have been outside the scope of the present survey. It

should not be discounted that organizations representing non-Indigenous people are reluctant to distribute such information.

5. DO INDIGENOUS PEOPLES AND FARMERS GROUPS SHARE THE SAME CONCERNS?

The exact wording of demands made by Indigenous and non-Indigenous groups is critical to the likelihood of their achieving those demands. This has been touched on in the discussion on the definition of people or peoples, and recurs in many contexts. In seeking to work together there is a danger that the apparently similar needs of groups are in fact not complementary when the language used to define those needs is examined. Bringing these needs or demands together may weaken rather than strengthen them. There is a problem of commonalities and differences between the groups being masked by superficial interpretation, or of losing the differences in meaning between words if they are used interchangeably, for example, "peoples" and "communities", "land" and "territory", or "ownership" and other related but distinct concepts such as "stewardship"⁹.

The key difference is that, while non-Indigenous people may act and speak as a community, they are not claiming the right to be a "distinct people"; whereas all statements by Indigenous peoples must be seen in this light. This means that while both groups may demand similar human rights, for Indigenous peoples this means human rights for a distinct culture, not for individuals or a community.

5.1 Linkages

Areas of common interest where Indigenous peoples and farmers may benefit from the groups working together include¹⁰:

- The fear of the globalisation of trade;
- the need for reform of TRIPs;
- farmers' rights;
- the strengthening of rights over traditional knowledge and know-how in the light of forecast world food shortage.

These points are centered around the relationship between the major international environment processes, the CBD and other UNCED documents, the outcome of the FAO

⁹ These are major concerns stressed by representatives of Indigenous peoples' organisations at the meeting held in Oxford by the WGTRR.

¹⁰ Points raised at the meeting at the Gaia Foundation, London, 27 January 1996.

Fourth International Technical Conference in Leipzig and the World Food Summit, and the forthcoming TRIPs review.

Access

Indigenous peoples and farmers are likely to agree on the importance of the right to deny access to outsiders to their lands, territories and resources. Outsiders (who may be collectors, researchers, business people, or even tourists) must first conduct negotiations with the local people or community on terms of access which are based on principles of prior informed consent (PIC), full disclosure and equitable benefit sharing (Posey & Dutfield, 1996).

The principle of prior informed consent is endorsed in the CBD in Article 15, clause 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."

Terms of access, which include requirements for obtaining the PIC of Indigenous peoples and local communities, have been formalized in agreements, and are now being used by plant-collecting institutions such as Kew Gardens in the UK, and pharmaceutical companies such as Shaman Pharmaceuticals in the USA. Any agreements, such as material transfer agreements, should be drawn up by lawyers for the communities themselves so that the terms of access are beneficial to them and understood by them, and comply with the national laws of the host country.

Patents

The debate over the propriety of applying patents to life forms is intense. There is no unified voice on the question of patenting living matter amongst farmers and their representatives, and/or amongst Indigenous peoples, though the consensus appears generally to be against.

The UNDP Regional Consultations on Indigenous Peoples' Knowledge and Intellectual Property Rights made clear that there is still strong opposition among Indigenous peoples throughout the world to patenting of life forms. The Final Statement from the Pacific Region, April 1995, called for the Pacific Region to be declared a "life forms patent-free zone". The unacceptability of patenting life had also been stated at the UNDP Consultations in Santa Cruz, Bolivia and Sabah, Malaysia, in February 1995:

For Indigenous peoples, life is a common property which cannot be owned, commercialized and monopolized by individuals. Based on this world view, Indigenous peoples find it difficult to relate intellectual property rights issues to their daily lives. Accordingly, the patenting of any life forms and processes is unacceptable to Indigenous peoples.

For farmers and rural peoples the debate centres around appropriation by seed companies of their innovative material, and subsequent profits made by those companies. It also refers to the depositing of plant material in ex situ collections and loss of access to that

material. The Rural Advancement Foundation International (RAFI) have consistently opposed any kind of patenting of life forms, but Anil Gupta (Gupta, 1995) has countered RAFI's stance by arguing that people in developing countries have just as much right as seed companies to seek intellectual property right protection of their innovations. He feels that "contemporary innovators in the developing world would not be able to pursue their claims in the current international intellectual property rights regime" if patents are denied.

A *sui generis* system or systems

The TRIPs agreement's call for a *sui generis* system for protecting plant varieties where countries do not wish to apply patent law is often taken up as a solution without recognition that in the context of TRIPs *sui generis* means "alternative patent-type protection" which is a very limited form of control. If, however, by *sui generis* it is accepted that "alternative" controls are needed which include other intellectual property rights mechanisms then more general alternatives need to be sought which can be applied by and for communities rather than against communities and are not limited to patents. This would have to be approached through the World Trade Organization by lobbying for revision of Part III of Annex 1C of TRIPs.

There was concern at the meetings in early 1996¹¹ that the CBD should have priority over TRIPs in order to pre-empt the imposition of patents over the more general requirements of the CBD. There was also general agreement at these meetings that at the TRIPs review in 1999 usable alternatives to patents should be presented to national governments and to the WTO's Council for TRIPs for its consideration.

An alternative approach is to work for formulating multiple *sui generis* systems which would enable nations and communities and peoples to provide targeted systems for protection of their particular knowledge and resources. TRIPs would then be one option or requirement within the range.

The Traditional Resource Rights (TRR) approach would enable traditional and Indigenous peoples to build a solid foundation for more equitable systems of protection and benefit sharing (Posey, 1995) expanding the general understanding of Intellectual Property Rights to include "bundles of rights" already recognized by international legally and non-legally binding agreements. By looking at all aspects of human rights in international and national law TRR has the flexibility to acknowledge individual and communal rights and to advertise a wider interpretation of those rights than the narrowly-defined current intellectual property laws.

TRR is more than a system. It is a framework of principles from which a whole range of *sui generis* systems can be generated. The principles upon which TRR are founded recognize basic human rights, the right to development, rights to environmental integrity, religious freedom, land and territorial rights, the right to privacy, farmers' rights, intellectual property rights, neighbouring rights, cultural rights, cultural heritage

¹¹ See footnote 1

recognition, rights of customary law and practice, and the right to prior informed consent and full disclosure. Further principles may be identified as the concept evolves.

5.2 Points of potential conflict of interest

Indigenous peoples have an understandable concern that identifying themselves too closely with farmers will jeopardize the advances they have made in terms of international recognition. Given the differences in demands noted above, Indigenous peoples do not wish to see Indigenous rights subsumed under the rights of non-Indigenous groups. Although there are overlaps, the demands of Indigenous peoples are concerned with separate political and ethnic identities from the state within which they live, whereas non-Indigenous demands are not. One of the dangers for Indigenous peoples is that they will be co-opted into farmers movements and have their specific concerns subordinated to the demands of farmers.

The selective precision of language

Whilst “peoples” have the right to self determination “communities” do not. This is why the CBD only mentions “Indigenous and local communities embodying traditional lifestyles” and is deliberately non-specific in its use of “Indigenous”. For this reason Indigenous peoples will not willingly accept farmers’ adoption of “a right to self determination” as set out in the draft Farmers’ Rights Charter from India, or in the “philosophy of democratic pluralism” (Shiva & Holla, 1996) which recognizes: that diverse communities have diverse interests, and in the shaping of national law and policy they all have legitimate democratic rights of decision making and self determination.

How are these communities to be defined? Whilst the word community may be specific, as in “a community” meaning a place or grouping of people, or have a wider sense, as in “the community of Sikhs” it is not self defining. It is absolutely imperative for Indigenous peoples to retain their unique identity and rights by being described as “peoples”, whereas farmers require recognition as an identifiable grouping, which can be accommodated under the CBD definition and thereby accorded the rights and benefits due to them.

The selective precision of language is a characteristic of legal documents and statements. This is due to the need to be legally exact whilst accommodating political sensitivities amongst signatories through the use of anodyne language whose meaning may be widely interpreted. For example, in drafting the CBD it took two days’ discussion to agree to use “community” rather than “peoples”, and it was only after considerable further discussion that “local” was added to qualify “communities”. A document like the CBD is a compromise between national and international interests, and as “peoples” is a red-letter word to some governments who refuse to accept the term “Indigenous peoples”, the final wording in the Convention avoided “Indigenous peoples” by use of the generalized term, “Indigenous and local communities embodying traditional lifestyles”. However this term is in danger of becoming so heavily used that Indigenous peoples’ distinctness may be submerged, and with it the recognition given to their status and rights. But at the same time the fact that Indigenous peoples include farmers, male and female, amongst their

numbers requires that Indigenous peoples should be involved in debates over farmers' rights.

Land, tenure and territory

The International Work Group for Indigenous Affairs (IWGIA) notes that Indigenous peoples share three aspects in common (IWGIA, 1994):

- A cultural aspect of common history, language, or affiliation to an area of land which causes them to feel a people or nation;
- The notion of common territory;
- Political deprivation from being able to control their own affairs, territory, resources, and prospects for development; exclusion or marginalisation from political decision-making; and non-recognition of their collective and national rights to land, water, and culture by the dominating and governing group(s) of the State.

Therefore, territoriality is a vital aspect of identity and of self-determination. On the other hand, articulating demands with the use of words like "land" and "tenure" is less all-embracing than claiming territorial rights. Tenure implies right to ownership of the land surface, whereas territorial rights are wider including the earth beneath and the sky above (which in economic terms translates into mineral rights, water rights or air space).

Indigenous rights over territories (and lands) have been stated in international law but governments would be likely to be supportive of any moves to weaken this right. For example, the amendment by the Brazilian Government of Decree 22/91 on demarcation of Indian territories to allow for legal challenges to demarcations is a weak response to political pressure undermining the 1988 Constitution.

ILO 169 refers to the "concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use" (Article 13.2). ILO 169 upholds Indigenous peoples' rights to ownership and possession over the lands which they traditionally occupy (Article 14.1). This right extends to nomadic peoples and shifting cultivators. Such rights over "lands, territories and resources" is even more firmly stated in the Draft Declaration on the Rights of Indigenous Peoples (1993). Part VI, Article 26, recognizes the rights of Indigenous peoples to "own, develop, control and use the lands and territories, including the total environment of the lands, air, water, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used."

At present the UN Human Rights Commission is scrutinizing the language of the Declaration of the Rights of Indigenous Peoples, and the wording of the definition of territory they agree upon will determine its interpretation in the Declaration. There is a danger that governments will try to weaken it in order to retain control over resources which they may not be prepared to cede to the inhabitants of that territory.

Both collective rights and the inalienability of resources are linked to the need for Indigenous peoples to secure legal title to their territories and can be used to strengthen their claim to territory. According to Gray (1994):

Indigenous land rights are based on a people's prior occupation of an area, usually before a state was even formed. In this sense, Indigenous Peoples have a claim to "eminent domain" (inalienability) which a state usually considers to be its own exclusive right.... Connected with the concept of inalienability is the collective responsibility which a people has for its territory. This does not mean that individual persons cannot hold lands and resources for their own use, but that personal ownership is based on collective consent. The collective rights to lands and resources of Indigenous Peoples have been acknowledged by many governments of the world in their constitutions and in international provisions.

In Brazil "Decree 1775 has just opened up 344 reserves, or 57% of all Indigenous land, to claims by any person, company or local authority who thinks they may have a case" (Rocha, 1996). This weakening of national law is an excellent example of the justification Indigenous peoples have of being fearful of losing rights they have won. They need to be ever-vigilant.

However, whilst Indigenous peoples claim recognition of their territorial rights as part of the claim to self-determination, farming communities may only claim security of tenure on the land they live and farm and the right to continue their customary practices. These are not the same as the right to self-determination as expressed in international law and claimed by Indigenous peoples. The hard-won right of Indigenous peoples to lands and resources would be endangered if it was subsumed into tenure issues relating to farmers' rights and this is an issue of critical sensitivity which must be taken into account in any alliances which may be formed. Indigenous peoples are aware that many governments would find it highly convenient to deny Indigenous territorial rights by construing these as tenurial or usufruct rights only.

Ownership and related concepts

In many Indigenous societies, the right to livelihood resources (apart from immediate personal possessions) such as trees, crop species, and medicinal plants, is not usually exclusive. These resources are often shared among individuals and social and corporate groups, each of which may have "bundles" of graded rights to the same resources within a given area. Such rights are considered inalienable; they cannot be transferred, either as a gift or through a commercial transaction. As a general rule, knowledge and resources are communally held and, although some specialized knowledge may be held exclusively by males, females, certain lineage groups, or ritual or society specialists (such as shamans), this does not give that individual or group the right to privatize the communal heritage.

The idea of society being composed of the dead, the living and those yet to be born is central to Indigenous societies for whom the boundary between manifest life and spiritual life is differently defined. Russell Barsh (Barsh, 1996) writes of Indigenous peoples'

knowledge as being “operating instructions for the land, given to them from time to time by the Creator and the spirit world, not just through revelations or dreams but frequent contacts with the minds and spirits of animals and plants.” Knowledge is “lent” or “shared” with outsiders. This knowledge is not the property of an individual, but a responsibility he or she bears under the “locally-specific systems of jurisprudence” pertaining to their society. They cannot therefore enter into arrangements involving their so-called property as defined by the western world without compromising their beliefs and culture.

Notions of “property” in Indigenous societies can vary considerably from western concepts. Frequently “ownership” in the sense of a right that is alienable is not accepted. However, Indigenous societies may be imbued with such notions as custodianship, guardianship and stewardship. Indigenous peoples frequently view themselves as guardians and stewards of nature. Harmony and equilibrium among components of the Cosmos are central concepts in most indigenous cosmologies. However, Indigenous peoples are not satisfied with only the role of “custodians” or “stewards” of biodiversity if the inalienable nature of their relationship to their territory and resources, and their right to use these resources are not recognized.

On the other hand, recognition of ownership is the essential point of farmers' rights over the seeds they have bred. These are their personal property to dispose of as they wish. Their dispute is with seed companies who have taken their property without acknowledgment or reward, and with governments who deny that they have such ownership rights. Their rights have been denied because in the Preamble to the CBD ownership of biological resources is vested in the State, and FAO vests it in the international community as “trustees” for farmers (Resolution 5/89).

5.3 Conclusions

Indigenous peoples have achieved a status where their rights to self-definition and self-determination have been publicized and supported, both in statements published under the aegis of UN agencies such as the United Nations Development Programme, and in international law (in ILO169). Farmers, on the other hand, have no such distinct status. The resource-poor farmers who are largely located in developing countries are still working for their rights mainly through NGOs and local organizations. There is a wide variation in levels of political organization of farmers' groups between countries, and even between continents, and limited global cooperation at present. The position is changing. There is an overlapping agenda between the two groups, but it needs to be carefully scrutinized to ensure that the demands of one group do not submerge those of the other. When discussing the collaboration of farmers' and Indigenous peoples we need to address the following questions?

Q. Even if the two groups have aims in common would they weaken themselves politically by getting involved with each other?

A. If taking each point of action separately as far as possible there should be benefit from cooperation, but any alliances must remain flexible and responsive to possibilities of blurring of positions.

Q. Is it acceptable "within" each constituency to be seen cooperating with the other?

A. This is a highly charged question. Where Farmers' Rights are seen to be associated with FAO it will be unacceptable to Indigenous peoples' organizations to place themselves in a dependent position. On the other hand, many organizations working for farmers' rights are antipathetic to FAO, and the wider question of what is meant by "farmers' rights" should be addressed jointly by both groups.

Q. Is there a possibility that negotiations "between" the Indigenous and farmers' groups (to harmonize positions and to devise strategies) could take up so much time that the "real" opposition (corporate interests, etc.) would have free reign in the formal international legal processes?

A. Given the existing lack of formal cooperation this may well be a consideration in the short-term, but a long-term strategy should be devised, working in parallel with immediate action taken separately.

Q. What are the chances that, for example, Indigenous groups might get so involved in Farmers' Rights battles that they will not have the reserves left to fight their own battles for self-determination (which in any case would grant them resource rights as a secondary effect)?

A. This is a fear Indigenous groups have voiced, but it is likely that resistance by Indigenous peoples to encroachment on their rights would counteract this tendency. The need is more the other way round, that Indigenous peoples should find a way to accommodate farmers' groups need for control of their resources within the concept of "self determination".

Q. Do farmers' groups and Indigenous peoples use complementary or non-complementary political channels (e.g. various UN bodies and regulatory commissions) and strategies (e.g. negotiation, armed conflict, demonstrations, etc.) to achieve their goals?

A. It is difficult to generalize and perhaps it would be fruitful to investigate this issue further. One significant channel through which Indigenous peoples have been able to articulate their demands separately from other groups such as farmers is the UN Working Group on Indigenous Populations. Official channels used by farmers would be through trade unions, or local organizations. For both groups there are special interest NGOs, based both in developing and developed countries, who lobby and publicize their demands. It is probably essential that the two groups remain separate and only work together when united by a common demand.

It would appear that common goals do not necessarily imply that the two groups can or should undergo a common political process for achieving rights, but their positions can be strengthened by selective cooperation and by constant dialogue.

6. EQUITISING

Unless challenged, governments and corporations will continue to presume rights to access and control over the transfer of biogenetic resources and local knowledge, innovations, and practice. This was evident at the Environmental Resource Management (ERM) Stakeholders Workshops¹². The goal of the Workshops was to provide practical advice to the European Union on the implementation of Articles 15 and 16 in the Convention on Biological Diversity.

The ERM background paper, which was otherwise a technically superb and informative document, under-emphasized the rights of Indigenous and local communities to claim ownership over their own lands, territories, and traditional resources. The basic, united, and adamant voice of Indigenous and local communities was not heeded, "Rights first, then (maybe) access."

Unless the CBD is made to harmonize with human rights instruments, it will never achieve its goals to improve and enhance in situ biodiversity conservation. Furthermore, without this rights-driven approach to establish equity, the CBD will become a target of derision and protest from both Indigenous peoples and local communities. Similarly the revision of the IUPGR and the development of Farmers' Rights need also to be guided by international human rights law.

Equity is not something granted by words in a Convention. The current imbalance of power and money means that real equity will have to be achieved. That will require a process, which may as well be called "EQUITISING". Another term in an extensive list of biodiversity jargon may not be desirable. But somehow we must recognize and communicate that a process is necessary to develop the tools and equality needed for a dialogue. These minimal conditions do not currently exist.

The process should begin with the following steps to be taken (and funded) by governments and the international community:

1. Countries should support the rights of Indigenous peoples and local communities in international law and soft law, for example by:
 - signing and ratifying ILO 169 providing minimal recognition of Indigenous rights in international law;

¹² See footnote 1

- accepting the present draft of the Declaration on the Rights of Indigenous Peoples and ensuring its early adoption by the UN General Assembly.
2. Countries should undertake an immediate review of how their human rights commitments can be harmonized with the CBD and GATT to provide equity throughout negotiations on trade, development, and conservation.
 3. Funding should be provided and support given for an independent study to investigate the possible links between enhanced intellectual property protection of plant varieties and the abandonment of traditional practices in favour of agricultural systems associated with monocultures and deforestation.
 4. An Ombudsman Office(s) should be established to provide free legal advice and representation for indigenous and local communities.
 5. There should be a 10-year process, or Global Consultation, whereby “indigenous and local communities embodying traditional lifestyles” could meet to develop their own guidelines and principles for a *sui generis* system of protection of traditional resources. The Global Consultation could follow the established process of the Working Group on Indigenous Populations of the United Nations to develop the Draft Declaration on the Rights of Indigenous Peoples. It could take place under the auspices of the CBD and meet annually to develop a new rights-based system to replace IPRs and similar instruments that work against communities in favour of corporations and governments.

A high-profile Global Consultation would draw attention to the existence of an investigation process, and annual reviews would maintain publicity. Similarly an Ombudsman's Office would provide a public forum. The time and costs needed to establish an Ombudsman's Office and Global Consultation may seem long and expensive. But if this is not done now, in ten years time we will still be searching for equitable solutions, having spent much more time and money than these “equitising” processes would require - and we will have had another decade of devastation of Indigenous and local communities and their knowledge and resources.

7. STRATEGISING

The six main topic areas identified in the WGTRR survey - self-determination, territory, prior informed consent, human rights, cultural rights and treaties - provide a framework wherein Indigenous peoples and local communities may work together. However, it must be borne in mind that it is not certain whether alliances, such as the implicit alliance of “Indigenous and local communities embodying traditional lifestyles”, are desirable or even possible given the sensitivity of issues outlined in this paper. The common ground and differences existing between groups should be investigated - would the shared concerns make it advantageous for people to mobilize jointly, or would the differences weaken such joint negotiating processes by diluting arguments? The conclusions of these investigations

should then be looked at to see what effects alliances may have both between constituent groups and internally within those groups.

In planning any strategy for future action by Indigenous peoples, farmers and NGOs, groups should take the strongest position they can publicly in case it is necessary to cede ground during negotiations. The complexity of any issue can be expanded during the negotiating process whilst taking the position of “alliance” publicly. It will be necessary to decide whether it is advantageous to work in the existing time frame imposed by current processes and thereby be actively involved, or to ask for time to formulate positions, perhaps by invoking some form of moratorium, and risk losing ground or being marginalised.

It is widely acknowledged that appropriate access to genetic resources and transfer of traditional technologies depend first on recognition of basic community rights and guarantees of community control over lands, territories and resources, and then on developing mechanisms and instruments that guarantee equitable benefit sharing. It is also generally recognized that existing intellectual property rights are inadequate and inappropriate for this purpose and development of *sui generis* alternatives are necessary. To this end activities in the following areas would be useful:

1. Identification of principles to guide the development of *sui generis* systems to implement Article 8j of the CBD, by protecting local communities while guaranteeing benefit sharing from the wider use and application of traditional technologies. This requires:
 - development of national alternatives to IPR which support the conservation of biological diversity while simultaneously putting into effect other international commitments made by national governments. Examples of these include expanded and/or redefined Farmers' Rights and Traditional Resource Rights (TRR);
 - reviews of statements, declarations and viewpoints of indigenous and traditional groups on IPR to identify key principles and requirements;
 - analyses of legal, political and anthropological definitions of “local communities embodying traditional lifestyles” and other key terminology of Article 8j. Diversity of communities will dictate development of *sui generis* models appropriate to each region and country for protection of community knowledge, innovations and practices, as well as benefit sharing from their wider use and application of technologies.
2. Any *sui generis* system to implement Article 8j should harmonize with similar initiatives of FAO-IUPGR (International Undertaking on Plant Genetic Resources) and GATT-TRIPs (Trade-Related Aspects of IPR of the General Agreement on Tariffs and Trade). However, the broader mandate of the CBD should be exercised to provide the overall guidelines and instruments for national *sui generis* systems relevant to biological diversity.

3. Integration of biological diversity conservation efforts with human rights principles to strengthen international support for Indigenous peoples and local communities. Adopting an “integrated rights approach” (such as Traditional Resource Rights) is an appropriate way to uphold respect for the land and territorial rights of Indigenous peoples and local communities, and to ensure local control over knowledge and biological resources. Such an approach will enhance the link between biological and cultural diversity.
4. Provision of detailed technical, technological and scientific advice on traditional knowledge, innovations and practices relating to land use, management and conservation, including: development of methods for acquisition, evaluation and analysis of traditional technologies; procedures for storage, retrieval and dissemination of information; identification of constituents, stakeholders, users and beneficiaries; development of tools and instruments for protection and benefit sharing; identification and application of methodologies to utilize indigenous and local community ethnoecological concepts and criteria for identification, monitoring, environmental impact assessment, public education and awareness.
5. Identification of sources of funding for indigenous and local communities to finance their own resource management and conservation efforts, such as community registers, self-demarcation of territories, and community-controlled research, as well as support for the creation of additional funding.
6. Identification of sources of funding for studies and wider application of traditional knowledge, innovations and practices including education and training to enhance application and use of such knowledge, innovations and practices, as well as support for the creation of additional funding.

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