LUKANKA

(Miskito for “Thoughts”)

Pre-emptive wars, climate change, bacterial and viral pandemics, and the unstable global economy all find their roots in the rush of development and the capital-centered, commodity-centered economy of the modern state system. Socialism and capitalism are the modern systems of economy directly connected to the various threats that now dominate regional and global affairs. These economic theories buttress the modern system of states that was established by the Roman Catholic Church negotiated Treaty of Westphalia in 1648 that is now tested as it has never been tested before. Teetering on the brink of breakdown, the many of the world’s states are either bankrupt, ruled by narco-criminal regimes, or have simply collapsed all-together.

The most observable aspect of the state-system breakdown is recognized as environmental breakdown—pollution, commodification of plant, animal and other forms of life and the disruption of cultural societies in the Fourth World.

Contributors to this issue of the Fourth World Journal touch on some of the central controversies involved in environmental breakdown. Enactment of international property rights agreements that states’ governments fail to enforce contribute to threats to the global commons by systematically undermining Fourth World cultures. Corporations overwhelm or buy-out states’ governments to gain access to Fourth World lands and resources. Wars are preemptively launched in violation of the United Nations Charter resulting in substantial environmental damage as well as cultural dislocation of Fourth World nations.

Social Justice attorney and former CWIS Fellow **Valeria A. Gheorghiu** argues in a groundbreaking legal analysis “Sailing the Seas of Treaties,” a thorough expose of the International Treaty on Plant Genetic Resources for Food and Agriculture that bears considerable importance to Fourth World nations as metropolitan populations. Working in India during the summer of 2005 Ms. Gheorghiu was called upon to encourage the Indian government to comply with the International Treaty on Plant Genetic Resources for Food and Agriculture it had signed with other states. Fourth World nations in India would be beneficiaries of India’s lawful compliance with this agreement. Her analysis is a product of that important work.

Dr. Richard S. Mbatu, a CWIS Associate Scholar, draws on his personal knowledge and scholarship to discuss the affects of resource commodification on the Ogoni peoples of the Delta region of Nigeria and the Bakola-Bagyeli Pygmy of Cameroon. Oil is the commodity sought by trans-state corporations and his analysis demonstrates the adverse consequences of commercial exploitation in Fourth World territories. He points to strong efforts by these nations to pursue environmental justice, economic stability and social welfare.

Weihua Tan, of the Research Institute of anthropology and ethnology, University of Jishou City, Hunan Province, China beautifully illustrates and comments on the "Miao Drum Culture and its Social Function," He points to the significance of Miao culture as a mediating force for environmental and social balance. His piece strongly supports the often argued point that Fourth World cultures are essential to climate and environmental balance supporting life in the commons.

Long-time contributor **Joseph Fallon** sounds an alarm about the collapse of United States government foreign policy. Drawing on his personal knowledge of the Middle East Fallon critiques globalization and economically motivated preemptive wars launched by the United States; and directs our attention to political and economic blowback that is demonstrably a product of destabilized Fourth World nations.

Finally, I offer up my review of **Charles C. Mann's 1491**, a popular but surprisingly dense discussion of pre-Columbian western hemispheric history. Mann's pre-Columbian history is an unusual subject that has great relevance for the present-day debates about the environment, social justice, and war. I like this book and consider it a valuable contribution to our understanding of the future of Fourth World nations in the western hemisphere as we come to understand their past.

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Sailing The Seas of Treaties

Biopiracy in the Wake of the International Treaty on Plant Genetic Resources for Food and Agriculture

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Five hundreds years after the discovery of "new" territories by "more advanced" civilizations, and centuries after the doctrine of discovery legally thwarted any potential property rights of millions of indigenous peoples, the theft of property and resources in the name of imperialist progress persists today, albeit in a different medium, and with more successful challenges. Rather than outright theft of physical property, neo-imperialists have "discovered" intellectual property, or indigenous knowledge of bioresources, such as medicinal plants or seed varieties.[1] Instead of supporting the theft of indigenous knowledge using the doctrine of discovery to promote their view of progress as they had with indigenous lands, they use their patent systems to rationalize the theft of indigenous knowledge because of their "inventive" genetic advancements thereupon in a form of "intellectual colonization."[2] Using their intellectual property regime, they secure the profits of their genetic advancements based upon indigenous knowledge without compensating the original indigenous holders of that knowledge for their initial discoveries and developments. In 1994 FAO Assistant Director-General Obaidullah Khana coined a term of art for this practice: "biopiracy."[3] The same arguments of progress and ethnocentricity continue to rationalize the intellectual property rights debates today as centuries ago for actual property, only this time, developing nations and indigenous peoples are better equipped to use the same legal systems imposed upon them to protect their interests.

The Onset of the Problem - Case Studies

Successful use of the very legal system employed to oppress indigenous peoples and developing nations includes challenges to specific instances of biopiracy.[1] For

[1] Although the ITPGR only covers food and agriculture, I include medicinal uses of indigenous knowledge because they demonstrate the same problems associated with biopiracy as exist with the seed varieties and plants saved, bred or gathered by small indigenous farmers used for food and agriculture.

example, in 1997, the US Patent and Trademark Office (USPTO) granted to RiceTec, Inc. a patent for inventing basmati rice,[4] rice which has been indigenous to India for centuries. After international protests and challenges to revoke the patent in its entirety, the USPTO partially revoked the patent in 2001.[5] Similarly, the USPTO granted a patent for the Ayahuasca plant, indigenous to the Amazon and sacred to thousands of Amazonians.[6] Groups from nine South American countries filed for reexamination of the patent on the basis that knowledge of the plant had already existed in the public domain, resulting in the withdrawal of the patent.[7] Again, on the similar basis that the patent claims were not novel because of prior public use, the European Patent Office revoked the joint patent of WR Grace and the US Department of Agriculture for an insecticide and fungicide derived from the seed of the neem tree.[8] Neem has been traditionally used as part of the ancient Indian Ayurvedic system of medicine for those and other qualities.

While these challenges to patents of "inventive discoveries" based on indigenous knowledge met with success, many have gone unabated due to lack of resources by developing nations and indigenous communities.[9] In these cases, no credit or compensation is given to the original holders of the knowledge or developer of the plant variety, nor is access to the new technology granted to the source developing countries.[10] An older example which demonstrates this problem is that of, quinine, used to cure malaria, which originated in Peru.[11] A more recent example can be found in the rosy periwinkle, unique to Madagascar and found to have anti-cancer properties.[12] While the medicines vincristine and vinblastine derived from the periwinkle have resulted in $100 million in annual sales for Eli Lilly, "virtually nothing" has returned to Madagascar.[13] A third example involves the African plants katempfe and the serendipity berry, which also resulted in no compensation to African communities.[14] Africans long used those plants for their sweetening properties while the University of California and the Japanese Lucky BioTech obtained a patent for the sweetening proteins naturally derived from the plants.[15] Any transgenic plant containing the patented proteins is also covered by the patent.[16]

In this final case, the additional danger exists that the indigenous communities may be prevented from freely cultivating and developing such plants. As a result of these foreign patents, indigenous communities may no longer be permitted access to and rights over the same plants and indigenous knowledge that they have harvested and conserved for centuries.[17] Because the danger exists that biopiracy will continue unseen and unchallenged in such ways, developing nations and indigenous peoples have organized themselves to find protection under systems of international and national regulation.

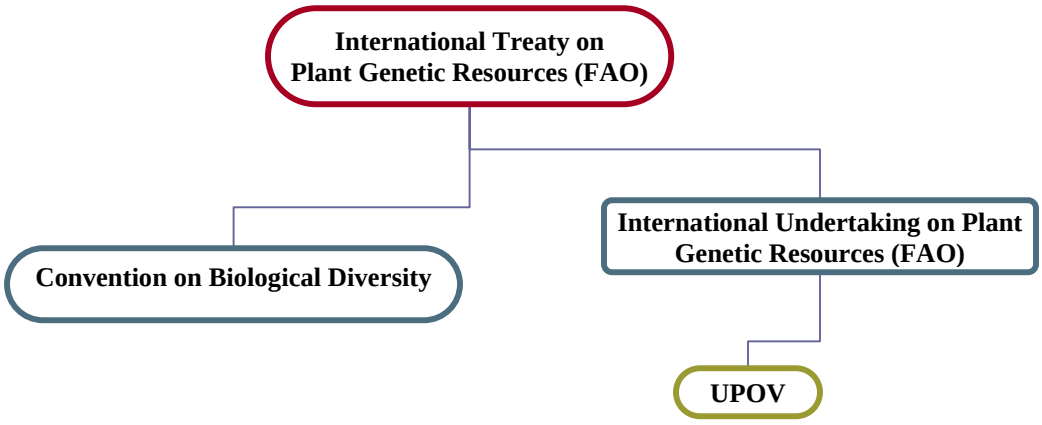
Treaty History

The ***International Treaty on Plant Genetic Resources for Food and Agriculture*** [ITPGR], signed in November of 2001, bridges food security, biodiversity and intellectual property rights as the first legally binding multilateral agreement on sustainable agriculture.[18] It is part of a regime complex governing plant genetic resources that consists of five coexisting and partially overlapping elements: the 1961 International Convention for the Protection of New Varieties of Plants [UPOV]; the UN Food and

Agriculture Organization [FAO]'s 1983 International Undertaking on Plant Genetic Resources [International Undertaking] and its practical replacement, the 2001 ITPGR; the Consultative Group on International Agriculture Research [CGIAR]; the World Trade Organization [WTO]'s Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS], the Convention on Biological Diversity [CBD][19] and the World Intellectual Property Organization's Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore [WIPO-IGC]. Originally intended as a fusion of the International Undertaking and the CBD,[20] the ITPGR creates a limited commons over plant genetic resources through its multilateral system of access and recognition of farmer's rights.

Conceptually, a limited commons blends the notion of national sovereignty over plant genetic resources, as proclaimed by the CBD, and industrialized nations' old International Undertaking basis that plant genetic resources are part of the common "heritage of mankind,"[21] property to be held in common and freely accessible to all. The International Undertaking's position on plant genetic resources as a public commons stems from the view that plant genetic resources, from time immemorial, have been available for free discovery.[22] With the ends to preserve food security and biodiversity, the International Undertaking encouraged the means of free access in order to facilitate food and medicinal innovations through new gene technologies.[23]

Figure 1: Treaty Roots of the ITPGR



However, it was the North that lacked biodiversity while it was the majority nations[24] that continued to maintain the knowledge and develop its biodiversity by saving and exchanging seeds. The majority nations increasingly began to view the industrialized nations' "discovery" of their knowledge of plant genetic resources as similar to the sort of "discovery" of the "New World" five hundred years ago. Thus, the CBD promoted the view that plant genetic resources were on par with mineral resources, such as gold and copper,[25] and rooted in indigenous knowledge for which developing countries demanded fair and equitable benefits sharing and over which they claimed national sovereignty. Prior informed consent and equitable benefits sharing[26] for innovations based upon

indigenous knowledge, as per Article 8(j) of the CBD, arose from the belief that ensuring adequate compensation for communities whose knowledge was exploited would not only promote justice, but would also preserve the livelihood of the communities which in turn would continue to conserve their biodiversity. Biodiversity, culture and development were inherently linked.

UNEP has also identified the importance of integrating cultural perspectives into the debates on globalization and that protecting indigenous knowledge is critical to preventing environmental degradation.[27] To this end, this paper attempts to analyze whether the ITPGR adequately harmonized with the CBD, particularly Article 8(j) and associated prior informed consent and equitable benefits sharing provisions, to protect the interests of the rural indigenous and *adivasi* communities of India and other developing nations. It also contains suggestions for long term improvements. It analyzes ITPGR compliance with the CBD primarily by piercing through the international veil, to reveal how the North may manipulate treaty interpretations, in their favor, during the present execution of the ITPGR. Ultimately, I conclude that the ITPGR's preparatory developments diverge from the CBD aspects of the ITPGR, in favor of the North's and the FAO's/CGRFA's platform which favors free access, along the lines of the old International Undertaking before the CBD proclaimed national sovereignty over PGR. As the implementation of the ITPGR draws near, groups such as Gene Campaign and the Center for World Indigenous Studies can help ensure the representation of *adivasi* interests by contesting those preparatory provisions which diverge from the original intent of the ITPGR to harmonize with the CBD.

Salient Features of the International Treaty on Plant Genetic Resources

Out of the polarized worldviews of the old International Undertaking and the CBD developed the International Treaty on Plant Genetic Resources, which was drawn from the International Undertaking. In 1992, countries sought the Food and Agricultural Organization (FAO)'s cooperation in Resolution 3 of its "Nairobi Final Act" to apply the CBD within the field of sustainable agriculture.[28] In turn, the FAO adopted Resolution 7/93 at the Twenty-seventh Session of the FAO Conference,[29] which recognized the need to revisit the International Undertaking in order "to harmonize the International Undertaking with the CBD, to facilitate access to plant genetic resources for food and agriculture [PGR] which remained outside the scope of the CBD, and to address the controversial issue of Farmers' Rights."[30] The following is a brief summary of the relevant features of the ITPGR after seven years of negotiations.

1. Objectives and Scope

At the outset of the text, the ITPGR clearly states its purpose:

> 1.1 The objectives of this Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable

agriculture and food security.[31]

In Article 1.2, the ITPGR next states that such goals will be reached by "closely linking this Treaty" to the FAO and the CBD, thereby establishing cooperation between the two bodies.[32] The fundamental bridge between these two bodies, the Multilateral System [MS], is its most sophisticated feature. It is a unique mechanism which simultaneously attempts to meet the demands of the industrialized world, and the developing world, by facilitating access to PGR, while also ensuring equitable benefit sharing. Here is applied the concept of a limited commons by limiting the scope of the MS to the major food crops which have been chosen in previous international negotiations and listed in Annex 1.[33] The remaining items of food and agriculture remain under national sovereignty while treaty provisions with respect to conservation apply universally to all PGR.[34]

2. The Multilateral System – Facilitated Access and Benefit Sharing

Through the Multilateral System, access is provided under certain conditions, via a Material Transfer Agreement (MTA), to be signed by the recipient of the PGR and the provider. Contracting Parties are then required to ensure resolution of disputes over the MTAs within their own legal systems. Out of all of the listed conditions, the ITPGR specifically requires that the MTA include the following:

1. Use and conservation solely for research, breeding and training for food and agriculture.
2. Recipients shall not claim Intellectual Property Rights or other rights over PGR, or their parts in the form received from the MS, that limit their facilitated access.
3. PGR accessed shall continue to be made available to the MS by the recipients.
4. Commercial benefit sharing to a Trust fund for ITPGR activities, unless the PGR created is freely available for research and breeding, in which case commercial benefit sharing is only encouraged.

Other forms of benefit sharing may take the form of information exchange, capacity building, technology transfer and monetary shares of commercialization through partnership with developing countries' private and public sectors of research and technology development. However, these are not specifically identified for inclusion in the MTA.

3. Farmer's Rights

Article 9 on Farmer's Rights expresses deep gratitude to farmers world-wide for their contributions to the development of and security of PGR for food and agriculture. It leaves the responsibility for realizing Farmer's Rights with national governments, suggesting three measures to include:

1. Protection of relevant traditional knowledge
2. Right to equitably participate in benefit sharing
3. Right to participate in national decisions on conservation and sustainable use of PGR

It also prohibits any interpretation of the article that would limit farmer's rights "to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate."[35]

Outside of this, paragraph 3 of Article 13 on benefit sharing also mentions farmers. It states that benefits arising from the Multilateral System should flow to farmers in the majority nations who conserve and sustainably use PGR.[36]

4. Implementation

The Governing Body is charged with implementation through consensus decision making. At its first meeting, it must address mechanisms of promoting compliance and addressing non-compliance. These shall include monitoring, offering advice or assistance, including legal aid, when needed, especially to developing countries or economies in transition. The ITPGR itself does not require periodic reporting of progress on implementation or the state of PGR within a member nation's borders.[37] Dispute resolution mechanisms are characteristic of conventional formulas for multilateral environmental agreements, with negotiations first, followed by conciliation procedures, then election to submit to arbitration or the International Court of Justice.[38] If the dispute involves the Multilateral Transfer Agreements, under Article 12.5, parties are required to provide for recourse under their legal systems as per their jurisdictional requirements.[39] Thus, enforcement of provisions under the MTAs is subject to contract law. With regard to its position relative to other international instruments, it maintains a neutral and independent status, not claiming any hierarchy nor infringing on other treaties.[40]

Current Status of the ITPGR

The ITPGR entered into force on June 29, 2004, 90 days after the deposit of the 40th instrument of ratification, acceptance, approval or accession as per Article 28.[41] As of August 1, 2006, there are 105 such parties to the ITPGR[42] who have deposited the required instruments with the CGRFA. Table 2 in the Appendix shows the nations who have ratified, accepted, approved or acceded as of that date.[43]

Currently the Commission on Genetic Resources for Food and Agriculture [CGRFA] of the Food and Agriculture Organization [FAO] is acting as the Interim Committee to provide the necessary preparations for the first meeting of the Governing Body of the ITPGR.[44] The FAO Conference adopted the ITPGR at its 31st Session with Resolution 3/2001[45] providing interim arrangements for its implementation. It was decided that the CGRFA should act as the Interim Committee, inviting participation by "Members of the FAO and States that are not Members of the FAO, but are Members of the United Nations and any of its Specialized Agencies or the International Atomic Energy Agency."[46]

The Interim Committee has met over the past two years to lay the groundwork for adoption at the first meeting of the Governing Body. The Interim Committee's first meeting, at Rome, in October of 2002, revolved around draft rules of procedure, financial rules, and draft compliance procedures.[47] The second meeting, in November of 2004, at Rome, further elaborated on these matters, adding work on the terms of the Material Transfer Agreement.[48] A "Contact Group" was created to finalize the draft standard

MTA.[49] Resolution 3/2001 also called for the creation of an Expert Body to formulate recommendations for the terms of a draft Material Transfer Agreement [MTA] to be prepared by the Interim Committee for consideration at the first Session of the Governing Body.[50] The Expert Group has met and made recommendations. The Contact Group had its first meeting in Tunisia from July 18 – 22 2005 to discuss the terms of the Standard Material Transfer Agreement. Most recently, the Contact Group agreed on a draft Standard Material Transfer Agreement [SMTA] at its second meeting in Alnarp, Sweden on April 24 – 28, 2006.[51] Although the treaty has been in force for over two years now, the Governing Body has not yet met to adopt or consider these measures. They are scheduled for revision and adoption at their first meeting June 12 – 16 in Madrid, Spain.[52]

Potential of the ITPGR to Protect Small Farmers' and Indigenous Interests

The general harmonization of the CBD into the International Undertaking is a positive advance for small farmers and indigenous peoples in protecting their knowledge. Broadly speaking, this is because of its promotion to a legally binding instrument, the incorporation of equitable benefit sharing into the Multilateral System of access as well as a greater recognition of national sovereignty over PGR which allows nations to negotiate over the inclusion of PGRs in the MS. In addition, Farmer's Rights are slightly better framed than in the International Undertaking.

The Seventh Special Session of the Global Ministerial Environment Forum of UNEP dealt predominantly with strengthening international environmental governance. Since there are approximately 500 treaties on the environment,[53] it was put forth that better use of the structures that already exist would serve better ends than creating new structures.[54] The majority nations in particular feared that such new structures would emerge to their detriment, as was the case initially with the WTO.[55] Given that their capacity to attend such frequent meetings is limited due to scarce resources, creating new structures might add a burden majority nations could not meet. It is to this end that the following positive uses of the ITPGR may be employed to protect indigenous knowledge.

1. From Bilateral to Multilateral

The shift in an access mechanism to the ITPGR's multilateral process represents a positive step forward for the developing nations because now the disparity in bargaining power has reduced. With the developing nations in the majority, and decision making by consensus, developing nations may be able to use their numbers to negotiate well on behalf of their indigenous and rural communities. This is, of course, provided that they coordinate amongst themselves and establish clear, regional cooperative platforms, such as through the Like Minded Group of Megadiverse Countries.

This public multilateral system is more transparent, specific, efficient and conducive to standardizing just negotiations through the standardized Material Transfer Agreement, provided it is drafted in favor of rural and community interests. In such a

non-arbitrary system, multinational companies would not be able to pit individual nations with the same PGR in their bioregions against each other in a race for the best deal.[56]

2. Broadened Scope to Rectify the Past

The scope of the MS's application has also broadened in favor of rural communities. Whereas the CBD did not apply to PGR collected prior to its entry into force, the ITPGR incorporates *ex-situ* collections through the CGIAR-IARCs. Article 11.5 simply states that the MS includes *ex-situ* collections of the CGIAR and other international institutions.[57] This has the potential to provide protection to indigenous communities who may have been harmed by early instances of biopiracy over their seed collections because now their seed collections are a part of a system that includes equitable benefits sharing.

Article 15 of the ITPGR also further addresses CGIAR-IARC collections, encouraging the IARCs to sign agreements or MTAs negotiated with the Governing Body, which should provide for at least an indirect just compensation for past instances of biopiracy.[58] However, the ITPGR uses soft language, "call[ing] upon" IARCs to enter such agreements. Hence, IARCs may not sign any agreements with the Governing Body at all, leaving their collections outside the specific governance of the ITPGR.[59] At a minimum, Article 15.3 provides that the contracting parties from whose *in situ* territory specimens were collected for the IARCs are to be provided samples thereof, upon demand, without an MTA, thereby guaranteeing at least continual access to their own resources.[60] Nonetheless, indigenous communities may wish to petition their national representatives to call for specific MTAs which address their particular past grievances.

3. Selective National Sovereignty

While the Multilateral System's jurisdiction over qualifying PGRs broadened, since the International Undertaking, to include *ex-situ* collections, it also reduced the actual number of applicable PGRs. Although *prima facie* this may appear negative, the fact remains that this was the result of the majority nation's own negotiations as to which items to list. They wanted to retain exclusive national sovereignty over certain prized genetic resources, such as Brazil groundnuts,[61] presumably so as to gain better compensation individually through their own bilateral arrangements. (Indigenous advocacy groups should scrutinize which PGRs have been included in the ITPGR system and which have not.) Thus, some nations have retained complete sovereignty over certain genetic resources of their own choosing so as to remain unencumbered by the standardized international mechanism.

Likewise, indigenous communities are free to lobby their own governments to advocate the best arrangements for equitable benefit sharing when they take these products to the international market. Provided a strong and creative grassroots initiative exists, coupled with transparent democratic governance, communities may be able to make significant advances over the terms provided in the ITPGR suited to their own individual needs and preferences by influencing Governments' deliberations in

implementation proceedings.

4. Wise Use of the Trust Fund

Article 13.3 states that the benefits which arise from the use of PGRs under the MS should flow to farmers, especially those in developing countries and economies in transition, provided that they are conserving the PGRs.[62] Farmers may claim that programs which protect their indigenous knowledge are integral to the conservation of their biodiversity, and its supporting culture, and they therefore qualify for funding from the Trust Fund provided for under Article 19.3(f) of the ITPGR once benefits from the use of PGR accrue thereto.[63]

In preparation, NGOs representing indigenous interests may advocate that the criteria developed by the Governing Body for providing assistance, as called for by Article 13.4, include measures to protect indigenous knowledge. Article 13.4 calls for the Governing Body to determine the criteria for providing assistance to developing countries and economies in transition that have contributed significantly to the diversity of available PGRs and/or have special needs.[64] Because protecting indigenous knowledge is concomitant with protecting biodiversity as recognized by Article 8(j) of the CBD mentioned supra, those nations who protect indigenous knowledge contribute significantly to PGR diversity and therefore deserve assistance on such a basis.

This would further meet the sustainable management goals of the ITPGR because funding for indigenous knowledge and its attached biodiversity offers an incentive to preserve the two. If profits flow directly back to the communities of origin, whose indigenous knowledge was used to provide marketable products, this creates a positive feedback loop as the indigenous communities are thereby motivated to further preserve their biodiversity and indigenous knowledge thereof. NGOs may demonstrate how their countries have already contributed to biodiversity through the preservation of their indigenous knowledge. This may persuade the Governing Body that the Article 19.3(f) funds should be used to fund programs whose goal is to protect indigenous knowledge, such as the Biodiversity Registers of India, because then biodiversity will also be enhanced.

5. MTA's and the Use of Domestic Contract Law to Enforce International Law

The Multilateral Transfer Agreements [MTA's or SMTA's] also offer a new option for enforcement.[65] Article 12.5 also speaks to contracts and national law. Article 12.5 provides that parties must seek recourse over contractual disputes via their national legal systems. This is beneficial to indigenous communities because they stand at a significant advantage if they sue in their home courts over their biodiversity and compensation issues.

The choice of source country venues when the source country is the complaining

party is jurisdictionally appropriate given conventional U.S. personal jurisdiction and evidentiary requirements. Well-established contract law also adds a significant enforcement potential to the equitable benefits sharing aspects of the ITPGR's MTAs. By following the overall trend towards encouraging self-regulation through reliance on private contractual arrangements, this may serve to mitigate the generally weak enforcement capacity of international law. However, this all hinges on the Governing Body revising the draft SMTA in June. The draft SMTA as it is currently proposed by the Contract Group to the Governing Body proposes international arbitration.[66] The Governing Body would have to revert back to the original proposals, which allowed for the use of national legal systems for contractual disputes arising out of the SMTAs in keeping with Article 12.5 of the ITPGR. This is discussed in more detail infra.

6. A More Detailed List of Benefits

The ITPGR has improved upon the 1992 CBD text in that the options for benefit sharing are more clearly specified. Article 13.2 also elaborates upon the list of four types of benefit sharing. The four types are information exchange, technology transfer, capacity building, and commercial benefit sharing.[67] Advocates of indigenous groups should continually cite this article because it positively mandates that those four mechanisms shall be used to fairly and equitably share benefits, including commercial benefits, accrued from access to the Multilateral System.

7. The Conditions

A closer look at the conditions under which access to PGR is facilitated through the MS, reveals several favorable terms protecting the interests of indigenous communities. Listed under Article 12, the table below highlights the advantages of each condition for indigenous communities.

Table 1 – Article 12.3 Conditions for Access: Improvements for IK Interests

Condition Listed	Improvement Explained
a) Use and conservation solely for research, breeding and training for food and agriculture*	Limits the use of PGR within reasonable bounds of social service to issues of food security, relevant to many indigenous.
b) Expeditious access, without tracking individual accessions, free of charge, or not exceeding minimal cost involved.	Tracking is technically difficult in developing countries with poor infrastructure. Low costs facilitate compliance.
c) Passport data and available non-confidential descriptive information provided with PGR.	Meets geographical origin/source demands of indigenous knowledge advocacy groups.
d) Recipients shall not claim IPR or other rights over PGR or their parts in the form received from the MS that limits their facilitated access*	Indigenous communities are not prevented from using seeds used for generations or their own breeding innovations. This may have been added in response to the US practice of granting patents even on "discoveries," without the requisite inventive step for granting patents, of any biological

	resources.[68]
e) Access to PGR under development shall be at discretion of developer, including farmers	This recognizes farmers as breeders, in spite of lack of scientific training, in contradiction of UPOV. This allows that farmers may share with whomever they please, and avoid sharing with those that violate their trust, such as "biopirates."
f) Access to PGR protected by IPR and other rights shall be in accordance with international and national laws.	No benefit.
f) PGRs accessed shall continue to be made available to the MS by the recipients*	Similar to (d) supra, source countries may continue to use their own resources.
g) Access to *in situ* PGRs shall be in accordance with national legislation, or where none exists, in accordance with standards created by the Governing Body.	Recognizes national sovereignty over PGR, as per the CBD.

***** These provisions in bold font, along with Article 13.2d(ii) (that commercial benefit sharing should go to a Trust fund for ITPGR activities), are the only terms specifically required to compose the Material Transfer Agreement under Article 12.4.

Potential Weaknesses of the ITPGR for Farmers and the Indigenous

In an NGO statement upon the adoption of the ITPGR, the treaty was denounced as "a weak [t]reaty that poses few challenges to the dominant trade policy environment, technological developments and intellectual property rights regimes which tend to serve the interests of OECD countries."[69] Several criticisms of the ITPGR have already been delineated. First, Farmer's Rights are yet again only a token of gratitude, leaving it to the national governments to enforce.[70] Second, whereas the CBD permits incursion into other treaties' authority where serious threats to biodiversity exist, the ITPGR neutrally stands independent, neither superceding nor sublimating to other international instruments.[71] Third, it has a weak compliance mechanism, with lacuna in reporting and tracking, which would better monitor non-compliance.[72] Fourth, consensus decision-making may be a barrier to amendments to the list of PGR available under the Multilateral System.[73] Fifth, benefit sharing with regard to monetary compensation is "inchoate."[74]

I would add three criticisms. First, the use of the language "[s]haring of the benefits arising from commercialization" in Article 13.2(d) misleads.[75] During a cursory reading, this seems to include monetary benefits to the indigenous communities from which the PGR was collected. However, any benefits thus accrued do not go directly to the indigenous communities themselves, but rather, to the Article 19.3(f) proposed Trust Fund, or like "appropriate mechanism."[76] The funds then are distributed at the discretion of the Governing Body to further the goals of the ITPGR, for sustainable use and conservation.[77]

This is a far cry from the call for restorative justice in the Convention on Biological Diversity. The noble aim of providing equitable benefits sharing has been perverted into merely a funding mechanism for the ITPGR. Self-determination is therefore stunted, because the Governing Body would decide to whom, and for which, programs to designate the funds. Even if the funds do eventually trickle down to the indigenous communities, it is still solely to meet the goals of the ITPGR, and not sustainable development in general as demanded by the CBD, with which the ITPGR was supposed to harmonize.

Second, although conditions are listed explicitly, only four are specifically required to enter the language of the Material Transfer Agreement, as identified supra in Table 1.1. Given that resolution of the MTAs in national courts will most likely turn on the specific language in the MTA as per conventional rules of contract law, should this be the ultimate course chosen in June, it appears circumspect that only these provisions would be specified. This may ultimately render the other "conditions" as unenforceable and weakly followed as other international law instruments.

Finally, another point of weakness is evident in Article 13.2(d)(ii)'s voluntary language with respect to equitable benefit sharing. Payment into the Trust Fund is not mandatory when the PGR developed is freely available, as per Article 13.2(d)(ii).[78] Although Article 13.2(d)(ii) mandates that language in the Material Transfer Agreement shall require equitable benefit sharing to the Multilateral System, benefit sharing is merely encouraged if the recipient who developed the PGR for commercialization provides that PGR for research and breeding without restriction.[79] This strips the ITPGR of its supposed harmonization with the CBD principle of equitable benefit sharing for the sake of sustainable development.

This reflects the FAO bias that the purpose of the ITPGR is to secure free access to PGR for breeders, as opposed to the CBD's emphasis on equitable benefit sharing as a matter of fair compensation to the indigenous and majority nations. All a breeder has to do is provide free access to their genetically modified resource to avoid having to pay any benefits to the original communities. Essentially, biopiracy may continue unperturbed, so long as one subjects one's self to the biopirates of one's own country. No benefit sharing is mandated in this case, and this is not in keeping with the goals of the CBD. It allows an insidious loophole.

The Interim Committee's Imposition

1. **The Interim Committee's preparatory drafts of procedures and operational documents for adoption by the Governing Body at their first meeting alters the course of the ITPGR away from its original intent because the Interim Committee encroaches upon the responsibilities of the Governing Body and it is not composed solely of the Contracting Parties, as the Governing Body is.**

Beyond the treaty itself are its implementing mechanisms and procedures. An

analysis of the ITPGR necessarily covers its implementation so as to determine whether interpretations and application of the ITPGR therein are true to the spirit of the original language in the treaty itself. Monitoring the development of the implementation of the ITPGR thus, reveals that its twin aims of facilitated access and equitable benefits sharing have been treated partially. The twin of facilitated access has developed well, whilst the twin of benefit sharing has remained stunted in its growth.[80]

The root of this bias lies at the foundation upon which the procedure and implementation of the ITPGR is being built. While the Governing Body has been charged with adopting procedures for compliance, financial rules, the Standard Material Transfer Agreement, and procedural rules, it is the Interim Committee that is actually doing the work and compiling influential research prior to the first session of the Governing Body. This sounds helpful and practical. However, comparing the composition of the Interim Committee to that of the Governing Body as it would currently stand, reveals that influences outside of the Contracting Parties to the treaty are shaping its policies.

These influences reflect the age old divergence in worldviews between the old International Undertaking's "common heritage" and the CBD's national sovereignty and equitable benefits sharing approach. The non-contracting parties are pushing implementation of the ITPGR back towards the "common heritage" approach and are neglecting to adequately apply the principles of the CBD through their preparatory policy work in the Interim Committee. Fortunately, the policies are as yet to be adopted by the Governing Body in June and some time for challenge still exists.

2. The Vienna Convention

Although the Vienna Convention on the Law of Treaties supports interpretation on the basis of both the preparatory work of the treaty, and subsequent agreements and practices,[81] the overarching principle remains that a treaty must still be interpreted in good faith in accordance with the plain meaning of the terms and in light of its objectives.[82] The US and other non-parties in the Interim Committee who have meddled with the preparatory work of the implementation of the ITPGR, which inherently involves interpretation of the treaty, may point to Article 31(2)(b) which allows that an instrument may be made by "one or more parties in connection with the conclusion of the treaty" as long as it is ultimately accepted by the other parties as related to the treaty.[83] The U.S. would argue that the SMTA, which they have helped draft as part of the Interim Committee, was also drafted alongside them by parties to the treaty, and does not explicitly preclude non-parties from involvement, as long as there is at least one party involved, and the ultimate instrument is accepted by all parties. The U.S. would maintain that if all parties accept the SMTA at the next Governing Body meeting in June, then the process was legitimate according to Article 31(2)(b) of the Vienna Convention.

However, this argument fails in light of Article 31.1, which still demands that the

treaty shall be interpreted in good faith, based upon the plain meaning of the treaty and according to its objectives.[84] Prior to the Governing Body's first meeting in June, many objectives of the ITPGR have been ignored or neglected during the preparatory meetings, and in the drafting of the SMTA, in which the U.S. and other non-parties participated, as demonstrated below. Therefore, the SMTA ultimately violates the Vienna Convention on the Law of Treaties even if the Governing Body, composed of parties, subsequently adopts the SMTAs in June, because they were not drafted based on interpretations made in good faith in accordance with the objectives of the ITPGR.

3. The composition of the Interim Committee differs from the Governing Body as it would currently stand, and is the source of the interpretation and application of the ITPGR diverging away from the original intent to harmonize with the CBD.

a. General Composition

Why is the Interim Committee taking on the functions of the Governing Body? The ITPGR has been in force for over two years, since June 29th, 2004, and the Governing Body has only been scheduled to meet for its first meeting in June 12 – 16 of 2006.[85] In the past year, instead of the Governing Body at work, the Commission on Genetic Resources for Food and Agriculture [CGRFA] composed the Interim Committee which took over many of the functions of the Governing Body by authoring its procedures under the guise of "advance preparation." A look at the composition of the Interim Committee and its work reveal potential hidden agendas.

The CGRFA, which composes the Interim Committee, is a division of the FAO, and thus represents primarily their interests. The FAO's interests are more heavily influenced by the International Undertaking "common heritage" line of thinking because they were established prior to the CBD. Hence, with such institutional memory and momentum, the CGFRA will tend to regress towards the old worldview that free access will ensure sustainable use, as opposed to equitable benefits sharing under the CBD. Additionally, since they are not equipped with direct experience with the CBD, the CGFRA, as the Interim Committee, will inevitably favor their own paradigm as they formulate the preliminary procedures and standardized Material Transfer Agreements, measures the ITPGR charges the Governing Body to adopt at the first meeting under Articles 12.4, 19.3 and 19.7.[86]

Comparing the composition of the Interim Committee to that of the Governing Body reveals the political drivers behind the developments in implementation. According to Article 19.1 of the ITPGR, the Governing Body shall be composed of one delegate per country or institution of the contracting parties.[87] Contracting parties are those that have ratified the ITPGR. In contrast, the Interim Committee is composed of anyone and everyone with an interest in the outcome of the ITPGR, whether they agreed with the original benefits sharing provisions and other elements of CBD harmonization or not. This is evidenced in Paragraph 7 of Resolution 3/2001 of the FAO Conference when it invites any member of the FAO to participate in the Interim Committee, (or if not a

member of the FAO, than any State that is a member of the UN, and any of its specialized agencies, or the International Atomic Energy Agency).[88] In essence, by this provision, the FAO permits those parties who have not ratified the ITPGR in its pure form, to be actively involved in the construction of the operational mechanisms that will most likely provide the basis of implementing the ITPGR. Thus, those shaping the polices through the rules for implementing the ITPGR need not have ratified the original treaty and may influence the outcome of the Interim Committee's meetings to meet their own agenda, and not that of the ITPGR and the original Contracting Parties who readily ratified.

Looking at the voting powers granted through these procedures further points to a reason the Interim Committee may have been established. At the first meeting of the CGRFA acting as the Interim Committee, they established their rules of procedure.[89] Following Resolution 3/2001's invitation, Rule 1 states that membership is open to all members of the FAO, and non-member States of the UN, its agencies or the International Atomic Energy Agency, and, in particular, all members of the CGRFA, with each member having one vote.[90] Thus, non-contracting parties of the ITPGR, as part of the open Interim Committee, are given the power to vote and accordingly influence the outcome of the MTA, the rules of procedure and compliance and so on. In contrast, if these meetings preparing for the ITPGR's entry into force had been comprised of the Governing Body, the States who did not ratify would only be observers, unable to influence the outcome of the operational documents.

b. The Expert Group, The Contact Group and Advisors

At the second meeting of the CGRFA acting as the Interim Committee for the ITPGR, the Interim Committee reviewed the recommendations of the Expert Group for the terms of the Material Transfer Agreement. The Interim Committee at the first meeting drew up a list of questions on the MTA for the Experts to analyze. According to Paragraph 7 of meeting report, the Chair recalled that the experts were appointed in their capacity through the regions.[91] Paragraph 3 reiterates that Governments had appointed Experts on a regional basis.[92] They also expressed gratitude to the US for having donated $50,000 to make the meeting possible.[93] The list of experts is identified in Annex 1, and includes one delegate from the U.S. as an Expert, and several US delegates as Advisors, in spite of the U.S.'s non-party status. Perhaps the fact that they fund these meetings stymies any potential challenges by parties who are developing countries and cannot otherwise afford to support the ITPGR.[94]

Advisors are nominated by the chairs of the FAO Regional Groups.[95] There are *six* advisors from various US agencies and institutions.[96] Amongst these are several representatives from the USDA, a representative from the Department of State, a representative from the US Patents and Trademark Office, and most disturbing, the President/CEO of the American Seed Trade Association.[97] This is not surprising given that industry in general played a strong role in the ITPGR negotiations, particularly through the International Association of Plant Breeders.[98] It is interesting to note, at this point, that the USA and Australia are the only two countries whose appointed experts

include industrial representatives.[99] Most countries provide agency and other governmental representatives, and some provide professors.[100]

If this ITPGR purports to be such a landmark for Farmer's Rights, as evidenced in their preamble and Article on Farmer's Rights, then why is this expert group not comprised of advisors on Farmer's Rights? The experts do involve representatives from Africa, China, Malaysia, Brazil and other developing nations, some (dubiously) funded by the European Commission to permit their presence, however, there should be more representation of farmers right's advocates to counterbalance the presence of government agencies and some industry. The list of countries represented through the FAO Regional Group appointments of experts and advisors is included in Table 2 below.

Table 2: List of Countries Participating as FAO Regional Group Expert and Advisor Appointees to the First Meeting of the Expert Group on the Terms of the Standard Material Transfer Agreement

REGION:	Africa	Asia	Europe	Latin America & the Caribbean	Near East	North America	South West Pacific
EXPERTS:	Burkina Faso	China	France	Brazil	Iran	Canada	Australia
	Ethiopia	Japan	Germany	Colombia	Kuwait	USA	
	Morocco	Malaysia	Norway	Costa Rica	Libya		
	Zambia		Switzerland	Uruguay			
ADVISORS:	Angola	Indonesia	France	Argentina	Iran	Canada	Australia
	Cameroon	Japan	Netherlands	Brazil	Jordan	USA	
	South Africa	Pakistan	Poland	Chile			
		Thailand	Switzerland	Cuba			
				Ecuador			
				Paraguay			

c. CBD Involvement

Organizations were also invited to the first meeting of the Contact Group as recommended by the Expert Group as recently as November of 2004.[101] These invitees included the CGIAR, WIPO and UPOV.[102] If the goal of the ITPGR as stated in its objective, is to promote sustainable use of PGR in harmony with the CBD, and such objective shall be achieved according to Article 1.2 of the ITPGR by closely linking the FAO to the CBD,[103] then why is the CBD not present at this meeting which considers the contents of the SMTA, that which shapes the very benefit-sharing mechanisms over which the CBD has greater expertise?

The SMTA will also be critical in domestic lawsuits over compliance with their terms, in the jurisdiction where indigenous communities may have recourse as provided for by Article 12.5, (if, in June, the Governing Body refuses to adopt the Contact Group's recommendations for international arbitration and returns to the ITPGR's original

intentions, as mentioned supra). If the CBD is not involved in the development of the terms of the SMTA, then this shortchanges harmonization with the CBD. Granted, the CGFRA is charged to act as coordinating agent between the FAO and the CBD, so one may assume that they are represented, but the CGFRA is a committee of the FAO, and hence liable to bias towards the FAO goals.[104]

In addition, Paragraphs 12 and 13 of Resolution 3/2001 do request and invite the CGRFA to establish cooperation with the CBD and vice versa.[105] However, based on my analysis of the treaty and its current development, it is patent that the CBD has not been able to do such a good job to assert the original purpose of the ITPGR to harmonize with the CBD. The fact that they were not present in the initial meetings as per the list of attendees mentioned supra demonstrates a certain degree of negligence, ignorance, or disregard. Fortunately, they were involved in the latest meetings.[106]

Furthermore, under Article 19.3(g), the Governing Body is charged to establish cooperation with other international organizations, "including in particular the Conference of the Parties to the Convention on Biological Diversity, on matters covered by this Treaty, including their participation in the funding strategy."[107] Since 19.3(f) also charges the Governing Body to establish a Trust fund for the purposes of collecting the benefits that accrue under the facilitated access to the Multilateral System, the SMTA actually should delineate this process to the parties for this part of the funding strategy.[108] Under these funding terms of the ITPGR, the Governing Body is therefore authorized to develop the SMTA since it will specify the terms of the facilitated access/equitable benefit sharing aspect of funding and hence constitute part of the funding strategy of the ITPGR. This is in addition to its charge to adopt the SMTA under Article 12.4 mentioned supra.[109]

However, later the problem of lack of CBD involvement was remedied with the Contact group, which was established after the Expert Group convened, to complete the SMTA based on the Expert Group's recommendations.[110] Here, at last, for the 2005 meeting, the Contact Group explicitly stated that "[t]he CBD, WIPO and UPOV will be invited to send one representative each, to provide technical assistance at the request of the Contact Group."[111] Nonetheless, given the dubious beginnings of overlooking the CBD, it is necessary to continue to monitor these developments.

4. There is still time to act.

The authority for the Interim Committee is provided for in Conference Resolution 3/2001 of the FAO Conference.[112] It adopts the ITPGR and provides for the "Interim Arrangements for its Implementation."[113] Paragraph 6 of the Resolution provides the Interim Committee the authority to begin the implementation of the ITPGR by stating that the Conference "[d]ecides that the Commission on Genetic Resources for Food and Agriculture shall act as the Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture."[114]

The CGRFA, acting as Interim Committee, is charged with preparing various operational documents for "consideration at the first Session of the Governing Body."[115] These include draft rules of procedure, draft financial rules, a proposal for a Budget, a

draft Standard Material Transfer Agreement, proposals for compliance procedures, draft agreements between the International Agricultural Research Centres (IARC) and the Governing Body after consultation with the IARCs, and "other such functions…for the effective implementation of the [ITPGR] upon its entry into force."[116] These are all critical to the effective execution of the ITPGR.

Of particular import, the Standard Material Transfer Agreement is the operational tool of the ITPGR. It is the cornerstone of the multilateral system and should ensure that the twin aims of the multilateral system are met, those of facilitated access and benefit sharing. It, especially, must withstand the outside influences of the Interim Committee encroaching upon the Contracting Parties' authority as the Governing Body of the ITPGR. Although the Governing Body ultimately has the power to adopt or decline the draft proposals, the actual work in creating these mechanisms is being done by *all* members of the CGRFA, not solely the contracting parties of the ITPGR, as would compose the Governing Body. In fact, the Conference in Resolution 3/2001 invites the IARCs themselves, as well as "other relevant international organizations and treaty bodies" to assist the Interim Committee.[117] But the Governing Body has not yet even materialized.

These behind the scenes influences have the potential to steer these rules of procedure, the standard MTAs, et al., away from the true spirit of the ITPGR because parties who have not ratified the original ITPGR are involved in the creation of critical implementation policies and operational documents. It remains to be seen if the Governing Body will actually adopt these drafts when they first meet in June, or whether they will considerably alter them to remain true to the intent of the ITPGR. It is likely that they will, given that in April, in Alnarp, Sweden, the Contact Group advised the Governing Body to review and adopt its SMTA in its most recent meeting.[118] However, Paragraph 14(f) in the report of that same meeting also advises that at their second or third meeting, the Governing Body review the SMTA with a view to revision based on experience.[119] Perhaps grassroots groups such as Gene Campaign and the Center for World Indigenous Studies may monitor the use of the SMTA if it is adopted, and then challenge the departure from the original goal of harmonizing the International Undertaking with the CBD, so that the SMTA may be revised to better harmonize with the ITPGR at that time, if not in June.[120]

5. The responsibilities charged to the Governing Body by the ITPGR.

In further clarifying this analysis, it is important to look to the ITPGR to see what it itself charges the Governing Body to do. This way, one can more clearly see that the Interim Committee co-opted these functions, and understand their implications. Next, one must look to the driving participants at these meetings, as well as the funders. Finally, one can follow the developments over time by comparing drafts in succession in order to elucidate the political directions and influences behind the scenes. I do this with the most recent project of the Interim Committee: the drafting of the Standard Material Transfer Agreement. As a long term strategy, by understanding exactly how the political maneuvering is accomplished, one can better prevent it in the future by creating strategies

against such tactics early on. In the short term, one can also use such knowledge to find the language of the documents and treaties themselves to steer the developments back to the true spirit of the ITPGR.

The following table contains some of the relevant Governing Body's functions as delineated in the ITPGR, which have either been developed by the Interim Committee in preparation for the first meeting of the Governing Body as authorized by Resolution 3/2001 or there is some potential that they may be co-opted:

Table 3: Governing Body Functions Co-opted by the Interim Committee

Article in ITPGR	Correlating Provision in Resolution 3/2001	Function Delegated to the Governing Body - Resolution 3/2001 charged the Interim Committee To Prepare
11.4	None	Within 2 years of entry into force, assess progress of including all PGRs into the Multilateral System. Following, the Governing Body shall decide whether to continue to allow access to people who have not included their Annex 1 PGRs in the Multilateral System, or take other measures as appropriate.
12.3(h)	None	Where no national laws govern access to *in situ* collections, may set such standards.
12.4	8(c)	Adopt the standard Material Transfer Agreement.
13.2(d)(ii)	8(b), generally, to prepare draft financial rules	Adopt means of payment of commercial benefit sharing into Trust fund. This includes the creation of various levels of payment for different categories of users, review of these levels, and within five years, review whether to require payment of recipients who provide unrestricted access for research and breeding.
13.2(d)(iii)	*Id.*	Determine the means of payment into the Art. 19.3(f) trust fund
13.4	None	"consider relevant policy and criteria for specific assistance under the agreed funding strategy established under Article 18 for the conservation of plant genetic resources for food and agriculture in developing countries, and countries with economies in transition whose contribution to the diversity of plant genetic resources for food and agriculture in the Multilateral System is significant and/or which have special needs."
15.1	8(e), to consult IARCs in preparing draft agreements	Sign agreements with IARC relating to their *ex situ* collections.
15.5	*Id.*	Sign agreements with other international institutions.
19.1	None.	The Governing Body is composed of all contracting parties.
19.3 (a)	8(b),(c), and (d)	Direct and guide to monitor and adopt recommendations to implement treaty and MS.
19.3 (m)	12	Apprise CBD and other international bodies of developments as appropriate.
19.3 (n)	8(c), (e), 9	Approve the terms of agreement with the IARCs and other international bodies. Review and amend the MTAs.
21	8(d)	At the first meeting: approve procedures to promote compliance and address non-compliance. Includes

		monitoring, offering advice or assistance, including legal, when needed in particular to developing countries.

One could claim that it is necessary to deliberate on all of these functions within the Interim Committee because they could all reasonably fall under the umbrella clause 8(f) of Resolution 3/2001 charging the interim committee to prepare "other such functions…for the effective implementation" prior to the first session of the Governing Body.[121] After all, preparation is necessary. However, after a certain point, does preparation become meddling? If one looks closely to the duties charged to the Governing Body, the following questions and points come to mind.

Article 11.4 charges the Governing Body to review the progress with respect to access to all PGRs within two years of the Treaty's entering into force.[122] The ITPGR has already entered into force two years ago and the Governing Body still does not exist. Finally, on June 12, 2006, the Governing Body will convene at last[123] to consider the recommendations of the Interim Committee, who have altered the nature of the treaty beyond recognition through their continuing preparations. However, given the last two years of preparatory work involving non-parties such as the US and other G8 nations, an aggravating question arises. Do these non-parties want to be a part of the preparatory deliberations within the structure of the Interim Committee to influence the outcome in their favor, that is, to ensure greater access overall without providing access to their own PGRs within their *ex situ* collections?

Moving on through the rest of the ITPGR, Article 12.3(h) permits the Governing Body to set standards over *in situ* collections where no such national laws exist.[124] Since *in situ* locations are where indigenous communities are most vulnerable, in their native homelands, and where bio-piracy may occur in the field, could leaving the determination of such standards to the Interim Committee be unwise? Perhaps it is better to involve the CBD to set such standards since they have greater expertise in this area. This may be something to monitor as the Governing Body begins considering and/or adopting the Interim Committee's recommendations.

On the other hand, this may also be an impetus to nation states to create laws regulating access to their PGRs, which are deemed a higher authority than those created by the Governing Body. Nations wishing to protect access to their resources *in situ*, where the indigenous and their knowledge are often located, will be wise to speedily create their own protective legal regime in the event that the Governing Body's protective measures are not adequate.

The next Article on the list, Article 12.4, charges the Governing Body to adopt the standard Material Transfer Agreement.[125] The wording is merely "to adopt" and not "to draft," which is a flaw in the wording of the treaty.[126] Such wording allows non-contracting parties to influence the substantive terms and provisions of the SMTA in their favor by generating the SMTA in the Interim Committee to fill the lacuna of authority granted to the Governing Body to do the same. In future treaties, the wording should be such that outsiders may not thus influence the interpretation of the Treaty through a transitional structure such as the Interim Committee.

The same issue with the wording of the treaty surfaces with respect to promoting measures for compliance, involving Article 21 of the ITPGR.[127] The Interim Committee has already deliberated these for the Governing Body to approve at the first meeting. Where common sense dictates that the proper procedure would be to have the signatories prepare these measures for compliance, anyone and everyone in the CGRFA has had a hand in creating these for the Governing Body. Perhaps this is again a flaw in the writing of the treaty. In order to prevent such structural treaty manipulations in the future, the wording should be greater than merely providing the power to "approve" regulations, but rather, to "draft" or "design" them as well. In this way, only those who were initially willing signatories in good faith can deliberate amongst themselves what operational mechanisms they find suitable for their purposes.

Article 13.2(d)(ii) directs the Governing Body to adopt a multileveled means of payment into a trust fund for commercial benefit sharing.[128] Meanwhile, the Interim Committee has already decided to forgo differentiation with respect to small farmers when it is clearly stated that the Governing Body may make such decisions.[129] If the Governing Body is not meticulous in its review of the Interim Committee's preparations, and they merely adopt what they have been handed, such oversight will pass unnoticed. Likewise, Article 13.2(d)(iii) designates to the Governing Body the duty to "determine the means of payment into the Art. 19.3(f) trust fund," not to this fictitious Interim Committee's.[130] The Governing Body must be called upon to critically assess these preparations before adoption.

Moving on through the ITPGR, Article 19 more specifically lists the duties of the Governing Body. Of these, Articles 19.3(a) and (n) most closely reveal that the Interim Committee is actually over-stepping its bounds into the territory of the Governing Body. Article 19.3(a) states that the Governing Body shall:

> …provide policy direction and guidance to monitor, and adopt such recommendations as necessary for the implementation of this Treaty and, in particular, for the operation of the Multilateral System.[131]

This imputes upon the Governing Body the onus to be the leading designer of the mechanisms, which make the Multilateral System operative, such as the Material Transfer Agreement. It is therefore the Governing Body that should be preparing the first draft of the Standard Material Transfer Agreement, and not the whole of the CGFRA operating as the Interim Committee. As mentioned supra, the Governing Body is composed solely of the Contracting Parties as per Article 19.1,[132] who signed the treaty in good faith, with a ready will to adhere to its honorable goals. If the original Contracting Parties composed the Interim Committee, as opposed to everyone and anyone with their own agenda in the FAO and other agencies, the Standard Material Transfer Agreement might look radically different than the one under development.

Fortunately, Article 19.3(n) allows the Governing Body to review and amend the SMTAs.[133] This means that even if a noncompliant MTA is adopted at the behest of these outside influences, the Governing Body at its first meeting in June, and subsequent

meetings, may challenge and amend the SMTA. However, this offers false hope because all decisions must be made by consensus as delineated in Articles 19.2 and 22.3.[134] As more states ratify the ITPGR because of their progress in the Interim Committee, and become Contracting Parties and hence members of the Governing Body, their agenda may obstruct a future change to the initial documents generated by all members of the Interim Committee/CGRFA. To be effective, the challenges must begin at the next round of deliberations over the SMTA in June, urging the Governing Body not to blindly adopt the Contract Group's recommendations as part of the Interim Committee preparatory proceedings.

6. The Contact Group and Expert Group

The scope of the work for the Contact Group, as defined by the Interim Committee, demonstrates their manipulation of treaty interpretation towards their end. Although the ITPGR in Article 19.3(a) quoted supra states that the Governing Body shall provide policy guidance as to treaty implementation, especially the Multilateral System, which by necessity includes policy guidance relating to the Material Transfer Agreement, the Interim Committee only cites to Article 12.4 of the ITPGR to substantiate the Contact Group's authority, which limits the role of the Governing Body regarding the MTA to that of merely adopting the draft provided for by the Contact Group.[135] The scope of the Contact Group is quoted as follows:

- To develop a draft of the Standard Material Transfer Agreement (MTA) referred to in Article 12.4 of the International Treaty, on the basis of the first draft prepared and described below, for submission to the first session of the Governing Body, for its consideration with a view to adoption, taking into account the report of the Expert Group on the Terms of the Standard MTA, with the guidance given in the report of the Second Meeting of the Interim Committee, as well as inputs from regional groups
- The whole process and the draft will be consistent with the International Treaty[136]

While the scope itself maintains that the process and the draft be consistent with the ITPGR, the process itself does not follow Article 19.3(a)'s directive that the Governing Body shall provide the policy guidance with regard to the Multilateral System and treaty implementation in that the Governing Body does not even exist yet while the Interim Committee is taking its place by creating the policy of the Multilateral System through generating the terms of the MTA.

The Expert Group in turn recommended that "the Interim Committee establish a Contact Group to draft the elements of the Standard MTA, for consideration by the Governing Body[, and that t]he Interim Committee decide on the preparation of the first draft of elements of the Standard MTA, which would reflect all options and views identified by the Expert Group, taking into account any guidance from the Interim Committee."[137]

The Interim Committee was created when the treaty had not yet entered into force and should have disappeared when the treaty did enter into force. The Interim Committee, by itself, has no authority from the International Treaty on Plant Genetic

Resources. Nowhere does the Treaty mention an Interim Committee. Rather, the Conference requested such an Interim Committee meeting through Resolution 3/2001 to allow for interim arrangements, and to adopt its Rules of Procedure at its first session.[138] At this time, there were not yet 40 signatories to hold the treaty in force. Hence, it is understandable why they would have invited all members of the CGFRA and others who had not yet signed the treaty to participate in its interim arrangements. However, once the treaty had achieved the required number of signatories in June of 2004, the treaty entered into force, and therefore, as a matter of adhering to the spirit of the law, the interim arrangements should have only been conducted by the Contracting Parties as the Governing Body is to be composed solely of them. It was at this turning point that the Contracting Parties should have demanded a reassessment of the implementation procedures to permit only the contracting parties to continue the deliberations because the Governing Body has been charged by the ITPGR with the duties that the Interim Committee overstepped.

Notwithstanding the treaty's recent entry into force, the November 2004 comments, by governments on the formulation of compliance procedures, reveal that the US, a non-party at that time, may still have exerted influence, (even more so, perhaps, because it continued to fund the meetings). Here the US boldly claims that

> …[c]ompliance procedures and mechanisms should not include contractual enforcement of MTA. The Article 21 procedures and mechanisms focus on improving Parties' compliance with their international obligations under the IT-PGRFA, not an individual contract developed between two entities under the multilateral system. Indeed the Treaty separately provides for treatment of disputes arising under the MTA, see Article 12.5. Therefore the compliance mechanisms and procedures should not include enforcement matters under the MTA.[139]

One must question why the US would wish to postpone deliberations as to the Article 12.5 contractual enforcement mechanism. Are they the ones behind the disappearance of such considerations under the latest MTA?

7. The Developments of the Interim Committee and What They Reveal

The whole purpose of the Interim Committee's involvement in manipulating the interpretation of the Treaty, and in creating policies and an SMTA favorable to their own interests, is so that they may ratify the document and become part of the Governing Body. The US in particular reveals such motives when it stated at the recent SMTA deliberations in Tunisia that "[a]doption of an effective Standard Material Transfer Agreement would facilitate widespread ratification of the International Treaty."[140] This was stated by Mr. David Hegwood, Agricultural Minister Counselor at the United States Mission to the FAO, right after announcing that "his government was pleased to be able to [financially] support the meeting."[141] The sequence of his sentences underscores US motives behind funding such meetings. US intent to fund and accordingly influence the deliberations could not be more transparent. Otherwise, if they did not ratify the treaty and become

members of the decision making Governing Body, they would merely be permitted to be observers, as per Article 19.5 of the ITPGR.[142] Perhaps this is why the Interim Committee, comprised of all other parties who would otherwise be mere observers, are so intent on creating the documents which execute the ITPGR. In this way, after shaping implementation procedures and operational documents such as the SMTA to their preference, they may then approve ratification and become bonafide members of the Governing Body, no longer lurking in the interim shadows.

Changes in the draft of the Standard Material Transfer Agreement reveals the political influences behind these developments.

1. Recommendations, prepared by the Expert Body, from which the standard draft MTA was prepared by the Secretariat for the latest meeting of the Contact Group.

Looking at the Standard Material Transfer Agreement, one can assess whether the Contact Group is following the mandates of the ITPGR. As of the time of this writing, the Contact Group has just met. I analyze the draft as prepared by the Secretariat drawn from the recommendations of the Expert Group as provided for in the 2nd Meeting of the Interim Committee on the ITPGR. Then I analyze the updates as a result of the meeting last year in Tunisia, with an eye to revealing the political developments as well as whether or not they adequately adhere to the ITPGR. Finally, I comment on the developments of the SMTA of the most recent meeting of the Contact Group in Alnarp, Sweden last April.

Under Section 9.2 of the draft as prepared by the Secretariat,[143] one sees that the ITPGR is not followed. It provides two options for dispute settlement arising under the Agreement. The first is through conventional international law dispute mechanisms, negotiation, mediation and then arbitration. The second option allows for recourse through the national courts of the recipient country OR the provider of PGR. Analyzing which of these options best complies with the mandates of the ITPGR requires looking at Article 12.5:

> Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs.[144]

Given that Article 12.5 expressly states that contracting parties shall ensure recourse under their own legal systems should contractual disputes arise, it appears that Option 1 of the Secretariat's draft SMTA, advising international arbitration, may not even be a permissible choice as it does not provide normal access to the contracting parties' legal systems in their entirety. Article 12.5 signifies a departure from standard international law dispute settlement mechanisms and instead views each individual

Material Transfer Agreement as a contract drawn between the relevant parties, the recipient and the provider country, to be litigated as a contract under the legal system of those particular contracting parties. The fact that Article 12.5 uses the phrase "contractual disputes" denotes a departure from conventional international law dispute settlement. Option 1 should not be considered.

Article 12.5 also provides for recourse under "their" legal systems. This implies that both legal systems may be utilized. Therefore, Option 2's limit of recourse either to the provider *or* the recipient countries' national courts does not hold true to the ITPGR because both of their legal systems should be accessible to either under the language of Article 12.5. Usually, the complaining party chooses the forum subject to jurisdictional laws. Thus, it is questionable why the delineation between recipient and providing country should exist. Rather, the choice of forum should be framed as to whether to permit the complainant a choice of forum or not. This way, the designation would be neutral as to rift between the North/South or recipient/provider countries, because a providing country *or* a recipient country may choose recourse through their own national courts.

Under standard personal jurisdiction and evidentiary requirements, the forum is usually the place where the evidence is located, and where most of the parties and witnesses live so as to facilitate a speedy and efficient trial. The doctrine of *forum non conveniens* addresses this matter. If a recipient country were to be the chosen forum, it is likely favorable to the recipient party, because they would be using their own national courts. If the providing country's legal system were to be used, the same result would arise for the providing party.

The actual PGR material is located in the providing countries, which are often developing countries that are the beneficiaries of equitable benefit sharing. Because of this, should there be a dispute over the provisions of the Agreement with relation to the actual transfer, or the mechanisms of benefit sharing, it would naturally arise to use the legal systems of the providing countries, in their home country. This would also be a legal parallel to the call of Article 15.6 of the CBD to develop and carry out scientific research on PGR in the PGR providing country, as a form of technology transfer and equitable benefit sharing.[145] Thus, the more appropriate choice of national legal systems, when the provider country is the complaining party, should be the provider country following conventional forum choice analysis and in keeping with CBD principles and the ITPGR.

Nonetheless, the choice between forums should not even exist because the language of Article 12.5 allows access to both the contracting party's legal systems. As a result, they should follow the convention of allowing the plaintiff to choose their own forum. A choice should not exist between provider *or* recipient. Why they did not include the option of allowing either is a matter for further investigation. Perhaps it would be so as to clearly reject that option, and be left with Option 1, the soft law of international law, which would result in weak enforcement of benefit sharing, and would continue the disparity of bargaining power between the provider country, most likely a developing nation, and the recipient, most likely the developed world.

2. The Contact Group's first draft of the SMTA, Tunisia, July 2005.

It is in the introduction of the Report of the First Meeting of the Contact Group for the Drafting of the Standard Material Transfer Agreement that funding by the US and their intent to create interim preparations so as to facilitate ratification is pronounced, as described supra. Paragraph 6 also demonstrates that the Contact group/Interim Committee has forgotten the original intention of the ITPGR as it relates to harmonization with the CBD.[146] In this report, nowhere is anything mentioned about harmonizing with the CBD. It is all about PGR accessibility. Is it sheer ignorance behind the forgotten Nairobi Final Act and Resolution 7/93's response mentioned supra?

Some of the bias of the Interim Committee towards the FAO/International Undertaking worldview of PGR as the "common heritage of mankind" is revealed in the language used by meeting participants. When Dr Abdelaziz Mougou, General Director, President of the Agriculture Research and Education Institution at the Ministry of Agriculture and Water Resources, welcomed the Contact Group, he merely rehashed the FAO rhetoric as the goals of the ITPGR:

> The International Treaty, as part of FAO's wider policy platform, including the Special Programme for Food Security, contributed to the achievement of world food security. The Treaty's aim was the rational and sustainable management of plant genetic resources for food and agriculture, in order to enable the development of new varieties, as a response to environmental changes and pests and diseases.[147]

In reality, the treaty's precise aim, according to the language of the treaty itself, is stated in Article 1.1:

> The objectives of this Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.[148]

Although he goes on to emphasize the importance of developed countries' continued aid to developing countries so that they may sustainably manage PGR, the rationale nonetheless remains that of sustainable management, and not that of equitable benefits sharing on its own principle as part of harmonizing with the CBD. Why does this Tunisian official kowtow thus to the principle aims of developed countries, without giving equal weight to equitable benefits sharing by asserting the principles of social justice as maintained in the CBD? Fortunately, the draft SMTA itself mentions equitable benefits sharing in Article 1.1.b,[149] but is this merely lip service? The fact that the opening remarks so quickly gloss over equitable benefits sharing, reveals that the operating motives behind the meetings are those of the old International Undertaking, and not the ITPGR as harmonized with the CBD.

Fortunately, there is still time for organizations and individuals to act to counteract these forces. As per paragraph 13 of the Tunisia Report of the Contact Group, they have presented their proposals to the Governing Body for adoption and consideration in June 2006, the first meeting of the Governing Body. The Contact Group had requested that comments from countries in a region be made to the Regional Vice-Chairs of the Contact Group, copied to the Chairs of the FAO Regional Groups in Rome. These comments would have been taken into account in preparation for the next meeting, which was in Sweden last April.

3. Some of the changes and what they reveal.

Overall, Article 12.5 of the ITPGR, favoring the use of national legal systems, has been pushed aside in favor of the softer international law proceedings of dispute resolution. Paragraph 5.2 reveals non-compliance with the ITPGR.[150] It states that the Governing Body has the right to initiate dispute resolution proceedings as a third party beneficiary in the event of a breach of the MTA as per Article 9.2 of the MTA, ignoring Article 12.5 of the ITPGR. Article 12.5, as quoted supra, states that in the event of contractual disputes regarding the MTA, contracting parties shall ensure the opportunity for recourse under their own legal systems. Paragraph 5.2, by displacing such an opportunity in favor of dispute resolution proceedings over non-compliance with the MTA, is therefore not "consistent with the International Treaty"[151] as mandated in the Terms of Reference for the Contact Group.

As for adherence to the ITPGR's Article 12.3's listed requirements for the MTA, as listed supra in Table 1, the Tunisia draft SMTA incorporates most of those items into Paragraph 6 and Paragraph 7. Paragraph 7 contains those items considered rights and obligations of the provider, and italicized in the chart supra, while Paragraph 7 denotes the rights and obligations of the recipient as denoted in bold in Table 1.[152]

Most crucially, one can infer the political agenda of the Interim Committee by noting the changes from the Secretariat's draft of options for the SMTA[153] to that of the outcome at the Tunisia meeting. In the case of those recommendations from Article 12.3, the one item that was not listed in the Tunisia draft of the SMTA was the one that most closely embodied the CBD principles.[154] This is item h in Table 2.1 supra, where it is provided that access to *in situ* PGR shall be in accordance with national legislation. As mentioned supra, access to *in situ* PGR is often the actual situs of bio-piracy. The scope of that original provision appeared to be to allow national governments to protect their indigenous communities, located *in situ*, from exploitation. It also keeps with the CBD principle of national sovereignty over PGR. Taking away this provision seriously draws away from the ITPGR's potential to protect indigenous knowledge from bio-piracy.

Originally, item h was referred to in Art. 6.2 of the Secretariat's explanatory note to the initial draft, suggesting that because this implicated national law jurisdiction, one uniform standard clause for the MTA over such a matter would be impossible.[155] Thus, the Secretariat advised to leave the matter to the Governing Body to resolve in the future. Although this may be true in that domestic laws would vary considerably, it still is

possible to continue to state such a concept generally, so as to permit the parties then to determine their own ground rules and to keep this important concept highlighted. This concept links to national sovereignty over PGR, that of the CBD, thus the Secretariat should keep this issue highlighted within the MTA so as to stay true to the original CBD harmonization goals.

Further evidence in the changes to the preamble similarly demonstrates the Tunisia draft's departure from protection of indigenous knowledge through national sovereignty. The Secretariat's proposal, which was discussed and changed at the Tunisia meeting, actually contains that concept in item 1(d) of the Preamble, first and foremost establishing the intent of the ITPGR and the MTA:

> 1d. Under the Treaty, the Contracting Parties recognize the sovereign rights of States over their own plant genetic resources for food and agriculture, including that the authority to determine access to those resources rests with national governments and is subject to national legislation;[156]

Article 1(d) has been removed in its entirety from the Tunisia draft of the MTA and appears nowhere in the full text of this version of the SMTA. If the ITPGR was supposed to harmonize with the CBD, and the CBD signified a change towards national sovereignty over PGR, then how can the Contact Group permit this? It appears they have forgotten the original scope of the ITPGR as per the Nairobi Final Act, or are choosing to ignore it, thereby defying international law and treaties.

Similarly, the Tunisia SMTA gutted Item 1(c) of the Secretariat's preamble, which, as per Article 9.1 of the ITPGR, recognized and thanked farmers for their contributions to conserve and develop PGR.[157] Does this evoke a different mindset? Although these acknowledgements were just a patronizing token of gratitude, they did serve to maintain the momentum towards clearer farmer's rights by keeping the concept at the forefront. At least it demonstrates some degree of integrity on behalf of the CGRFA in that they are no longer feigning to harmonize with the CBD.

Articles 1(f), (g) and (h) of the Secretariat's proposed draft SMTA have also been gutted in the Tunisia draft SMTA.[158] These specify that Annex 1 and the *ex situ* IARC collections fall under the jurisdiction of the multilateral system, and also speak directly to the sharing of benefits, listing the four types as listed under Article 13.2 of the ITPGR.[159] The loss of these articles which promulgate coverage over *ex situ* collections as per Article 15.1(a) of the ITPGR is alarming in that collections held under IARCs in non-party countries may interpret this as permission to not include their collections in the multilateral system of access. In addition, the Tunisia SMTA, instead, replaces the explicit listing of benefits sharing in Article 1(h) of the Secretariat's version with Article 7.12, which merely *encourages* non-monetary benefits sharing.[160] This is permissible because the ITPGR only requires that the SMTA include commercial benefit sharing under Article 13.2(d)(ii) out of all the types of benefit sharing listed under Article 13.2.[161] However, it does demonstrate that the Contact Group is intent on meeting only the minimal requirements of the ITPGR's harmonization with the CBD through the SMTA.

Other changes that reveal political maneuvering involve two definitions. First, the definitions for "product" and "to incorporate" have grown more sophisticated. Besides providing options, which do not limit the amount of original PGR, both now have options which quantify the minimum original PGR genetic content of the product, with 25% as the proposed baseline.[162] This has implications when determining whether to transfer the benefits shared and other SMTA obligations for those producers who have based their products on PGR already obtained as second parties, by accessing the products of those who accessed the material through the Multilateral System. 25% may be too limited and difficult to determine in the case of this "second-hand" PGR access. To promote more benefit sharing that does ultimately assist the provider/developing nations as originally intended, it would be necessary for indigenous advocates to champion the option which proposes any amount of original PGR as the baseline. It also implicates benefit sharing because the definition for "commercialization" uses the term "product" as an element.[163] Determining commercialization will include determining whether the item is a product or not.

Another definition that bodes poorly for indigenous interests is the Contact Group's choice of the definition of "available without restriction."[164] The Secretariat's draft provided several options for what it means to make something freely available for research, including whether or not patents are applied for. For example, Option 2 under Article 7.16 of the Secretariat's draft defined this term as a product which "is not protected by any intellectual property rights," while Option 4 separates intellectual property from the issue and instead defines the term in the context of how the intellectual property proprietor shall make the product available.[165] Not surprisingly, the Contact Group chose the latter treatment of the term over those that restricted intellectual property rights.[166] Now developed nations may continue to patent their products based on indigenous farmer varieties at will, so long as they make the product freely available for further research and pay a percentage of the commercialization to the Article 19.f trust fund.[167]

Another troubling aspect is present within the intellectual property rights provisions. Paragraph 7.2 of the Tunisia draft SMTA provides that the recipient may not claim intellectual property over materials received in the form received such that would limit facilitated access.[168] Paragraph 7.3 goes on to permit the recipient to claim intellectual property rights if they adhere to domestic laws.[169] But most GMOs are created in such a way as to use the farmer's variety as a base, with minor changes. If the commercialization stemming from the product is taxed, with the funds going to the Governing Body Trust fund, when does the community of origin ever receive adequate benefits sharing from such commercialization? And whose domestic laws must be followed, the recipient's, the provider's or both? The MTA needs to further clarify this by applying the original intent of the ITPGR as harmonized with the CBD.

The Tunisia draft of the SMTA appears to clarify this in Paragraph 7.8 by stating that "[a]ny subsequent transfer of Material supplied is subjected to the rights of the country of origin of the plant genetic resources for food and agriculture."[170] However, this appears to refer to the transfer of material from one recipient to the next. Although

by holistically reading this article in conjunction with Paragraph 7.3, one can infer that the domestic laws of the country of origin with respect to intellectual property rights acquired over products derived from the PGR would apply, it is not clear enough. Indigenous communities and developing countries should advocate for a clarification of Paragraph 7.3 such that the country of origin's domestic laws apply. By doing so, they would help keep the MTA in line with Article 10.1 of the ITPGR, which, following CBD principles, recognizes sovereign rights of states over genetic resources, including the right to determine access subject to national legislation.[171]

Another inconsistency of the Tunisia draft of the SMTA with the ITPGR is evident in Paragraph 7.12, where the recipient country is only "encouraged to share non-monetary benefits."[172] How does this encouragement accord with Article 13.2 of the ITPGR, where it is affirmatively stated that the Contracting Parties "agree that benefits… *shall* [italics added] be shared fairly and equitably."[173] This provision in the MTA encouraging non-monetary benefits is substantially weaker than Article 13.2's affirmative agreement to so proceed.

In addition, it will also be necessary to monitor the development of Paragraph 7.14, where the Contact Group still needs to determine the exact percentage of the gross income of commercialization, which goes into the Article 19.3(f) trust fund established by the ITPGR.[174] The Secretariat's notes listed a multiplicity of the Expert Group's options for monetary benefit sharing.[175] In the end the Contact group opted for the simplest most practical one, the fixed percentage.[176] Indigenous groups should quantify this number beforehand and advocate the rationale behind the number. Previous suggestions have been based on the percentage of raw genetic material in the product.[177]

A development with the Tunisia round of the SMTA drafts is the proposal in Paragraph 8 to make the applicable law the UNIDROIT Principles of International Commercial Contract 2004.[178] This marks a point of contention between whether to apply Article 12.5's implication of using contract law in contracting parties' own legal systems over contractual disputes regarding the MTA or to use alternative dispute resolution. Judging from the US's prior comments on compliance mentioned supra, one may speculate their position is to continue with alternative dispute resolution, an inconsistent application of the treaty. But this is mere speculation.

Nonetheless, it appears that Article 12.5 is being dodged, especially since Paragraph 9 of the Tunisia draft SMTA only offers traditional models of dispute settlement.[179] I would advise to reinvigorate the Article 12.5 option, in keeping consistent with the treaty. However, in the event that dispute settlement is ultimately chosen, indigenous groups should advocate for the option that provides for the joint establishment of the Panel of Experts.

With regard to the options provided for signature or acceptance in Paragraph 11 of the Tunisia draft, again the point of contention surfaces as to whether the SMTA is a contract.[180] A signature would more clearly qualify the SMTA as a contract. Hence, I

would advise that signing should be required as per option 3 in keeping with Article 12.5 of the ITPGR.

Another concern with the Contact Group's Tunisia draft revolves around Paragraphs 5.2 and 5.3 and their concept of *locus standi* rights, which makes the Governing Body a third party beneficiary entitled "to monitor the execution of this Agreement and to initiate dispute resolution procedures."[181] Why should governing body initiate dispute resolution proceedings as a third party beneficiary? Article 12.5 of the ITPGR recognizes "that obligations arising under such MTAs rest exclusively with the parties to those MTAs."[182] This article conflicts with authorizing the Governing Body to initiate dispute resolution proceedings when MTA obligations are not met. Furthermore, nothing in Article 19, which spells out the functions of the Governing Body, can be directly interpreted to grant the Governing Body authority to initiate dispute settlement proceedings, and nothing grants them *locus standi* rights as a third party beneficiary either. This concept appears nowhere in the Secretariat's version.

Although one may argue that granting *locus standi* rights to the Governing Body may be a compliance mechanism, it remains suspect because of the language denoting the Governing Body as a third party beneficiary. The very use of the phrase "third party beneficiary"[183] reveals that benefit sharing is no longer applied to assist the communities of PGR origin, but rather, to share the benefits with the Governing Body of the ITPGR. Since there are no clear provisions specifying exactly how the communities of origin will receive those benefits through the Governing Body, it must be surmised that the funding, at least initially, will be solely used to facilitate access through the Multilateral System. As such, the ITPGR appears to be turning into a funding mechanism for the FAO, taking the International Undertaking principles and using the multilateral system to fund it.

This underscores that the ITPGR is slowly being watered down into just another instrument of the FAO, without due regard for CBD principles. It is up to indigenous communities and their advocates, whether States or NGOs, as well as the CBD, to monitor these developments, challenge the ITPGR's straying from its original purpose, and ensure that indigenous communities ultimately receive the benefits which they were promised via the CBD and the ITPGR harmonization therewith.

In addition, the Contact Group in Tunisia developed the system of payment for benefit sharing as outlined in Appendix 2.[184] Again, this infringes on the duties of the Governing Body, which is directed to establish an appropriate mechanism for receiving and using funds as per Article 19.3 of the ITPGR. This also demonstrates exactly how the CGRFA co-opts the CBD term, "benefit-sharing," to mean funding mechanism for the ITPGR. Although benefit sharing was supposed to be targeted towards countries of origin and indigenous communities as per the CBD, this Appendix nowhere refers to such beneficiaries, instead speaking only of payment to the Governing Body and the Article 19.3(f) Trust fund. It is likely that those developed nations using the standard form in the future will not interpret benefits sharing with the Governing Body in the context of sustainable development and CBD principles, but rather in the context of ensuring access to the material by funding those bodies who coordinate access, such as the Governing

Body. Indigenous communities should make an outcry against this perversion of the term "benefits-sharing" and this further evidence that the ITPGR veered off of the CBD side of harmonization.

4. The SMTA of the Contact Group Meeting in Sweden, April 2006

In the latest version of the SMTA, the opening remarks seemed more hopeful as Ms. Ingrid Petersson acknowledged that "genetic resources were important for food security, sustainable development, and the fulfillment of the Millennium Development Goals."[185] However, many of the same problems persist with regard to the loss of the CBD scope of the ITPGR implementation. Again, the Governing Body acts as a third party beneficiary, and in both options presented under Paragraph 4, they have to right to institute dispute resolution procedures.[186] And while the options for applicable law have broadened to include explicitly "general principles of the law of contract" and UNIDROIT, Paragraph 8.3 states that "[a]ny dispute arising from this Agreement" shall be resolved using standard international dispute settlement mechanisms, such as negotiation, mediation and arbitration.[187] While this seems to be a compromise to the issue of whether to choose national legal systems or international mechanisms, it still is questionable in light of the ITPGR's Article 12.4 posture to permit recourse through Contracting Party's systems of law because it limits their recourse to dispute settlement, and not their full systems of law, including the courts.

In addition, this latest version of the SMTA again provides for "benefit sharing" through a fixed percentage of the commercialization of material with any amount of PGR acquired through the Multilateral System to go to the Governing Body Article 19.3(f) Trust fund.[188] However, there still remains no guarantee that such funds will ultimately benefit the provider countries or indigenous communities from which the material was acquired rather than serve as a funding mechanism for the operation of the Governing Body to continue to monitor and facilitate access for OECD countries.[189] This would not be equitable benefit sharing, this would be benefit sharing for the benefit of the developed world's continued access.

And again, even these payments are voluntary when the material is freely provided to others for further research and breeding, which also demonstrates the facilitated access bias of the SMTA over the benefit sharing goals.[190] While it is likely that the Governing Body will adopt the SMTA, they do not have to, as they have authority to review it and consider amendments. If amendments are not successful at their first meeting scheduled in June in Spain, then there is the possibility to suggest revision at the second or third meeting of the Governing Body as recommended by the Contact Group in Paragraph 14(f).[191] It is strongly recommended that public interest groups monitor whether benefits actually ever flow to providers.

Compliance Analysis

One cannot discuss adequate means of protecting indigenous knowledge using international instruments such as the ITPGR without also addressing the overarching

issue of that voluntary nature of international law. Although most multilateral environmental agreements are legally binding, for enforcement, they rely on international dispute settlement mechanisms which remain weak. Thus, in the effort to protect indigenous knowledge, one must also call for stronger enforcement. There is potential to push for stronger enforcement by using national laws if the SMTAs are viewed as contracts between independent parties. The ITPGR must be interpreted accordingly to allow recourse in national laws for dispute over their delivery.

The report on International Environmental Governance by the Global Ministerial Environmental Forum also commented on the state of implementation of multilateral environmental agreements, claiming that monitoring is currently weak.[192] The same has been said of the ITPGR. Although draft procedures for compliance have already been submitted, the Governing Body must still adopt these at its first session, hence there is still time to ensure that there are adequate monitoring measures in place.

Conclusion

Although some weaknesses exist, there are points for positive use to protect indigenous knowledge. However, this inherently necessitates monitoring of the deliberations of the Interim Committee, and now the Governing Body as it meets in June. As evidenced above, the Interim Committee and its Contact Group have strayed from the true spirit of the ITPGR, that of harmonizing the International Undertaking with the CBD. This is in contravention of the CBD's Nairobi Final Act and the FAO's Resolution 7/93. Instead, the Interim Committee, because it is composed of members of the CGFRA and FAO with minimal CBD involvement, are regressing to their original state of affairs. They have co-opted the term benefits sharing and used its good name to justify a mere funding mechanism for facilitating access. They have also defied the ITPGR in merely encouraging benefits sharing in the MTAs. If this continues, parties outside the original good faith signatories will continue to influence the course of the implementation of the ITPGR away from its original intent, become signatories, and then run the show as part of the Governing Body. Before this occurs, it is necessary to challenge the Interim Committee's watering down the ITPGR through the Governing Body and return it to its true spirit.

APPENDIX

Table 4: Contracting Parties to the ITPGR: Countries who have deposited the necessary instrument of ratification, acceptance, approval or accession as of August 1, 2006.

Country	R/A/A/A
Algeria	13/12/2002
Angola	14/3/2006
Argentina	
Australia	12/12/2005
Austria	4/11/2005
Bangladesh	14/11/2003
Belgium	
Benin	24/2/2006
Bhutan	2/9/2003
Brazil	22/5/2006
Bulgaria	29/12/04
Burkina Faso	
Burundi	28/4/2006
Cambodia	11/6/2002
Cameroon	19/12/2005
Canada	10/6/2002
Cape Verde	
Central African Republic	4/8/2003
Chad	14/3/2006
Chile	
Colombia	
Congo, Republic of	14/9/2004
Cook Islands	2/12/2004
Costa Rica	
Côte d'Ivoire	25/6/2003
Cuba	16/9/2004
Cyprus	15/9/2003
Czech Republic	31/3/2004
Democratic People's Republic of Korea	16/7/2003
Democratic Republic of the Congo	5/6/2003
Djibouti	8/5/2006
Dominican Republic	
Denmark	31/3/2004
Ecuador	7/5/2004
Egypt	31/3/2004
El Salvador	9/7/2003
Eritrea	10/6/2002
Estonia	31/3/2004
Ethiopia	18/6/2003
European Community	31/3/2004
Finland	31/3/2004
France	11/7/2005
Gabon	
Ghana	28/10/2002
Germany	31/3/2004
Greece	31/3/2004
Guatemala	1/2/2006
Guinea	11/6/2002
Guinea-Bissau	1/2/2006
Haiti	
Honduras	14/1/2004
Hungary	4/3/2004
India	10/6/2002
Indonesia	10/3/2006
Iran, Islamic Republic of	28/4/2006

Ireland	31/3/2004
Italy	18/5/2004
Jamaica	14/3/2006
Jordan	30/5/2002
Kenya	27/5/2003
Kiribati	13/12/2005
Kuwait	2/9/2003
Lao	14/3/2006
Latvia	27/5/2004
Lebanon	6/5/2004
Lesotho	21/11/2005
Liberia	25/11/2005
Libyan Arab Jamahiriya	12/4/2005
Lithuania	21/6/2005
Luxembourg	31/3/2004
Madagascar	13/3/2006
Malawi	4/7/2002
Maldives	2/3/2006
Malaysia	5/5/2003
Mali	5/5/2005
Malta	
Marshall Islands	
Mauritania	11/2/2003
Mauritius	27/3/2003
Morocco	14/7/2006
Myanmar	4/12/2002
Namibia	7/10/2004
Netherlands	18/11/2005
Nicaragua	22/11/2002
Niger	27/10/2004
Nigeria	
Norway	3/8/2004
Oman	14/7/2004
Pakistan	2/9/2003
Panama	13/3/2006
Paraguay	3/1/2003
Peru	5/6/2003
Poland	7/2/2005
Portugal	7/11/2005
Romania	31/5/2005
Saint Lucia	16/7/2003

Samoa	9/3/2006
Sao Tome and Principe	7/4/2006
Saudi Arabia	17/10/2005
Senegal	
Serbia and Montenegro[1]	
Seychelles	30/05/2006
Sierra Leone	20/11/2002
Slovenia	11/1/2006
Spain	31/3/2004
Sudan	10/6/2002
Swaziland	
Sweden	31/3/2004
Switzerland	22/11/2004
Syrian Arab Republic	26/8/2003
Thailand	
The Former Yugoslav Republic of Macedonia	
Togo	
Trinidad and Tobago	27/10/2004
Tunisia	8/6/2004
Turkey	
United Arab Emirates	16/2/2004
United Kingdom	31/3/2004
United Republic of Tanzania	30/4/2004
United States of America	
Uganda	25/3/2003
Uruguay	1/3/2006
Venezuela	17/5/2005
Yemen	1/3/2006
Zambia	13/3/2006
Zimbabwe	5/7/2005

Endnotes

[1] Maser, Chris, *Ecological Diversity in Sustainable Development, The Vital and Forgotten Dimension*, p. 244, Lewis Publishers, Boca Raton, 1999.
[2] Vandana Shiva, *Monocultures of the Mind*, p. 10, Zed Books Ltd., London, 1993.
[3] See Mark Ritchie et al., "Intellectual Property Rights and Biodiversity: the Industrialization of Natural Resources and Traditional Knowledge," 11 St. John's J. Legal Comment 431, (1996) at 445.
[4] *The Biodiversity Rights of Developing Nations: A Perspective from India*, p. 8.
[5] *Id.*
[6] Developing Nations and the Agreement on Trade Related Aspects of Intellectual Property Rights, 1999 Colo. J. Int'l Envtl. L. & Pol'y 49, p. 4.
[7] *Id.*
[8] Trade-Related Aspects of Intellectual Property Rights and Biotechnology: European Aspects, 6 Sing. J. Int'l & Comp. L. 406, p. 4.
[9] Supra FN 6.
[10] *Id.* at FN 53.
[11] *Id.* at FN 54.
[12] *Id.* at FN 56.
[13] *Id.*
[14] *Id.* at FN 55.
[15] *Id.*
[16] *Id.*
[17] Intellectual Property Rights and Plant Variety Protection in South Africa: An International Perspective, 16 J. Envtl. L. 19, p. 7.
[18] H. David Cooper, "The International Treaty on Plant Genetic Resources for Food and Agriculture," 11 Rev. European Community & Int'l Envtl. L. 1, 15 (2002).
[19] David G. Victor, "The Regime Complex for Plant Genetic Resources: An Overview," 97 ASILPROC 29 (2003).
[20] Rose, Gregory, "International Law of Sustainable Agriculture in the 21st Century: The International Treaty on Plant Genetic Resources for Food and Agriculture," 15 Geo. Int'l Envtl. L. Rev. 583 (2003).
[21] Rose, Gregory, "International Regimes for the Conservation and Control of Plant Genetic Resources" in *International Law and the Conservation of Biological Diversity*, edited by Michael Bowman and Catherine Redgwell, p. 154, Kluwer Law International, London, 1996.
[22] Geoffrey Tansey, "Intellectual Property Rights, Food and Biodiversity," Harvard International Law Review 54 at 55, (2002).
[23] Safrin, Sabrina, "Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life," 98 Am. J. Int'l L. 641, 644 – 649 (Demonstrating that prior to the CBD's proclamation of national sovereignty over PGR, the International Undertaking, and its contemporary, the UPOV, were based on the notion that PGR were part of a public commons as the common heritage of mankind, with UPOV granting breeders rights. It was in 1992, with the entry of the CBD, that the regulation of PGR changed from that of an open system/public commons to that determined under national sovereignty.)
[24] I use the term majority nations, as opposed to developing world, to emphasize their position as the majority and to promote the concept that sustainable development must also occur in so called "developed" nations, by developing less consumptive lifestyles based on meaningful friendships and cultural pursuits.
[25] Supra FN 20.
[26] Two main principles under the CBD embodied in Article 8(j).
[27] UNEP/GCSS.VII/4 (14 November 2001) Global Ministerial Environment Forum Report on the Implementation of the Decisions Adopted at the Twenty-First Session of the Governing Council/Global Ministerial Environmental Forum.
[28] Rose, Gregory, International Law of Sustainable Agriculture in the 21st Century: The International Treaty on Plant Genetic Resources for Food and Agriculture, 15 Geo. Int'l Envtl. L. Rev. 583, at 612, (2003).

[29] Specific resolution number information taken from Conference Resolution 3/2001, Adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture and Interim Arrangements for its Implementation, at 1. Available at http://www.fao.org/ag/cgrfa/itpgr.htm, 7/29/05, available at ftp://ext-ftp.fao.org/ag/cgrfa/res/c3-01e.pdf.
[30] This also appeared initially in April of 1993 as Resolution CPGR 93/1, (Revision of the International Undertaking on Plant Genetic Resources), initially authored by the Commission on Plant Genetic Resources of the FAO. Glowka, Lyle et al., *A Guide to the Convention on Biological Diversity*, p. 79, IUCN, Switzerland, 1994.
[31] International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), available at http://www.fao.org/ag/cgrfa/itpgr.htm, July 2005.
[32] *Id.* at Article 1.2.
[33] *Id.* at Annex 1.
[34] Supra FN 20 at 614 – 615.
[35] Supra FN 31, at Article 9.3.
[36] Supra FN 20 at 624.
[37] Supra FN 20 at 626.
[38] Supra FN 20 at 627.
[39] Supra FN 31, at Article 12.5.
[40] Supra FN 20 at 629..
[41] http://www.fao.org/Legal/TREATIES/033s-e.htm, August 1, 2006.
[42] *Id.*
[43] http://www.fao.org/Legal/TREATIES/033s-e.htm on July 29, 2005. A signature does not make a state a contracting party to the ITPGR, only the deposit of the necessary instrument of ratification, acceptance, approval or accession does.
[44] Supra, FN 20 at 589.
[45] Resolution 3/2001, available at ftp://ext-ftp.fao.org/ag/cgrfa/res/c3-01e.pdf, July 29, 2005.
[46] *Id.*
[47] ftp://ext-ftp.fao.org/ag/cgrfa/mic1/m1repe.pdf on July 29, 2005.
[48] Infra FN 101.
[49] *Id.*
[50] Conference Resolution 3/2001 available at ftp://ext-ftp.fao.org/ag/cgrfa/res/c3-01e.pdf - Resolution 3/2001, on July 29, 2005.
[51] Bridges Trade BioRes, Vol. 6 No. 9, 19 May 2006.
[52] *Id.*
[53] UNEP/GCSS.VII/2, 27 December 2001.
[54] UNEP/GCSS.VII/6, paragraph 44.
[55] *Id.*
[56] Supra FN 20 at 609.
[57] Supra FN 31 at Article 11.5.
[58] Supra FN 31 at Article 15.
[59] Supra FN 31, at Article 15.1.
[60] Supra FN 31, at Article 15.3.
[61] Supra FN 20 at 616.
[62] Supra FN 31 at Article 13.3.
[63] Supra FN 31 at Article 19.3(f).
[64] Supra FN 31, at Article 13.4.
[65] The Interim Committee's Contact Group has met twice to discuss the provisions of the standardized Material Transfer Agreement. It would be advisable for a group like Gene Campaign to monitor whether the terms generated are adequately favorable to indigenous communities.
[66] Supra FN 51.
[67] Supra FN 31, at Article 13.2.
[68] Ujjwal Kumar, Gene Campaign, September, 2005.
[69] *Statement by Public Interest, Non-profit Civil Society Organizations to the 31st FAO Conference*, 3 November 2001 (http://www.iisd.ca/biodiv/iu.html) quoted by McGraw, Desiree M., "The Story of the

Biodiversity Convention: From Negotiation to Implementation", in *Governing Global Biodiversity*, edited by Phillipe G. Le Prestre, p. 28, Ashgate Publishing, Burlington, VT, 2002.
[70] Supra FN 20.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* .
[75] Supra FN 31, Article 13.2(d).
[76] Supra FN 31, Article 19.3(f).
[77] *Id.*
[78] Supra FN 31, Article 13.2(d)(ii).
[79] Supra FN 31, Article 13.2(d)(ii).
[80] Supra FN 20 at 631.
[81] Vienna Convention on the Law of Treaties, Article 31(2) and (3), and Article 32.
[82] *Id.*, Article 31(1).
[83] *Id.*, Article 31(2)(b).
[84] Supra FN 81.
[85] Supra FN 51.
[86] Supra FN 31, Articles 12.4, 19.3 and 19.7.
[87] Supra FN 31, Article 19.1.
[88] Supra FN 50.
[89] First Meeting of the Commission on Genetic Resources Acting as Interim Committee of the International Treaty on Plant Genetic Resources for Food and Agriculture, CGRFA/MIC-1/02/3.
[90] *Id.*
[91] CGRFA/IC/MTA-1/04/Rep, Report on the Outcome of the Expert Group on the Terms of the Standard Material Transfer Agreement, Paragraph 7.
[92] *Id.* at paragraph 3.
[93] *Id.*
[94] In the future, this sort of direct funding should be prohibited because it may lend itself to quid pro quo situations. Instead, there should exist an organization that collects money for intergovernmental organizations, who would be obliged to apply for funding through this neutral third party.
[95] Supra FN 91.
[96] *Id.*
[97] *Id.*
[98] Thomas, Urs P., "The CBD, the WTO, and the FAO: The Emergence of Phytogenetic Governance" in *Governing Global Biodiversity*, edited by Phillipe G. Le Prestre, p. 197, Ashgate Publishing, Burlington, VT, 2002.
[99] *Id.*
[100] *Id.*
[101] CGRFA/IC/MTA-1/04/Rep, Second Meeting of the CGRFA acting as the Interim Committee for the ITPGR-FA, Report on the Outcome of the Expert Group on the Terms of the Standard Material Transfer Agreement, November 2004, p. 23.
[102] *Id.*
[103] Supra FN 31, Article 1.2.
[104] CGRFA, www.fao.org/ag/cgrfa.
[105] Supra FN 50, Paragraphs 12 and 13.
[106] Infra, FN 146.
[107] Supra FN 31, Article 19.3(g).
[108] Supra FN 31, Article 19.3(f).
[109] Supra FN 31, Article 12.4.
[110] CGRFA/IC/CG-SMTA-1/05/Inf.1, Terms of Reference of the Contact Group, available at http://www.fao.org/ag/cgrfa.
[111] *Id.*
[112] Supra FN 50.

[113] *Id.*
[114] *Id.* at Paragraph 6.
[115] Supra FN 50.
[116] *Id.*
[117] *Id.*
[118] CGRFA/IC/CG-SMTA-2/06/REP, Paragraph 14(a), April 2006, available at http://www.fao.org/ag/cgrfa/cgmta2.htm.
[119] *Id.*, Paragraph 14(f).
[120] Supra FN 51.
[121] Supra FN 50, Paragraph 8(f).
[122] Supra FN 31, Article 11.4.
[123] Supra FN 51.
[124] Supra FN 31, Article 12.3(h).
[125] *Id.*, Article 12.4.
[126] *Id.*
[127] Supra FN 31, Article 21.
[128] Supra FN 31, Article 13.2(d)(ii).
[129] The ITPGR language exactly states: "The Governing Body may decide to establish different levels of payment for various categories of recipients who commercialize such products; it may also decide on the need to exempt from such payments small farmers in developing countries and in countries with economies in transition." *Id.*
[130] Supra FN 31, Article 13.2(d)(iii).
[131] Supra FN 31, Article 19.3(a).
[132] Supra FN 31, Article 19.1.
[133] Supra FN 31, Article 19.3(n).
[134] Supra FN 31, Article 19.2 and 22.3.
[135] Supra FN 31, Article 12.4.
[136] CGRFA/IC/CG-SMTA-1/05/Inf.1, Terms of Reference of the Contact Group.
[137] CGRFA/IC/MTA-1/04/Rep.
[138] CGRFA/MIC-1/02/REP, Report of the Commission on Genetic Resources for Food and Agriculture Acting as the Interim Committee for the International Treaty on Plant Genetic Resources for Food and Agriculture, First Meeting Rome, 9 – 11 October 2002.
[139] CGRFA/MIC-2/04/3, Compilation and Analysis of Government's Views on Compliance With the International Treaty on Plant Genetic Resources For Food and Agriculture, p. 28, November 2004.
[140] Paragraph 4, p.1, Report of the Contact Group for the Drafting of the Standard Material Transfer Agreement, July 18 – 22, 2005, CGRFA/IC/CG-SMTA-1/05/1 Rep, available at www.fao.org/ag/cgrfa/cgmta1.htm.
[141] *Id.*
[142] Supra FN 31, Article 19.5.
[143] CGRFA/IC/CG-SMTA-1/05/2, Article 9.2.
[144] Supra FN 31, Article 12.5.
[145] The Convention on Biological Diversity, Article 15.6, available at www.biodiv.org.
[146] Report of the First Meeting of the Contact Group for the Drafting of the Standard Material Transfer Agreement, CGRFA/IC/CG-SMTA-1/05/1 Rep, Paragraph 6, July 2005, available at http://www.fao.org/ag/cgrfa/cgmta1.htm.
[147] *Id.*
[148] Supra FN 31, Article 1.1.
[149] Supra FN 143, Appendix A, Article 1.b.
[150] Supra FN 143, Appendix A, Article 5.2.
[151] Supra, FN 136.
[152] Supra FN 146, Paragraphs 6 and 7.
[153] CGRFA/IC/CG-SMTA-1/05/2, First draft of the Standard Material Transfer Agreement prepared by the Secretariat.

[154] Explanatory Notes on the First Draft of the Standard Material Transfer Agreement Prepared by the Secretariat, CGRFA/IC/CG-SMTA-1/05/2 Add.1, Article 6.2, July 2005.
[155] *Id.*
[156] Supra FN 153, Paragraph 1(d).
[157] Supra FN 146.
[158] *Id.*
[159] Supra FN 146, Paragraphs 1(f), (g) and (h).
[160] Supra FN 146, Paragraph 7.12.
[161] Supra FN 31, Article 13.2.
[162] Supra FN 146, Paragraphs 3.1, pp. A2 – A3.
[163] *Id.*
[164] *Id.*
[165] Supra FN 153, Paragraph 7.6.
[166] Supra FN 146 Paragraph 3, p. A3.
[167] Supra FN 146, Paragraph 7.10.
[168] Supra FN 146, Paragraph 7.2.
[169] Supra FN 146, Paragraph 7.3.
[170] Supra FN 146, Paragraph 7.8.
[171] Supra FN 31. Article 10.1.
[172] Supra FN 146, Paragraph 7.12.
[173] Supra FN 31, Article 13.2.
[174] Supra FN 146, Paragraph 7.14.
[175] Supra FN 153.
[176] Supra FN 174.
[177] Dr. Suman Sahai, Executive Director of Gene Campaign, New Delhi, India, personal conversation, July 2005, www.genecampaign.org.
[178] Supra FN 146, Paragraph 8.
[179] Supra FN 146, Paragraph 9.
[180] Supra FN 146, Paragraph 11.
[181] Supra FN 146, Paragraph 5.
[182] Supra FN 31, Article 29.
[183] Supra FN 181.
[184] Supra FN 146, Appendix 2.
[185] Report of the Second Meeting of the Contact Group for the Drafting of the Standard Material Transfer Agreement, CGRFA/IC/CG-SMTA-2/06/REP, p. 1, Alnarp, Sweden, April 2006.
[186] *Id.*, paragraph 4.
[187] *Id.* paragraph 8.
[188] *Id.*, paragraph 6.
[189] *Id.*, paragraph 6.
[190] *Id.*, paragraph 6.8.
[191] *Id.*, Paragraph 14.
[192] UNEP/GCSS.VII/2, 27 December 2001, Global Ministerial Environment Forum International Environmental Governance, Paragraph 137.

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Environmental Injustice and the Ogoni and the Bakola-Bagyeli Pygmy Peoples

Experiences from Nigeria and Cameroon

By Richard S. Mbatu

ABSTRACT

More than two-thirds of the world's biological resources are within the territories of indigenous peoples yet indigenous territories are among the least protected areas of the world. Despite numerous international environmental laws and human rights laws, indigenous peoples and their homelands around the world continue to suffer environmental injustice from undertakers of development projects. This article discusses three issues surrounding indigenous peoples and their homelands in today's contemporary environmentalism: Indigeneity; Self-determination; and Property rights. Two case studies are used to illustrate the plight of indigenous peoples around the world: the struggle for political autonomy and environmental justice by the Ogoni peoples of Nigeria, and the fight for social welfare, economic stability, and environmental justice by the Bakola-BaGyeli Pigmies of Cameroon. In both cases, Oil companies and their activities are presented as a foe to these indigenous peoples and their homelands.

Indigenous peoples have a powerful relationship with the environment that goes beyond the limits of a confined area where perspectives of race, language, nature, and development converge. It is a relationship that encompasses the historical or colonial perception of indigenous peoples as having the "garden of Eden" relationship with nature. That is, indigenous people are seen as peoples living in primitive lands unaltered by significant human intervention. The image created by such a perception is that of wilderness and wild people. This stereotypic notion about

indigenous people is seen as the epicenter in debates over conservation and development policies. Although some advocacy organizations like survival International have embarked on public education campaigns highly critical of words like “primitive” and “savage”, these stereotypes are still present in much public discussion.

Even though it is argued in many instances that this colonial impression of indigenous peoples belittles them and misrepresents the true relationship between people and nature, the notion is used in many situations throughout the world, especially in Europe and North America as an effective tool against excessive modernization (Alcida 1998). It is no doubt, therefore, that indigenous peoples are using this assumption to rally support for their claims to resources, emphasizing their role as stewards of the environment. Richardson (2001) notes that stereotypes of indigenous peoples as “living in harmony with nature” have been used to create policies that narrowly confine indigenous peoples to particular places and lifestyles deemed to be environmentally sound (Richardson 2001). It seems logical therefore, to assert that indigenous peoples throughout the world are fighting for recognition because they are conscious of the fact that their true sense of belonging or identity is tied to their relationship with nature. Hence, the more they embrace “unchecked development” activities within their territories, the more they lose their identity. Three issues surround debates on indigenous peoples and the environment: Indigeneity, self-determination, and property rights.

The Objectives and Methodology

This paper presents an overview of these key issues, emphasizing the need for developers to see the interests of indigenous peoples and the environment as compatible with their own interests. To illustrate this observation, two case studies are used. In the first case, the internationally recognized struggle for political autonomy and environmental justice by the Ogoni peoples of Nigeria is revisited. In the second case, the struggle of the little known Bakola-BaGyeli Pigmies of Cameroon is used to highlight the need for social welfare, economic stability, and environmental justice for the indigenous peoples of the world. In both cases, Oil companies and their activities are presented as a foe to these indigenous peoples and their homelands. The Ogoni case is significant because it provides a positive example of the importance of an indigenous group’s “raison d’être” to its struggle for sustainable livelihoods, access to resources, etc. The Bakola-BaGyeli Pigmies case is vital in drawing contrast to the Ogoni case in terms of global recognition. Despite a common geographical location (gulf of Guinea) and a common enemy (oil companies) with the Ogoni, the Bakola-BaGyeli Pigmies’ struggle is almost unheard of by the international community. Why? I contend with Bob Clifford’s “marketing of rebellion” thesis that indigenous peoples must market themselves in order to preserve a way of life, in particular that which pertains to property rights and self-determination.

Indigeneity

The question of defining indigenous people has been challenging to both academics and policy makers for a long time. According to Alcida (1998), the concept of indigenous peoples is of colonial origin. The concept was first conceived by the European colonists as "natives", "Indians", "aboriginals", and "savages". These appellations often carry some stigma, which is a misrepresentation of who indigenous peoples really are. The United Nations, together with many human rights advocacy groups, have conducted campaigns to deconstruct this negative impression about indigenous peoples. Also, ethnobotanists and ethnobiologists like Darrell Posey in the Brazilian Amazon have done much to demonstrate that indigenous peoples are constantly changing their environment and increasing the biological diversity of their ecosystems. The efforts of these groups and individuals are directed towards empowerment of indigenous peoples with the hope that in the process, indigeneity will be redefined.

Despite numerous international laws on the rights of indigenous peoples in particular, and the rights of human beings in general (with some in existence for more than half a century), and despite examples of indigenous peoples defining and securing environmental justice in North America (LaDuke 2005) and in South America and Central Asia (shown by the International Environmental Network's (IEN) track record), much remains to be done to define and secure environmental justice for indigenous peoples around the world, particularly in Africa. Why have these international laws and individual efforts failed to adequately protect indigenous peoples of the world? Why is it difficult to define and secure environmental justice for the world's indigenous peoples? What is central to these questions is the issue of rights and justice for the indigenous peoples. Rights and justice in this context is determined by the degree of freedom and equity in the distribution of benefits and burdens. In most cases indigenous communities are robbed of their rights to participate in matters that concern them and are not given equitable share of benefits derived from resources in their homeland. Justice is not done when indigenous peoples are kept out of the limelight and not given the chance or opportunity to make meaningful contributions to the wellbeing of their communities.

Self-determination: Win-win or Win-lose Outcome?

In the early 1980s the concept of "self-determination" was put forward by a United Nation's working group on the problems of discrimination against indigenous populations (UN Doc. E/CN.4/Sub.2/l.566 1982). According to the report of this group, the international community can better define and understand indigenous peoples if the indigenous people themselves determine who they are. Following this UN study, it was agreed that indigenous peoples are culturally distinct groups traditionally regarded and self-defined as "descendants of the original inhabitants of areas which they share a strong spiritual and economic attachment" (Richardson 2001, 1). The granting of the right of self-determination to indigenous peoples has encountered serious problems, especially within nation-states. The struggle over this concept of self determination can be traced back to the late 1950s and early 1960s when colonizers found it difficult to grant independence to the colonized and still have to influence decisions they make in governing themselves. In the same way the nation-state finds it difficult to grant special rights to a segment of its population and still have to take control over issues directly affecting this segment of its population. What is common to these two scenarios is that the parties involved seemed to be overtaken by the "win-lose" situation and do not see self-determination as a "win-win" situation. Even though there has been a long history of contentions between indigenous

peoples and their ruling nation-states as outlined by Joyson Clay in Barbara Rose Johnston's 1994 edited volume, *Who Pays the Price?*, it is possible for nation-states to fully grant indigenous peoples the right of self-determination and still fulfill their responsibilities of maintaining environmental protection and ensuring sustainable development actions. This is so because, according to Cassese cited by Richardson, "only the entire population of an existing nation-state constitutes a people with a right of self-determination. Distinct populations within a nation-state merely have the rights to "internal" as against "external" self-determination without any right of secession" (Richardson 2001, 1).

The question is, how do nations "internalize" self-determination when the concept itself carries traits of independence, self control, self will, and right of choice? The answer to this question lies in the ability of both parties to work within the norms of international laws and treaties without having the feeling of being the "loser" or, in other words, being cheated or exploited by the other party. Such a negative feeling on the part of indigenous peoples can only be eradicated by empowering them and making them part of the system that is responsible for laws and treaties governing them. On the part of the nation-state, it needs to realize that national territorial integrity can not be compromised if it exercises control and justly governs with the powers bestowed on them by its people without favor.

Even though indigenous peoples are powerless and have little or no influence when it comes to modern nation-state building, state governments have to recognize the indispensable role indigenous peoples play in sustaining the environment. For example, according to a document by a UN sessional working group on the implementation of the outcomes of the Convention on Biological Diversity (CBD), many of the areas of highest biological diversity on the planet are inhabited by indigenous peoples (UNEP/CBD 1996). The document asserts that more than two-thirds of the world's biological resources are within the territories of indigenous peoples.

On this background, one can equate marginalization and inadequate protection of indigenous peoples and their homelands to destruction or lack of respect for the environment. States therefore have to work in close relation with indigenous peoples, recognizing their rights and spiritual tie to the environment as their reason for existence.

Property Rights and Environmental Management

One of the biggest sources of transformation for indigenous societies and their environment is the incursion of extractive industries and large-scale development projects on indigenous homelands. These extractive resource projects on indigenous lands are among the most controversial projects on the planet and have been the focus of numerous campaigns in the international community. Measures have been put in place (*Convention on Biodiversity, the Kari-Oca Declaration, the ILO Convention-169, the Ramsar Convention, the World Heritage Convention, the CITES Convention* etc.) to protect the Indigenous peoples and their environment, yet the assault on indigenous cultures continues unabated. Why has the international community been unable to stop this assault on indigenous cultures? Even though local, national, regional, and international laws call for environmental impact assessment (EIA) of projects, Indigenous communities seem not to benefit from this move. The lifestyle and the environment of the indigenous peoples are still affected even when EIAs precede development projects. Why? The reason is that too often projects are executed on the bases of false EIA reports. Even in situations

were EIAs are properly carried out, projects are executed without, or only partially considering outcomes of EIAs.

In cases where indigenous peoples are due compensation, they are often left in dispute and disappointment as they do not get the benefits they are promised. Even the little benefit they receive is unequally distributed. When outcomes of EIAs are not followed and when communities are not compensated for what they lose at the expense of development projects, then environmental justice is not done. These ties in with Osheronko's assertion that the cost and benefit of development schemes such as mining, oil and gas extraction, logging, and the building of dams and roads are often unequally distributed. He argues that indigenous groups have always endured a disproportionate share of the cost and benefit of development projects in their homelands (Osheronko 1995).

Most of the time, because they are not well empowered and informed, indigenous groups misuse their property rights. They turn to be very myopic when they negotiate deals with giant developers. In many cases indigenous peoples' struggle for recognition of ownership and involvement in development projects is for securing an equitable share of the benefits arising from the use of environmental resources and not as true stewards of the land (Rangan and Lane 2001). Indigenous peoples must be empowered and encouraged to put their stewardship of the environment ahead of the petit benefits offered them by developers of their land. Even though perceptions of indigenous peoples' impoverishment and underdevelopment are given as justification for "imposing" development projects on their homelands, such projects often do little more than exacerbate the symptoms of poverty that the so called "development" was supposed to treat. Even in situations where indigenous peoples are well informed of their rights, their own governments often quell any attempt to exercise these rights. It is this non-tolerant attitude of governments to indigenous peoples' rights on environment and development issues that spurs the desire for autonomy by some indigenous groups.

The cry for autonomy of unrepresented nations and peoples has echoed around the world. For some of these unrepresented nations and peoples, their struggle has won the hearts of many nations and groups around the world and has become a global cause. For others, their struggle has gone no farther than the bounds of their homeland. Why is this so? How do we account for the fact that the Dalai Lama's struggle for greater autonomy for the peoples of Tibet from the Chinese government has garnered international support while the struggle of a group like Southern Cameroon National Council (SCNC) for greater autonomy of the peoples of Southern Cameroons (Ambazonia) from the Republic of Cameroon has gone relatively unheard? To answer this question one needs to first understand the raison d'être of a group seeking autonomy. The struggle for political autonomy, environmental justice by the Ogoni peoples of Nigeria, and the fight for social welfare, economic stability, and environmental justice by the Bakola-BaGyeli Pigmies of Cameroon is what pervades the two case studies that follow.

Nigeria: The Ogoni Peoples Experience

Ogoniland covers an area of about 100 000 km², east of Port Harcourt in Rivers State of Nigeria. Ogoniland has an interesting geography dominated by its coastal plain features of terraces and gentle undulating slopes. The plain landscape is occasionally interrupted by deep valleys, in which gentle flowing rivers cascade their way into the Atlantic Ocean. Most of Ogoniland was once part of the tropical rain forest that stretches across central Africa. Today, the

forest is almost completely loss as most of it has been cleared to create farm land. The Ogoni are one of the many indigenous groups inhabiting the Niger River Delta of Nigeria. They came to this location some 500 years ago and settled in six kingdoms, namely: Babbe, Eleme, Gokana, Ken-Khna, Nyo-Khana, and Tai. Though settled in separate kingdoms, the peoples are culturally the same, hence their common identity, the Ogoni peoples.

Figure 1. Ogoniland in the Niger River Delta of Nigeria.

Land is the basic means of survival for the close to half a million Ogoni people. This arouses in them strong emotions and high sense of aesthetic quality. In this regard they see land (nature) as the source of life and do not think of themselves separate from the land (mother earth). They do not separate themselves from nature and from God. Man, nature, and God are one, hence the use of "Ogoniland" and "Ogoni people" are used interchangeably. It is therefore not a surprise that the plight of the Ogoni people has been the destruction of their homeland by industrial pollution caused by oil extraction. This plight began in the late 1950s when oil was first discovered in Ogoniland. While this discovery was and is a fortune to the self-centered, highly corrupt and tribalistic government of Nigeria, it has been the Ogoni's greatest misfortune. The establishment of Shell Oil Company in Ogoniland in 1958 has since led to a series of environmental problems in the Delta region as a whole and in Ogoniland in particular (Bob 2005). Among these problems are visible signs of air and water pollution, destruction of biodiversity, loss of fertile soil, degradation of farmland and damage to aquatic ecosystems. Water and air pollution has led to serious health issues in Ogoniland. In a 1996 interview with Dr. Owens Wiwa, one time medical practitional in Ogoniland, he noted that incidence of respiratory disease were higher in Ogoniland than in other parts of the country where he also practiced medicine (Multinational Monitor 1996). He also acknowledged that diseases such as

asthma, tuberculosis, bronchitis, and lung cancer were not uncommon among the indigenes of Ogoniland. Dr. Owens also pointed out that skin disease is a menace in the area.

This graphic health situation painted by Dr. Owen more than a decade ago has gotten wore. According to a 2005 Unrepresented Nations and Peoples Organization report, 87 oil spill sites have been identified in Ogoniland since 1996 (UNPO 2005). These oil spills are not unrelated to health and environmental problems that plague Ogoniland. Problems such as farmland degradation, damage of aquatic ecosystem, and poor forest foliage have been linked to chemicals contained in soot which is deposited on roofs of buildings and washed into the soil and rivers whenever it rains. Ground and water pollution also comes from gas flaring (75% of annual gas production), leakages from exposed pipe lines, oil spills, and dumping of oil waste.

These environmental problems have had tremendous impacts on the social, cultural, and economic way of life of the Ogoni peoples. Traditional sites, some of which contain ancestral groves, have been destroyed by pipe line tracks and oil spills. As a result, families can no longer pour libation to their ancestors and carry out other traditional rites. The artistic ability of wood carving and drum making of the Ogoni peoples that rely on the availability of specific wood type (iroko) has dwindled enormously, primarily due to loss of trees (wood) to make way for pipe lines. As a result, this artistic ability of the indigenous peoples of Ogoniland cannot be passed to younger generations.

The interdependent social way of life of the Ogoni peoples has been interrupted by the lavish life style of the refinery workers. Shell Company with its educated and highly skillful workforce has stratified the society. Educated workers live in well-furnished housing complexes, while a majority of people in the community live in dilapidated (as they did before oil workers arrived) houses and huts. This has created a social gap in the community, as the well-to-do oil workers do not interact with the less fortunate locals. This has led to tension between oil workers and the indigenous people as most of the oil workers are not from Ogoniland. The problem is further compounded by the exodus of indigenous sons and daughters of Ogoniland. Even though rural exodus was a problem in Ogoniland before the arrival of the oil company, their presence has exacerbated the problem. The few indigenes that are lucky to fine employment with the oil company live a better life than the rest of the peoples. This acts as a push factor to those who cannot find employment with the oil company. They are forced to migrate to urban centers in search of jobs. This rural urban migration breaks the social bond these sons and daughters of Ogoniland have with their families. Although oil accounts for about 90% of Nigeria's export earnings, the Ogoni peoples whose homeland sits on two-thirds of the oil fields and reserves are one of the most impoverished in Nigeria. The Ogoni peoples have never profited from oil export revenues and have instead suffered loses in their traditional economic activity, agriculture and fishing, due to water and soil pollution from acid rain and oil spills (UNPO 2005).

After suffering years of environmental injustice, ethnic discrimination, and economic exploitation by the Nigerian government and the oil giant Royal Dutch/Shell, the Ogoni people in 1990 found themselves on an old platform of struggle for political autonomy. The Ogoni Peoples' struggle for political autonomy began in the 1950s when Nigeria was preparing for independence from the British. As Nigeria was getting closer to having its independence, the Ogoni peoples and many other minority indigenous groups in the Niger delta feared suppression and domination by the major indigenous group, the Ibos. At independence, Nigeria was federated into three regions following the country's largest ethnic groups; the Housa-Fulani in the north

(29 percent), the Yurobas in the southwest (21 percent), and the Ibos in the southeast (18 percent). With this organization, the Ogoni peoples' concerns turned into reality. They found themselves under the control of the Ibos who dominate the entire delta region in terms of development, politics, and culture. For this reason, the Ogoni peoples decline to pledge support for Isaac Boro and Colonel Chukwuemeka Odumegwu Ojukwu's declaration of the Niger Delta Republic in 1967. After the secession attempt in 1967 that left about a million people dead, the Ogoni peoples kept a low profile under the River State, one of the 12 Federal States that replaced the former ethnic regions. Due to growing international environmentalism, the Ogoni peoples in the late 1980s and early 1990s under the leadership of Ken Saro-Wiwa revived their fifty years old struggle for political autonomy. Although the number of independent states has since grown to thirty six, the Ogoni people's demand for the creation of a Port Harcourt State has not been met.

Why the Ogoni Struggle has Gained International Recognition

It is not by accident that the Ogini struggle has gained international support. Under Ken Sara-Wiwa's leadership the Movement for the Survival of Ogoni People (MOSOP), in the early 1990s, engaged in a struggle with the ruthless military government of Nigeria for political autonomy. Apart from seeking political autonomy, Saro-Wiwa and his people protested ethnic discrimination, economic exploitation, and the destruction of their environment by the Nigerian government and the oil giant Royal Dutch/Shell. The struggle gained international support mainly because they were able to market themselves by developing and strengthening relationships with international organizations over the years (Bob 2005).

The way oppressive governments operate and how they present themselves in the international milieu is often beyond the understanding of its local people. Generally, governments have a better relationship with NGOs than with its own peoples. Local peoples often benefit from this relationship between their government and NGOs through what sociologists call "boomerang effect." That is, NGOs acting as middleman between the government and its people. MOSOP used the "boomerang effect" to draw the world's attention to their plight. Saro-Wiwa's close workings with international NGOs became an effective marketing strategy for the struggle of the Ogoni peoples. Two factors account for the global recognition of Ogoni's plight: a well defined raison d'être under the umbrella organization of MOSOP, and a close relationship with NGOs and INGOs.

Cameroon: The Bakola-Bagyeli Pygmy Experience

The way of life of a people is a definitive characteristic, which is passed on from generation to generation. For some groups, this definitive way of life is dependent upon the physical environment in which they live. This is generally true for indigenous peoples of the world. Their identity is tied to their natural environment which gives them a true sense of belonging. Therefore, exposure to "artificial" changes in the homelands of indigenous peoples is tantamount to distorting their identity. The development of sedentary life was the first major change in the way of life of indigenous peoples of the world. Thousands of years since this change began; some groups today still live the hunter-gatherer life led by their ancestors. One such group is the pygmies of Central Africa.

Until about 3000 B.C, the pygmies were the sole inhabitants of the Central African region. This central African indigenous group was infiltrated by another indigenous group from inland savanna West Africa, the Bantu peoples. Thus, contrary to popular belief, sub-Saharan Africa was not always inhabited by the Bantu speaking peoples but by the pygmies who still inhabit the Central African forest today (Diamond 1999). The plight of the pygmies began soon after they had contact with the Bantu peoples who began cutting down the forest, planting gardens and keeping cattle (Diamond 1999). This sedentary way of life began "distorting" the hunter-gatherer way of life of the indigenous Pygmy population. By changing their way of life, the Pygmy population began dwindling in size and was replaced by the Bantu population. The Bantu ancestral farmers also expanded southwards to displace another indigenous group in drier parts of subequatorial Africa, the Khoisan hunter-gatherers.

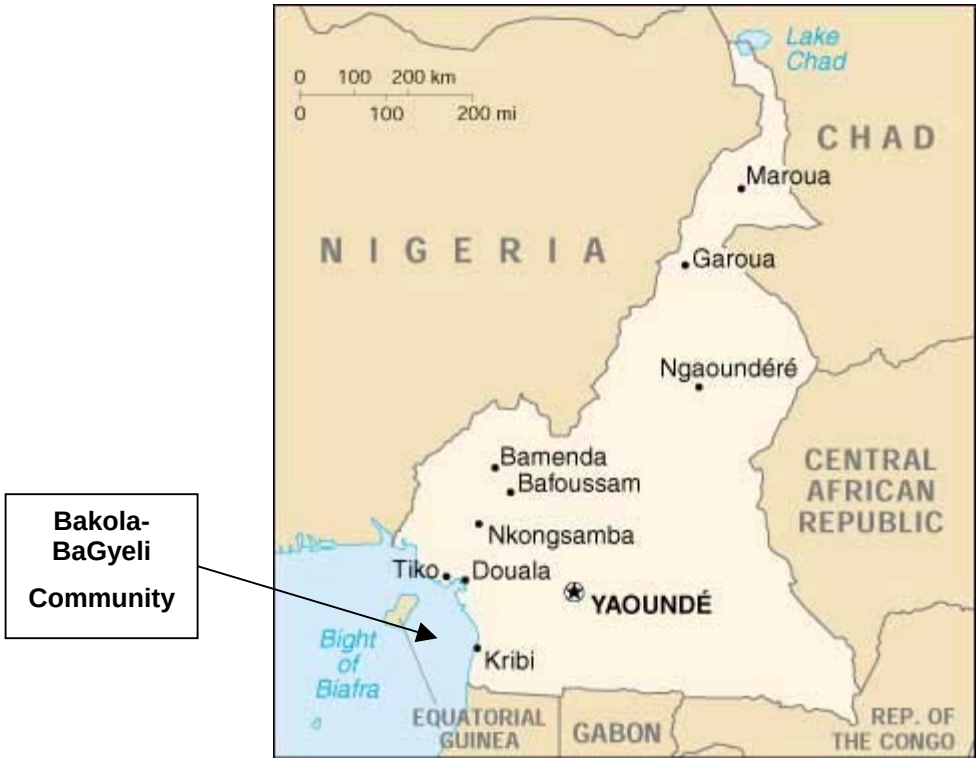

Figure 2. The Bakola-BaGyeli Community in Ocean Division, Kribi, Cameroon

Anthropologists have identified four major Indigenous pygmy groups that inhabit the Central African rain forest; the Baka, the Bakola-BaGyeli, the Aka, and the Bedzan-Tikar Pygmies. The southern part of Cameroon constitutes part of the Central Africa rain forest which is homeland to the Baka and the Bakola-BaGyeli surviving indigenous Pygmy population. Since the arrival of the Bantu peoples in Central Africa the Pygmies have never stopped losing their definitive traits and characteristics. This problem was compounded when the white colonizers arrived in the late 1800s introducing western civilization to the indigenous peoples. The

development of plantations, sawmills, roads, and lately oil pipelines in and around Pygmy homelands has been a threat to the survival of the Bakola-BaGyeli Pygmies of the Atlantic forest region of Cameroon.

The Bakola-BaGyeli Pygmies of Cameroon inhabit a secluded portion of the forest covering roughly 10 square miles. Unlike the Ogoni peoples, the Bakola-BaGyeli peoples are not seeking political autonomy from the government of Cameroon, but demand social welfare, economic stability, and environmental justice. Their plight is economic exploitation and environmental destruction by the government of Cameroon and oil companies undertaking the Chad-Cameroon oil pipeline project. The project is a joint venture of the governments of Chad and Cameroon, ExxonMobil of the US (40%), Petronas of Malaysia (35%), and Chevron of the US (25%). The project is also partly funded by the World Bank Group. These oil giants claim that the project has fulfilled all World Bank's environmental requirements, including environmental Impact Assessment (EIA) of the project. According to a 2003 Inspection Panel report, the EIA for the project was not properly done. EIA for the Chad-Cameroon oil pipeline project was conducted under the directives of ExxonMobil and Petronas officials who have the influence of the US frame of an EIA, completely different from Chad or Cameroon frames, which are developing countries. EIA practices vary from country to country. In a study of the practice of EIA between Canada and the United States, Mbatu (2003) showed that EIA is a dynamic process often biased by social, political and cultural lineage of the undertaker. It is not a surprise therefore that despite claims of a sound EIA preceding the Chad-Cameroon oil project, many environmental problems have appeared only within the first two years of the project's expected twenty five year duration.

Problems plaguing the Bakola-BaGyeli pygmy community include environmental, social, economic and political. Environmental problems include oil spills, water pollution, destruction of biodiversity, and disturbance of the forest and aquatic ecosystems. According to a report by the Center for Environment and Development (CED), a Cameroon based environmental watch group, wells and other drinking water sources along the pipeline route were already being polluted even before the project was inaugurated in June of 2004. These polluted waters have been the cause of several water-borne diseases within the Bakola-BaGyeli community. The Bakola-BaGyeli pygmies have been living in harmony in this forest region for thousands of years, demonstrating with their skillful and selective hunting and gathering strategies how to be the best stewards of the environment. The pipeline project has changed this admirable way of life of the Bakola-BaGyeli peoples. They lost a significant portion of their hunting and gathering ground to the Campo Ma'an Project, which is an "offset" (compensating program) project to the pipeline project (COTCO 1999). Also, the main fishing area for this indigenous group was destroyed during the construction of the sea terminal, disturbing aquatic ecosystem and depriving the people of their livelihoods (CED 2004).

On the social front, the Bakola-BaGyeli peoples have suffered and continue to suffer social division and marginalization as a result of partiality in resolution of compensation claims. Individual and community compensations were either partially made or not made at all (Kenrick and Jackson 2001). Exposure of this relatively closed community to the influx of workers and job seekers has led to increase sexual activities among its youths. This has made the Ocean Division one of the highest in the number of reported AIDS cases in Cameroon (IP 2003). Also, as a result of land losses to the pipeline project, the Bakola-BaGyeli community now experience fierce competition with other local communities over access to agricultural land.

All these environmental, social and health impacts have acted as a draw back to the local economy of the Bakola-BaGyeli peoples. Their contribution to the fishing industry has dropped, and income from the sale of bush meat has also declined (IP 2003).

Inefficiencies are partly to blame for the plight of the Bakola-BaGyeli people. The Indigenous Peoples Plan (IPP), which was supposed to be the people's best bet, was completely flawed from its inception. The IPP is a document that lays out a plan of action for protecting indigenous peoples and their communities against programs that impinge on their social, economic and environmental well-being. Such a document cannot be binding if the concerned indigenous peoples are not a chief participant in its preparation. Unfortunately the Bakola-BaGyeli peoples had little or no input to the pipeline project's IPP. The lack of Bakola-BaGyeli people's input to the IPP led to a major deficiency of the plan, as the organization that was charged with implementation of the IPP, the Foundation for Environment and Development in Cameroon (FEDEC), misdirected funds aimed for the Bakola-BaGyeli community. A $600,000 (CFA330 000,000) endowment provided by the Cameroon Oil Transportation Company (COTCO) was paid to organizations in which the Bakola-BaGyeli people have no connections and to fund the project in which they have no control (Ndobe and Aboe 2004). Deficiency of the IPP has been acknowledged by an Inspection Panel (IP 2003), set up by the World Bank to report on the activities of the oil pipe line project.

Why the Bakola-Bagyeli Peoples' Struggle has not Gained Global Recognition

The Bakola-BaGyeli peoples' plight is a serious problem as that of the Ogoni peoples, yet their struggle has had little national or global recognition. Why? Looking at the Ogoni peoples "success" strategy, we understand why the Bakola-BaGyeli peoples' plight has gone relatively unheard of. The Ogoni peoples' case study analysis showed that they have a raison d'être as they are well organized under an umbrella organization, the Movement of the Survival of the Ogoni Peoples (MOSOP). In the case of the Bakola-BaGyeli peoples, there is no such umbrella organization. They are loosely organized in small family groups with no effective communication; hence they lack a visible reason for existence. Nevertheless, Bob (2005) argues that having a reason for existence is a necessary but not a sufficient condition for a group's global recognition. In his book *The Marketing of Rebellion* Bob outlines a five point strategic approach for the success of groups seeking autonomy and global recognition: winning the support of NGOs; development and retention of this support; systematic organization of economic and political resources; organized, dynamic and systematic marketing structure; and confirming the needs and agendas of distant audiences (Bob 2005, 4).

The leader of the Ogoni peoples of Nigeria, Ken Saro-Wiwa, understood the importance of a strategic approach to marketing the plight of his people and used that to tell the world what is happening in the Niger Delta. The Bakola-BaGyeli peoples lack such a strategy in their struggle. Whether a group's struggle is for political autonomy, economic equity, social wellbeing, or environmental justice, a defined strategic approach is indispensable for the group's success.

It is important to note here that it took well over fifty years before the global community acknowledged and responded to the Ogoni peoples of Nigeria. The Bakola-BaGyeli peoples of Cameroon are only in their third year of struggle, and may need more time in order to placate the

international community to rally behind them in their fight for social welfare, economic stability, and environmental justice from ExxonMobil, its partners, and the Government of Cameroon. The problem is that the state of their environment might degrade to an irreversible point by the time they organize themselves into a group with a visible raison d'être.

Conclusion

We can not deny the fact that the international community has been trying to protect the world's indigenous peoples and their environment. This is evidence by the numerous treaties and conventions on the rights of indigenous peoples and the environment. But much still has to be done as far as effective implementation of these treaties and conventions is concerned. Development must never be valued more than the distinct way of life of indigenous peoples of the world and their environment. As Jared Diamond (2005) argues in his latest book *Collaps: How Societies Choose to Fail or Succeed,* "the interests of big businesses, environmentalists, and the society as a whole coincide more often than you might guess" (Diamond 2005, 442). Diamond's assertion is correct only when these parties express mutual values. The value accorded to an oil pipeline project in Cameroon, dam construction in Ghana, oil exploration in Alaska, or industrial forest exploitation in Brazil should equally be accorded to the distinct way of life of an Inuit in the heartland of Canada, a Bushman in the Kalahari Desert of Namibia, or a Pigmy in the Congo forest. After all, valuing the way of life of these indigenous peoples of the world means valuing the world's cultural and biological diversity since many of the areas of highest biological diversity on the planet are inhabited by indigenous peoples.

The cry of the Ogoni peoples has been heard around the world. Although Saro-Wiwa fought a good fight for a just cause he nevertheless paid a price any true liberator will pay for the rights and freedom of his people; death! The assassination of Ken Saro-Wiwa and eight other environmentalists in 1995 did not end the struggle they died for. Like Saro-wiwa and the eight others who were assassinated for standing up for their rights, some indigenous men and women around the world are willing to defend their homelands to the point of death, as some literally drive their struggle with the zeal of "live and let die."

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Miao Drum Culture and Its Social Function

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Abstract

The Miao drum, as a specific cultural symbol, possesses great ethnocultural significance and it serves an important social function complementary to Miao people's customs of production, livelihoods, beliefs, rituals and festival celebrations. Knowledge of the Miao Drum Culture is helpful for further understanding the unique culture of the Miao people.

Customs of a nation are the reflection of its economy, politics and culture. Customs are also social phenomena, with which to understand one nation and the windows to see its inherent cultural meaning. Miao is a nationality with a long history, which over time has developed unique customs. The drum itself is one kind of folk custom. The Miao people not only have dazzling drums, but they are also endowed with an elaborate drum culture, revealed in their production, livelihoods, beliefs, etiquette, recreation, etc. (Li Tinggui 1996:303-304). In the mountainous regions where the people reside, the Miao drum embodies highly significant cultural characteristics in virtue of a remarkable history, humanity and geographical environment. In the face of changes in Miao life and with the integration of cultures, the Miao drum continues to bring singing and dancing together to form diverse cultural contexts. From an indigenous perspective, the author considers it beneficial to have knowledge of the Miao Drum Culture in order to further understand the unique culture of the Miao people.

The Origin of the Miao Drum

Thousands of years ago, Miao people had a kind of mystical worship to the drum. They believed that the drum symbolized the abdomen of pregnant women and procreation. They considered that the drum, which is constructed of twelve planks, represented twelve large branches of Miao in ancient times, thus the drum could help them to find their origin. Upon careful investigation of the Miao Drum Culture, from an indigenous perspective, it was determined that the production and evolution of the drum are closely tied to Miao

people’s history, humanity, geography and ecological environment.

In the earlier time of the Qin Dynasty to the Qin Han Dynasty, the Miao people experienced seven major migrations in the areas east of the monsoon line in China. Approximately 5000 years ago, tribes were reined by Chiyou, ancestor of the Miao people, and they lived together in the lower reaches of the Yellow River and the middle and lower reaches of the Yangtze River areas. After the Yanhuang Tribe defeated tribes of Chiyou and killed him, Miao tribes migrated from the middle areas of China to the southern areas.

About 4000 years ago, under the rule of Yao, Shun and Yu, Miao tribes migrated to the middle and lower reaches of the northern and southern Yangtze River and established San Miao country (Editing Committee of The Collection of the Brief History of Chinese Nationalities 1985:1-8). During the Shang and Zhou Dynasties, Miao tribes migrated to the northern and southern areas of Dongting Lake. When they migrated from the north to the south, they created diverse shaped earthenware "Earth Drums." Up until the Spring and Autumn Periods and the Warring States era, Miao tribes lived a patriarchal clan communal life in the Wuling mountainous regions of dense virgin forests with wild animals such as tigers and leopards. In their daily life, they collected branches to manufacture wooden drums or they fashioned tools of bamboo to drive away wild animals with their striking sound. Up until the Tang and Song Dynasties, Miao tribes mainly lived together in the borderlands of Hunan, Hubei, Sichuan and Guizhou Provinces, and some lived in Yunnan Province and the northern area of Guangxi Province (Editing Committee of the Collection of the Brief History of Chinese Nationalities 1985:1-8). Miao tribes attempted to make big drums and at the same time they created drum dances related to their sedentary agricultural life.

During the Ming and Qing Dynasties, Miao people ceased migrating in groups. They modified the copper drum of the Baiyue people. In the areas of western Hunan and Hubei, they were influenced by Han people and discontinued producing copper drums and began to make simple, cheap wooden drums. Originally, they primarily used sheepskins to cover wooden drums. Later, they largely used cowhides for this purpose. There are numerous records, which indicate that the Miao manufactured and used wooden drums from "The Prosperous Age of Kang and Qianlong Emperors" to the Qing Dynasty. With the appearance of the wooden drum, various traditions developed such as *Dul Nhol*, the Drum Dance.

The Miao drum arose in the early period of the Qin Dynasty to the Qin Han Dynasty. After a migratory life during the Tang and Song Dynasties, particularly from the Ming and Qing Dynasties until the present, the Miao lived a peaceful, agricultural life. At the same time, the Miao drum appeared in different forms connected with dance, further enriching the drum culture of the Miao.

Figure 1: Drum Princess Long Juxian

Figure 2: Monkey Drum Dance

Figure 3: Miao Village

Photography © John Amato

Traditions of the Miao Drum

After the Miao Drum Dance appeared, there were many types of performances in western Hunan and southeastern Guizhou within the Qingshui River Basin. The styles and forms are heterogeneous because of diverse living environments, distinct language dialects, unique clothing and traditions. The Drum Dance may be divided into three types; “the Single Drum Dance”, “the Double Drum Dance” and “the Group Drum Dance”. According to the performance forms, drum dances may be divided into the “Monkey Drum Dance”, “Symmetric Drum Dance”, “Four Sided Drum Dance”, “Reunion Drum Dance”, etc. The specific performance characteristics are as follows:

The Single Drum Dance

The Single Drum Dance can be divided into two types: In one kind of Single Drum Dance, the performer dances while holding the drum in one hand and striking it with the other hand. In another Single Drum Dance, the performer dances while striking the drum with two hands. There is also a "Male Single Drum Dance" and a "Female Single Drum Dance". In the "Male Single Drum Dance", the male beats the drum and dances at the same time, waving his hands and stepping vigorously. The rhythm is lively and powerful. Miao

people usually use this drum dance to celebrate festivals and abundant harvests. The "Female Single Drum Dance" is the most common performance in the Spring Festival and other holidays. Sometimes people accompany the dancer. The dance steps are brisk and choreographed well, including shuttle-like turns. The upper body moves as the feet step, with sudden twists and swinging hips. The dance is spontaneous or steady, pleasingly graceful or highly energetic and spirited. (Long Ningying 2001:367-368).

The Double Drum Dance

The Double Drum Dance may be divided into the "Male Double Drum Dance" and "Female Double Drum Dance". These two drum dances are similar. The “Double Drum Dance” is free-form. The drummers can strike on the same side or on each side of the drum, or one strikes the drum and the other dances, each taking turns with coordinated rhythms.

The Group Drum Dance

The Group Drum Dance is also called “Flower Drum”. With the exception of the “Four People Drum Dance”, “Eight People Drum Dance”, “Male and Female Mixed Drum Dance” etc., there are also the “Reunion Drum Dance” and “Jumping Year Drum Dance”, which is popular and folkish. The drummers dance and strike a drum with their hands or with mallets at the same time. The two drummers’ rhythms are coordinated and symmetrical. There is no limit to the revolving circle of men and women. “The Group Drum Dance” has a two-sided drum and a four-sided drum. It is performed during the special activities of traditional holidays such as “the Spring Festival”, "June Sixth", "August Eighth", "Catching up with Autumn", "Catching up with Summer", etc. (Long Ningying 2001:367-368)

The Monkey Drum Dance

The Monkey Drum Dance is a drum dance that simulates a monkey’s actions while dancing around a drum. Besides the simulation of productive labor, the drummer must simulate a monkey picking peaches, scratching itches and playing with the drum. (Long Ningying 2001:361) The drummer's posture is agile, light and humorous. There are many highly difficult techniques in this dance. The drummers may wear a monkey costume or furnish the monkey’s performance with Miao clothes (Figure 3).

Symmetric Drum Dance

In the Symmetric Drum Dance, two drummers on either side of the drum perform identical symmetrical movements. This performance is usually conducted in the "Blocking the Drum Dance" or in a competition. In this presentation one family strikes on one side of the drum while relatives and friends strike on the other side of the drum. Sometimes people

of one village strike on one side of the drum while those of another village strike on the other side of the drum. On other occasions, a performer strikes on one side of the drum while another person accompanies.

The performers' movements on both sides of the drum must be symmetrical and harmonious. Each side should accompany the same identical rhythm. After the first rendition, the people immediately carry on the second set and change their position. In an execution, if one side cannot follow very well, the other side will win. Thus the "Symmetric Drum Dance" has become a kind of match. The drummer should not only be skilled in the repertoire and techniques, but must also be nimble and quick to respond at the right moment. In traditional grand drum matches, when the two sides are represented by accomplished drummers, the performance may continue all day and night in order for the contestants to defeat each other. "All Night Long" drum dances have been recorded in the "Historical Chronicle."

Four Sided Drum Dance

This drum dance is very special because the drum has four sides to strike. Two males and two females strike the separate sides of the drum respectively. This performance reflects the joyful mood of practical farm work. The four drummers change their positions during the performance and the dance movements are consistent and symmetrical. (Ji Lanwei et al. 1998:368-369)

Reunion Drum Dance

The Reunion Drum Dance is a collective dance form. It features setting a big drum on a drum rack and one person is selected to beat the drum. The others gather round the large drum dancing to the rhythm. The greater the number of dancers, the better the performance. Movements are divided into three types: big pendulum, small pendulum and thin pendulum. Males generally dance in the big pendulum, standing in an inner circle and females generally dance in the small pendulum and thin pendulum, standing in an outer circle, exclaiming in a passionate outcry, "Ahoo---- " to reflect the joyful mood. This dance rhythm is quite discernible. The characteristics are obviously different from other forms with waist and hand movements.

There are various drum dances however there are thirty-six types of traditional drum strikes. The best drummer is awarded the title of, "Drum King/Princess". Miao people still maintain the custom of selecting a Drum King or Drum Princess. In Dehang Village of Xiangxi Tujia-Miao Autonomous Prefecture in Hunan Province, Long Yingtang was chosen as the first Miao Drum Princess of China. The second Drum Princess is Shi Shunming, the third selected is Long Julan, the fourth, Long Juxian (Figure 1) and the fifth Drum Princess is Huang Juan. The activity of Drum King and Drum Princess is a good way to hand down indigenous knowledge and it is helpful for understanding Miao culture.

Function of the Miao Drum

During their ancient migrations, the ancestors of the Miao people lost much yet they still carried the drum. After their migrant life had ended, the ancestors of Miao people used the drum in celebrations, welcoming ceremonies, sacrificial rites and other significant activities. They also could not abandon the drum while transmitting information during wartime. Along with the further development of the drum itself and the evolution of drum culture, the function of the Miao drum gradually advanced multi-functionally from its sole purpose. In examining the history of the Miao people, the drum primarily served the following purposes:

War Function

Originally, the drum was used on the battlefield in ancient times. Miao people suffered disastrously in the history of their migration. With each migration they underwent the brutal attacks of war. In the course of their long migration, Miao ancestors did not discard the drum because it helped them to make contact during times of war. Conversely, they could use the grand sound of the drum to enliven the spirit and to dispel anguish, which caused them to suffer setbacks during war. The resonance of the drum encouraged the survival of officers and soldiers by rousing them from defeat and restoring the battle strength of the whole clan. The drum was so important during ancient wartime that it became the weapon of necessity that might cause enemy troops to panic or be defeated. The function of the Miao drum was indispensable for alleviating Miao people's suffering during times of war.

Sacrificial Offering Function

From ancient times, Miao people struggled for survival and were subjected to widespread ethnic oppression, thus they attached their fate to the ancestors, manifested in fervent ancestor worship. They believed in animism and

Figure 3: Monkey Drum Dance

made sacrificial offerings. Most Miao sacrificial offerings took the drum as the faith token and the Miao killed oxen to sacrifice to the drum. The Miao people's activities associated with sacrificial offerings were popular in the villages and divergent forms were conducted with the greatest care and in the most sincere manner. When the people settled down, they would begin an assembly to make a drum. They hoped that the sacrificial offerings to their ancestors would evade calamities, and bestow them with the fortune to express their heartfelt hopes for peaceful, undisturbed and prosperous lives. In order to be rid of disasters and evil, Miao people frequently asked their holy man to sacrifice offerings to ghosts and ancestor gods, while striking gongs and drums with the assembly audience. It is evident that the drum became the essential sacrificial offering cultural apparatus and symbol.

Symbol, Social Status and Authority

The "Drum Commune" is a patrilineal family organization, which evolved from fragmented groups after wartime. Each Drum Commune had a wooden drum, which symbolized the ancestral tablet. Miao people required regular or non-periodical sacrifices to the drum through ritual slaughter of cows; fully grown female oxen. This is the most significant sacrificial offering rite in southeast Guizhou Province. By performing sacrificial offerings to the drum, the drum's divine nature was strengthened. Therefore, in the cultural system of the Miao, the status of the drum became increasingly more important, symbolizing property and authority.

Entertainment Function

Today, at every Miao celebration, the drum is one of most commonly used musical instruments and has become a conveyor of artistic expression. Miao people merge unique dance movements with the strike of the drum. People took part in drum dances to celebrate victory, to demonstrate talent and to exchange sentiment. From few to many, from irregularly to periodically, from unselected places to agreed-upon places, the drum dance has become a tradition among the people. For thousands of years, whether in the field or in the stronghold of the village, at festivals or for wedding ceremonies, Miao people will hold the drum dance competition in order to display their brilliance and cultural traditions (Figure 2). The Miao drum is an essential musical instrument for the mass culture and the entertaining culture.

Conclusion

There are numerous functions of the drum that were not discussed in this paper. The Miao people entrust the drum with great significance and meaning. It is an empowering cultural symbol that serves to furnish the Miao people with strength of character, resolve, determination and fortitude within their spiritual and physical environment.

Today, some functions of the Miao drum that were formerly practiced are not performed because of imposed assimilation policies that have caused changes in Miao life and culture. However there are some new functions and forms of the Miao drum that have been developed, which are an integral part of Miao culture and World Cultural Heritage.

Culture is the product of the human and ecological environment of a social community or ethnic group. Lives and livelihoods are created within this environment to sustain cultural development (Yang Tingshuo et al. 1992:2). In Miao social life, the drum is an important instrument of existence and is a key conveyer of culture. The Miao Drum Culture is a system in which Miao people demonstrate their rich and colorful life.

The drum has deeply permeated Miao history and civilization. It is an intrinsic and defining ethnic spiritual symbol, which bears important social functions and fully manifests cultural

significance and the social values of Miao life. The Miao drum reflects the historical processes and cultural evolution of the Miao people. It is the product of the human and ecological environment. It is as an ancient and dynamic cultural phenomenon that will continue to be entrusted with new meaning along with changes in the environment. With the development of tourism, its form and function will be integrated into the advancement of industry and artistic development. The Miao drum is the cultural heritage of the Miao people and it will continue to possess its own inherent cultural value.

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The Tragedy of U.S. Foreign Policy

By Joseph E. Fallon

Since the end of the Cold War, Washington has actively pursued a foreign policy inimical to the national interests of the United States. To paraphrase Pat Buchanan, Washington seeks an empire, not a republic. And it is pursuing empire through a sovietization of U.S. foreign policy. This occurred because Democrats and Republicans have been seduced by three false beliefs.

1. History proves the United States is the only successful politico-economic model for the rest of the world to emulate.
2. As the world's most powerful nation, the United States has an obligation to insure global peace and economic development by imposing its model on the rest of the world.
3. The rest of the world desires to have the United States impose its model on them.

Acting on such beliefs, Washington adopted a Marxist attitude toward countries, cultures, and economies. Including its own. All are viewed as anachronisms; treated as obstacles to the spread of American democracy and free markets worldwide. Therefore, they must be revolutionized, standardized, and anesthetized. Each must be made non-national in form, capitalist in content. The affinity with Marxism extends to promoting the withering away of the state. Political borders, including those of the United States, are being abolished through free trade agreements, while the sovereign powers of states are being expropriated by international beaucracies. All are preconditions for what Washington calls globalization, which mirroring Soviet foreign policy advocates that a powerful ideological state imposes a single political and economic order on the rest of the world. Capitalism replaced socialism as that ideal order and the United States supplanted the Soviet Union as the historic agent of change. Both attempts only unleashed political and economic havoc upon the world.

Contrary to assurances from Washington, outsourcing, privatization, and free markets restructured global economies for the benefit of the few, not the many. As a result noted Joseph E. Stiglitz, former Chief Economist and Senior Vice President of the World Bank, in *The Overselling of Globalization:* "globalization has been accompanied by increased instability; close to a hundred countries have had crises in the past three

decades. Globalization created economic volatility, and those at the bottom of the income distribution in poor countries often suffer the most."

The United States was not immune from this volatility and has experienced an economic blowback. By encouraging the relocation of U.S. manufacturing abroad Washington's policies have deindustrialized the U.S. economy. As a result of such relocations, coupled with outsourcing of U.S. jobs and the flood of illegal aliens into the domestic job market, more and more U.S. workers are being made redundant. In some sectors, overtime pay is being abolished. Unions are being busted. Pension contracts are being broken. Income disparity is widening. The Social Security System faces financial crisis. The health care system is going bankrupt. The education system is failing more and more families. Social safety nets established after the Great Depression are being cut. The national debt is ballooning and exceeds the amount of U.S. dollars in circulation. The middle class, on which representative government rests, is being crushed under the weight of wars, taxes, and institutionalized corruption. And things are only getting worse for Americans.

As Dr. Stiglitz observed "some of the more ardent advocates of globalization advance a position not far different from social Darwinism; tough luck for the cultures that cannot survive in the face of the forces of globalization; they should be left to die, and the quicker the death the better".

This belief is shared by Washington. For it, the only "cultures" that count are those of transnational corporations. And cultures that "should be left to die" include America's. Proposals, at this point trial balloons, are advanced on merging the United States with Mexico and Canada in a North American Union and replacing the U.S. dollar with a new currency, called the amero. Laws and treaties are being selectively enforced. The U.S. Constitution is being shredded. Habeas corpus? Property rights? They have effectively been abolished. Freedom of speech is attacked. Dissent is criminalized. Freedom of assembly proscribed. Freedom of religion is guilt by association. Transparency and accountability in government are ignored. To all intents and purposes, the separations of powers, and checks and balances on government have been annulled. Under deregulation, health, safety, labor, and environmental laws are being eviscerated. This deconstruction of classical Western political liberalism, foundation of U.S. liberties, is what Washington is aggressively exporting to the rest of the world under the name of globalization.

To advance this process, the U.S. government resorts to wars, sanctions, and color-coded revolutions to topple uncooperative governments -- Afghanistan, Iraq, Somalia, Ukraine, Georgia, Kyrgyzstan, and Lebanon -- and dismember inconvenient states -- the USSR, Yugoslavia, and Serbia.

In doing so, Washington ignores the potential political blowback. It is oblivious to how its tactic of dismembering states can also be applied to a number of U.S. allies -- Brazil, Canada, Chile, Georgia, India, Indonesia, Mexico, Pakistan, the Philippines, Poland, Romania, Spain, Turkey, Ukraine, and the U.K. -- or even to the United States, itself, in the case of the Aztlan movement.

It is now targeting Saudi Arabia and Iran for regime change and dismemberment even though this could destabilize the world's oil markets and trigger a worldwide

recession. Under the pretext these interventions are to liberate Muslims, especially Muslim women, from the oppressive rule of Islamic fundamentalists, Washington seeks to control the oil and politics of both countries by exploiting religious and ethnic secessionist movements in each.

On July 10, 2002, Richard Perle, then Chairman of the Defense Policy Board Advisory Committee, sponsored a presentation by Laurent Murawiec, a Rand Corporation analyst and former executive editor of Lyndon LaRouche's 'Executive Intelligence Review', who called for the U.S. to seize the oil wells in Saudi Arabia's Eastern Province and proclaim that region an independent state.

In 2003, in An End to Evil: How to Win the War on Terror, a Random House book which he co-authored with Paul Frum, a fellow Neo-Con and former speech writer for President George W. Bush, Richard Perle, championing Murawiec's proposal, urged Washington to support independence for Saudi Arabia's Eastern Province.

That year another Neo-Con, Max Boot, senior fellow at the Council on Foreign Relations and contributing editor of "The Weekly Standard" envisioned a similar fate for Saudi Arabia with the United States "occupying the Saudi's oil fields and administering them as a trust for the people of the region."

Iran also became an official target for dismemberment in 2003. The Pentagon met with Mahmud Ali Chehregani, leader of Southern Azerbaijan National Awakeness Movement. While Mr. Chehregani resides in the United States his opposition movement operates in Iran. He advocates the secession of "southern" Azerbaijan from Iran and its unification with "northern" Azerbaijan, the former Soviet Republic. According to the Washington Times, "Mr. Chehregani said in an interview that his group was working with other Iranian ethnic minority groups — such as the Iranian Kurds, Baluchis, Turkmen and Arabs — to form a common political front that could challenge Teheran." It reported "Mr. Chehregani said he had more than 50 meetings with senators and congressman, State Department officials, the White House to further his cause."

In October 2005, the American Enterprise Institute, a Neo-Con think tank, convened a conference chaired by a prominent proponent of regime change, Michael Ledeen, entitled "A Case for Federalism?" It was repudiated by exiled Iranian opposition groups in the United States as a call for the dismemberment of Iran along ethnic lines.

That same year, responding to Mr. Chehregani's call to form a common political front, Iranian Arab, Azeri, Baluch, Kurdish, and Turkmen organizations assembled in London where they issued a manifesto calling on Teheran to restructure the state along the lines of ethnic federalism. The U.S. State Department then met with the Iranian secessionists to support their demands for autonomy, while continuing to condemn similar secessionist movements in neighboring Turkey, Georgia, Afghanistan, Pakistan, and India.

On February 23, 2006, the Financial Times reported the U.S. Marine Corps confirmed its intelligence unit was actively analyzing the potential military benefits ethnic secessionist movements in Iran could hold for U.S. foreign policy.

This was followed by the April 17, 2006 issue of The New Yorker which published the article by Pulitzer-awarding winning journalist, Seymour Hersh entitled

"THE IRAN PLANS: Would President Bush go to war to stop Tehran from getting the bomb?" In it, Mr. Hersh wrote: "If the order were to be given for an attack, the American combat troops now operating in Iran would be in position to mark the critical targets with laser beams, to insure bombing accuracy and to minimize civilian casualties. As of early winter, I was told by the government consultant with close ties to civilians in the Pentagon, the units were also working with minority groups in Iran, including the Azeris, in the north, the Baluchis, in the southeast, and the Kurds, in the northeast….The broader aim, the consultant said, is to 'encourage ethnic tensions' and undermine the regime."

Then came the publication of "Blood Borders" by Ralph Peters in the June 2006 issue of Armed Forces Journal. *"Armed Forces Journal* is the leading joint service monthly magazine for officers and leaders in the United States military community…providing essential review and analysis on key defense issues for over 140 years." Publication confers authority and respectability on the views presented. In "Blood Borders", the author champions national independence for Azeri, Baluchi, Kurds, Pushtuns, and Arab Shia. He advocates redrawing the borders of virtually every country in the Middle East, not just Saudi Arabia and Iran, and provides his readers with the following map of his Pax Americana for the Middle East.

Influenced by thinkers such as Murawiec, Perle, Boot, Ledeen, and Peters, U.S. foreign policy was radicalized. It now fosters perpetual wars to enhance U.S. power and

profits. First there was Afghanistan, then Iraq and Somalia, and next is possibly Iran. The aim of globalization, therefore, is not democracy and free markets, but U.S. world hegemony. And the means to hegemony is coercion and subversion at home, as well as, overseas. But the policy isn't working well. Washington's actions in the Middle East have enraged Muslims and alienated much of the world. As a result, the post-911 support and good will of most of the international community has been lost. Washington is not winning its wars in Afghanistan and Iraq. Its ability to unilaterally impose its will on other countries is evaporating. Overextended militarily, financially and psychologically, its empire is reaching the breaking point. And the rest of the world knows it.

Washington's foreign policy has become the very definition of "waste", "futility," and "self-destruction." As the fates of Athens and Rome attest, no republic that acquires an empire remains a republic. And the price citizens pay for an empire has always been the loss of their liberties. Washington's decision to protect the United States by waging imperial wars abroad confirms the wisdom of that great American philosopher, Pogo: "We have met the enemy and he is us!"

About the Author

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Lesson from the Hemisphere's Past

Book Review by Rudolph C. Rÿser

1491

New Revelations of the Americas Before Columbus
Charles C. Mann
Vintage Books, NY
Pp. 538 (2005, 2006)

The bow and arrow, and the spear were superior weapons to the musket. Pre-Columbian American cities were often populated with numbers of people far and away larger than the smaller cities of London and Paris in the 16th century. Nations managed jungles and forests like massive gardens. But for the ravages of introduced disease and a few societies over-reaching in their efforts to manage the environment that broke the back of a hemispheric population of an estimated 110 million people, the western hemisphere could today be dominated by indigenous nations instead of the descendents of western European settlers.

This is a picture of the western hemisphere never truly reported in the literature of world and regional history. Fourth World nations and small segments of the conventional scientific community have known for at least a century the nations that peopled the western hemisphere lived in a world of little disease, prosperous societies in 9 or 10 regions of what is North America, Central America and South America. No, this isn't the New World of Rousseau's Noble Savage. There were wars of domination, human/ecological imbalances, occasional famines, political intrigues, social upheavals, greed and avarice, as well as music, dance, architecture, systems of mathematics and literature. The peoples of the western hemisphere shared many common human traits experienced the world over, yet there world was very different place with very different cultures from Europe, Africa and Asia. Remnants of the hemispheric past are tucked away into small societies retaining knowledge and consciousness that is little understood by peoples living in modern states.

Charles Mann, a correspondent for *Science* and *The Atlantic Monthly,* has written in reporter-like-fashion a story that a journalist is most likely to produce. His narrative in the first two chapters is interesting and holds the reader as Mann pulls together information about the path of disease devastating the Taino people who first met Columbus and how invisibly disease traveled to kill millions in advance of the arrival of Spanish conquistador arrivals on the mainland. He even points to the mysterious introduction of what appears to have been hepatitis in what is now New England in the United States before the arrival of the Jamestown settlement in 1607 – eventually rubbing out more than 80% of the indigenous population. The march of

disease followed the pathways of trade routes long used to build large and prosperous societies devastating the prosperous cities and closely related towns and villages by 50% to more than 90%.

The first smallpox epidemic struck Tawantinsuyu—the land of the Inkas—in 1533. Quoting an eyewitness Mann reports, "They died by scores and hundreds. * * * Villages were depopulated. Corpses were scattered over the fields or piled up in the houses or huts…. The fields were uncultivated; the herds were untended [and] the price of food rose to such an extent that many persons found it beyond their reach. They escaped the foul disease, but only to be wasted by famine." This scene was to be repeated thousands of times throughout the hemisphere with typhus, diptheria, measles, malaria, influenza, tuberculosis, and other diseases known only in Europe and Asia before the earliest visits of European ships to hemispheric coasts. Mann (and Henry Dobyns) postulates a decline in population hemispheric wide from as many as 110 million to about 10 million in less than 100 years after Skanian, English, Spanish, French, Dutch and Portuguese ships touched the eastern shores.

Challenging the idea that guns and steel might have overwhelmed the warriors of the Zapotec or the warriors of Tawantisuyu Mann describes the range limitations of Spanish muskets bringing little or no harm to warriors with bows and arrows and spears. Muskets were accurate for only a score of yards while arrows could pierce the chest armor of Spanish soldiers at 100 yards. The accuracy and distance of which spears and arrows were capable rendered Spanish weapons nearly useless. When comparing the multi-layered, tightly woven cotton vests of Tawantisuyu warriors with the Spanish soldiers' *chainmail* the warriors' arrows won over musket balls. Only disease and the revenge interests of subject populations that joined with the Spaniards provided the means by which the millions of Tawantisuyu in the 1520s could be defeated and subjugated. So it was equally the case, Mann reports, that disease and vengeful vassal states joining the Spaniards reduced the Nahuatl speaking Aztecs who dominated Mexico for more than 100 years to willing subjects of Hernando Cortes and his 600 or so not so well trained soldiers.

Mann describes the advanced cultures of what is now the Mississippi River corridor and what is now southern Illinois, the peoples of eastern Canada and the US and of course the cultures of the US southwest. When combined with the more detailed discussions of Aztec, Mayan, Amazon and Tawantinsuyu civilizations one becomes consumed with admiration for what was and what could have been and may still become.

There are a few omissions from the list of hemispheric civilizations that seem glaring: The Salish of north coastal US and south coastal Canada, and the rich civilization of Haida Gui and the Tlingit; and the powerful culture of the Anishinabe of the Great Lakes region. Still, Mann's narrative is none-the-less powerful and insightful.

At times Mann gets occupied with the tedious discussions of competing theories and speculations among anthropologists and archeologists from the middle of the 19th century onward. One thing is certain, his description of competing views

prove that much of what had been popularly known about the peoples of the western hemisphere achieved prominence only because one researcher with the backing of his university or museum made more noise than another.

Despite this minor flaw, Charles Mann has written in his 1491 what will become an influential popular rendering of history extracted from archaeology. This is a book well worth reading and in many chapters, savoring.