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Biopiracy and Intellectual Property over Natural Resources: the consequences for Tobas. A comparative work with the New Zealand experience.

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To My Father

In Loving Memory

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I. INTRODUCTION

Indigenous groups have always been discriminated against in Argentina. Since colonization ages their land was systematically expropriated under the, what became known as, *terra nullius* principle. Genocide took place not only in Argentina but in most countries of Latin America, thus only few groups remain and some of these face extinction. For the "survivors", the scenario is not promising, they are living in indigenous reserves, (most of which are not in fertile land), in very poor and unhealthy conditions facing potential diseases such as cholera and tuberculosis.

The scenario is not necessarily the same for the indigenous people of New Zealand: the Maori. The conquest of the islands by British was made in a more peaceful way if compare with other cases. However, there were also wars, confiscation of lands, and suppression of traditional Maori practices. Nowadays, while Maori are integrated to the society some of the injustices of the past are seen as affecting their spiritual and material way of life.

It is claimed by indigenous activists that, the Intellectual Property Regimes (IPR), under the World Trade Organization (WTO) agreements could make indigenous people face the possibility of being deprived of the free use of plants that they have been using for centuries for food and medicinal healing purposes among others, because of the patenting processes of multinational companies. In addition, aborigine communities could find themselves negotiating without full knowledge of the purpose of the extraction or the use to which the material will be put; and because of

biopiracy, not receiving royalties in exchange for their knowledge of plants. In this context, their situation would become even worse.

However, if these processes and agreements were being made in a more equal and fair legal context, they could obtain the royalties for the use of their knowledge by pharmaceuticals or seed companies, as other people obtain royalties for their knowledge in more "traditional" or market-oriented industrial areas. This money could help them to achieve other goals such as a more indigenous-oriented education, or start their own productive activities to give just some examples. These kind of agreements are part of a more general discussion that includes the rights of indigenous peoples to regulate their own traditional knowledge (TK), this involve: defining what TK is to any given indigenous community, as well as developing norms and standards around who outside the indigenous community can access their knowledge, under what conditions and for what benefit.

This research will analyze the Argentine and the New Zealand cases to compare the public policies implemented in both countries and the effects on indigenous peoples. Detailed objectives are going to be mentioned further on this thesis.

II. TOBAS

Tobas called themselves Kom Ntakebit, kom lek or ntakewit. Toba means big forehead. The name was given because they used to shave the immediate part of hair after the forehead when a relative died (Hernandez, 1992; Miller, 1979; Palermo, 1993; Martinez Sarasola, 1996).

Tobas are tall, of vigorous physical complexion and excellent horse-riders. The Incas could not subordinate them, and was not an easy task for the Spaniards to achieve either. Their worst enemies among the different aborigine tribes were the Matacos-Mataguayos (Biedma, 1975). Tobas used to live in small villages, their tribes were usually formed by families relate to each other, and in number no superior to 80, which were commanded by a Chief whose authority was control by and Elderly Council. In the sixteen century they were 200.000 Tobas; nowadays they are just a quarter of that number and they are dispersed amongst the provinces of Chaco, Formosa, Salta, Santa Fe and the poorest suburbs of the cities of Buenos Aires and Rosario (Arzen & Muro, 1993)

Tobas were truly ecologists; they never overexploited natural resources. If animals or plants were in danger of extinction, they migrated to another region (Miller, 1979; Figueroa, 2005). Mainly women did gathering; they were also in charge of raising the kids. Tobas also knew how to work with Andean wool but they were not ceramists; they wore some body ornaments of Amazonian origin such as necklaces, feather hats etc. Men were in charge of collecting honey, and before going haunting they asked for permission to Nowet, the spiritual Lord of the woods. Fishing was an individual and collective activity and was made with harpoons and lances (Hernandez, 1992; Martinez Sarasola, 1998; Miller, 1979).

The pre-Hispanic farming included: eight species of pumpkins, sixteen of corn, two of melon and water melon, four of beans, green peas and hay. Potatoes, sweet potatoes, hot pepper and rice were also in the list (Solis,

1972).With the introduction of the horse around 1650, the hunting activities lost its importance and the economy become related to the stealing of bovine and ovine cattle (Martinez Sarasola, 1998).

The traditional leadership was inherit, however it had to be confirmed trough a series of activities that demonstrated their braveness and strength that included haunting and healing skills. The conflicts between leaders were usually related to sorcery disputes (Miller, 1979).

The magic ruled the spiritual live of Tobas. The sun represents peace; wind symbolizes strength, and water personifies life (UNESCO, 2005). Two main values guided the beliefs and activities of the Tobas: 1) the harmony and equilibrium between nature and human being and 2) the well being of their relatives (Miller, 1979). The idea of a monotheist religion was also there; their almighty God was Ayaic (Hernandez, 1992; Martinez Sarasola, 1998). The most common kind of disease was the one cause by a spell or by the misguidance of the person's soul (Fernandez, 1992).

There are three types of mystical specialists: the shaman, the healer and the witch. The main function of a shaman is to heal diseases, but they are also rain-makers or storm-stoppers if they required to. Sending their souls to the sun, source of all wisdom, they can predict the future. Tobas do not consider the possibility of death by natural causes; all deaths are caused by some supernatural elements. All major disasters and even a simple rheumatic pain were attributed to this kind of phenomenon (Fernandez, 1992).

A second type of specialist is the "healer" or "curandero" (natannaxanaq in Guaycuru). A curandero heals with plants and herbs in a procedure that are a mix of shamanism, folklore traditions and religious practices. The third and last type of specialist is the witch, whose activity is to cause damage and pain. No good action comes from a witch. If she is "good" at her job he result will be the death of the person that was spelled (Miller, 1979; UNESCO, 2005).

II.1 **Tobas in the present**

Indigenous people, once pacified, entered to the market economy working in sugar and forest refineries. In 1904, Juan Biallet Masse elaborated a report about the labor conditions in the country, as requested by the Internal Affaires Minister Joaquin V. Gonzalez; stating that: "worst than any other worker, beneath any worker, paired with animals... everybody abhor Indians but everyone exploits them; without the Indians nor cotton nor sugar refineries would be possible" [1](as cited in Hernandez, 1992 p255).

After 1919, the Argentine Chaco was divided and exploited; especially for the valuable quebracho tree (*Schinopsis*), used for its tannin and its extremely durable timber. This devastated the ecosystem in a relatively short time. The private owners of the Chaco then turned to cotton production, employing the Tobas as a cheap seasonal workforce; the conditions did not change substantially for decades (Hernandez, 1992; Hermitte, 1995)

The first group of European settlers consisted of Italians and Spaniards, the second wave were mainly center-European people. These groups were the direct beneficiaries of the national government colonization plans. The high rate of human labor required for an enterprise of this nature and the high risk of the investments with low possibilities of return made that no latifundiums were created. Cotton has been very important for the province's economy, but since the 1990s is in crisis mainly due the synthetic fibers which compete in cost and quality. There has been no governmental program to readapt the economy or the workers' skills, the lack of useful information or just some insuperable restrictions (lack of the necessary capital, farm dimensions etc) made the crisis even worst (Hermitte, 1995).

1 My translation

Today, for those living in reserves, hunter-gatherer activities are still an important part of Tobas' economy, representing 65% of the total of food consumed in the year. However, as these activities are not enough to support themselves, they also need to become wage earners workers, and/or craftmen sellers (Gordillo, 1994). Several anthropological and sociological works on Tobas show that they hardly have access to a permanent job; most of their activities are seasonal or occasional (Hermitte, 1995). The relatively null development of the manufactures goods, make this sector of the industry not important to make a socioeconomic difference between those who work in it and those who do not (Gordillo, 1994).

Tobas are about 50,000 (if counted those settled in fiscal or state-owned land, and those in the peripheries of some cities). The main urban Tobas settlings are the Tobas neighborhood of Resistencia, Fontana, Villa Sarmiento, and Villa Elba. Other cities such as Castelli, Saenz Peña, Presidencia de la Plaza have in their peripheries some precarious Tobas houses. Several head-families have been hired by the different town halls to work in the infrastructure enterprises or work in factories of bricks, textiles or pottery (Hermitte, 1995).

No matter the indicators taken into account (diet, house comfort, occupation, education, income, sanitary or health), the current socioeconomic situation of Tobas is considered disastrous[2] (Hermitte, 1995). The education figures state that the percentage of people that abandon school is high; being the main causes the seasonal migrations, the lack of bilingual schools and the educational curricula not adapted to their needs (Martinez Sarasola, 1996). Women enjoy a major level of independence and the divorce rate is increasing as well. The population without vaccination is elevated; the mortality rate is 1 in 4. The percentage of pregnancy with medical control is just 48% (Wynarczyk, 1997).

2 Because of the lack of new information about research on Tobas, some of the percentages may be no longer accurate. However, in general terms, it seems that there have not been significant changes.

With the return of democracy in 1983, an important number of Tobas entered to the Public Service Agencies as: workers with permanent stability, workers hired by day called "jornaleros", and workers under the table or "in negro". The Tobas-politicians relationship can be summarized as follow (Wynarczyk, 1997):

- Between Tobas are differences and personal problems, what makes it difficult to organize themselves as an united group
- Tobas have a transactional vision of the vote, not ideological
- Tobas articulate their political relations with white people according to their relations, divisions, and loyalties of their own neighborhoods.

The forms in which the indigenous affairs are administrated have generated what is known as political clientelism. The politicians' paternalistic vision of indigenous peoples encouraged the treatment of indigenous as children that need guidance; fake electoral promises and coercion to vote for a specific party are common (Carrasco, 1994; Vidal, 2006; Frites, 2006).

The most important indigenous associations in Argentina are the Coya Center (Centro Coya), the Indigenous Association of the Argentinean Republic (AIRA), the National Indigenous Movement (MIN) and the Indigenous Committee of Chaco and Formosa (CPI). This last organization was created in 1983; it is related to the CISA (Indian Council of Latin America) and the CMPI (United Nations Indigenous Peoples World Council, with headquarters in Canada). The main objective of CPI is to fight for the rights of the Tobas, Pilaga and Matacos nations in the fields of cultural identity, bilingual education, and land tenancy.

III. MAORI

The original inhabitants of New Zealand came from Raratonga in the Cook Islands, and from Tahiti and Raitatea in the Society Islands, in sea voyaging canoes over a period of several centuries. The last arrival made landfall about six hundred years ago (Great fleet). These Polynesians called themselves Maori. Maori oral tradition suggested that their homeland was "Hawaiki", which was variously interpreted by Europeans as Samoa's Savai'i, Hawai'i or elsewhere in eastern Polynesia (Howe, 2003; King, 2003).

Maori were fishermen and hunters but kumara (*Ipomoea batatas*) gave them a more permanent way of life in settled communities (MacDonald, 1979). Hunting was strictly controlled by season, within specific rights associated to particular groups and sites and birds were never disturbed during their breeding season (NZCA, 1997). As well as the hunting of birds and other creatures for food, Maori utilization of natural resources included:

- large trees for waka and building
- rongoa plants, often with distinctive local uses for particular species
- wild plants for food resources
- dyes from muds and soils
- oils from whales
- green leaves and twigs for ceremonial purposes
- decoration with special colored feathers or plumes of birds, and teeth of sharks and whales

Walker (2004 p109) gave a brief and concise description of the social units of Maori society, expressing that:

"The social units of Maori society in ascending order are: the whanau (extended family), hapu (tribe), iwi (confederations of tribes) and waka (canoe confederation of iwi). The latter are iwi groups descended from ancestors of the same canoe who migrated to New Zealand between the ninth and fourteenth centuries. Internally the units were hierarchically structures with the kaumatua (male elder) and kuia (female elder) heading the whanau, the rangatira (chief) heading the hapu, and the araki (paramount chief) heading the iwi; the marae is the courtyard in front of the ancestral house.

The hapu, led by a rangatira, was the political landholding group. Each hapu aspired to incorporate a stretch of coastline in its territorial boundaries, some arable land for horticulture, and interior forestland for hunting and as a source of timber and other raw materials. Inland tribes sought to control territories around lakes and along riverbanks. Land was a tribe's turangawaewae, the essence of its identity and existence as a tribe".

Maori lived in pas; each tribe had an entity and owned the land in the area in which they lived. The pa had several main types of building such as the wharerunanga, the meeting house outside which was the marae; and the wharewananga, the house for instruction in occult lore. The wharepuni, was the sleeping place; the whareumu, the separate kitchen in which food was cooked (McDonald, 1979).

III.1 **Maori in the present**

The transition from traditional Maori society to modernity was marked by economic, spiritual and political transformations induced by the advent of whalers, sealers, traders, missionaries, and colonial government. The salient features of European contact included: tribal expansion of food production to accommodate trade and the cash nexus; population collapse and recovery following the introduction of European diseases; readjustment of the Maori cosmogony by the adoption of Christianity; abandonment of some forms of tapu; expropriation of land by State violence and legal artifice; disempowerment of chiefs and domination by the State. The modern reality of Maori is that they no longer live in compact

tribal collectives on a local land base. People live in scattered whanau units, both within and outside the old tribal regions. Although tribalism survives as an ideology, tribes become manifest occasionally, and for particular purposes: tribal hui, weddings, birthdays and tangi (funerals) (Walker, 2004).

Maori are relatively youthful population (two-thirds below thirty years of age) with an 82% living in the big cities; nearly 90% of Maori live in the North Island, with nearly 60% in Northland, Auckland, Waikato and Bay of Plenty. The number of Maori living in the South Island has increased 38% since 1991. A quarter of Maori and 30,000 non-Maori could speak Maori.

Social indicators are contradictory. Maori are making impressive in-roads in establishing equitable standing in outputs related to education, health, life expectancy, birth mortality, self-employment, and employment levels. Yet, Maori as a whole are not improving fast enough to keep pace with non-Maori with the result that relative disparities remain in place. On average, Maori live 7 years less than the average Pakeha. Sixty-two percent of Maori leave school without qualification opposed to 28 % of Pakehas. Only 1 in 6 Maori adults had a vocational qualification (such as New Zealand Certificate of Engineering); and 1 in 21 had a degree or higher qualification as their highest post-school qualification (Te Puni Kokiri, 2007).

The establishment of the three Maori tribal Wananga, Te Whare Wananga o Awanuiarangi, Te Whare Wananga o Raukawa and Te Wananga o Aotearoa, has significantly strengthened the ability to learn about matauranga Maori. According to the Ministry of Education, the number of Maori students completing qualifications in 2002 (16,409) represented an increase of 92% compared with 2001. Seventy three percent of this increase was due to student enrolments and graduation at Wananga (UN, 2005).

For Maori, under 20 years of age, the imprisonment rate is nearly 5 times that of Non-Maori. Fifty-one percent of the prison population is Maori,

although only 12% of the New Zealand population (Sharp, 1997; Pratt, 2004). Unemployment rates in 2001 were 17% for Maori compared to 6% for non-Maori whites (Maaka & Fleras, 2005; Sullivan, 2005). Maori and Pacific Islander made up 64% of those employed in factory, production and laboring work. They were under-represented in occupations like law, medicine, education, and Government (Sharp, 1997).

IV. OBJECTIVES

In this context, the objectives of this research are to:

- determine to what extent the IPRs are affecting Tobas
- determine what sector (agriculture, wild foods, dyes, traditional medicines among others) has been more affected by IPRs
- explore any current agreements with pharmaceutical companies
- explore what are the possible scenarios for Tobas (better legislation, entering into contracts with pharmaceutical or seed companies, more active participation in international forums etc)
- explore what the benefits could be of signing these contracts (e.g. have their own money and not have to rely on government's social assistance)
- compare and analyze the Argentina public policy case study with the New Zealand case

The following questions are going to guide this research:

1. Does IPR over natural resources necessarily lead to the violation of Indigenous Peoples' rights? , and
2. Do indigenous people in New Zealand and in Argentina face common problems in the implementation of IPR over natural resources?
3. How effective have any measures that have been put in place by the state been in protecting Indigenous Peoples' property and cultural rights in both countries?

To achieve these goals, relevant literature was reviewed, legislation and official documents were analyzed (national and international), and key informant interviews were carried out.

IV.1 **Notes**

Despite the fact that it is almost difficult to analyze one area of the indigenous peoples' world isolated from the others, this is worthwhile this research and the focus is put on the intellectual property area. The natural resources concept is also quite broad; that is why for the purpose of this research the focus was only on IPR over plants and not over other things such as animals or even human cells. The main reason of this choice was the major developments and improvements on genetic modification in plants (which allow, for instance, the patenting processes) than in other living creatures.

From the many indigenous groups that live in Argentina, the Tobas (of the Chaco province) were selected because they are living in one of the richest areas in terms of flora and fauna diversity. Hence, a potential targeted area for bioprospecting activities.

V. DEFINITIONS

V.1 ***Intellectual Property (IP):*** The term intellectual property reflects the idea that the subject matter of IP is the product of the mind or the intellect, and that once established; such entitlements are generally treated as equivalent to tangible property. The forms of intellectual property include copyrights, patents, trademarks, and trade secrets. The WTO (n.d.) defines IP as the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time. The Agency divides the intellectual property into two main areas:

1. Copyright and rights related to copyright: the rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by copyright, for a minimum period of 50 years after the death of the author. The main social purpose of protection of copyright and related rights is to encourage and reward creative work.
2. Industrial property: Industrial property can usefully be divided into two main areas;
   - One area can be characterized as the protection of distinctive signs, in particular trademarks and geographical. The protection of such distinctive signs aims to stimulate and ensure fair competition and to protect consumers, by enabling them to make informed choices between various goods and services.
   - Other types of industrial property are protected primarily to stimulate innovation, design and the creation of technology. In this category fall inventions (protected by patents), industrial designs and trade secrets.

The World Intellectual Property Organization (WIPO, n.d) defines IP as the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields and explains that IP law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. For instance, drugs, like other new products, are developed under patent protection. The patent protects the investment in the drug's development by giving the company the sole right to sell the drug while the patent is in effect. When patents or other periods of exclusivity expire, manufacturers can sell generic versions (USFDA, 2007)

For the purpose of this research, references to IPR will mean the legal entitlement which sometimes attaches to the expressed form of an idea, or to some other intangible subject matter; sometimes enabling its holder to exercise exclusive control over and benefit from the use of the subject under the IP.

V.2 ***Indigenous Peoples***: the 1989 International Labour Organization Indigenous and Tribal Peoples Convention (ILO, 2005) consider indigenous as:

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

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

The United Nations (2004) adopted the following definition: Indigenous communities, peoples and nations are those which; having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

For the purposes of this research when talking about indigenous people we are referring to pre-colonial inhabitants of the land which are culturally, ethnically and sometimes religiously different from the colonial and post-colonial settlers. Having also most of the times a different world-vision than the one prevailing in most western societies.

V.3 ***Biopiracy***: Bioprospectors seek to identify and extract biological material with useful properties that can be developed into products capable of commercial exploitation. Sometimes, this activity involves the participation of locals, who share their traditional knowledge and practices, but do not receive equitable compensation for their contributions. These activities have been characterized as episodes of "biopiracy". It should be pointed out, however, that biopiracy does not have a specific legal meaning (Ong, 2004).

The Action Group on Erosion, Technology and Concentration (ETC), formerly known as RAFI, has defined biopiracy as "the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions seeking exclusive monopoly control (usually patents or plant breeders' rights) over these resources and knowledge" (as cited in McManis, 2004 p448). Biopiracy involves the exploitation of either

citizens of a State or the State itself. In terms of exploitation of citizens, holders of traditional ecological knowledge have been identified as the primary victims. In terms of the exploitation of the State itself, developing countries are considered the most common victims, as they frequently lack the resources and capability to protect their natural resources form exploitation (Jeffery, 2004).

For the purpose of this research, when talking about biopiracy we are referring to the appropriation of knowledge (in this case indigenous knowledge) without their consent by people or companies looking to obtain some kind of profit from it.

V.4 ***Genetically Modified (GM) Crops***: Genetic modification is a technology for altering the genetic make-up (the DNA) of living organisms so they are able to make new substances or perform new or different functions. Genes control the characteristics of living organisms. A 'genetically modified organism' is a plant, animal, insect or micro-organism whose genetic make-up has been changed using modern laboratory techniques and can grow and reproduce and can pass on its genes (including its modified genes) to its offspring (MFE, 2004). The inserted gene sequence (known as the transgene) may come from another unrelated plant, or from a completely different species: transgenic Bt corn, for example, which produces its own insecticide, contains a gene from a bacterium. Plants containing transgenes are often called genetically modified or GM crops, although in reality all crops have been genetically modified from their original wild state by domestication, selection and controlled breeding over long periods of time (Arce & Vicuña, 2001). For this research, we will use the term GM crops to describe a crop plant which has transgenes inserted.

V.5 ***Customary Activities:*** This expression is used to generally describe activities that took place before the arrival of the white settlers.

Include personal relationships such as adoption practices, the recognition of marriage and divorce, and rules of inheritance. There are also other activities such as hunting, fishing or other types of food gathering, which of necessity are linked to land, rivers, lakes, foreshores and other natural features. It has been said, that indigenous people have the right to continue practicing these activities nowadays, but these rights can be lost in three ways (Graham, 2001 p7):

1. abandonment of the custom on which it is based or, in the case of customary title, severing the physical link with the land concerned
2. surrender by the holder to the Crown; or
3. extinguishment pursuant to a lawful act of the sovereign

However, there are also opinions expressing that customary rights are not fixed at pre-contact with colonizers, but can develop after contact as well. For instance, the Waitangi Tribunal expressed in Chapter 10 of the tribunal's Ngai Tahu Sea Fisheries Report 1992 that it is by now a truism that Maori Treaty rights are not frozen as at 1840. This is based on the premise that, there would be developments that could not have been foreseen or predicted at that time (WT, 2007). These are known as development rights, or the right to use new technology in customary activities.

For the purpose of this research when talking about customary activities we will be referring to those activities practiced by indigenous peoples before the arrival of the white settlers; by customary rights, the rights of practicing those activities in the present.

VI. THEORETICAL LENS

The theory that may assist the present analysis is the neo-colonialism theory because it seems the most appropriate because of the topics involved. Since the end of World War II, neocolonialism has stimulated the reflections of many intellectuals around the world, particularly those of former colonial empires (Grovogui, 2002). Neo-colonialism theory "brought into prominence the position of the non-European world and it established the continuing relevance of the imperial experience" (Darby, 1997 p22).

The word postcolonial is useful as a generalization to the extent that it refers to a process of disengagement from the whole colonial syndrome (Loomba, 2005). Theories of style and genre, assumptions about the universal features of language, epistemologies and value systems are all radically questioned by the practice of postcolonial writing (Aschroft & Tiffin, 2002). Moore-Gilbert (1997 p203) concluded that "because postcolonial histories and their presents are so varied, no one definition of the post-colonial can claim to be correct at the expense of all others"; as it has been explained (Aschroft et al, 1998 p188):

> "The term is now used in wide and diverse ways to include the study and analysis of European territorial conquest, the various institutions of European colonialisms, the discursive operations of empire; the subtleties of subject construction in colonial discourse, and the resistance of those subjects and the different responses to such incursions and their contemporary colonial legacies in both pre and post-independence nations and communities. While its use has tended to focus on the cultural production of such communities, it is becoming widely used in historical, political, sociological and economic analyses (post-colonialism, concerned to examine the processes and effects of, and reaction to, European colonialism from the 16th century up to and including neo-colonialism of the present day)".

Literally, the term neocolonialism was coined by the first president of Independent Ghana and exponent of Pan-Africanism, Kwame Nkrumah in his "Neo-Colonialism: the last stage of imperialism". This title, which developed Lenin's definition of imperialism as the last stage of capitalism, suggested that, although countries like Ghana have achieved technical independence, "the ex-colonial powers and the newly emerging superpowers such as the United States continue to play a decisive role through international monetary bodies, through the fixing of prices on world markets, multinational corporations and cartels and a variety of educational and cultural institutions" (Aschroft et al, 1998 p163). The control of former colonies remains through ruling native elites in compliance with neocolonial powers, resulting in a continuous unsustainable development and perpetual underdevelopment. Hence, neocolonialism is often used as a synonym for contemporary forms of imperialism, under the tacit understanding that colonialism should be seen as something more than the formal occupation and control of territories by the Western developed countries (Koshy, 1999).

The neo-colonial theory usually works well with African and Asian cases but ignores the particularities of Latin America. That is why, in the region, the theory assumed the form of what is known as post-Occidentalism. This line of thought, claim that is necessary to confront the universality of theories by creating a new epistemology that articulates the general theories with alternative models (Gotta, 2003; Coronil, 2000).

Latin American countries gained their independence in the early decades of the nineteen century (not from an indigenous statehood point of view though), while the African and Asian countries during the second half of the twentieth. Hence, the focus of the post-Occidentalism perspective is not on the struggle for political freedom and the consolidation of statehood but on social and economic rights claims and in new ways of participating in the public arena. No matter the differences, indigenous peoples share their realities facing common problems such as foreign debt, control of the

market by multinational companies, neoliberal integration programs, and extreme poverty; lose of identity, and all sorts of discrimination and positions of marginality in their relationships with nation-states among others (Sotelo Valencia, 2006).

There have been two broad tendencies in analyses of colonialism in relation to race and ethnicity: the first, derived from the Marxist analysis, can be referred to as the "economic" because it regards social groupings, including racial ones, as largely determined and explained by economic structures and processes. Colonialism was the means through which capitalism achieved its global expansion. Racism simply facilitated this process, and was the conduct through which the labour of colonized people was appropriated. The second approach, which has been called "sociological", and derives partly from the work of Max Weber, argues that economic explanations are insufficient for understandings the racial features of colonized societies (Loomba, 2005).

In Latin America and in other parts of the world, indigenous societies are an important proportion of the small-scale farmers working at a subsistence level. Sometimes aborigine groups are seen as a pre-modern social category, but from the postmodern tradition, they are seen as actors that reclaim the popular culture and affirm their collective identity. In this last approach, the focus of analysis is on the ethnic and not on class characteristics (Petras, 2003).

VI.1 **Globalization and neoliberalism**

Globalization has become identified with a number of large trends, most of which may have developed or accelerated since World War II. These include the greater international movement of commodities, money, information, and people; and the development of technology, organizations, legal systems, and infrastructures to allow this movement. There are two main tendencies in analysis about globalization: the positive one (that argues that as an engine of commerce, globalization brings an

increased standard of living to everyone); and the negative one (that see this phenomenon as an engine of corporate imperialism which only seeks to gain more profits without changing wealth distribution. Cultural assimilation, export of artificial wants, and the destruction of ecology are others of the negative aspects of globalization (Steger, 2003; Stiglitz, 2002).

Some authors have claimed that because of new science and technology, global capitalism now functions as an autonomous "empire", ruled only by the market and the multinational corporation. Against this interpretation, it is argued that far from being superseded by the overseas expansion of capital, the imperial states have grown and become essential components of the world political economy. Mercantilist imperialism, in which the imperial state combines protectionism at home, monopolies abroad, and free trade within the empire, is thus the chosen strategy for maintaining the empire and sustaining domestic political support "at a terrible cost to Latin America and to the dismay of its European competitors" (Petras, 2003 p13). In other words, it is the rise in importance of accumulation by dispossession (Harvey, 2003). Koshy (1999 p1) explained that:

> "Neocolonial strategies of power are increasingly articulated not through the language of the civilizing mission as in the 19th century, or through the American-sponsored discourses of anticommunism and modernization that superseded it, but through a new universalistic ethics and human rights, labor standards, environmental standards and intellectual property rights. In the New World Order, neocolonial power operates less through military force than through economic domination. What we are witnessing in out time is the scramble among developed countries not for territory but for the competitive edge in trade and commerce, especially through monopolistic control over vital sectors of profitability".

The neoliberal economic policies implemented during the 1980s and 1990s altered the economic and social contexts of many countries. Postero

& Zamosc (1994 p21) explained that these reforms affected indigenous peoples by: political restructuring, which has changed relations between Indian groups and the State; a new emphasis on resource extraction schemes, which has threatened their lands; and economic restructuring, which has caused drastic economic crisis.

In this context, indigenous groups have become important social actors in the struggle over the future of democracies.

VII. DESIGN

VII.1 Methodology

The methodology chosen for this research is a public policy comparative case study. Yin (2002) described the case study as an empirical inquiry that investigates a contemporary phenomenon within its real life context. The case study method can be used for a wide variety of issues, including the evaluation of training programmes, organizational performance, project design and implementation, policy analysis and relationships between different sectors of an organization or between organizations (Gray, 2004). Case studies enable researchers to focus on a single individual, group, community, event, policy area or institution and study it in depth, over an extended period of time, rather than dealing with variables. The researcher will usually have a number of research questions or hypothesis to give focus to the researcher and organize the data collection, analysis and presentation of the material. This approach is closely associated with historical study and with anthropology (Burnham et al, 2004; McNabb, 2004).

It has been said that case studies can be separated into three types: intrinsic (particular case interesting in itself, but which needs better understanding); instrumental (provide insight into an issue or redraw a generalization, generally used in exploratory research designs); and collective, multi-case or cross-case study (the study of a number of cases in order to investigate a phenomena, population, or general condition, also used to suggest whether a characteristic might be common to a larger population of similar cases) (McNabb, 2004; Choopug, 2005). Gray (2004 p133) made the following categorization:

- Single case study holistic (when represents a unique case) and embedded (within a single case study there may be a number of different units of analysis)

- Multiple case, holistic (when is not possible to identify multiple units of analysis) and embedded (multiple units of analysis are used which allow for more sensitivity and for any slippage between research questions and the direction of the study to be identified at a much earlier stage)

To make a comparison is a natural way of putting information in a context where it can be assessed and interpreted. Systematic comparisons of some aspects of the political systems of two or more countries often provide the empirical basis for building and refining general political science theories (Burnham et al, 2004).

VII.2 Methods

From the methods that case studies use, for the purpose of this research the following are going to be implemented: key informants or elite interviews, and literature review.

VII.2.1 **Elite interviews:** the majority of work by political scientist is concerned with the study of decision-markers and hence a key research technique for political scientist is what is known as elite interviewing. This may be defined in both terms of the target group being studied, an "elite" of some kind, and the research technique used, most characteristically what is known as semi-structured interviewing. It is often the most effective way to obtain information about decision-makers and decision-making processes. More generally, elite interviewing "can be used whenever it is appropriate to treat a respondent as an expert about the topic in hand"; elite interviewing is characterized by a situation in which the balance is usually in favor of the respondent (Leech as cited in Burnham et al, 2004 p205). The interview is a research-gathering approach that "seeks to create a listening space where meaning is constructed through an interexchange/ cocreation of verbal viewpoint in the interest of scientific knowing" (Miller & Crabtree, 2004 p185). In-depth interviews enable the researcher to capture the complexity of individuals' feelings, thought, and perceptions; are much less standardized than other data collection methods, but a degree of instrumentation prevents the interviewer from collecting superfluous or irrelevant information (Goodman, 2001; Ruane, 2005; Miller & Crabtree, 2004).

Interviews are preferable to questionnaires where questions are either open-ended or complex, or where the logical order of questions is difficult to predetermine. Interviews can be divided in 5 categories (Gray, 2004; Steinberg, 2004): structured, semi-structures, non-directive, focused and informal conversations. In depth interviews in qualitative studies involve

non probability sampling. External validity, or the ability to generalize study findings beyond study participants using inferential statistics, is not the objective of in-depth interviews. Sample specificity rather than a representative sample, is the important factor (Goodman, 2001).

VII.2.2 **Literature Review**: is a foundational stage in the development of any research project. During this stage, researchers gain information regarding the current knowledge base in their areas of interest, refine their conceptualizations and operationalizations, and identify problems that are likely to arise during their studies: "it helps the researcher to anticipate and avoid problems, define concepts, identify measures and select design. The literature review is equally important to the reader of the research report because it helps him to understand the researcher's decision and choices" (Sowers et al, 2001 p401).

The study of documents and archival data is "usually undertaken to supplement the information the case study researcher acquires by interview or by observing in a situation" (McNabb, 2004 p366). Primary sources consist only on evidence that was actually part of or produced by the vent in question; secondary sources consist of other evidence relating to and produced soon after the event; and tertiary sources of material written afterwards to reconstruct the event (Burnham et al, 2004; McNabb, 2004).

Text sources of research data can be grouped into four broad categories: the first is written text. These include such sources as books, periodicals, narratives, reports, pamphlets, and other published materials. Collectively, this group of sources includes most, if not all, of the mass media. Research using these sources if often called library research or desk research. The second category is formal and informal documents; it includes personal messages and assorted types of archival information, such as personal notes and memos, government records and vital statistics and other informal written material including e-mail. The third

category of sources is made up of the varieties on non-written communications. This group includes such things as graphics displays, photographs and illustrations, tools and other artifacts, films and videotapes. The final category includes all nonverbal signs and symbols (McNabb, 2004).

VII.2.3 **Implementing the Methods**

In order to carry out the public policy comparative case study, was thought that was necessary to have a historical background not only on the IP laws in both countries, but on the government-indigenous peoples relationships as well, in order to understand the current situation. To do this the first step was the review of literature in different libraries, these included: the Massey University Library, and the Auckland City Library in New Zealand; and the National Public Library, the National Congress Library, and the Supreme Court of Justice Library in Argentina. While in the former country almost none book related to the topic of this research could be found, the opposite happened in the New Zealand libraries. In the Argentine published material, indigenous topics were treated from an anthropological, sociological or historical point of view, but they were never related to IPR.

The same happened with public documents, discussion papers etc. In most cases, the different branches of the New Zealand government had their own websites, in which relevant information could be found. The government agencies in Argentina are not digitalized, and if they are, no relevant information is provided on their websites. The only way of receiving some sort of information was to physically going to these agencies repeatedly, not having the possibility of going beyond the front desk in many occasions; positive results were reached only in a few cases.

When tried to contact different indigenous organizations that were mentioned in different books and documents reviewed, the task was even more difficult. No telephone number or postal address could be found, not

even through the National Institute of Indigenous Affairs (Spanish acronym INAI), because the information contact was rarely updated. The authorities of the Institute of the Aborigine of Chaco (Spanish acronym IDACH), gave several excuses before eventually granting an interview.

Different government agencies were contacted in New Zealand as well, but little information was provided. Only Deanna Richards, Policy Analyst from ERMA (D. Richards, personal communication, 7 September 2006), Dayle Callaghan, Advisor from the Intellectual Property Office of New Zealand (D. Callaghan, personal communication, 11 May 2006) and Felicity Rashbrooke, Librarian from the Parliamentary Library (F. Rashbrooke, personal communication, 21 August 2006) provided some useful feedback.

Several public figures including Members of Parliament of both countries, and recognized Maoris and Tobas rights activists were contacted. Most people were reluctant; more interested in discussed other problems concerning indigenous peoples; or openly recognized that they did not know anything about or they were not experts on the topic. The last argument was given more often than expected. Of the interviews scheduled or intended, only four were finally possible. Three were made face-to-face, and one via telephone; these interviews were carried with Argentine specialists: Ms. Erika Vidal (member of the INAI) on 26 June 2006; with Mr. Carlos Correa (Lawyer expert on intellectual property rights and Professor at the University of Buenos Aires (UBA)) on 1 August 2006; with Mr. Eulogio Frites (Lawyer, member of the Indigenous Lawyers Commission of Argentina, member of a Coya tribe and a recognized indigenous activist) on 3 August 2006 ; and finally with Orlando Charole (President of the IDACH and member of a Toba tribe) on 20 September 2006.

VIII. INTERNATIONAL LEGAL CONTEXT

VIII.1 Relevant Documents, Agencies, and Conventions

VIII.1.1 **The WTO** (n.d): does not specifically address protection of traditional knowledge. At first glance, the most relevant provision appears to be the protection of know-how as envisaged in art 39. the mentioned article states that: "natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret".

The 2001 ministerial conference of the WTO in Doha, Qatar, did put great emphasis in those questions and instructed the competent subsidiary organ of the WTO, to examine inter alia, the relationship between the TRIPS agreements and the CBD, the protection of traditional knowledge and folklore, and other relevant new developments (Stoll & von Hahn, 2004). The most important document under this organization is the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, n.d.), negotiated in the 1986-94 Uruguay Round, which introduced intellectual property rules into the multilateral trading system for the first time.

The three main features of the Agreement are: A) Standards: the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and

permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. B) Enforcement: The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. It contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights. C) Dispute settlement: The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

The Agreement provides for certain basic principles, such as national and most-favored-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. The obligations under the Agreement will apply equally to all Member countries, but developing countries will have a longer period to phase them in. Special transition arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals.

TRIPS say that there are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to order public or morality; this explicitly includes inventions dangerous to human, animal or plant life

or health or seriously prejudicial to the environment (Article 27.2). However, in general, the negative to concede the patent, does not necessarily mean that the commercialization is also prohibited (Correa, 2001). The second exception is that Members may exclude from patentability diagnostic, therapeutic and surgical methods for the treatment of humans or animals (Article 27.3(a)). The last one is that Members may exclude plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, any country excluding plant varieties from patent protection must provide an effective sui generis system[3] of protection. Moreover, the whole provision is subject to review four years after entry into force of the Agreement (Article 27.3(b)).

VIII.1.2 **The International Union for the Protection of New Varieties of Plants** (UPOV, 2002)**:** UPOV was established by the International Convention for the Protection of New Varieties of Plants. The Convention was adopted in Paris in 1961 and it was revised in 1972, 1978 and 1991. The objective of the Convention is the protection of new varieties of plants by an intellectual property right. Under UPOV 1978 (UPOV, 2002a), governments may select the range of plant species eligible for protection. The right of farmers to replant and exchange the seed of protected varieties is also reasonably secure. Some breeders, however, believe that the flexibility in the 1978 convention is detrimental to commercial breeding. This has stimulated their interest in utility patents for plants instead of Breeders' Rights. The main differences between the two are summarized as follows:

3 A "sui generis" system simply means "one that is of its own kind". It refers to the creation of a national law or the establishment of international norms that would afford protection to intellectual property dealing with genetic resources -or biodiversity - and the biotechnology that might result.

Provisions	UPOV 1978	UPOV 1991
Protection coverage	Plant varieties of nationally defined species	Plant varieties of all genera and species
Requirements	Distinctness Uniformity Stability	Novelty Distinctness Uniformity and Stability
Protection term	Min. 15 years	Min. 20 years
Protection scope	Commercial use of reproductive material of the variety	Commercial use of all material of the variety
Breeders' exemption	Yes	Not for essentially derived varieties
Farmers' "privilege"	Yes	No. Up to national laws
Prohibition of double protection	Any species eligible for Plant Breeder's Rights protection cannot be patented	—

Source: van Wijk and Junne as cited in The Crucible Group 1994

VIII.1.3 **WIPO** (n.d.): The World Intellectual Property Organization (WIPO) is one of the specialized agencies of the United Nations (UN) system of organizations. The "Convention Establishing the World Intellectual Property Organization" was signed at Stockholm in 1967 and entered into force in 1970. However, the origins of WIPO goes back to 1883 and 1886, with the adoption of the Paris Convention and the Berne Convention respectively. The mission of WIPO is to promote through international cooperation the creation, dissemination, use and protection of

works of the human mind for the economic, cultural and social progress of all mankind.

WIPO is expected by its Member States to be present at international discussions relating to genetic resources, traditional knowledge and folklore, to help clarify as far as possible the implications for intellectual property. This involves identifying and addressing the relevant intellectual property issues. WIPO is also expected to engage in work and facilitate discussions with a view to bringing about progress in the consideration of the issues. In this context, a WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established in September 2000 by WIPO Member States. The primary themes include the intellectual property questions raised by:

- access to genetic resources and benefit-sharing;
- protection of TK, whether or not associated with those resources;
- protection of expressions of folklore.

The work of the Intergovernmental Committee (IGC) has led to the development of two sets of draft provisions for the protection of traditional cultural expressions/folklore (TCEs) and for the protection of TK against misappropriation and misuse. The drafts have not been adopted or endorsed yet by the IGC. WIPO also carried out nine act-finding missions to identify and explore the intellectual property needs and expectations of holders of TK, in order to strengthen the role of the intellectual property system in their cultural, social and economic development (WIPO, 2006, WIPO, 2006a).

The last draft elaborated on TK (WIPO/GRTKF/IC/8/5) had as policy objectives among others: meet the actual needs of TK holders; promote conservation and preservation of TK; contribute to safeguarding of TK, ensure prior informed consent and exchanges based on mutually agreed terms and promote equitable benefit-sharing. And in the guiding principles

stated about the principle of equity and benefit-sharing, the protection should reflect the need for an equitable balance between the rights and interests of those that develop, preserve and maintain traditional knowledge, namely traditional knowledge holders, and of those who use and benefit from traditional knowledge; and that traditional knowledge protection should respect the right of traditional knowledge holders to consent or not to consent to access to their traditional knowledge and should take into account the principle of prior informed consent (clause e). The draft also clarified that the authority to determine access to genetic resources, whether associated with traditional knowledge or not, rests with the national governments and is subject to national legislation (clause f) (WIPO, 2006b).

In 1984, WIPO and the UN Educational, Scientific and Cultural Organization (UNESCO) developed "model provisions for national laws on the protection of expressions of folklore against illicit exploitation and other prejudicial actions". Under this model provisions, folklore need not be reduced to material form (written down) to be protected (Posey, 2004 p161).

VIII.1.4 **The International Labor Organization** (ILO, 2006) was the first UN organization to deal with indigenous issues. A committee of experts on indigenous labor was established in 1926, to develop international standards for the protection of aborigine workers. The ILO developed a special convention (107) known as the convention concerning protection and integration of indigenous and other tribal and semi-tribal populations in independent countries. The convention was revised in June 1989 as convention 169 concerning indigenous peoples in independent countries. This text expresses the view that governments should ensure that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; promote the full realization of the social,

economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; and assist the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life. At present ILO is the only legally binding instrument of international law with respect to indigenous peoples (Stoll & von Hahn, 2004).

VIII.1.5 **UN Economic and Social Council (ECOSOC)**: In 1972, this Agency authorized a Commission on Human Rights to form a special sub-commission to conduct a broad study of the problem of discrimination against indigenous peoples. ECOSOC created in 1982 a working group on indigenous populations. Resolution 1990/27 of the sub-commission recommended that any UN Conference on Environment and Development convention "provide explicitly for the role of indigenous peoples as resource users and managers, and for the protection of indigenous peoples right to control of their own traditional knowledge of ecosystems. Resolution 1991/31 called for a study on the applicability of collective rights regarding property, including intellectual property (Posey, 1994).

VIII.1.6 **The World Health Organization (WHO):** created in 1948 as a specialized agency of the UN, dealt with traditional medicine and the intellectual property implications associated therewith at an Inter-regional workshop on intellectual property rights in the context of traditional medicine in December 2000. The workshop produced recommendations regarding, inter alia, the development of national policies and strategies in the framework of national health policies on the utilization and protection of traditional medicine, the strengthening of customary laws for the protection of traditional medicine, the documentation of traditional knowledge in the public domain, and the equitable sharing of benefits for commercial use of traditional medicine (Stoll & von Hahn, 2004). The WHO's Traditional

Medicine Strategy 2002-2005 includes as one of its objectives the "protection and preservation of indigenous traditional medicine knowledge relating to health". However, there is no further explanation about what is meant by "protection" in this context and what the concrete legal measures and other means to achieve that objective would be (Correa, March 2004 p4).

VIII.1.7 **The Food and Agriculture Organization** (FAO, 2006; FAO, 2006a): The Commission on Genetic Resources for Food and Agriculture, was the forum in which governments negotiated and renegotiated the International Undertaking on Plant Genetic Resources, 1983. Ten years later, the FAO Conference adopted Resolution 7/93 for the adaptation of the International Undertaking in harmony with the CBD, including the issue of the realization of Farmers' Rights. Finally, by Resolution 3/2001 the International Treaty on Plant Genetic Resources for Food and Agriculture, was adopted in November 2001.

This Treaty covers all plant genetic resources relevant for food and agriculture. Through the Treaty, countries agree to establish an efficient, effective and transparent Multilateral System to facilitate access to plant genetic resources for food and agriculture, and to share the benefits in a fair and equitable way. The Multilateral System applies to over 64 major crops and forages. The recognition of Farmers' rights includes the protection of traditional knowledge, and the right to participate equitably in benefit-sharing and in national decision-making about plant genetic resources. It also gives governments the responsibility for implementing these rights. The Treaty came into force on 29 June 2004, ninety days after forty governments had ratified it (Argentina has signed the Treaty in 2002 but the ratification is still pending, New Zealand is not part of the Treaty).

VIII.1.8 **The Convention on Biological Diversity** (CBD, 2005; Vivas Eugui, 2003): the objectives of the Convention are "the conservation of

biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding". According to article 3 States have "sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". Article 15 declares that: "recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation". About benefit-sharing of biotechnology article 19 informs that: "each Contracting Party shall take legislative, administrative or policy measures, to provide for the effective participation in biotechnological research activities and to promote and advance priority access on a fair and equitable basis by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties. Such access shall be on mutually agreed terms.

The CBD established that a Contracting party: "shall as far as possible as appropriate... (8j) subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilizations of such knowledge, innovations and practices".

At its fourth meeting, by decision IV/8 on access and benefit-sharing, the Conference of the Parties decided to establish a regionally balanced

panel of experts to: "draw upon all relevant sources, including legislative, policy and administrative measures, best practices and case-studies on access to genetic resources and benefit-sharing arising from the use of those genetic resources, including the whole range of biotechnology, in the development of a common understanding of basic concepts and to explore all options for access and benefit-sharing on mutually agreed terms including principles, guidelines, and codes of conduct of best practices for access and benefit-sharing arrangements." During their first meeting, held in San Jose, Costa Rica, in October 1999, experts reached broad conclusions on: prior informed consent, mutually agreed terms, information needs and capacity-building. The fifth (May 2000) and sixth meeting (Bonn, 2001) were on the same line of work and had the mandate to develop draft guidelines on access and benefit-sharing that meant to assist Parties and stakeholders with the implementation of the access and benefit-sharing provisions of the Convention. There were also further meetings of the Working Group in Kuala Lumpur, Malaysia (2004), and in Bangkok, Thailand (2005) with similar agendas.

The safety protocol known as the Cartagena Protocol on Biosafety, has as main objectives are "to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements".

VIII.1.9 **The 1992 Rio Declaration on Environment and Development** (UNEP, 2006): express that States have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

(principle 2). All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development (principle 5), States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies (principle 8). States shall enact effective environmental legislation (principle 11). Principle 22 talks about indigenous people's roles and rights: they have a "vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development".

VIII.2. Declarations on indigenous human rights

VIII.2.1 **UN Draft Declaration on Indigenous Rights** (UN, n.d.): was created by the Economic and Social Council of the Working Group on Indigenous Populations. The Draft United Nations Declaration on the Rights of Indigenous Peoples (1994) represents one of the most important developments in the promotion and protection of the basic rights and fundamental freedoms of indigenous peoples. The draft declaration covers rights and freedoms including the preservation and development of ethnic and cultural characteristics and distinct identities; protection against genocide and ethnocide; rights related to religions, languages and educational institutions; ownership, possession or use of indigenous lands and natural resources; protection of cultural and intellectual property. Maintenance of traditional economic structures and ways of life (including hunting, fishing, herding, gathering, timber-sawing and cultivation); environmental protection; participation in the political, economic and social life of the States concerned, in particular in matters which may affect indigenous people's lives and destinies; self-determination; self-government or autonomy in matters relating to indigenous peoples' internal and local affairs. Traditional contacts and cooperation across State boundaries; and the honoring of treaties and agreements concluded with indigenous peoples.

Article 24 expresses that: Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

The draft declaration on the rights of indigenous peoples has by far the most far-reaching standards for the protection of indigenous people, however even if adopted by the UN General Assembly will remain a non-binding instrument of international law (Stoll & von Hahn, 2004).

VIII.2.2 **American Declaration on the Rights of Indigenous Peoples** (OAS, 2005): (Approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 1333rd session, 95th regular session): proclaimed that Indigenous peoples have the right to the full and effective enjoyment of the human rights and fundamental freedoms; and have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Indigenous peoples have the right to legal recognition and practice of their traditional medicine, treatment, pharmacology, health practices and promotion, including preventive and rehabilitative practices; the right to the protection of vital medicinal plants, animal and mineral in their traditional territories. Indigenous peoples have the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it. Finally, the declaration express that Indigenous peoples have the right to the recognition and the full ownership, control and protection of their cultural, artistic, spiritual, technological and scientific heritage, and legal protection for their intellectual property through trademarks, patents, copyright and other such procedures as established under domestic law; as well as to special measures to ensure them legal status and institutional capacity to develop, use, share, market and bequeath that heritage to future generations.

VIII.2.3 **Other documents**[4]

Other Declarations, Covenants, Consultations, and Recommendations also discussed the value of indigenous knowledge, biodiversity and biotechnology, customary environmental management, arts, music, language, and other physical and spiritual cultural forms. Some examples are: **The Covenant on Intellectual, Cultural, and Scientific Resources** (IDRC, 2006b) was an attempt to provide a basic code of ethics and conduct that will form the basis for equitable partnerships that lead to

[4] A complete list in Zamudio (2006)

economic independence for local communities, while providing for the conservation of natural resources. The main category for protection in the covenant included all sacred property (images, sounds, knowledge, material, culture or anything that is deemed sacred and, thereby, not commoditizable). **The Declaration of Principles of the World Council of Indigenous Peoples** (IDRC, 2006c) (Ratified by the IV General Assembly of the World Council of Indigenous Peoples) stated that Indigenous Peoples have inalienable rights over their traditional lands and over the use of their natural resources, and more important in this context that Indigenous Peoples will reassume original rights over their material culture, including archaeological zones, artifacts, designs, and other artistic expressions (article 14).

The Kari-Oca Declaration and the Indigenous Peoples· Earth Charter (IDRC, 2006d) (The World Conference of Indigenous Peoples on Territory, Environment and Development, Brazil, 25–30 May 1992) declared that: traditional medicines and their preventive and spiritual healing power, must be recognized and protected against exploitation; Indigenous peoples must consent to all projects in our territories. **The Charter of the Indigenous: Tribal Peoples of the Tropical Forests** (IDRC, 2006a) (Malaysia, 1992): also claimed the necessity of indigenous prior consent when involved or affected, and for the revalidation of traditional medicine, and the promotion of programs of modern medicine and primary health care. **The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples** (IDRC, 2006e) (New Zealand, 1993) declared that indigenous peoples should be aware that the existing protection mechanisms are insufficient for the protection of their intellectual and cultural property rights; wished for the development of a code of ethics, and proposed a moratorium on any further commercialization of indigenous medicinal plants until an appropriate protection mechanisms is developed. **The Recommendations from the Voices of the Earth Congress** (IDRC, 2006f) (Amsterdam, 1993)

proposed the creation of a 'Council on Indigenous Intellectual, Cultural, and Scientific Property Rights," in order to: develop educational materials on intellectual, cultural, and scientific property rights; develop mechanisms for protection and compensation; and advise indigenous and traditional communities on legal and political actions among other duties.

The following three and last documents to be mentioned are, perhaps, the ones that provided more specific actions to be taken: **Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica (COICA** Spanish acronym for Indigenous Peoples Coordination Agency of the Amazon)**/UN Development Program (UNDP) Regional Meeting on Intellectual Property Rights and Biodiversity** (IDRC, 2006) intended to: plan, program, and establish timetables, and seek financing for the establishment of an indigenous program for the collective use and protection of biological resources and knowledge; hold seminars and workshops at the community, national, and regional levels on the topic; and rain indigenous leaders in aspects of intellectual property and biodiversity among others. The **UNDP Consultation on the Protection and Conservation of Indigenous Knowledge** (2006a) (Basic points of agreement on the issues faced by the indigenous peoples of Asia) wanted to disseminate information, organize follow-up workshops at the community level and organize local or national conferences to explore effective ways of protecting and conserving indigenous knowledge as the short-term strategies. The intensification on advocacy and campaign works against intellectual property systems and the Human Genome Diversity and the construction of a network within the Asian groups were part of the long-term strategies. Finally, the **UNDP Consultation on Indigenous Peoples· Knowledge and Intellectual Property Rights** (2006) (Fiji, 1995) called for a moratorium on bioprospecting in the Pacific and urged indigenous peoples not to cooperate in bioprospecting activities until appropriate protection mechanisms are in place. It also encouraged the establishment of a treaty declaring the Pacific Region to be a life forms patent-free zone.

IX. NATIONAL LEGAL CONTEXTS

The general principle behind IPR protection is that the right holder is given some form of monopoly control over the economic exploitation of the material concerned, as a reward and incentive for the efforts of those involved in the creation of the "property", as well as to prevent unfair competition from others (Tucker, 2004; Walden, 1995). Extreme positions are not the right answer to the problem of IPR: a very strong intellectual property protection leads to the problem of monopolies and weak protections lead to the problem of excessive free riding and lack of investment in innovation (Drahos, 2002).

IX.1 Argentina Legal Context

Argentina is the second country in the world in the production of transgenic organisms, behind the USA, with more than 4 million of hectares dedicated to those cultivars, mainly soya (Gonzalez de Apodaca et al, 2000).

By resolution 22/92 the MERCOSUR created the Environment Specialized Reunion; whose objectives are to analyze the current legislation of the member countries, harmonize them, and propose action to be taken to protect the environment (SAyDS, 2006d). Two meetings were celebrated in Montevideo; both in 2005 (SAyDS, 2006b; SAyDS, 2006c).

IX.1.1 **IP Legislation**

Prior to the amendment of the National Constitution (hereinafter NC) in 1994, international treaties were considered, as domestic laws. After the amendment, the new Constitution established a list of international treaties, dealing mainly with human rights, which have Constitutional hierarchy (the highest law of the state). The rest of the international treaties are considered superior to the laws but inferior to the Constitution. That is why, for instance, the UPOV 1978, the CBD, and the TRIPS Agreement ratified

by Argentina, are all part of the domestic system of legislation and have superiority over other laws and can repeal them. The legislative branch of government has the right to approve or reject the international agreements (art 75 par.21 NC).

In Argentina, the power of the national and the provincial authorities coexists over the same territory and population; retaining the provinces all the powers not expressively delegated to the National Government (art. 121 NC); having the provincial states the original domain over the natural resources (art. 124). The NC guarantees the rights to private property and IPR; these rights can either affect access to GR or be restricted by rules on access (art.17). Law 22.351/80, organized the system of National Parks and Reserves; that same year, Argentina passed the law 22.344 adopting the Convention on International Trade of Endangered Species (CITES). A year later, law 22.421 on Protection and Conservation of Wild Fauna was adopted and regulated by decree 691/81[5].

There were many patent law projects since the 1930s but none of them was approved. From 1864 until 1995 the only patent legislation was law 111 that was instituted following the article 17, first clause of the NC that stated that "every author or inventor is the exclusive owner of his/her work, invention or discovery for the time stipulated by law". The fourth clause expressed that were not patentable the pharmaceutical compositions other inventions and discoveries already published. Argentina adhered to multilateral regimens on the subject such as the Paris Convention 1883 and its amendments, Lisboa 1958 (law 17.011) and Stockholm 1967 (adhered to the articles 13 to 30 by law 22.195) (Rapela, 2000).

In this context, it seemed possible to patent a superior vegetal in the country or at least obtained the recognition of a patent obtained abroad. However, these laws were never cited in patent conflicts; in general, the claims were made referring the law 2.247 of 1963 known as the "seeds and

[5] For the complete list of Multilateral Agreements signed by Argentina in relation to the environmental/ecological agenda see CBD (2001 p102)

fitogenetic creations law". According to Meyer (as cited in Rapela, 2000 p144) all the non-pharmaceutical compositions would be possible to patent if a product or industrial result could be obtained. Gutierrez is in the same line of thought arguing the law 111 did not consider the patents of live organisms but did not exclude the possibility either (as cited in Rapela, 2000 p146).

The first law addressing new seed varieties was enacted in 1935, providing for the registration of new seeds but not providing any legal protection to intellectual property rights for these new seeds. In 1973, the military government passed a decree called the "Law of Seeds" 20.247 (ARPOV, 2006), this was the first piece of legislation that gave commercialization rights to the inventors of new seed varieties, but was not fully implemented until 1978 (Kesan & Gallo, 2005). Under this law, the varieties developed through biotechnology as well as new varieties discovered could be registered, therefore allowing the patenting of natural elements without the mediation of an inventive process (article 19). The ownership over the variety lasted for a minimum of 10 years and a maximum of 20. Farmers' rights to save seeds for their own use without previous authorization by the owner of the variety were recognized[6] (art. 27).

The Law of Seeds was modified in 1991 by Decrees 2.183 and 2.817, which called for the creation of the National Seed Institute (Spanish acronym INASE) (Kesan & Gallo, 2005); and in 1994, by law 24.376 adopting the 1978 UPOV. The latest version of this agreement (UPOV 1991) has not yet been approved in Argentina. It has been said that there are serious chances that the Act is going to be joined by the Argentine government in the near future (Vidal, 2006; Correa, 2006).

In 1995, a new law known as Patents of Invention and Utility Models Law (law 24.481), replaced law 111. Some of its articles were in open contradiction with the GATT (General Agreement on Tariffs and Trade)

[6] For farmer's rights and breeder's rights definitions go to page 62

agreement (signed by Argentina on 15 December 1993), for example with article 27, which is why, the law was observed and corrected by law 24.572. These new laws enlarged the scope of patentable matter compared to Law 111 that prohibited patents on pharmaceutical compounds. In October 1995, decree 590 tried to clarify the chaotic situation created by releasing a new text with the rights procedures to be followed. Two months later, law 24.603 was promulgated, stating that the laws 24.481 and 24.572 substituted and repealed the law 111.

The consolidated text of the Patents and Utility Models Law, (Law 24.481 as amended by Law No. 24.572), (WIPO, 2003) says that: inventions relating to products or processes shall be patentable if they are new, involve an inventive step and are susceptible of industrial application (art. 4). This text also lists what things shall not be considered inventions, including any live material or substances already existing in nature (art. 6 clause g). It also declares that shall not be patentable all biological and genetic material existing in nature or derived there from in biological processes associated with animal, plant and human reproduction, including genetic processes applied to the said material (art. 7 clause b).

In March 1996, decree 260 regulated the consolidated text. Abiding just to the mentioned decree, it can be assumed that the possibilities of obtain a patent after the reforms are as follows (Rapela, 2000 p150):

- The discoveries on plants are not patentable
- Plants are not patentable
- Plant varieties are not considered subject of patents either
- Is possible to patent a process and biotechnological product
- It would not be possible to patent a natural gene
- It would be possible to patent an artificial genetic construction

As Article 7b of the consolidated text is included in the regulatory decree of the law, it is interpreted that plants, animals and biological processes for their reproduction are considered discoveries and not

inventions (Correa, 2001). Bergel (as cited in Rapela, 2000 p150) understood that the Argentine patent law when omitted to mention the plant varieties, made them not able to be protected under that law because Argentina adhered to the UPOV 78. As Rapela (2000) expressed, the patenting process of genetic compounds, genetic processes, genes, plants or plant varieties is everything but clear.

The Argentine patent law did not include a definition of microorganisms but the National Administration of Patents has issued disposition 633/2001, in order to give guidelines for the analysis of patent applications over products or processes based on microorganisms or using microorganisms. Such disposition states that modified microorganisms can be patented if they satisfy the general requirements of novelty, inventiveness and industrial application. Nevertheless, it would be impossible to patent the whole genetic information of a new plant or animal due to article 6 of the decree that establishes the exclusion of animals and plants from patentability. An invention will also not be patentable if it affects in any aspect the Rio Convention on Biological Diversity, signed by Argentina and approved through Law 24.375 on September 7, 1994.

There were no rules explicitly focused on GR prior to the adoption of the CBD; it is important to mention that the adoption of the CBD did not generate many domestic laws regarding its implementation. This contributes to the doubts about its direct application.

IX.2 New Zealand legal context

IX.2.1 **IP Legislation**

As a former colony of Great Britain, New Zealand has drawn many of its intellectual property statutes from that country. Thus, the Patents Act 1953, the Trade Marks Act 1953, the Copyright Act 1962 and the Design Act 1953 were based on UK legislation. New Zealand has ratified the London text of the Paris Convention for the Protection of Industrial Property, dated 1934 (Brown & Grant, 1989).

In New Zealand the two main criteria for the granting of a patent are (MED, 2006):

- novelty: An invention is considered to be new if a description of the invention has not been published in New Zealand before the filing date of the application.
- manner of new manufacture: This has been interpreted by the Courts to exclude such things as "products of nature", mathematical operations, bare principles, mathematical algorithms, schemes or plans and methods of medical treatment of humans.

On July 1988, the Attorneys-General of New Zealand and the Commonwealth of Australia signed an inter-governmental Memorandum of Understanding on Business Law Harmonization. The document notes that "a significant degree of harmonization and co-operation" has already been achieved in the area of "intellectual property law" but does not otherwise refer to patents, trade marks or intellectual or industrial property generally (Law Commission Report N13, 1990 p4).

In 1992, the Ministry of Commerce produced a paper which proposed a number of changes to the Patents Act. Four hui were held in 1994 to further discuss Maori concerns on patenting life forms, this led to the establishment of the Maori Patenting of Life Forms Focus Group and a paper was presented in April 1997 (MED, 2006h; MED, 2006g). In December 2002, the Cabinet decided that the issue of patent term

extension for pharmaceuticals should be considered in order to (MED, 2006a):

- ensure that the patent system continues to provide adequate incentives for investment in the development of new pharmaceuticals; and
- provide incentives for pharmaceutical companies to invest in the country providing for the extension.

Currently, the maximum term of a New Zealand patent is twenty years; this regime was instituted in 1994, when the Patents Act 1953 was amended to bring it into line with New Zealand's obligations under the TRIPS agreement. Prior to the 1994 amendments, the patent term in New Zealand was a maximum of 16 years from the date of filing, with provision for up to 10 years extension on grounds that included inadequate remuneration.

The TRIPS Agreement which came into force in 1995 permits a specific exclusion from patentability for plants and animals (except for micro-organisms). This exclusion is due to be reviewed and some parties to the Agreement may seek its removal. The New Zealand Government has yet to consider this issue and is interested in Maori views (MED, 2006h).

The Patents Act 1953 was amended in 2002 to introduce a "regulatory review exception". This allowed third parties to make, use or sell an invention for purposes reasonably related to the development and submission of information to a government agency in order to gain approval to make, use or sell the invention. This exception was intended to facilitate the entry onto the market of generic products, such as generic pharmaceuticals (MED, 2006d).

IX.2.2 **Plant varieties rights (PVR)**

New Zealand has independent legislation for the protection of plant varieties, the Plant Variety Rights Act 1987 (Frankel & McLay, 2002; MED, 2006c). This Act was amended in 1990, 1994, 1996 and 1999 (PVR, 2006). Since the PVR Act certain species of Koromiko and puawananga have had patents granted (Jackson, 1997). This act creates an economic incentive to develop new varieties by protecting the plant breeder's propagation rights for a limited period. Nevertheless, it does not cover other biota or other forms of intellectual property, nor are there comparable measures for encouraging the conservation and storage of existing species and varieties, including cultivars that were developed before the plant variety rights legislation came into effect (Frankel & McLay, 2002). The conditions for granting a PVR in New Zealand are (MED, 2006j; PVR, 2006):

- Novelty: the variety must not, for more than one year, have been offered for sale or marketed with the consent of the breeder in New Zealand, nor for more than four years (six years for grapevines and trees) in any other State. Therefore, novelty arises in a commercial sense, not in the sense that the plant is necessarily a "new" development.
- Distinctness: The variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge;
- Stability: The plant must be stable in its essential characteristics;
- Denomination: The variety must be given a denomination enabling it to be identified.

The Act gives PVR owners the exclusive right to:

- produce for sale and to sell, reproductive material of the variety concerned;
- propagate that variety for the purposes of the commercial production of fruit, flowers, or other products of that variety (if the

variety is a plant of a type specified by the Governor General by order in Council).

The Plant Variety Rights Act 1987 is based in UPOV 78 and provides for exceptions to the rights that plant breeders have over their protected varieties; S18 states that any person may: (a) Propagate, grow, or use a protected variety, for non-commercial purposes or (b) If the production of the hybrid or new variety concerned does not require repeated use of that variety (i) Hybridize, or produce a new variety from, a protected variety; or (ii) Sell and hybrid of, or new variety produced from, a protected variety. S18(b) of the Plant Variety Rights Act 1987 implements the so-called "breeders' exemption". This originates from Article 5(3) of the 1978 Revision of the UPOV Convention (UPOV 78), of which New Zealand is member.

PVRs are granted for a term of 20 years in the case of non-woody plants, or 23 years in the case of woody plants, beginning from the date when rights are granted (MED, 2006j; PVR, 2006).

Certain aspects of the Act have been recently reviewed, and a draft Bill to amend the PVR Act 1987 has been drafted and released in 2005. The Bill provides for the same stronger rights for plant variety rights owners as provided for in UPOV 91. The "experimental use" exception contained in UPOV 91 is not, at this stage, being incorporated into the Bill. This exception would be adopted in the Plant Variety Rights Act if New Zealand were to ratify UPOV 91 (MED, 2006c).

The main changes proposed by the Bill are as follows: currently the owner of a variety is defined as a person who bred or discovered a variety. The Bill clarifies that mere discovery by itself is insufficient to justify a claim to ownership of a new variety. Under this new proposal, it is required to take account of whether the denomination may be offensive to a significant section of the community, including Maori. A grantee will have more rights to prevent other people from exploiting the protected variety without the

grantee's authority. These rights include the right to prevent other people from producing or reproducing, conditioning for propagation, selling or marketing, or importing or exporting the reproductive material of a protected variety (MED, 2006i).

X.1 Biodiversity, biotechnology, TK and indigenous peoples

The Convention on Biological Diversity (CBD, 2005) defines TK as:

> "The knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. TK is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, and forestry".

While the definition outlines what types of knowledge the CBD considers traditional, this agency has never defined what constitutes an indigenous or local community embodying a traditional lifestyle. Amiott (2006 p6) explained that: "by limiting its protections to "indigenous communities" and ignoring the more generally accepted term "indigenous peoples," the CBD fails to protect the TK of indigenous individuals that do not live within an indigenous community".

It has been said, that there are at least three concepts on ownership of knowledge (Timmermans, 2003 p748):

1. a common view is that all knowledge is in the public domain, free for anybody to use, except that knowledge that is privatized, which is protected by IPR laws.
2. others consider that the previous concept oversimplifies the situation. They hold that within the private domain, one can distinguish knowledge protected according the customary law and practices, in addition to knowledge protected by IPR laws.
3. there are three domains of knowledge: individual, community and public. Different rights are associated with knowledge in the different domains, which however overlap. This framework explicitly

distinguishes between individual and community knowledge, and considers that neither is a part of the public domain.

According to Khor the major concerns about the implementation of TRIPS include the following (2002 p23):

1. it is said that the strong IPR being established in each country through TRIPS will confer monopoly rights on private research organizations and powerful corporations
2. whereas before the establishment of TRIPS many countries have prohibited the patenting of life forms, the provisions in TRIPS make it mandatory for WTO members countries to patent some categories of life forms and living processes. This has raised ethical, religious, environmental and developmental concerns
3. there is a concern that due to the definitions and criteria used, favor will be given to private persons or companies and modern technology
4. there is growing evidence of the misappropriation of traditional knowledge and the rights of farmers and local communities by the corporation and private research institutions that have been patenting biological and genetic materials and knowledge relating to their use.
5. there is a widespread fear among NGOs, farmer's groups and indigenous people's organizations that allowing genetic materials to be subjected to IPRs would increase the global control of a few corporations over seeds and crops.

A broad range of abuses inflicted on indigenous peoples can be seen as violations of their right to be informed: unauthorized use of tribal names; unauthorized commercialization of indigenous peoples' knowledge, seeds and plants, and extraction of their own biogenetic material without their informed consent (biopiracy); public disclosure and use of secret

knowledge, images, and other sensitive information; filming and taking photographs without permission (Posey & Dutfield, 1996 p44).

X.1.1 **Globalization and indigenous peoples**

The framework of the global capitalist economic order is sustained and regulated by a series of multilateral agreements; one of its pillars is the WTO. This organization came into existence in 1995 replacing the GATT and cover trade in services, inventions, creations and designs (intellectual property); a scope not covered by its predecessor (WTO, 2007). As Harawira (1999) explained, "for indigenous peoples, these new forms of economic globalization are a continuation of the colonization which has been perpetrated on them since the beginnings of capitalist expansion".

Indigenous movements have become vectors of resistance to globalization and neoliberal policies. For instance, in New Zealand, Maori made the WAI 262 claim before the Waitangi Tribunal. This initiative worked as a landmark case, with implications for indigenous people everywhere (Harawira, 1999). In addition, in Latin America, Bolivian Indians claiming for land and dignity in 1990, the uprising of indigenous peoples from Ecuador the same year, and the emergence of the Zapatista army in México in 1994, are some of the examples of resistance (Postero & Zamosc, 1994). As Niezen (2003 p215) explained, these struggles aims "to restore and reinforce ways of life based upon personal ties of kinship, friendship and obligation".

X.1.2 **Biodiversity, biotechnology and environmental damage**

The introduction of genetic engineering technologies into agriculture has unleashed a great debate concerning their potential consequences upon the environment, health, and the sustainable development of nations (Larach, 2001). As Doods (2003) and Sosa Belaustegui (2001) pointed out, the application of biotechnology has become essential because of the pressing challenges of feeding additional people.

Genetic modification technologies introduced over the last thirty years have allowed for the development of plants that are resistant to various herbicides and insecticides, have the potential to increase yield, and have altered the characteristics of some plants to, inter alia, increase nutritive value, prolong shelf life, and increase resistance to abiotic stresses, such as salinity and drought. Critics see the GM organisms as contributing to a further disharmony between agriculture and the environment (Binder, 2001; Serageldin, 2003; Gonzalez de Apodaca et al, 2000). Some of the negatives effects or potential risks include plague resistance to transgenic products, impact on species of insects not harmful for crops or even their evolution to become pesticide resistant species (Larach, 2001).

One of the major concerns in the natural resources area is the declining in biodiversity; a possible explanation is that this was due to the realization of agriculture by human societies. In the early 1900s, for example, Argentina possessed over 100 million hectares of forests; today, this number has dropped to less than 20 million hectares (Amiott, 2003). Agriculture has consisted of the selection of a few prey species, and the expansion of their ranges. For instance, the four big carbohydrate crops (wheat, rice, maize and potatoes) feed more people than the next 26 crops combined (Swanson, 1995). Most of the crops used these days in agriculture are GM crops. The USA leads with 68% of the global area of GM crops, followed by Argentina (22%), Canada (6%) and China (3%). The main crops are soybean (63%), maize (19%), and cotton (13%); being Argentina the third largest producer of soybean in the world (Sasson, 2003; Larach, 2001).

Argentina is one of the few developing countries that have developed a national biotechnology industry. While most of the research, development and production of genetically modified organisms has taken place in the USA and Western Europe, Argentina has taken advantage of a well-developed educational and agricultural infrastructure to develop a thriving industry in genetically modified plants. In general, the national regulatory

system in Argentina for dealing with genetically modified products is considered quite advanced and sophisticated (Binder, 2001).

The other members of the MERCOSUR countries (Common Market of South America) have different positions: Brazil is the second producer of soybean worldwide; however, the government has prohibited the use of transgenic seeds until further tests. Paraguay tries to keep a free-transgenic zone, while Uruguay in involved in a process of plant variety registration and is having a freer market (Sosa Belaustegui, 2001).

New Zealand's biotechnology strength mainly derives from more than 150 years of experience in genetically improving animals and plants, creating one of the world's most efficient agricultural economies. The knowledge gained as a world leader in agricultural primary production has combined well with a tradition of scientific research excellence (NZTE, 2006). The Australia New Zealand Biotechnology Partnership Fund (ANZBPF), administered by New Zealand Trade and Enterprise (NZTE), was designed to facilitate and accelerate trans-Tasman biotechnology industry collaboration (NZTE, 2006b).

Three major problems have been identified about bioprospecting activities in New Zealand (MED, Nov 2002 p3):

1. the lack of an overarching framework for bioprospecting
2. uncertainty of the policy environment and lack of information;
3. ad hoc controls over access by foreign interests

X.1.3 **Pharmaceuticals and poverty**

Since the earliest forms of colonialism, extractive products such as silver in the Latin American countries were often the basis for colonial wealth. It has been said that industry and business discovered that indigenous knowledge sometimes means money (Posey, 2004); and that pharmaceutical industries and seed companies have become the major exploiters of traditional knowledge. However, there is no empirical

evidence to support the last two statements with many more than anecdotic facts.

Poverty is the reason why over two billion people have no regular access to even the basic list of a few essential drugs. The world's poor rely upon biological products from local sources for 85% of their needs, food, fuel, shelter, and medicine. Even in the industrialized countries, the use of "alternative" medicine is increasing (Timmermans, 2003). It has been said, that TRIPS when fully implemented, will deny access to essential drugs to many more millions of people (Balasubramaniam, 2002).

Pearce & Puroshothaman (1995 p128) explained that plant species are used for medicines in two ways: 1) as a major commercial use, whether by prescription or over-the-counter sales; and 2) as a traditional medicine which may or may not attract a market price. In the rich world, 25% of all medical drugs are based directly on plants and plant derivatives; but in the poor world, the proportion of drugs based on plants is closer to 75%.

Before TRIPS, a vast majority of developing countries protected processes but not products. This enabled countries such as Argentina, China, India, Korea and Mexico to develop a strong national pharmaceutical industry to compete with the drug multinational in the North (Balasubramaniam, 2002). Pharmaceuticals companies along with governments of developed countries claim that WTO patent rules are not contributing to the problem of denying the access of poor people to basic drugs. They say that other factors (poor health infrastructures and lack of political will of governments) are more important (Maine, 2002). Some authors even declared that TRIPS is actually fairly permissive on the issue of government decision to authorize third parties to use patents without the permission of the patent owners (for public non-commercial use and for emergencies, including public health emergencies) (Love, 2002). The figures mentioned in the previous paragraph are also interesting because suggest that technology is moving away from traditional medicines to synthetics. If TRIPS deny access to certain drugs, poor countries may

continue to produce plant-based drugs, which probably will be seen as unprofitable or old-fashion medicines by multinational companies.

X.1.4 **Plant Breeders and Farmers' rights**

Crops and plants genetically manipulated once altered, become the property of the corporations and can be sold worldwide. Plant breeder's rights means that the person or company holding the intellectual property rights on particular seeds is entitled to collect a royalty when the seeds are sold by the grower (Barclay, 2005). Under this instrumentalist approach, new plant varieties are afforded legal protection to encourage commercial plant breeders to invest the resources, labor and time needed to improve existing plant varieties by ensuring that breeders receive adequate remuneration when they market the propagating material of those improved varieties (Helfer, 2002).

This situation generated some inequities and power unbalance between plant breeders and farmers, which led to the recognition under FAO of the Farmer's Rights in 1989 (Correa, 2001). FAO Resolutions 5/89 and 3/91 addressed these rights declaring that the concept of Farmers' rights allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods (FAO, 1989). This concept provides a measure of counterbalance to "formal' IPR and patents that compensate for the latest innovations with little consideration of the fact that, in many cases, these innovations are only the most recent step of accumulative knowledge and inventions that have been carried out over millennia by generations of men and women in different parts of the world (Bunning & Hill, 1996).

X.1.5 **Fair compensation, partnerships and benefit sharing**

There is today a growing appreciation of the value of TK; not only to by those who depend on it in their daily lives, but to modern industry and agriculture as well. Many widely used products, such as plant-based medicines and cosmetics, are derived from TK. Other valuable products based on TK include agricultural and non-wood forest products as well as handicraft.

Posey estimates than less than 0.001% of profits from drugs developed using traditional knowledge systems have been passed on to the owners of such knowledge (as cited in Jeffery, 2004 p204). In general, people from the society who discovered the use for the plant in the first place, receive no compensation at all; whereas breeders, pharmaceuticals or seed companies, depending on the case, have resorted to intellectual property rights to recover their development expenditures (Blakeney, 2004; Gardiner, 1997; Figueroa, 2005).

As mentioned in chapters VII and VIII, most international agreements and conventions on biodiversity and indigenous peoples' rights include a clause on benefit-sharing. How much should receive a community to be considered a fair trade? It has been said (Vogel, 2005) that a 50-50 slipt between the state or company and the indigenous communities are the most easily accepted contracts. In addition, TK is generally concentrated in the shaman and not evenly distributed whithin the community. This exposes a further question; should the shaman receive more money than other members of the community? the answer may be yes, but probably that would be very difficult to implement due to resistance whithin the group. What kind of incentives the shaman could have besides money? The prestige gained by the shaman's involvement in the selecion of public goods for his or her community could work as some sort of additional compensation. Ultimately, these are questions to be resolved by the groups themselves.

There have been initiatives that launched collaborative programs with indigenous peoples. As an example can be mentioned:

The Merck/InBio Initiative: the contract established between the pharmaceutical company, Merck, and an NGO, InBio, in Costa Rica offers practical recognition of the value of biodiversity to industry. Merck is providing $1.135 million for 10.000 extracts from biological accessions gathered by parataxonomists. The partners have also agreed on a royalty-sharing system if any of the material is commercialized.

The Shaman Partnership: A second drug company, Shaman Pharmaceuticals (now defunct), had announced its intention to return a percentage of profits back to all countries and communities it has worked with, after any and every product is commercialized (The Crucible Group, 1994). Because of the long lead-time before a drug is actually on the market, the company thought inappropriate to delay reciprocity until this happened. Short-term reciprocity devotes 10-15% of the field research funds to immediate community needs, reciprocity can be in the form of services, or of supplies, which are lacking in the country. Medium-term reciprocity involves projects that transpire in several months or years and include major parts of the CBD, technology transfer and sustainable development goals. Long-term benefits are those that are distributed after a product reaches the market (King, 1994; King et al, 2004).

Maori/Crown contractual agreements: a Maori tribe has entered into an agreement with a Crown Research Institute and a University to research "rongoa Maori" or Maori knowledge of certain plants and their medicinal qualities. The agreement provides that the TK remains in the ownership of the tribe and benefit-sharing agreements have been negotiated, ensuring that the tribe receives at least thirty-percent of any returns from any commercialization of the knowledge. The agreement stipulates that any IPR arising form the project will be owned exclusively by the tribe (Solomon, 2006).

X.1.6 **Biopiracy**

As already discussed, biopiracy refers to bioprospecting activities which involve the participation of locals, who do not receive any compensation for their contributions or their knowledge. MacManis (2004 p448), said that a serious discussion of biopiracy must address foundational questions:

1) What should and should not be capable of being owned
2) Who should and should not qualify as owner
3) What is the precise scope of the rights that owners should enjoy in which is owned?
4) What, if any, rules should govern the relations among joint owners and the transfer of rights form one owner to another
5) What should be protected by property rules and what should be protected only by the more limited liability rules of law of unfair competition and contracts and
6) What does and does not constitute unfair completion or an enforceable contact and breach thereof?

In assessing cases of patents involving biopiracy, the "ActionAid" study listed the patents that have been claimed for naturally occurring compounds, genes or gene sequences with a variety of functions. These include (Khor, 2002 p25): 62 patents on genes or natural compounds from plants traditionally grown in developing countries. Including rice (34 patents), cocoa (7), cassava (2), millet (1), sorghum (1), sweet potato (2), jojoba (3), nutmeg, camphor and cuphea (4) and rubber (8); and 132 patents on genes in staple food crops which originated in developing countries but which are now grown globally. The crops include maize (68 patents), potato (17), soybean (25) and wheat (22).

Some biopiracy-related controversial cases include:

- The San people took actions against the South African Council for Scientific and Industrial Research (CSIR) over a patented active molecule (P57) from the Hoodia plant, which was patented by the CSIR who then sold rights for further development to the

UK herbal medicine company Phytopharm. A legal settlement was reached between the South African San Council and the CSIR on March 2003. The agreement stipulates that San people will receive 8% of all "milestone payments" the SIR receives from Phytopharm and 6% of all royalties CSIR receives once the drug is commercially available (Jeffery, 2004).

- Indigenous peoples' and farmers' organizations from the Andes and the Amazon meeting at the Ecological Forum in Lima denounced USA patents on Maca, the high altitude Andean plant that has been grown for centuries by indigenous peoples in the Puna highlands of Peru, both as staple food crop and for medicinal purposes. The USA patents were issued in relation to Viagra-like therapeutic aspects of Maca (Blakeney, 2004).
- In 1986, USA granted a patent to Loren Miller, granting him exclusive rights in a variety of Banisteriopsis caapi, which he had called "Da Vine". The patentee claimed that Da Vine represented a new and distinct variety of B. caapi, primarily because of the flower color. For generations, indigenous tribes of the Amazon have processed the bark of B. caapi to produce a ceremonial drink known as ayahuasca, which is used in religious and healing ceremonies. The claim stated that the Da Vine was neither new nor distinct. In March of 1999, was presented the demand to suspend the patent granted to Miller before the USA Department for Patents and the Registrations of Brands; on November 3rd of the same year the patent was suspeded (COICA, 2005).
- Recent controversy in India over the controversial patent granted by the USA Patent Office and the EPO on turmeric, basmanti and neem (all were based on the knowledge widely shared in India) has brought the issue of biopiracy to the centre-stag in all the legislative efforts undertaken by the government of India to

comply with its international obligations under the treaties (Verma, 2004). The neem patent: in 1992 USA granted a patent to W. R. Grace & Co for a "storage stable azadirachtin formulation", the active ingredient of which is derived from the neem tree which is common in India but nor in the USA. In 1995, several groups represented by the Foundation on Economic Trends filed a petition to revoke the patents based on the lack of novelty and because it was considered immoral.

MacManis (2004) gave his version of these cases clarifying that contrary to the impression the "neem patent" was not on the neem seed itself, nor to its use as natural insect repellent, which is one of the customary uses made of the neem seed in India. Rather, the patent was on a method of production and a resulting product consisting of a storage stable solution. The author added that in the case of the Ayahuasca patent, it is generally overlooked that the patent was not a utility one, but rather a form of patent protection that is virtually unique to the USA, namely, plant patent protections, which were first made available in 1930. The Turmeric patent, according to the author, was a case of biopiracy.

MacManis also stated that an important distinction must be drawn between those claims that are based on arguably "bad" patents (basmanti rice, turmeric, and Enola bean controversies) and those biopiracy claims that are, in effect, asserting that USA patent standards are too low (neem, ayahuasca, quinoa and maca controversies). He added that "while the former have a sound legal basis in existing USA patent, the latter claims are essentially making political policy arguments" (McManis, 2004 p467).

These cases show that the existing regime can protect indigenous peoples against biopiracy because forms of redress were available. The problem is to verify to what extent indigenous peoples have the information about their rights concerning TK, and about bioprospecting activities in breach of the legal regime, in order to take these actions to courts.

X.1.7 **Commercialization of spiritual material**

Sometimes the importance of control of traditional ideas and knowledge is not just for their potential economic profits, but for cultural purposes: some places, customs and beliefs, if publicly known, could destroy parts of a people's cultural identity (Greaves, 1994; Posey, 2004; Correa, 2001; Soleri & Cleveland, 1994). Most Indian communities celebrate their religion at a particular place; this "would seem to indicate that the spatial dimension cannot be avoided as men seek religious experiences (Vine, 1973 p81)".

Traditional healers, for instance, may not want to disclose their knowledge because they believe that once disclosed it loses its effectiveness, or because they presume that others will not be able to follow the required discipline in preparing and dispensing the medicine (Timmermans, 2003).

The debate on genetic modification highlights the conflict between science and religion and the unsolved dilemmas of this relationship. For instance, in Maori mythology, plants and people have a common origin, both being offspring of Tane as the controller of forests and fertilization; their relationship shows the respect for sacred ancestors. The modification of plants and other living creatures by scientists are seen in breach of this relationship and an offense to the gods (Vine, 1973; RSNZ, 2007).

X.1.9 **Patents and Control issues**

Several authors have claimed (Chapman, 1994; Verma, 2004) that IPR is inappropriate for indigenous knowledge because of the monopolistic and exclusionary nature of intellectual property and the collective nature of indigenous knowledge: "intellectual property rights were invented in the early development of European capitalism and are clearly linked to the rise of both industrial capitalism and the nation state" (Brush, 1994 p133). Greaves (1994) pointed out that copyrights and patents are for new knowledge, not for knowledge that already exists; and copyrights and

patents are supposed to confer temporary rights. In TK there is no identifiable inventor, all traditional culture is already in the public domain, and the monopoly of benefits would be at best, only for a finite number of years. The present purpose of patents and copyrights is to encourage change, not to maintain the traditional.

For indigenous peoples, IP has a different meaning. While IPRs confer private rights of ownership, in customary discourse to "own" does not necessarily or only mean "ownership" in the western sense. Gibson (2005 p50) explained that "it can convey a sense of stewardship or responsibility for the traditional culture, rather than the right merely to exclude other from certain uses of expressions of the traditional culture which is more akin to the nature of many IP rights systems". As argued by many indigenous peoples, exclusive private property rights on traditional cultural expressions and knowledge even if held by communities, may induce unforeseen side-effects, such as competition within and between communities. This reasoning includes perhaps a romantic notion that suggests that conflict does not exist within and between communities anyway, despite IPR.

Indigenous groups are often willing to share their traditional knowledge but only on the basis that they retain control over that information and the way in which it is used. This may create a potential conflict between promoting the public understanding of TK and the desire of aborigines to protect this information from improper use (UN, 2005). That is why, Wendland (2006) expressed the view that exclusive property rights and IP type mechanism in general should be complemented and be carefully balanced and coordinated with other non-proprietary and non-IP measures to reflect the characteristics of traditional forms and processes of creativity. The decisive question is not a question on the principle in international law, but rather a technical one on the national level: how to manage and enforce patents collectively by means of appropriate entities and how to share the benefits of patents appropriately by way of contractual agreements (Leistner, 2001).

Some authors have provided possible alternatives to face the problematic relationship between IPR and TK. Petty patents (utility models) could become a useful tool to protect indigenous knowledge because (Posey & Dutfield, 1996 p82): the non-obvious requirement is far less stringent and may even be discarded in favor of a less demanding "inventive step"; the period of protection is shorter and; the patent examination is either deferred or replaced by a registration system.

XI. THE ARGENTINE CASE

In Argentina, most indigenous groups dwell primarily in the northern part of the country, bordering Bolivia and Paraguay. The larger groups are the Collas (35,000), the Chiriguanos (15,000), the Tobas (15,000), the Guaranies (10,500) of Misiones, and the Wichi (25,000). Further south, about 36,000 Mapuches and Tehuelches live in the province of Neuquen, bordering with Chile. However, these numbers refer only to those Indians that still live in aborigine reserves or recognize themselves as indigenous peoples. If the ones that live in the cities are counted, the sum is estimated at three million (Figueroa, 2005).

Current distribution of indigenous peoples in the Argentinean territory

Source www.chaco.gov.ar

Hernandez (1992) classified the pre-Hispanic presence in the Chaco region in three groups: 1) the typical chaquenses, whose members belonged to the linguistic family Mbaya-Gaycuru and Mataco-Mataguayo, 2) the cultures with Andean resemblances such as the linguistic family of the Lule-Vilela, and 3) the Amazon cultures formed by the linguistic families Tupi-Guarani and Arawak. The Guaycurues are originally from the Patagonia and included: Abipones, Mocovies, Tobas and Pilagas, some authors include in this family the Payaguas and Mbayaes. There is no important data available about these two last groups because they were exterminated as soon as the Spaniards arrived. The Abipones also disappeared, but later (Arze & Muro, 1993). The most important and big tribe of the Guaycurues have always been the Tobas (Fernandez, 1992; Miller, 1979; Punz, 1997).

Archeological findings talk about a mix between a hunter-gatherer economy of Amazon characteristics with some farming culture typical of the Andean cultures. However, it is uncertain exactly when those influences took place. In the sixteen century the population was estimated to be between 300,000 and 500,000; some authors gave a number close to 1 million, most of whom lived in the mountain areas (Martinez Sarasola, 1998).

According to the United Nations (n.d. (a)), the Guaycurú linguistic group has around 60,000 speakers, of which 15,000 to 20,000 live in Argentina. There are two dialects: Southeast Toba and Nothern Toba and they are different from Toba of Paraguay (Toba-Maskoy) or Toba-Pilagá of Argentina.

XI.1 Context Colonization

During the sixteen and seventeen centuries, the River Plate territories were the backyard of the viceroyalty of Peru; the area was an unexplored region, having as main settlements Buenos Aires, some cities along the estuary of the River Plate, Asuncion del Paraguay on the Parana River coast and Potosi in Upper Peru. Among the most important tradable goods, could be found: raw cotton, cereals, cattle, sheep, horses, and mules; most of which were marketed in Upper Peru in return for silver. Contraband was a very common practice that helped to strengthen the ties with the Atlantic economy (Rock, 1985).

Most indigenous groups were maize-based culture that had introduced some technologies to the farming procedures as artificial irrigation, but never had the development reached by the Incas in Peru or the Aztecs and Mayas in Mexico. From 1570 onwards, Indians were sent into Upper Peru for service in the mines. Aborigines were also used as units of exchange on commercial dealing and were bought to build roads, work the land, and produce surplus for the upper classes. Encomienda, Mita (similar to the French feudal "convee") and Yaconas were different forms of forced labor, and a nicer way to define slavery. This led to a fall in the birthrate and an increase in the morality rate of indigenous people (Rock, 1985; Bunge, 1994; Fraguas & Monsalve, 1996; Vedoya, 1973).

Until the 1960s, it was thought that when Columbus landed the entire hemisphere held only a few million people. Estimates now go as high as 40-60 million. The debate is important for many reasons; one is that the population numbers give a sense of the scale of Indian civilizations. A second reason is that one justification used by Europeans to take over the Americas was the legal doctrine of *res nullius*, the concept that anyone can take unused, unoccupied land. If, by contrast, the country was home to millions of people, this justification no longer becomes tenable. These figures are also important because in the early nineteen century, the aborigines had decline to 11 million. This situation reflects not only the

results of the war or the unscrupulous killing of many Indians but also the infamous labor conditions, the new diseases brought by the European settlers and conquerors (such as typhus, bubonic plague, tuberculosis etc), and the destruction of the social ties and web of reciprocities. When the number of Indians decreased, the import of African slaves increased (Fraguas & Monsalve, 1996; Rock, 1985).

The consequences of these actions, and the ideas that justified them, had as consequence the general idea that Argentina is a single nation without indigenous populations. Hence, indigenous people were systematically ignored by the European descendants and by the government in the elaboration of governmental policies, fact that continue nowadays (Vidal, 2006; Correa, 2006).

XI.1.1 **The colonization of the Chaco region**

In contrast with the relatively easy and fast conquest of the Inca Empire by Pizarro and the subsequent Spanish domination over the Andean region, the Chaco region took over 350 years to be pacified. The reasons were many including that the conquerors were not interested, in the early days, in the woods and semitropical forest of the region but as route to the silver and gold treasures that according the myths were in the West. Hence, the exploration of the Chaco was encouraged by the necessity to consolidate a route to the goldmines rather than domination over the territory (Martinez Sarasola, 1998; Meli, 1999; Miller, 1979; Hernandez, 1992; Hermitte, 1996; Borrini & Schaller, 1981; Rex Gonzalez & Perez, 1972).

On 31 December 1917, the war against the Indians was declared officially over (Hernandez, 1992). After this date, there was only sporadic fighting. The National Gendarme Force was created in 1939 replacing the Army in the custody of the borders of the nation (Meli, 1999; Borrini & Schaller, 1981). According to Frites (2006) the military influence against indigenous peoples continue until our days.

XI.2 Tobas' ethnomedicine

The Tobas' ethnomedicine have a many-sided pharmacopoeia use to heal wounds, fractures, ulcers; animal bites and parasitizes (Pierini, 2004).

The *papsali*[7] (Papsalum) is used for every type of wounds not caused by a poisonous animal, insects or tiger bites. For snake and other poisonous animals' bites they use *hierba de vibora* (Siroy asawara), called macagacaa black or with by the Chiriguayos; they also used for the same purposes the *contrahierba* (Asala epali) and the *colmillo de vibora*. The *cancelagua* is used for rheumatic and pleura inflammations, the *carqueja* (Baccharis crispa) is used for cancer disease purposes; same happens with the *hierba de huron*, which is also used for pleura, rheum and gastric disorders. *Poleo* (Limpia turbinata) is used against mosquitoes and the *helecho macho* (Dryopteris filix-mas) is a diuretic, same happens with the *ruibardo* (Rheum officinare baillon) and *cardo seeds* (Cynara cardunculus). The *higo infernal* (Ricino ricinus communis) is even a stronger diuretic. *Atamisque* (Atamisquea emarginata) is used to keep the feet warm (Fernandez, 1992; Solis, 1972; Chifa & Ricciardi, 2002).

Dyeing plants: Tobas use plants to paint their bodies rather than to dye clothes. To print stable colors for feathers, furs and double knapsack use the *lapacho colorado* (Tabuia avellanedae) for red colours, as well as the *roncon* (Annato bixaceae) and the *cochinilla* (Dactylapius coccus costs). They obtain yellow from the woods of the *jotom* and the *lapacho amarillo* (Tabuia ipe). For black, the bark from the *servile* and *bilca* are used (Solis, 1972).

XI.3 Legislation concerning indigenous peoples (not IP related)

7 For botanical names see Lovas (1995). Those plants that do not have a botanical name or the English name written next to the Spanish name is because they could not be found.

Carrasco (2000) argued that in Argentina there was an inverse genesis process in the development of constitutional rights for indigenous people. Hence, the first laws were at the provincial level, then at national level and finally these laws were incorporated in the fundamental laws (such as the NC). About 40 laws were elaborated referring to indigenous people; the first thirteen belong the 1853-1884 period and were oriented to construct an ideal of nation, and regulate the action in the frontiers (Hernández, 1992). The electoral reform known as Saenz Peña, gave the right to vote to all men, including aborigines, of at least 18 years (women will be allowed to vote with the reforms introduced by Peron in the early 1950s). The Irigoyen government interrupted the national scene by proposing a very different political program directed to those sectors traditionally ignored by the conservative parties: the outsiders, the low-middle class and poor classes. The most significant project was the labor regime presented in 1921, which specified that there would be no difference between the work made by an aborigine and the one made by any other worker (Martinez Sarasola, 1996).

The two first presidencies of Juan Domingo Peron (1946-1955) were the cornerstone for a more radical change in the direction of recognizing indigenous rights. For the first time, many indigenous people received their national identification documents (ID) in order to be incorporated to the electoral mass (Carrasco, 2000). The decree 41.397/43 regulated the mines, agriculture and cattle work. Since 1945, the functions of the Honorary Commission of Indian Reductions were stipulated; the law 13.560 ratified the International Conference on Indigenous Workforce Agreement and finally by law 14.252 was regulated the creation of colony farms for the aborigines. Indians were given provisory but not definitive titles on land (Martinez Sarasola, 1996).

The coup d'etat to Peron in 1955 and the conservative government that followed were a serious drawback for indigenous people's rights. When democracy returned in 1958 (the Peronist party was proscribed), the

National Agency of Indigenous Affaires was created (Comision Nacional de Asuntos Indígenas). The ILO 107 Agreement, relating to the integration of indigenous people in independent countries, was ratified by law 14.932. However, this agreement was never regulated, and the agency in charge of apply it was never created (Hernandez, 1992).

Under the presidency of Arturo Illia was launched an indigenous census that wanted to determine the demographic characteristics of each aborigine group, the quality of life; and wanted to elaborate development programs. The work was interrupted by the militaries taking control over government again, this time led by Ongania (Martinez Sarasola 1996; Hernandez, 1992).

When Peron returned to power, new strategies took place. The government launched a test plan of cotton plantations and indigenous people started to be hired as public servants (Martinez Sarasola, 1996). In 1977, the military government incorporated the remaining fiscal lands to the productive market, expanding the agricultural and cattle frontiers; the *impenetrable* chaqueño was part of these lands (Borrini & Schaller, 1981).

When democratic Raul Alfonsin won the election, indigenous people were part of the official discourse once again (Carrasco, 1994). The first important law for indigenous people at national level was sanctioned in 1985 under the number 23.302 and stated the right to live according to their own cultural ways (but not self-determination rights), and gave them the right to acquire legal capacity. This law created the National Institute of Indigenous Affairs (INAI) (Carrasco, 2000; Figueroa, 2005).

In 1992, the National Congress ratified the ILO 169 (law 24.071); law 24.375 ratified the CBD (1994); decree 1347/1997 regulated the Biological Diversity Law; Resolution 91/2003 the National Strategy on Biological Diversity; Resolution 260/2003 regulated the National Commission Council for the Sustainable Use of Biological Diversity; Law 25.257 approved the Unidroit Convention of stolen and illegally exported cultural objects (2000)[8].

[8] A complete list of the treaties ratified by Argentina related to indigenous people's rights in other areas can be found in Zamudio (2006)

The article 75 clause 17 of the NC of 1994 recognized: the ethnic and cultural pre-existence of indigenous peoples of Argentina, their right to bilingual and intercultural education; the legal capacity of their communities, and the community possession and ownership of the lands they traditionally occupy. Nine provinces have mentioned in their constitution the preexistence of indigenous peoples: Salta, Jujuy, Rio Negro, Formosa, La Pampa, Buenos Aires, Chaco, Chubut and Neuquen. All said that their governments were compromised to promote their economic, social and cultural well-being. However, the province of Chubut was the only one to go a little bit further stating that indigenous peoples have intellectual property rights over their theoretical and practical knowledge (Casal, 2000).

XI.3.1 **Legislation Chaco**

The reformed 1994 Provincial Constitution declared in its article 37 that the province recognized the preexistence of indigenous populations, their ethnical and cultural identity and their legal capacity, encouraging their participation, and communitarian property. It also said that the province would give lands in concept or historical reparation that will be non-transferable, and non-sizeable.

Law 3.258/86 of Indigenous Communities, (regulated by decree 2.749/87 and modified by Laws 4.801 and 5.089) declared that its main objective was to improve the situation of indigenous communities through access to land tenure and the necessary resources to reactivate their economy (art. 1); that the State recognized the juridical status of indigenous communities (art. 5); that Tobas, Matacos and Mocovies aborigines have the right to study in their own language (art. 14). This law also compromised the provincial government to create health centers (art. 17); and created the Institute of the Aborigine of Chaco (IDACH) (art.22), which has as main functions (art. 25): the application of the law 3.258; give the judicial status to indigenous communities; carry population census;

transfer lands; provide scientific, technical and economical assistance to the indigenous communities; and establish relationships with international indigenous entities among others.

Other legal documents include: Decree 2.138/99 on electoral indigenous process. Law 3.457/89 modified article 27 of law 3.258. Decree 116/91 recognized the rights of indigenous over 150.000 hectares of land. Decree 645/96, regulated an agreement between the Government of Chaco and the National Executive Branch on social assistance for indigenous people. Law 4.804/2000 of Registry of Indigenous Communities and Associations and the same year Law 4.7090 created a Registry of Indigenous Names. By Law 5.450/2004, the province adhered to the national law 25.517/2001 that ordered the restitution of indigenous peoples mortal remains of museums or private collection to their original habitats (Zamudio, 2006a).

XI.4 The CBD in Argentina

Decree 1347/97 established that the Secretary of Natural Resources and Sustainable Development (today Secretary of Environment and Sustainable Development, Spanish acronym SAyDS) is the competent authority to apply the Convention (art. 1) (SAyDS, 2006a). The National Strategy on Biodiversity has seven sections dealing with: conservation and sustainable use of biodiversity; genetic resources (GR); and national capacities on biodiversity (SAyDS, 2006).

In the GR chapter, the Strategy stated that the intention was to create a national integrated system; which based on the fair equitable share of benefits, facilitate the access to and the transference of vegetal, animal or microbial genetic resources, being these wild or not. It also proposed to regulate on the possibility to declare null and void the granting of IPR over products or processes that make use of GR whose origin is not declared. Moreover, if the seeker of intellectual protection cannot prove the consent of the country of origin of the resources for their use, the protection shall not be granted.

Argentina has elaborated two reports on the national efforts made to accomplish the articles 6 and 8 of the CBD (the third one was supposed to be elaborated before September 2006 but has not yet been submitted). The First one was in 1998 (CBD, 1998) and covered the activities done by the national government about protected areas, restoration and rehabilitation of degrade ecosystems, threatened species, exotic species and GM Organisms. However, the most interesting of the reports is the second elaborated in 2001 (CBD, 2001) in which the Argentine State recognized that almost nothing was done to accomplish the content of the CBD articles mentioned earlier, at that time.

XI.5 Interviews findings

The topic of IP on natural resources in the Argentinean agenda was not set by indigenous peoples but by the international multilateral agencies seeking to improve the current legal system on IP to provide the adequate context for foreign investment. This has generated, as counterpart that different social movements are discussing about biodiversity and IP in forums and congresses, causing more awareness. However, is still an outcast topic; there are other topics that seems more urgent such as indigenous access to food, health etc (Vidal, 2006; Correa, 2006; Frites, 2006).

Indigenous communities are not yet well informed or conscious about the implications of the relationship between biodiversity and IP. Charole (2006) expressed that the results of this relationship are "something quite complicated, that affects indigenous peoples as a whole. It affects the territoriality, the cultural integrity, and the spiritual vision". Vidal (2006) explained that the only well informed and involved group in every discussion about this topic, are the Mapuches. Vidal also remarked that there is also an increase of the awareness among the young people of the different tribes caused by the new technologies such as internet. She added that, those representing aborigines in international forums a not truly representatives; they are people that participate because personal contacts or seeking their own benefit (Vidal 2006). According to the people interviewed, in general, the laws and regulations in Argentina on indigenous peoples, do not take the lead if compare with other countries, but are generally moving in the right direction. The problem is not what the laws say, but the lack of implementation, the lack of actions of the control agencies, jointly with the poor information of the aborigines about their rights (Vidal, 2006; Correa, 2006; Charole, 2006)

There has been no national initiative, mainly because two reasons: the idea that Argentina is a country without indigenous peoples (denial of the reality), and their scarce social pressure as a group (because of the few number of people that recognize themselves as aborigines and the poor

organization of this groups). About this last point, it has been said that indigenous peoples did not take enough care of their NGOs, and became subordinated of the State without consciousness of group (Frites, 2006). There is also a "lack of leadership, and lack of perception that is a topic of interest for the domestic policy" (Correa, 2006).

There have been no claims of biopiracy in Argentina (Intellectual Property National Registry of Argentina, Personal Communication, May 23rd, 2006). This does not necessarily mean that cases of biopiracy did not happen; because the main reason of no denouncing is lack of information of indigenous peoples about their rights concerning these cases (Vidal, 2006; Correa, 2006; Frites 2006)[9]. The only topic about IP that have been discussed so far by the different indigenous groups, represented by the Indigenous Participation Council (CPI, belonging to the INAI) was about designs and trade-marks (Vidal, 2006).

Another problem mentioned during one of the interviews, was concern about the depredation of nature caused by farmers and indigenous people by monoculture plantations; and the political aspects of the IDACH, that "only serves to implement the paternalistic approach of government to indigenous peoples and does not help to encourage another way of relating them with the nature" (Frites, 2006). The president of the IDACH, Orlando Charole recognized that since its creation, the agency was run by untrained public servants, which helped facilitate the sell of lands, the loss of cultural values and the absence of progress on the bilingual education (Charole, 2006).

There are currently two projects in the Argentine Congress about protection of TK, neither is going to become law soon. One (project 6638-D-05) is about traditional medicine and was elaborated by the National Deputy Maria Chaya. The project seek to recognize the exclusive property and the personal or communal right of indigenous peoples over the use of

[9] Frites mentioned a case, but it was considered by the author of the present work, that it was not a case of biopiracy but a case of abusive contractual clauses.

seeds, plants, roots, flowers and all their derivates of medicinal characteristics and traditional healing practices. This initiative also wants to prohibit the use of traditional medicine by others without authorization of indigenous groups. The second project (0409-S-06) signed by National Senator Sonia Escudero declares that the objectives are to recognize, promote, preserve and protect the collective intellectual property rights and the TK of indigenous communities and the traditional expressions with potential economic value, medicinal plants and therapeutic treatment of ancestral knowledge (art 1). The project also intends to create a National Registry of TK protection (art 5) that will ensure that the access to TK be possible only under previous informed consent (art 6 clause II), provide technical and juridical assistance to indigenous people (clause VI) and promote judicial actions against companies or other if they patent a product without the consent of indigenous peoples (clause X). According to this text no person, academic institution or other group can carry bioprospecting activities without prior informed consent by indigenous communities (art 25). According to this project, cannot be matter of licensing contract: sacred knowledge, TK already in public domain, and the knowledge not registered in the National Registry (art 29). These contracts could be cancelled if: the reason of the investigation is not clear, apocryphal documentation is presented or if there are abusive clauses in prejudice of indigenous peoples (art 38).

These projects arise some questions such as: which agency would have the information database? How the process of regulation of the prior informed consent is going to be? There is also no guarantee that indigenous people could control or verify if there is a direct relationship between the knowledge that they provided and the final product either. The only things being discussed are the legal aspects (Vidal, 2006). Charole (2006) declared that every consultation process involving aborigines should be "clean, direct and without politization, pressures or rush".

None of the people interviewed were consulted or invited to participate in the elaboration or discussion of the mentioned projects. In the context of all the things described so far, was not odd.

As Walker (2004 p108) explained the founding cultures of the nation-state in New Zealand are derived from the two disparate traditions and histories of Maori and Pakeha:

> "Maori belong to the tradition-oriented world of tribalism, wit its emphasis on kinship, respect for ancestor, spirituality, and millennial connectedness to the natural world. Pakeha, on the other hand, were the bearers of modernity, the Westminster system of government scientific positivism, the capitalist mode of production and the monotheism of Christianity".

XII.1 Colonization context

The first known European contact with New Zealand occurred when the Dutchman Abel Tasman arrived at its shores in 1642; more than a century later, Captain James Cook initiated his trips to the islands (1769) (Graham, 1997). The sealing industry brought the first settlers who were joined by Christian missionaries; the Europeans introduced Maori to metals, venereal diseases and new vegetables, (especially potatoes and turnips). Europe moved even closer to New Zealand with the establishment of British penal colonies and for the demand for timber and flax that the wars in the old continent had created. The British East India Company had been granted a Crown monopoly on all trade in the Indians and western Pacific Oceans, and only the Royal Navy was exempt from this arrangement (King, 2003).

There was a degree of warfare among the Maori tribes, which lacked an overarching government. Authority was concentrated in small kinship units (hapu), rather than in tribes (iwi), and in rangatira (chiefs). The Maori population was unevenly spread through the country, with less than 2.000 in the South Island in 1840 and about 100.000 in the North Island (Sorrenson, 2004). There was no Maori nation or notion of a common identity, until European colonization made both desirable. In the 1830s, Pakeha settlers, missionaries and the British resident James Busby

promoted the idea of Maori nationalism in order to oppose to the French intentions to occupy the island (Walker, 2004; Graham, 1997).

Captain William Hobson was sent to act for the British Crown in the negotiation of a treaty between the Crown and Maori. In 1840, Hobson, several English residents, and approximately 45 Maori rangatira signed the Treaty of Waitangi (TW) at Waitangi in the Bay of Islands. The Maori text of the Treaty was then taken around Northland to obtain additional Maori signatures and copies were sent around the rest of the country for signing. By the end of that year, over 500 Maori had signed the Treaty (WT, 2006a)

In 1852, New Zealand was granted representative government, and within a decade, the settler representatives gained responsibility for the conduct of their internal affairs, even Maori affairs, though Maori were not yet presented in Parliament (Sorrenson, 2004). Section 71 of the 1852 constitution allowed the possibility for the Government to establish native districts which could be placed under a jurisdiction better adapted to Maori ways; but this was never taken up (Renwick, 1990).

Parliament became the vehicle for settler supremacy. It passed laws by which land passed out of Maori customary ownership into individual Crown title and progressively into settler ownership (Renwick, 1990). Native title was extinguished to the whole South Island, by purchase, confiscation of land and the consequent disempowerment of the Maori Chiefs. In the North Island, native title was extinguished "by a mix of purchase, confiscation and legal artifice through the operations of the Native Land Court" (Walker, 2004 p113). The Maori reluctance to sell land had as a consequence, a decade of so called "Maori Wars". Even when the main campaign was completed in 1864, there were eight more years of guerrilla warfare in the forests of the interior. Settler criticism, pre-emption and demands for "free trade" in Maori land were again successful with the passing of the Native Land Act 1862 (Sorrenson, 2004). Land ownership, as understood by the new settlers, was a concept unknown to Maori (Graham, 1997).

By the end of the nineteen century, all armed resistance had been defeated; indigenous forms of health care were partially replaced by Western practices; and use of Maori language began to decline. Gradual shift in the twentieth century from an essentially agrarian to an urbanized society encourage Maori migration to the cities (Pratt, 2004).

With their land base gone, the chiefs were disempowered, the TW was declared a legal nullity by the Supreme Court and its guarantees were ignored (Renwick, 1990). In the aftermath of colonization, Maori owned only three million of the sixty-six million acres they once held in toto; only two chiefs, Sir Hepi Te Heuheu and Dame Te Atairangikaahy, were able to preserve their traditional mana araki (Walker, 2004). The Kingitanga and the Kotahitanga movements failed to win the commitment of all iwi. One of the more active personalities that encouraged the defense of Maori rights was Sir Apirana Ngata who was elected as Member for Eastern Maori in 1905, a seat he would hold for the next 38 years (Howe, 2003). Another leader was Tahupotiki Wiremu Ratana, who was in the tradition of Maori charismatic religious leadership. The Church he founded created a strong sense of community among Maori with different tribal affiliations. It also provided a New Zealand-wide base for the political movement, which Ratana announced in 1928. The movement entered into alliance with the Labour Party in 1936 and it was as Labour Party members that successive Ratana candidates occupied their seats in Parliament after the Second World War (Renwick, 1990; Gardiner, 1997).

XII.2 Maori ethnomedicine

Maori were a very healthy race of people at contact time. Diseases were attributed to supernatural visitation, they had no natural causes; either witchcraft was suspected, or some evil influence. The Tohunga was a doctor of medicine, priest and scholar; maintained the power of tapu and was the one who knew and applied the helpful herbal medicines (Stark, 1979; Riley, 1994). He got his training as a student in the whare wananga (house of learning). Maori belief that plants and man have a common origin, both being offspring of Tane in his capacity as controller of the forest, and of fertilization, for He represents the powers of reproduction too (Riley, 1994).

The many vapor baths taken by the Maoris had a purpose far beyond that of simple cleanliness. Many of the plants employed in these baths were medicinal, and antisepsis was a natural result of their use. They were beneficial in many cases of rheumatism, deep bruising, and skin afflictions; for women to relieve pain after childbirth, and for many other sicknesses (MacDonald, 1979). When missionaries brought Christian religions in the early days, few tohunga were tolerated (Riley, 1994; Stark, 1979).

Some of the most common plants and herbs used by Maori are: Bracken (Pteridium esculentum) for dysentery; Hoiheri- lacerback (Hoheria populnea), Horipito (Pseudowintera axillaries) and Tutae kuri (Elymus multiflorus) for colds and burns; Karikates-white pine (Dacrycarpus dacrydioides) for kidney and urinary problems; Karakara (Corynocarpus laevigatus) as a poultice on wounds; Karamu (Coprosma spp) to treat kidney and bladder complaints; Kawakawa- Maori pepper tree (Macropiper excelsum)for toothache; Kiekie (Freycinetia banskii) as a laxative; Kohekohe –native cedar (Dysoxylum spectabile)for gonorrhea and menstrual disorders; Kumarahoe–Gumdigger's sopa (Pomaderris kumaraho)for coughs, cods, asthma and bronchitis. The Makomako – wineberry (Aristotelia serrata) was used to treat rheumatism; Matai- black

pine (Prumnipytis taxifolia) as a disinfectant; and Poroporo–nightshade (Solanum aviculare) for ulcers. The broken bones were treated with cork tree (Entela arborescens) and the Karamu (Coprosma spp); sore stomach with ngaio (Myporum laetum), mamaku (Cythea medullaris), piupiu (Pneumatopteris pennigera) and cancer with various mints (Mentha), Kaikaiatua (Eurphorbia), Matai (Prumnopitys) (Williams, 1996; Riley, 1994; MacDonald, 1979; Stark, 1979).

XII.2.1 **Tohunga Suppression Act**

In 1900, the idea of some form of Maori self-government was discussed in Parliament; as a result, the Maori Councils were established by the Maori Councils Act. This legislation authorized the Maori people to frame rules and regulations on matters of local concernment, but also included articles about the licensing of tohungas, and their relationships with medically qualified practitioners. As the Councils did not prosecute tohungas, in 1907 the Tohunga Suppression Act (TSA) was passed (Lange, 2002; Solomon, 2004). But it too, was rarely enforced. Several persons were arrested and eventually discharged; and some of the most famous healers and prophets were not even accused (Raeburn, 1999)

Healers who used herbal remedies, massage and steam baths were not seen to commit and offence under the TSA as long as they did not pretend that they had supernatural powers (Lange, 2002). As Raeburn Lange explained (1999 p262), in 1962, the Act was repealed and the Maori Purposes Act of 1949 was amended as to omit the provisions against tohunga.

XII.3 Contemporary Maori-Government relationship

The country suffered great shocks from 1984. Although Labour Party has long had the support of Maori and held the four Maori parliamentary seats for many years, its "Rogernomic" policies affected Maori interests. Nevertheless, Labour believed that Maori rights and welfare could be safeguarded, through the Waitangi Tribunal (WT) created by the previous Labour government just before it lost office in 1975 (Sorrenson, 2004). In 1985, the WT was made retrospective to 1840, thereby opening up to nation's history of colonization for interpretation. Successful injunctions in the High Court in 1987 against the State Owned Enterprises Act 1986, and the Individual Transferable Quota fisheries management regime followed. Maori fisheries claim culminated in the Sealords Deed of Settlement in 1992 (Walker, 2004).

In 1986, the Ministerial Report on the Department of Social Welfare, Puao-Te-Ata-Tu/Day Break, collected the overall figures on deprivation from the 1986 census. In the same year, the Board of Maori Affairs published Fading Expectation: the crisis in Maori Housing, showing continuing discrepancies in Maori and Pakeha enjoyments of that convenience (Sharp, 1997).

The government was forced to provide Maori with guarantees that their interest would not be overridden in any future privatization of land. Special provisions were inserted in the Treaty of Waitangi (State Enterprises) Act 1988 to guarantee that any SOE (State Owned Enterprise) land sold into private ownership could be repurchased by the Crown in the event of the WT finding that Maori claims to it were valid. There was a similar provision in the Crown Forest Assets Act 1989 (Sorrenson, 2004).

In 1994, the Crown unveiled its Treaty settlement policy, known as "the fiscal envelope"; the policy put a fiscal cap of NZ$ 1 billion on the settlement of all Maori land claims. Tribes began to assert their tino rangatiratanga by occupying land and buildings at Tauranga, Tamaki,

Waimana and other places. Tribe by tribe rejected the fiscal envelope (Walker, 2004).

The Labour-Alliance government in 1999 adopted the strategies of "Closing the Gaps" as part of Maori Development Policy, He Putahitanga Hou. The government's key strategic objective was to enhance Maori social and economic opportunities by improving levels of health, education, employment and housing. However, as Maaka & Fleras (2005 p138) explained Maori under-performance is defined "by reference to non-Maori standards while ignoring Maori measures for defining success or performance". The policy was very substantially toned down following public criticism.

XII.4 Treaty of Waitangi

The Treaty implied the idea of a contract between the Crown and Maori Chiefs, protecting the powers of the Chiefs; it also implied that the only rights that Maori could claim as tangata whenua were the ones expressly included in the Treaty. This proved wrong in practice, as the Treaty was not able to protect rights without being incorporated into domestic law. The Treaty cemented the idea that relations should be conducted based on a partnership of equals (Renwick, 1990; Pratt, 2004).

The English version of the Treaty refers to the Maori ceding sovereignty to the Crown while in the Maori text, chiefs ceded kawanatanga, meaning governorship or governance; their rangatiratanga, or chieftainship, was guaranteed. However, once administration of the country passed to a settler government, under the Constitution Act of 1852, Pakeha respect for the Treaty diminished rapidly and new laws ignored its existence (Robinson, 2002).

The Maori version of the second article uses the word rangatiratanga in promising to uphold the authority that tribes had always had over their lands and taonga, emphasizing status and authority. In the English text, the Queen guaranteed to Maori the undisturbed possession of their properties, emphasizing property and ownership rights. In the third article, the Crown promised to Maori the benefits of royal protection and full citizenship (WT, 2006a).

Under the Treaty of Waitangi Act 1975, the Waitangi Tribunal (WT) has exclusive authority to determine the meaning and effect of the Treaty and to decide issues raised by the difference between them for the purpose of examining claims. The principles expressed by the WT in its reports include among others (WT, 2006a):

- The Treaty implies a partnership, exercised with the utmost good faith

- The exchange of the right to make laws for the obligation to protect Maori interests
- The Maori interest should be actively protected by the Crown
- The needs of both Maori and the wider community must be met, which will require compromise on both sides
- The courtesy of early consultation
- The Crown cannot evade its obligations under the Treaty by conferring authority on some other body
- The Treaty is an agreement that can be adapted to meet new circumstances
- Tino rangatiratanga includes management of resources and other taonga according to Maori cultural preferences
- Taonga includes all valued resources and intangible cultural assets
- The principle of options (the TW provided an option for Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative: to walk in two worlds. Most importantly, as options, it was not intended that the partner's choices on these matters could be forced)

For many years, the New Zealand Courts often doubted the legal importance of the Treaty. However, the Treaty is now considered by many claimants, advocates and jurists as a founding document of constitutional significance and as an integral part of the New Zealand law. Frankel & McLay (2002 p101) explained that while the Treaty does not refer to intellectual property, as such, is clear that many of the things covered by traditional intellectual property might be considered to be taonga, loosely translatable as "treasure". While the treaty is far from specific in the obligations it imposes which might be relevant in modern times, including the reference to rangatiratanga, the manner in which the courts are

applying "the spirit" of the Treaty seems the most propitious way to ensure that the intention of the original signatories is promoted.

In the 1970s and thereafter Parliament included a reference to the TW in various statutes. Under New Zealand jurisprudence, the TW is not directly enforceable in the courts, until incorporated by statute. The first statute to uphold the Treaty was the Treaty of Waitangi Act 1975. While it did not make claims enforceable in courts, it enabled claims for post 1975 breached of the Treaty to be made before the WT. Several New Zealand statutory provisions have directly incorporated Maori rights under the TW; while not the oldest, the statutory provision that had the greatest impact on treaty jurisprudence and public debate over Treaty rights is s. 9 of the SOE Act 1986 (Iorns Magallanes, 2004).

XII.4.1 **The TW and political parties**

The position of the main political parties in New Zealand in respect of the TW can be summarized as follow: Labour recognizes the TW as the founding document of New Zealand; this party has put an emphasis on capacity building and working in partnership. National Party has set the goal of settling all historical Treaty claims by 2008 (Stuff, 2002); and encourages the policy one rule for all. This discourse is share by other center-right parties such as ACT or NZ First that also want to eliminate the separate Maori electorates (Sullivan, 2005). All attempts during the last 20 years to acknowledge Maori cultural differences, and empower Maori people have made many Pakeha fearful that they would prove to be dangerously divisive (Renwick, 1990). Many Pakeha see Maori rewarded with a series of group rights based on race rather than need or merit, with no limits to the number of grievances and financial irresponsibility (Maaka & Fleras, 2005).

XII.5 Waitangi Tribunal

The Tribunal was set up in 1975 by an Act of Parliament known as the Treaty of Waitangi Act 1975 (ToWA). By establishing the Tribunal, Parliament provided a legal process by which Maori Treaty claims could be investigated. There are also other statutes that regulate the work of the WT like the Commissions of Inquiry Act 1908, the Treaty of Waitangi (State Enterprises) Act 1988, and the various statutes that give effect to Treaty claim settlements (WT, 2006).

Generally, the Tribunal has authority only to make recommendations. In certain limited situations, the Tribunal does have binding powers, but in most instances, its recommendations do not bind the Crown, the claimants, or any others participating in its inquiries. In contrast, courts can make rulings that bind the parties to whom they relate.

The Tribunal's process is more inquisitorial and less adversarial than that followed in the courts; is flexible because not necessarily follow the rules of evidence that generally apply in the courts; and the Tribunal does not have final authority to decide points of law (WT, 2006). For administrative and scheduling purposes, claims are divided into two groups: district claims and generic claims. The former are those claims that relate to a particular land block or locality, while generic claims are ones not specific to any one area or that deal with matters of national significance (Robinson, 2002).

In 1985, the ToWA was amended to permit claims dating back to the signing of the Treaty of Waitangi in 1840 (Robinson, 2002); once the Tribunal could look back to that date, the conflicts over representation and overlapping and disputed rights became commonplace (Belgrave, 2005). As at 14 June 2005, the Tribunal has 14 members and 1236 claims had been registered with the Tribunal. Of those claims, 49 have been settled by the Crown, 27 have been withdrawn, and the Tribunal has declined to inquire into another 58, leaving 1102 claims subject to inquiry, 762 of which

(69%) have been fully reported on, are under inquiry, or being prepared for inquiry.

The Waitangi Tribunal has stated that the Resource Management Act 1991 (RMA) and the resource management regime continues to breach the Tiriti o Waitangi and the legal derivative principles of the Treaty, because the regime does not protect or permit the rangatiratanga of Maori to be exercised with respect to ancestral land and resources (Tunks, 2002). According to Byrnes (2004), the WT reports have become increasingly politicized, moving from a reparatory discourse to one based on ideas of autonomous political entities exerting their own sovereignty yet still part of the nation as whole. Some authors declared that the Tribunal has failed to address the key questions relating to economic and political power to Maori (Gardiner, 1997). However, the recognition of Maori Law and lore a priority by the WT, is leading in that way already.

XII.6 Biodiversity, customary rights and WAI 262

XII.6.1 **Biodiversity**

Maori have a holistic view of the environment and biodiversity that derives from a cosmogony (belief system) that links people and all living and non-living things. Descended from the union of Ranginui (the sky father) and Papatuanuku (the earth mother), and their offspring, the atua kaitiaki (spiritual guardians) Tane (atua of forests), Tumatauenga (atua of war and ceremony), Rongo (atua of cultivation), Tangaroa (atua of seas), Tawhirimatea (atua of wind and storms) and Haumietiketike (atua of land and forest foods), humans share a common whakapapa (ancestry) with other animals and plants. People are therefore part of nature and biodiversity. All components of ecosystems, both living and non-living, possess the spiritual qualities of tapu, mauri, mana, and wairua. Maori, as tangata whenua, are the kaitiaki (guardians) of these ecosystems and have a responsibility to protect and enhance them (NZBS, 2000; NZCA, 1997; Graham, 1997).

Like in all cultures, mistakes were made and some species were hunted to extinction such as the Moa (Solomon, 2000). Best estimates extinctions are (MAC, February 2000 p6):

- nearly one-third of indigenous land and freshwater birds
- close to one fifth of sea birds
- three out of seven native frog species
- one fish, one bat and perhaps three reptiles
- at least 12 invertebrates such as snails and insects
- 11 plants with several more that have not been sighted for years

A Ministerial Advisory Committee on biodiversity was appointed in 1999 (MAC, August 2000; MAC, February 2000). The committee detected that many agencies are either unaware of the nature and scale of the issue. A National Policy Statement under the Resource Management Act (RMA)

was proposed to clarify roles and establishing a basic methodology to ensure that local governments followed good process when carrying out their biodiversity-related functions under the RMA (MAC, August 2000).

In 1987, a new legislative regime created the Department of Conservation and in doing so introduced the possibility for greater Maori involvement in conservation management. Prior to that date, the Department of Lands and Survey was the principal government department responsible for managing natural and historic resources. In the 1980s, were passed the Environment Act 1986, the Conservation Act 1987, and later, the Resource Management Act 1991.

In 1984, the Government formed a Working Party to consider major reform of the institutional management of natural and historic resources. It acknowledged that the existing system had failed to "recognize either the conservation ethic practiced by the Maori community or their rights guaranteed by the Treaty of Waitangi". A prominent catalyst for the Working Party's stance was the work of the Waitangi Tribunal. It released several prominent reports in the early-to-mid 1980s that criticized the government-sanctioned degradation of natural resources (Ruru, 2004).

XII.6.2 **Customary rights**

The Land Claims Ordinance 1841, gave statutory recognition to customary Maori land rights, and these were upheld in the Supreme Court judgment in the *Queen* vs. *Symonds* in 1847. In 1862, the settler Parliament passed the Native Lands Act by which Maori customary title could be extinguished. From the 1860s, conflicts of interest about fishing rights arose between Maori and settlers; British legal precedents were followed to determine New Zealand law. Various court decisions rejected Maori claims based in customary rights. The courts ruled that when Maori sold their land they also lost their fishing rights associated with it. Since 1877, fisheries acts have included a section that has given in various ways, statutory protection to unspecified Maori fishing rights (Renwick, 1990;

Frame, 2001). This changed in 1992, when Maori and the New Zealand government signed an agreement known as the Treaty of Waitangi Fisheries Settlement; which replaced customary fishing rights by regulations, and developed a procedure to determine how the assets will be distributed.[10]

Various documents including recognized Maori customary rights: Criminal Justice Act 1985, Law Commission Act 1985, SOE Act 1986, Maori Language Act 1987, Conservation Act 1987, State Sector Act 1988, Coroners Act 1988, TW State Enterprises Act 1988, TW Amendment Act 1988, Maori Affairs Amendment Act, Resource Management Act 1991 and the Foreshore and Seabed Endowment Revesting Act 1991 among others.

XII.6.3 **WAI 262**

A group of Maori elders, concerned over the increasing loss of native plants and animals, the destruction of ecosystems and the continuing erosion of matauranga Maori, got together in 1988 to formulate the claim to the Waitangi Tribunal. The claimants represented the tribes Ngati Kuri Te Rarawa, Ngati Wai, Ngati Porou, and Ngati Kahungunu. The claim concerns indigenous flora, fauna, and cultural and intellectual heritage rights. It is based on Article 2 of the Treaty of Waitangi, which guaranteed to Maori (in the English version) "the full exclusive and undisturbed possession of their lands, forests, fisheries and other properties..." And in the Maori version Maori were guaranteed tino rangatiratanga translated as "their full chiefly authority") over these resources "me o ratou taonga katoa..." which is translated as all of their treasures (Solomon, 2000).

Tino rangatiratanga can be said to be about mana whenua, the right of iwi and hapu to exercise authority in the development and control of resources that they own or are supposed to own. Tino rangatiratanga has relevance for mana tangata, the right of all Maori, individually and collectively, to determine their own policies, to actively participate in the

[10] For details of the Sealord case see Walker (2005)

development and interpretation of the law, to assume responsibility for their own affairs, and to plan for the needs of future generations (Durie, 2005; Maaka & Fleras, 2005).

Among the remedies that the WAI 262 seeks from the WT is for Maori to have a greater say in the environmental and resource decision-making processes as was originally envisaged under the RMA legislation. The fact that this has not occurred to any significant degree is evidenced by the fact that since the RMA became law in 1991, no local authority in the country has transfer any power, duties or functions to an iwi authority, despite many applications received from iwi over the past years (Solomon, 2005). The RMA 1996 include provisions requiring decision-makers to "take into account" and "have regard to the principle of the TW" (Solomon, 2001 July).

Because of the Claims, the WT elaborated reports to analyze the Crown policies, actions and omission in relation to flora and fauna in New Zealand. Some of the findings stated that for instance between 1860 and 1912 the Native Land Court system and policies had considerable influence in undermining Maori authority over indigenous flora and fauna (Marr et al 2001). From 1912 to 1983 in Crown actions concerning the indigenous flora and fauna, this 'effective exclusion' include (Park, 2001):

- First, there were very few instances, anywhere in New Zealand, in which Maori customary rights were an element of the control and management structures that the Crown installed for the conservation of the indigenous flora and fauna or their ecosystems.
- Secondly, in matters concerning the indigenous flora and fauna the Crown made negligible reference to the Treaty of Waitangi between 1912 and 1983. When any reference was made, it was accompanied by legal reasoning that the Treaty had no basis in statute.

Other report claimed that after examining sections 6(e), 7(a), and 8 of the RMA, the Tribunal found that it was unsatisfactory and inconsistent with the principles of the Treaty (McClean & Smith, 2001).

XII.7 New Zealand IP and Biodiversity legal context

The Wildlife Act 1953 grants Crown ownership over all indigenous land mammals, most birds, reptiles and some invertebrates. Common law vest ownership of specimens of plants, micro-organisms and fauna not covered by the Wildlife Act. The Continental Shelf Act 1964 exerts Crown jurisdiction over sedentary organism on the seafloor. The Fisheries Act 1996 and Marine Mammals Protection act 1978 give the Crown management rights over marine fauna (NZCA, 1997).

Cabinet passed in 1978 a resolution establishing the Advisory Committee on Novel Genetic Techniques (ACNGT). The committee had responsibility for contained (laboratory) experiments involving new genetic techniques. The Cabinet resolution imposed an indefinite moratorium on experiments outside strict containment (field trials and releases). When the ACNGT was launched, New Zealand had not yet passed legislation allowing public access to official information; hence, the agency made no provision for public participation and its reports were not published for big audiences (Hope, 2002).

In 1988, was established the Interim Assessment Group (IAG) by the Minister for the Environment under s33 of the Environment Act 1986. The IAG was responsible for assessing all applications for work with GMOs but strictly contained conditions (i.e. for field trials, glass house trials and large-scale fermentation) that remained under the control of the ACNGT. All public sector researchers were obliged to apply to the IAG for approval to conduct field trials; while private sector researchers were encouraged to comply voluntarily with IAG procedures. These principles included a right to be informed and a right to comment on applications, for both the scientific community and the public. With the establishment of the IAG, the ten year moratorium on field testing of GMOs in New Zealand was lifted. The first New Zealand GMO field trials (of GM potatoes) were conducted in the summer of 1988-89 (Hope, 2002).

The Biosecurity Act 1993 also provides the framework for biosecurity management. This act provides for the exclusion of pests and unwanted organisms from New Zealand within a broad cost-benefit framework, as well as the eradication or management of pests once they are in the country. Recent developments in this management framework include (NZBS, 2000 p80):

- the establishment of the Environmental Risk Management Authority of New Zealand (ERMANZ);
- the creation of a Cabinet portfolio for biosecurity;
- the establishment of the Biosecurity Council;
- the merger of the Ministries of Agriculture and Forestry;
- the launch of a new MAF Biosecurity Authority; and
- the commissioning of an independent review of New Zealand's border control services.

In December 1995, New Zealand signed a treaty establishing a joint system with Australia for developing food standards in both countries; the Australia New Zealand Food Authority (ANZFA) began to work in 1996. GM foods that had been approved by an overseas regulatory authority (including the FDA), were not required to undergo independent safety assessment. Between 1996 and 1999, ANZFA allowed the release of eighteen GM food products into the Australian and New Zealand markets, including potatoes, sugar, wheat and corn (Hope, 2002)

The Department of Conservation is responsible for access to, and granting possession of, indigenous plant or animal; it is responsible for the preservation of indigenous freshwater fisheries and the protection of recreational freshwater fisheries and freshwater fish habitants. There are currently no direct controls on bioprospecting on private land (MED, Nov 2002). The Hazardous Substances and New Organisms Act 1996 (HSNO Act) regulates research into and release of all living things that do not already exist in New Zealand, including those that are genetically modified.

The HSNO Act applies to anything that can potentially grow, reproduce and be reproduced, whether or not it is also a food or a medicine. Before taking any action, the applicant must get the approval of the Environmental Risk Management Authority (ERMA). ERMA is an independent, quasi-judicial body set up specifically for this purpose, and it considers each application on a case-by-case basis (MFE, 2004; MFE, 2006b).

New Zealand has elaborated the three reports requested by the CBD so far. The first one presented in 1998 stated that the major limitations in implementation of programmes were the lack of knowledge about key elements of biodiversity, the lack of cost effective techniques, and resource constraints (CBD 1998a). In its second report, three yeas later, the New Zealand government made the following asseverations: the implementation of the articles 8 In situ conservation was high; the level of priority to implement the article 8j was medium; that the resources available for meeting the obligations were adequate; that the country had undertaken some measures to ensure that the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity were respected, preserved and maintained. It also recognized that the legislation concerning the implementation of article 8j were at early stages of development and that legislation for the development of a multilateral system to facilitate access and benefit-sharing in the context of the International Undertaking on Plant Genetic Resource was under development (CBD, 2001a). Finally, the third report emphasized that New Zealand is generally focusing attention on in-situ conservation, rather than ex-situ; management is through a mix of promoting or requiring economic activities that are compatible with biodiversity, and undertaking active protection and restoration programmes to repair the effects of past degradation and control alien species (CBD, 2006).

XII.7.1 **GM uses and control**

The Royal Commission on Genetic Modification recognized the significance of the cultural, ethical and spiritual aspects of biotechnology in general. It suggested that Toi te Taiao: The Bioethics Council be established to provide advice and promote ongoing dialogue among New Zealanders on the issues; which happened in December 2003. As a result, the legislation has been amended to give greater recognition to the knowledge and experience of Maori values by those involved in the decision making process on new organisms, including genetically modified organisms. It does this by adding knowledge of the Treaty of Waitangi and tikanga Maori to the range of expertise and experience the Minister considers when appointing members to the Authority (MFE, 2004; MoRST, 2003).

When ERMA considers applications for the release of GMOs, the HSNO Act requires the Authority to take into account the relationship Maori and their culture and traditions have with their ancestral lands, water, sites, wahi tapu, flora and fauna and other taonga. The Ministry of Agriculture and Forestry (MAF) inspects research facilities to make sure the organisms are properly contained and the controls are being followed (MFE, 2004).

Some medicines in New Zealand are manufactured by processes that use GMOs. These medicines must be approved by the Minister of Health under the Medicines Act 1981. Medsafe is part of the Ministry of Health and is responsible for assessing the quality and safety of all medicines before they can be used in New Zealand. No genetically modified crops are grown commercially in New Zealand. No fresh fruit, vegetables or meat sold in New Zealand is genetically modified. However, some processed foods may contain approved genetically modified ingredients that have been imported. For example, many soy-based products are derived from genetically modified soya beans. None of the fresh meat, fruit and

vegetables currently sold in New Zealand have been genetically modified (MFE, 2004; D. Richards, personal communication, September 7th 2006).

XII.7.2 **Patents, IP and Maori**

A number of Maori values are relevant to intellectual property, these include not just the broad concept of taonga, but also whakapapa (genealogy), mauri (life force), kaitiakitanga (guardianship), and rangatiratanga (spirit) (Frankel & McLay, 2002). Whakapapa is about whanaugatanga (biogenetic relationship), it is a means of explaining and transcribing the spiritual, intellectual, social and material relationship between Maori and the indigenous flora and fauna of the country (Solomon, 2005 p223). Philosophically, Maori people do not see themselves as separate from nature, humanity and the natural world, being direct descendants of Earth Mother (Henare, 2001).

The New Zealand Biodiversity Strategy declared that the rights of Maori as Treaty partners in relation to indigenous genetic resources "needed to be identified and addressed in the development of policy relating to bioprospecting" (NZBS, 2000 p74). The Trade Marks Bill 2001 and the Taonga Maori Protection Bill include process for considering Maori issues in relation to trade marks and for better protection for movable cultural property (Frankel & McLay, 2002).

Maori refer to genes by the use of phrases such as: kei roto i nga toto (it is in the blood) and nga toto o ana tipuna (it is in the blood of his/her ancestors). Genes are a part of the whakapapa relationship as animal or plant life. For Maori, a gene has Mauri that continues to exist ex-situ (when taken from its original place). The same perspective is carried over to issues of replication, trans-genetic engineering and cloning. Hence to alter the "genes" or genetic material is to alter the blood of the ancestors, altering the whakapapa relationship by changing or introducing "new blood" that may impact on the other rights that are passed down, rights of authority, status and control (Solomon, 2004; MED, 2006f p7).

Despite all the violations of WAI 262 mentioned in the reports before, no formal claims of biopiracy has yet been made. David Callaghan, an Advisor from the Intellectual Property Office of New Zealand provided the information to assert this (D. Callaghan, personal communication, 11 May 2006). The New Zealand government expressed that some of its agencies are working in the topics related to access to genetic resources, prior informed consent in fulfillment of article 8j of the CBD. However, access to information related to this progress is not provided anywhere; and there is currently no project on this topic being discussed at the Beehive. This was confirmed by Felicity Rashbrooke who works as a Librarian from the New Zealand Parliamentary Library (F. Rashbrooke, personal communication, 21 August 2006). In a recent UN workshop on the subject of prior informed consent the New Zealand government expressed that would be better if the workshop recommendations were expressed in non-mandatory language and that the consent process "may include the option of withholding consent", rather than "must" because "equal access to financial, human, and material resources" for "all sides in a free, prior informed consent process" would be impossible to achieve in most situations (MFAT, 2006).

XIII. CONCLUSIONS

After the economic crash of 1930 and the World War II, the economic system needed to be restored. Hence, some institutions were created and new policies were implemented. These agreements were reached at Bretton Woods and were based on a monetary regime of fixed exchange rate, a reconstruction and development fund and the creation of the GATT.

The goals of the agencies mentioned above intended in the beginning to set some basic economic rules and help the countries in need to alleviate and mitigate their poverty. However, since the late 70s, in concordance with the implementation of new economic policies known as "neoliberal" (emphasized during the 90s) these priorities changed. From then on, these institutions took an active role in the design and implementation of the economic plans in most of the countries and tried to secure the capacity of debtors countries to service their debts; implementing the same kind of policies anywhere regardless of cultural and socioeconomic differences. The encouragement and the implementation of some international standards for intellectual property regimes are also part of this new role and, according to some authors, are the new ways in which these agencies encourage the neoliberal policies.

This is in perfect synchrony with the neocolonial theory that support the idea that there is an indirect form of control through economic and cultural dependence, which is achieved by the superpowers through international monetary bodies, through the fixing of prices on world markets, multinational corporations and cartels and a variety of educational and cultural institutions.

One the one hand, little analytical capacity to undertake a sound cost-benefit assessment of the impact of IPR protection in different productive sectors and on consumers; political pressures to adopt IPR legislation that responds to the interest of industries from industrialized countries; adoption

of high IPR standards of protection in return for expected trade benefits; and over-protectionist bilateral or regional treaties that include obligations on IP, are some of the constraints that develping countries may face. On the other hand, indigenous peoples also face constraints; lose of identity, discrimination and positions of marginality in their relationships with nation-states make them almost powerless to protect their rights. However, this does not necessarily mean that there is a common interest between developing countries and their indigenous communities. Sometimes, even without constraints, developing countries do not implement policies in favor of indigenous peoples.

The topic of this thesis is still a relatively unknown subject in early stages of development, and one of the consequences for the research was the difficulty to find data and carry interviews. After the arguments shown, can it be said that the IPR does necessarily lead to the violation of indigenous peoples' rights? The answer, at first glance, seems to be yes; but we rather say not necessarily. Why is that?

The CBD in its Article 8(j) with the expression "as far as possible", encourage States to act somewhat benevolently towards indigenous peoples (although it does not require this and does not recognize indigenous control over genetic resources). This provision does not set out a clear-cut obligation with regard to TK and leaves a large room for maneuver to the contracting parties. Far from perfect and even taking into account all the lobbies mentioned before, most of the IPR give the states the chance of implementing policies to protect indigenous peoples' rights. However, it seems easier for the States to blame third parties or the IPR itself, than carry their own responsibilities and obligations. For instance, in the CBD many Parties have failed to carry out their reporting duties under the Convention, and most of those that have reported, have expressed that the protection of TK is not a "high priority" and that no protecting measures have been taken on the issue.

What about TRIPS? TRIPS is silent on genetic resources, TK, folklore and biodiversity, but it does have certain provisions which could be interpreted in favor of the concept of access and transfer of technology (art.7). These provisions are broad and subject to interpretation by WTO members. The same thing could be said about Article 27.2 on the exclusion from patentability on the ground of public order or morality, including prejudice to the environment. This article could prevent the unfair or abusive exploitation of genetic resources. However, does not confer legal protection on these or TK. Therefore, in this case the answer to the question of violation seems to be yes.

Under UPOV 1978, governments may select the range of plant species eligible for protection. The right of farmers to replant and exchange the seed of protected varieties is also reasonably secured as well as the customary uses of plant varieties by indigenous peoples. This is not the case in the UPOV 1991, where farmers' privilege is up to national laws, and the protection term of the variety is extended. In this last version, farmers and indigenous peoples' rights are seriously challenged. Here again the responsibility of protection is given to the States. A government seeking to recognize the concept of "farmers' rights" could join the FAO farmer's rights legally binding document (which Argentina did not. It would be pointless for New Zealand to do so, because no GM crops are grown commercially in the country). Another way to recognize the rights of indigenous communities would be to privilege their customary uses of plant varieties, an ambiguous term that could be defined to include uses that indigenous communities have traditionally and regularly engaged in as part of their agricultural or cultural practices. Such an exemption would likely be compatible with Article 27.3(b) of TRIPS only if the government defines with precision the types of customary uses permitted under its laws and provide equitable remuneration to breeders in the event that the exemption was especially broad.

The renew mandate of the Committee by WIPO proposed the adoption of a set of international rules for preventing the undue acquisition of rights involving TK, including the use of databases on TK for establishing prior art, determination of inventorship and information requirements. Despite the various efforts undertaken by the agency, no concrete solutions for guaranteeing the protection of interest and needs of indigenous people with regard to their traditional knowledge have yet been found.

Hence, although there are at present no clear, specific international IP standards for protecting TK, and these efforts have met with mixed success, there are a growing number of instances where individuals and organizations are resorting to existing patent, trademark or copyright systems to protect their knowledge and cultural expressions.

Finally, it is true that indigenous people in New Zealand and in Argentina face common problems in the implementation of IPR over natural resources? And how effective have any measures that have been put in place by the state been in protecting Indigenous Peoples' property and cultural rights in both countries?

Indigenous people in Argentina and New Zealand face violations of their rights caused by IPR. However, while Maori could suffer an economic and spiritual prejudice the situation seems worse for Tobas. They suffer the same violations but their poor living conditions make the situation even worst. The hunter-gatherer activities represent 65% of the total of food consumed in the year by them; for Tobas is a matter of survival. The fact that New Zealand is a free GM crops zone makes a big difference, because no one have IP rights on the seeds and can restrain their use.

In Argentina, indigenous people are not informed or conscious about the implications of the relationship between biodiversity and IP. There has been no national initiative to protect indigenous peoples' rights, because of the idea that Argentina is a country without indigenous people, and the scarce social pressure of aborigine groups (because of the genocide that

took place, the few number of survivors that recognize themselves as indigenous peoples and the poor organization of these groups).

This unfamiliarity with the subject not only by aborigines but by a big part of the academia as well, resulted in a very scarce information available. That is why it was impossible to determine to what extent the IPR was affecting Tobas. There is an obvious effect, but hard to measure it; it happened the same with the determination of which sector (agriculture, wild foods, etc) was more affected. However, it could be demonstrated that there is no current agreement with a pharmaceutical or seed company or claim of biopiracy either.

The benefits of partnerships between aborigines and pharmaceutical or seed companies are obvious and desirable, and even tough the revenues were not high; it could give indigenous people more control over their destiny and the possibility of escape to political clientelism. However, the examples of this sort of agreements so far were few, with some problems in the implementation to provide a guide for future partnerships.

As said before, the Argentine legislation on indigenous peoples changed over the years, with great emphasis during the presidencies of Irigoyen, Peron and Illia, and big drawbacks during the militaries government. The role played by the public agencies dealing with indigenous issues, lacked of coherent trends and projects; the IDACH was not an exception. In general, the content of the laws is not bad at all, but there is a total lack of implementation.

The adoption of the CBD did not generate many domestic laws regarding its implementation, which contributed to the doubts about its direct application. The government recognized the lack of resources to fulfill the CBD recommendations, and that TK was not a priority topic in the agenda. The legislation on patents, and specifically on living organisms, is yet quite unclear and contradictory; the UPOV 91 could be joined soon, which could make things even more complicated and worse for aborigines and farmers in general.

Hence, it can be said that the measures that have been put in place by the Argentine state to protect indigenous peoples' rights were not effective. Their rights are recognized in the paper but not in the real world. What it has been demonstrated so far shows that it is very difficult to reverse a history of denial of indigenous people's rights.

The New Zealand case is quite different. The TW set the bases for the relationship between foreigners and aborigines something unthinkable in the Latin American context. The Treaty, nonetheless, was not respected; lands were expropriated, and tohunga were suppressed, among other measures taken. However, with the years, Maori regained space in the public arena, they become a large political influence with seats in Parliament, the TW was repositioned as the New Zealand Magna Carta, and the WT was established to deal with all the grievances and was made retrospective to 1840.

All these changes resulted in, for instance, the mention to Maori interest in every SOE regulations and in several documents (Criminal Justice Act 1985, Law Commission Act 1985, Maori Language Act 1987 etc). While the Treaty does not refer to intellectual property, as such, is clear that many of the things covered by traditional intellectual property might be considered to be taonga. In this context, the WAI 262 claim, became a landmark in the struggle for indigenous people's rights.

New Zealand has elaborated the three reports requested by the CBD so far specifying that the legislation concerning the implementation of article 8j and the benefit-sharing in the context of the International Undertaking on Plant Genetic Resource were under development. No claims of biopiracy have been made, but there is no current project at the Beehive to regulate biopiracy or the prior informed consent process either. Some laws still need to be approved by the Parliament to fully protect Maori rights. There are still some problems and grievances to be solved; but the legal framework, despite its fragmentation, is quite clear.

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List of Abbreviations

ACNGT: Advisory Committee on Novel Genetic Techniques

AIRA: Asociacion indigena de la Republica Argentina (Spanish acronym for Indigenous Association of the Argentinean Republic)

ANZBPF: Australia New Zealand Biotechnology Partnership Fund

ANZFA: Australia New Zealand Food Authority

CBD: Convention on Biological Diversity

CISA: Comite Indigena SudAmericano (Spanish acronym for Indian Council of Latin America)

CITES: Convention on International Trade of Endangered Species

CMPI: Comite Mundial de Personas Indigenas (Spanish acronym for United Nations Indigenous Peoples World Council)

COICA: Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica (Spanish acronym for Indigenous Peoples Coordination Agency of the Amazon)

CPI: Comite provincial indigena de Chaco y Formosa (Spanish acronym for Indigenous Committee of Chaco and Formosa)

CSIR: South African Council for Scientific and Industrial Research

ECOSOC: United Nations Economic and Social Council

ERMANZ/ERMA: Environmental Risk Management Authority of New Zealand

ETC: Action Group on Erosion, Technology and Concentration

FAO: Food and Agriculture Organization

GATT: General Agreement on Trade and Tariffs

GM: Genetically modified

GMOs: Genetically Modified Organisms

GR: Genetic resources

GRTKF: World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

HSNO: Hazardous Substances and New Organisms

IAG: Interim Assessment Group

ID: Identification document

IDACH: Instituto del Aborigen Chaqueño (Spanish acronym for Institute of the Aborigine of Chaco)

IGC: Intergovernmental Committee

ILO: International Labour Organization

INAI: Instituto Nacional de Asuntos Indígenas (Spanish acronym for National Institute of Indigenous Affairs)

INASE: Instituto Nacional de Semillas (Spanish acronym for National Seed Institute)

IP: Intellectual property

IPR: Intellectual property regimes

MAF: Ministry of Agriculture and Forestry

MERCOSUR: Mercado Comun del Sur (Spanish acronym for Common Market of South America)

MFE: Minister for the Environment

NC: National Constitution

NGOs: Non-Governmental organizations

NZTE: New Zealand Trade Entreprise

PVR: Plant variety rights

RMA: Resource Management Act

SAyDS: Secretaria de Recursos Naturales y Desarrollo Sustentable, today Secretaria de Medio Ambiente y Desarrollo Sustentable (Spanish acronym for Secretary of Natural Resources and Sustainable Development today Secretary of Environment and Sustainable Development)

SOE: State Owned Enterprise

TCEs: Traditional cultural expressions/folklore

TK: Traditional Knowledge

ToWA: Treaty of Waitangi Act

TRIPS: Trade-Related Aspects of Intellectual Property Rights

TSA: Tohunga Suppression Act

TW: Treaty of Waitangi

UBA: University of Buenos Aires

UK: United Kingdom

UN: United Nations

UNDP: United Nations Development Program

UNESCO: United Nations Educational, Scientific and Cultural Organization

UPOV: International Union for the Protection of New Varieties of Plants

WHO: World Health Organization

WIPO: World Intellectual Property Organization

WT: Waitangi Tribunal

WTO: World Trade Organization

Transcriptions of the interviews carried in fulfillment of the 100-point-thesis of the MPP programme.

Interview Ms. Erika Vidal (member of the INAI, National Institute of Indigenous Affairs)

Cuénteme brevemente su experiencia en el INAI

Desde el año 1991 trabajo en el INAI, dependiendo del Ministerio de Acción Social que luego se divide en el 94. Por primera vez el tema indígena ingreso a la agenda social. Antes no tenia espacio propio, eran solo aislados. Los casos de cólera del 90 hacen que intervenga el Ministerio de Salud. Yo entro por una tesis, un grupo de sociólogos toma un edificio, establece allí las oficinas y se presenta un acta para cumplir con la ley 23.302 pero fue una incitativa de técnicos. Por eso el INAI tuvo presupuesto propio en el 94. Hoy hay 35 personas trabajando, en 14 años pasaron 12 conducciones. Hay 4 o 5 que somos como la memoria de la institución... se hace camino al andar. Es un espacio que va creciendo en el momento en que el estado colapsa y va decreciendo. En la etapa neoliberal que llevo al estado a mínimas expresiones, las que quedaron eran para reforzar el modelo de acumulación pero en cuanto a la temática social se contradijo y resulto en un pequeño espacio que va creciendo cuando otros espacios desaparecen. La temática que va tomando importancia son tierra y personería jurídica porque permiten la ejecución presupuestaria. Hubo una gran campaña para que las comunidades obtengan la personería, fue un gran esfuerzo interno con dirigentes cambiantes. Se mantuvo en 3 o 4 gestiones el interés, que luego se volcó al tema becas y al crecimiento administrativo interno. El 70% del personal es contratado o pasante y el 30% restante de planta (permanente).

Respecto al tema biodiversidad en el año 96 se convoca a un encuentro de medicina tradicional y biodiversidad y con ello se puedo en contacto con otros organismos como el INTA. Desde el afuera se da la instalación del tema medioambiental ligado a la biodiversidad y biopolitica que coincide con una visión

holistica de los pueblos indígenas. El derecho ligado a recursos naturales comienza a impactar desde afuera. La resolución 4811/96 del INAI se convoca a la gente para que se expidiera sobre el tema recursos naturales. Propiedad intelectual toma auge en los últimos 10 años. La participación es de referentes indígenas, asociaciones o contactos a traves de una ONG que son invitados a foros internacionales. Comienza a haber presencia discontinua, selectiva, pero al azar en los foros internacionales.

Con las urgencias económicas que hay en Argentina, los indios pueden pensar en temas de propiedad intelectual? O es un tema impulsado por la intelectualidad?

Desde el '98, no podes entender la instalación del tema sin lo expresado en la presión que tiene la Argentina en foros internacionales a través de la OMC (WTO) para expedirse con una legislación acorde a los regímenes de propiedad intelectual que propone. Hay una correlación directa entre: 1) organismos internacionales de propiedad intelectual para que la Argentina se alinee y tenga legislación acorde en una industria creciente como la biotecnología y 2) los insumos (conocimientos) que están de un lado del planeta y las personas en el otro. Parados sobre los recursos están las comunidades que funcionan como barómetro para otras cosas como cambio climático etc.

La Argentina ha tenido una practica de integración compulsiva, asimilación y negación que esta especie de revalorización de lo étnico por los propios y tal vez algún día por los mestizados va a ser la verdadera revolución cultural.

El tema de la propiedad intelectual es un tema que tiene concatenación pero como tema viene urgenciado por afuera, para dar status jurídico que garantice la inversión directa. Hace 10 años, Cancilleria negaba que Argentina tuviese población indígena. Hoy hay comisiones que llevan el tema con referentes indígenas. Cuales son estos referentes? Gente suelta que dadas las circunstancias de contactos, participa de los foros. Desarrollo personas individualmente pero a la hora de acordad como que firma esa persona? Como representante del pueblo mapuche, pilaga, toba.. diría quien es? Alguien que por su desarrollo tiene

contactos. Es del pueblo? Si, es del pueblo. Ahora, ahí viene el debate: pero puede firmar y convalidar algo en una reunión donde estuvieron gente del pueblo y asumir posiciones? Hay representatividad a través de las personería jurídicas pero sobre poblaciones en particular y no general. Hay iniciativas del INAI para que esto sea mas controlado.

El crecimiento del tema biodiversidad viene a través de: foros internacionales, y movimientos sociales ecologistas que convocan a mujeres, y movimientos étnicos. Tal es así que en los otros ministerios no había nadie que lleve el tema indígena. Hoy en varios ministerios tengo interlocutores y técnicos que están en minería, cancilleria, agricultura y pesca.

Viene acompañado el reconocimiento del tema indígena con el viejo concepto de asimilación?

Viene con una actitud de re-descubrir América. En el mundo académico también existen especialistas pero son particularistas y no generalistas. Se han especializado en alguna comunidad en particular y el único generalista es el INAI que esta en contacto con todos. Hay tres momentos en cuanto a proyectos: 1) trabajar para indígenas, 2) trabajar con indígenas y 3)grupos mas adelantados que presentan proyectos propios. Y aparece desde la Facultad de Derecho la Dra. Zamudio armando un página web con alumnos contactados por el INAI, asume un especio dentro de las antípodas de nosotros. El grupo abona a la tendencia de organizar legalmente los dispositivos que "protegerían" el conocimiento tradicional. Ella tiene lugar en las reuniones de Cancilleria, y en el Congreso con proyectos de ley.

Que organismos tendría el banco de información? Como seria la regulación de la operatoria de este conocimiento consensuado participativamente? Pero nadie discute eso, y esto si es valoración mía, que en ningún ámbito se discute acerca de la composición, de la simetría para controlar la comunidad que le dio el poder como lo impone el elemento mas progresista. No hay estructuración de ninguna modalidad que permita el contralor de los detentores de conocimiento sobre el uso.

No existe la vía regia de control con dos grupos que tienen una asimetría espantosa aun cumpliendo todos los requisitos.

Esa comunidad tampoco es la detentora del conocimiento. No existe la garantía que estos sujetos puedan controlar para saber si entre eso que entregaron o dijeron existe una relación directa con el producto final. Se discute sobre el andamiaje legal. El tema del consentimiento es solo inicial del proceso, el tema es como supervisar. Especie de banco de información en la cual las empresas que buscan conocimientos de distintos tipos tienen que pagar un canon y eso forma un fondo para proyecto de las comunidades. No hay ningún estado que tenga habilitado un sistema.. ya se esta discutiendo un proyecto de ley en el Congreso y desde el organismo publico no hay un espacio institucional armado, puede ser mejor.. pero si fuera de abajo hacia arriba hubiera crecido primero eso mas que lo que creció becas o tierras porque el organismo va como bombero frente al incendio que va teniendo detrás de las manifestaciones y presiones de abajo que hacen clic arriba entonces crea estructuras para eso.

En estos casos, vos ves una pagina web de la Facultad de Derecho (UBA) de una persona cuyo trabajo esta ligado a una empresa privada, si ves el CV te vas a dar cuenta. Entonces ese espacio de poder se basa en una ausencia de debate, es genuino y ocupa un lugar porque no hay otra conformación temática. Surge para proteger al haber una especie de vacío... tiene que haber una ley, pero también están las otras experiencias y bibliotecas en Latinoamérica que dicen que una vez protegido tiene que ser publico para determinados requeridores de ese conocimiento, y después todo el tema de beneficios, salud etc no esta garantizado. Hasta diría que prefiero que la gente mantenga en secreto parte de su conocimiento a razón de que sobrevivió con ellos, los compartió con otros y muchas veces lo padeció como supercherías. De pronto aparecen los académicos, estudiantes, que dicen esto tiene valor, mira que difícil que es al que le pone valor, que de pronto se de cuenta que valía la pena. Es un dato, un insumo, es el corte y pego. Si me voy al extremo y hay un vacío también le haces el caldo gordo al que avanza en eso y vos no tenes posición alternativa. En ese vacío se llena de alguna manera, ese debate se

tienen que dar en instituciones intermedias porque la presión es muy grande y los recursos de biodiversidad es la otra moneda fuerte en la mesas de negociaciones.

Es muy difícil para una comunidad en concreto cuando aparece gente que se convierte en operador de una maquinaria a través de un proyecto, etc plantear el tema de que protege mas: ley o el secreto? Ese es el tema. Hubo unas denuncias en el '98 de 4 comunidades en Jujuy por el tema de la extracción de sangre por el proyecto genoma humano, acá tuvo su impacto para ver como era la huella indígena en la población argentina. Como interesante el tema lo era, lo que sucede es ver que pasa después con esa información, si se convierte en propiedad o no de los organismos que financiaron a los investigadores. Subsiste la posibilidad de la propiedad intelectual sobre las manifestaciones celulares. Este tema quedo flotando y como resultado, lo interesante queda ocultado temas de propiedad intelectual sobre eso, que paso? Hubo financiamiento.. nadie dice quienes estaban detrás de la financiación del proyecto...paso sin pena ni gloria...

En la reunión de Chapadmalal donde se reunieron los del CPI (Consejo de Participación Indígena) por primera vez surge el tema de propiedad intelectual sobre diseños. Entran en contacto con gente del INTI el tema de marcas, diseños, en un pre-borrador. Los que lo impulsan son los mapuches ya que son el brazo político mas organizado del mundo indígena. Hacen un proyecto para hacer la instalación de un tema concreto, en cambio acá ya había algo concreto sobre diseños.

La OMPI (WIPO) se niega a separa la propiedad intelectual sobre los diseños y de la propiedad intelectual de los conocimientos tradicionales, quieren que se trabaje todo como un lote el valor estratégico... los conocimientos sobre biodiversidad no son los mismo que los de la industria textil y el dinero que puede llegar a mover. Pero para mucha gente es mucho mas fácil ver y darse cuenta de las implicancias de la propiedad intelectual sobre la música, el arte, etc ... dicen: "por que no averigua? La verdad nos podrían dar algo a nosotros". Pero es sobre eso solo. En relación a los conocimientos del hábitat es mas difícil de dar se cuenta, no me parece ingenuo que la OMC no los quiera separar.

Ha habido reclamos mas concretos de biopirateria?

No hay denuncia. La biopirateria la tenes que detectar. Los que los pueden detectar son los que tiene accesos a espacio urbanos o ahora a través de Internet. El tema de la comunicación a hecho que en los últimos 5 años muchos jóvenes de las comunidades ya manejan algo de tecnología. Además muchas veces los distintos organismos de estado para justificar su accionar y presupuestos organizan constantemente foros y encuentros en los cuales la gente por primera vez supo algo por causa de estos foros aunque no eran el objetivo primario de los mismos. Y empiezan a tener conciencia del otro grupo indígena nacional. Los expertos son los mapuches que ven la cuestión indígena con sus distintas variantes... el resto de la comunidades recién en la ultima década están teniendo una visión mas nacional de la problemática que los afecta. La contrastacion de casos, de situaciones, es lo que te permite asumir críticamente una posición. Recién ahora, esta la discusión de a que le damos la información? Viene cualquiera a la comunidad, si viene alguien que la gente lo conoce se abren.. el debate grande de la mesa del CPI puede llegar a tamizar estas cuestiones, es decir, bajar o dar datos concretos de casos de biopirateria, la gente hoy tiene claro de que hay un unos, una manipulación, pero no sabe hasta donde, hasta cuando.

El proyecto de ley que posibilidades tiene que salga? (proyect 0409-S-2006 implementing the article 8(j) CDB)

Fue elevado por Zamudio y tratado en cancillería. Si la hipótesis se cumple, de acuerdo a la negociación mas alta mas alta en al cual alguien diga es necesario sacar la ley sobre propiedad intelectual entra porque no hay nada alternativo. Si no ingresa con un discurso critico hay altas chances que al momento de armar un paquete desde arriba hacia abajo, ahora si van a convocar a los movimientos indígenas hoy hay cierta criticidad en los sectores que participaron frente a la posición tal cual la presenta el proyecto de ley. Es un proyecto a pedido de la OMC, es un calco. Porque eso también facilita espacios internacionales para estas personas que honestamente o no, piensan que están haciendo algo que no hizo el estado argentino hasta el momento a través del INAI para defender a las

comunidades indígenas. parece como muy encomiable pero hay reparto de "lugares". Si sale algo critico va a ser de la elite del grupo de expertos que trabajan en temas indígenas en el estado y de la elite de aquellos grupos nativos que si bien no tiene bien claro el tema ya empiezan a ver que algo no esta bien, pero de entrada no lo acepto, convénceme.

Y la aprobación del UPOV 91?

En las reuniones de Cancilleria si vos pones documentos críticos no los presenta, porque quería llevar pese a que era el INAI porque quería llevar un paquete homogéneo. Pese a que en esos tipos de foros internacionales vos encontras todo tipo de posiciones, a favor en contra, o en disidencia. Estos no se pronunciaron, tienen la posición de ir consensuados. Hay cierto desconocimiento, si no se abre cierta participación puede entrar, hay un progresismo que dice que hay que proteger, pero si no se indaga cuales son las consecuencias que podría traer... si o si van a tener que llamar a participar. Cancilleria va siempre con un "ni", y con los ni no sabes para que lado van a agarrar.

La legislación argentina no es explícitamente contraria a los intereses indígenas, eso se da mas por desconocimiento en el tema o porque el tópico esta en un segundo plano?

Estoy de acuerdo. Hoy no se si las leyes frente al fenómeno Evo (Morales) no las piensan, pero en eso momento frente al vacío el que llego con algo se cumple con eso. Después aunque las leyes son de avanzadas y si no se cumplen los indígenas pueden organizarse alrededor de esa ley, por lo menos tienen algo, porque lo peor es el desconocimiento de sus derechos. Eso les permitió por ejemplo a los mapuche proteger sus derechos y la inclusión en la constitución provincial que pretendía negárselos, aun en contra de la constitución nacional, debido a las presiones de grupos económicos como las petroleras, fue algo que se gano a ultimo momento.

La puesta en práctica dista de ser ejemplar, ya es tarea de la gente presionar para que se cumpla. Desde lo supra ya tienen todo muy armado, pero esta en discusión.

Interview Mr. Carlos Correa (Lawyer, Expert on intellectual property rights, Professor of the University of Buenos Aires-UBA)

La primera opinión suya que quería tener era sobre la presente situación legal en Argentina en relación a la propiedad intelectual (relacionado especialmente con recursos naturales), esta de acuerdo a estándares internacionales, es de avanzada o esta retrasada?

Los estándares no existen sobre todo en protección de conocimientos internacionales indígenas, en realidad y a pesar de que se ha escrito mucho sobre el tema en el ámbito de la CDB (CBD) todas las reuniones relacionadas con el articulo 8(j) y otras actividades en la OMPI (WIPO) del comité que tiene al respecto, poco han sido los resultados obtenidos en términos de establecer un estándar para protección de estos conocimientos y todavía perduran muchas diferencias. Hay quienes propician los regímenes para evitar la biopirateria, hay quienes están a favor de un régimen mas positivo de derecho como por ejemplo puede ser la legislación del caso de Panamá impulsada por la OMPI. Estamos lejos de un estándar internacional. Por otra parte esta claro que en Argentina este tema no ha sido objeto de debate, no ha habido iniciativas importantes para su consideración, es realmente marginal...dentro de la Universidad de Buenos Aires hay algún curso de postgrado, alguna cátedra donde esto se trata, pero no ha sido realmente nunca foco de atención.

A que cree que se debe? En otros países los grupos indígenas están mas organizados y son mas importantes numéricamente?

En Argentina no hay una percepción de que hay grupos indígenas y de que estos pueden estar padeciendo problemas o tener derechos particulares que le hayan sido negados. Obviamente es distinta la situación en América Latina donde la presencia indígena es mas fuerte. Tienen en algunos casos un claro reconocimiento constitucional. Esto nace con la campaña al desierto de Roca,

creando poca conciencia de que aquí hay o hubo población indígena. Entonces este tema recibió muy poca atención.

Ni siquiera por parte de grupos aborígenes, da la sensación de que hay otros temas mas urgentes para su cotidianeidad: reclamos de tierras etc...

Algunas organizaciones aborígenes han tratado este tema, un poco siguiendo la moda en otros países, pero al abordar las cuestiones de importancia, creo que efectivamente hay que poner este tema en el orden de prioridades. Y mi impresión es que en algunos casos los estados en el ámbito de la CBD o en Ginebra han dado mucha importancia al tema y al reclamo contra la biopirateria pero al mismo tiempo los estados hacen muy poco para respetar los derechos de los indígenas en cuestiones mas vitales como es su espacio territorial , educaron, salud..

Diferencia abismal entre legislación e implementación...

No existe legislación ni práctica, pero creo que en ciertos casos hay una asimetría muy grande entre los planteos que se hacen respecto a la protección de conocimientos por una parte y la falta de solución a temas más sustantivos. Entonces si este tema va a ser abordado en Argentina correctamente tiene que ser parte de un paquete mas integral donde no sea el único eje de preocupación que pasa con la protección de conocimiento sino que pasa con las condiciones donde esos conocimientos son generados o pueden ser desarrollados.

Que posibilidades cree Ud. que hay de ratificar la UPOV 91 que es mas restrictiva respecto al libre uso de plantas?

El libre uso de las variedades protegidas...no afectaría a las variedades campesinas, en el país ha habido bastantes tentativas para que se apruebe. De hecho en el decreto reglamentario de la ley de semillas hay algunos elementos que pueden interpretarse como inspirados en la convención del 91 pero faltan algunos que son importantes como son las variedades especialmente derivadas que limita un poco el campo para la mejora convencional. Y en materia de reserva y uso de semillas estamos regidos por la del 78... no se cuanto cambiaria con la del 91 ya que no excluye la posibilidad de que el agricultor pueda retener la semilla sino que

deja de se un derecho y pasa a ser una excepción, sujeta a regulación del estado. Contestando mas la pregunta creo que si hay posibilidades ya que hay ciertos sectores interesados de que esto suceda y el Parlamento ya trato varias veces el tema.

Cual cree que sea el mayor reclamo por parte de las comunidades indígenas respecto al área que pueda verse mayormente afectada? Cuando hablamos de protección de variedades de plantas hablamos de efectos sobre parte medicinal, espiritual y la parte que no escapa al resto de los campesinos?

Sucede que los regímenes de propiedad intelectual no contemplan esta problemática. No tienen un capitulo que pueda ser fácilmente aplicable a los conocimientos indígenas, incluyendo las variedades vegetales cuando no cumplen los requisitos que plantea la UPOV. Entonces, en términos legales hay una laguna, no esta legislado. Los conocimientos tradicionales pueden llegar a encontrar protección accidentalmente dentro de regimenes existentes. Si las variedades cumplen con las condiciones de estabilidad etc.... si es conocimiento patentable, lo que no sucede en muchos casos porque ya es conocimiento divulgado. Puede haberlo mas en el área de derecho de autor, en el campo de diseños por ejemplo, aunque se otorga el derecho a persona y no a comunidades, no hay reconocimiento de folklore por ejemplo. En el caso de Argentina hay un vacío normativo en este sentido y en parte se debe a que no ha habido una demanda articulada por quienes serian los beneficiarios y por otra parte el estado no ha tomado la iniciativa... no hay percepción de que pueda haber un beneficio significativo desde el punto de vista general con hacerlo; y al mismo tiempo ha habido una gran lentitud para poner en practica incluso la CDB. Ahora mismo el acuerdo de la FAO sobre recursos filogenéticos para la alimentación y agricultura que ha sido ratificado por mas de 100 países no lo ha sido por Argentina. Entonces, en nuestro país hay claramente una falta de activismo...

Hay actualmente en el Congreso dos proyectos de ley en relación al tema de propiedad intelectual y comunidades aborígenes, de la senadora Escudero y de la

Diputada Chaya. Ha tenido acceso a estos proyectos? Ha sido consultado como experto en el área? Que opinión le merecen?

Los he mirado, no he sido consultado. Tampoco se muy bien como se originan... como sabemos bien a veces presentan proyectos que personalmente no han sido elaborado por ellos sino por sus asesores, no se cual es el origen de esos proyectos. Por otra parte la CDB en si misma no tiene una normativa demarcatoria en cuanto a la protección de conocimientos tradicionales. El articulo 8j es un articulo programático, entonces es muy difícil tomarlo como una base; si no fuera así el tema en Argentina seria mucho mas sencilla porque nuestro país se reconoce a los tratados una fuerza auto-ejecutoria y esto lo tiene dicho claramente la Corte Suprema. Esto significa que una vez que el tratado ha sido aprobado por el Congreso forma parte del derecho nacional y tiene un estatus superior a la ley interna y no hace falta una reglamentar. Pero en la CDB hay pocas normas que puedan considerarse auto-ejecutorias porque son programáticas y por otro lado no ha habido ninguna situación en la cual se haya planteado.. no conozco ningún caso donde se haya iniciado una acción judicial por ejemplo..

No hay tampoco ningún reclamo sobre biopirateria ni contrato con compañías farmacéuticas...

Si por parte del INTA con una universidad de USA pero de comunidades indígenas que yo conozca no. El del INTA ha sido bastante discutido y ha tenido reacciones diversas, parece ser que las comunidades tampoco están demasiado focalizadas en este tema. Y creo que estaría bien que lo hagan pero insisto sin perder de vista lo demás. Porque si se solucionara este problema con una extraordinaria legislación pero sin embargo quedaran pendiente de solución los problemas básicos realmente se ganaría muy poco.

Da la sensación de ser un tema posmoderno cuando ellos siguen aquejados por temas "modernos"...

Es un poco mi punto de vista. Creo que hay que ponerlo en el lugar que corresponde, hay gobiernos que hacen grandes declamaciones en estos temas en

organismos internacionales sobre la protección de los derechos intelectuales y al mismo tiempo uno sabe que a nivel nacional es poco o nada lo que se hace y las comunidades están sujetas a tratos discriminatorios.

En uno de sus trabajos Ud. compara la CDB y los acuerdos TRIPS y los pasos a seguir para hacerlos mas compatibles.. que posibilidades cree que puede llegar a haber para que se llegue a esa compatibilidad?

Creo que va a ser algo a largo plazo. En general los países en desarrollo están bastante comprometidos en llevar adelante este ejercicio. Países como la India, Brasil y Perú aunque ahora ha tenido un traspié al suscribir el TLC con USA un anexo sobre biodiversidad que no se corresponden con los planteos que venían haciendo. Pero hay varios países que están decididos a llevar a cabo esto, esto se ve claramente en el ámbito de la OMC en el ámbito de la OMPI. Un grupo de países había preparado en los últimos meses una propuesta en lo que se refiere a la obligación de revelar el origen de los materiales genéticos y los conocimientos tradicionales asociados en tema patentes. Se había avanzado en la redacción de un texto, con idea de que fuera parte del paquete de negociación de la rueda de Doha que ahora esta suspendido...es un tema que va a estar sobre la mesa por un tiempo...hay países en desarrollo que están comprometidos a que eso pase. Argentina en esos temas no ha jugado ningún papel.

Cuando uno analiza las propuestas de los distintos países, ve un activismo muy importante de Brasil, por ejemplo, que ni siquiera Argentina como socio de MERCOSUR lo sigue como parte de políticas en común. Hay como una falta de consulta permanente, y de iniciativas en cuanto a propuestas. Hay reacción ante el hecho consumado...

Argentina claramente no ha tenido en este tema ningún liderazgo y tampoco ha acompañado de cerca a otros países, sumado a la falta de demanda interna, la falta de percepción de que es un tema de interés para la política nacional. Siempre en esas negociaciones cunado uno demanda algo le piden de algo a cambio, entonces forma parte del posicionamiento táctico y estratégico de los países. Se demanda en

donde uno piensa que tiene cosas para ganar y por eso hay que pagar un precio, pero no donde no hay esa perspectiva. Efectivamente no ha habido posición y en parte puede ser responsabilidad del gobierno pero también de los actores interesados, de los beneficiarios con las reservas del caso...

Y además el tema de conciliar dos sistemas completamente distintos sobre todo en las cosmovisiones...

No esta muy claro, yo mismo no estoy muy convencido de que el paradigma de propiedad intelectual que se aplica en otras condiciones...hay falta de discusión acera de cuales son los objetivos que se persiguen con las propuestas de regimenes sui generis, que en este caso son muchas. Pero cuando uno indaga en profundidad no esta claro que se que se busca si es la conservación del conocimiento en si, si lo que se busca hacer justicia, si se busca es una ganancia económica... entonces es bastante confuso el objetivo que se persigue y esto se refleja en que los instrumentos que se plantean tampoco son claros... porque sino esta claro el objetivo, tampoco la herramienta que se plantea. Si las comunidades argentinas se deciden a hacer mas énfasis en este tema creo que es importante que haya claridad respecto a los objetivos que se persiguen.

Interview Eulogio Frites (Lawyer, Member of the Indigenous Jurists of Argentina, Coya community descendent)

.....digresión.....

Dicen que dar tierras a los indios es dar flores a los chanchos, sobre todo ahí donde se pueden hacer cosas para el turismo nacional...

Hubiera pensado que las oposiciones eras mas de grupos económicos que militares...

De la Marina y la Aeronáutica también. El Ejercito es como el partido Radical, dice que si, dice que si y cuando llega la hora no pasa nada... solo salen las cosas cuando se fuerzan.

.....digresión.....

Hicimos un proyecto con las Senadoras Morales (Jujuy) y Gustiniani (Santa Fe) que todavía esta en la Comisión de Asuntos Legales donde el Senado ve con agrado que el Poder Ejecutivo mediante decreto otorgue las tierras fiscales del boquete Nahuel-pa a las comunidades tehuelches, mapuches, en los términos del articulo 75 inciso 17 de la Constitución Nacional (CN) inajenables e inembargables.

El derecho de la posesión sobre tierras y recursos naturales de la CN, que es superior al derecho civil, y no nos puede hacer desalojo.. el 15 y 16 de abril de 2005 el gobierno de Neuquén pidió el desalojo de hermanos mapuches... la montada y la aviación fueron con la orden de sacarlos. Entonces fuimos con Perez Esquivel, Pino Solonas, el Obispo de Neuquén y yo pedimos una reunión para consultar e interpusimos una medida cautelar, e impusimos el mejor derecho a la sentencia aplicando el articulo 75 inciso 17 y 22 de la CN. Porque no solamente es derecho nacional sino internacional. Ya no hay desalojos independientemente que el Congreso todavía no se haya pronunciado al respecto. Los principales bloques

no bajaron al recinto. Que decía el proyecto? Que se propone declarar emergencia del derecho comunitario indígena y se paran los desalojos por 4 años. Pero hace poco los paramos independientemente de que haya o no ley. Lo estamos planteando desde el punto de vista jurídico.

Las Senadoras Fellner (Jujuy) y Kirchner (Santa Cruz) (quien era la que quería destinar los dineros del Banco Mundial para aborígenes para los planes "trabajar" y " manos a la obra"), desarrollaron siete foros indígenas en todo el país: juricidad, territorialidad, biodiversidad y la interculturalidad (la cosmovisión, la manera de ver el mundo religioso y filosófico) y la enseñanza multicultural, mono-cultural y no bi-cultural. Esos fueron los 4 temas ejes fundamentales de las reuniones.

.....digresión.....

Como definiría la situación de lo que esta pasando en el Chaco ya que hay distintas versiones...

Es el enfoque paternalistico historio que tiene la cuestión indígena en el Chaco. El mazazo cultural dado por los conquistadores primero, los republicanos después con la invasión religiosa fundamentalmente. Chaco nunca fue tomado militarmente gracias al hermano Arbol y su flecha envenenada, los ejercito como fueron vinieron. La única excepción fue en 1923 con el Coronel Uriburu donde surgió la restitución de 150 mil hectáreas de tierras que es un acto preexistente. Pero respecto a la personería jurídica, la territorialidad y a la biodiversidad y a la interculturalidad las provincias de Chaco y Formosa con los pueblos indígenas agrícolas, sean Tobas, Mocovies, Pilaga, Choroti, Chane, Wichi. Actúan con una cuestión paternalistica terrorífica desde el punto de vista religioso político y además totalmente paternalista.

Todos se mueren de hambre en medio de tierra fértil! Y salvan el día para comer en forma lánguida cuando les dan unos pesitos las distintas iglesias o los partidos políticos cuando empiezan a ser parte de su clientela. Se van a las ciudades a los barrios periféricos, ahí los representantes del Estado son tan miopes en interpretar y ver que saliendo del mundo del algodón y la madera que no hace

mas que depredar al máximo y siembran la soja... lo demás no interesa. Entonces la gente se va a Santa Fe, Buenos Aires, y a otras provincias donde también forman barrios trashumantes.

Que ocurre? El Estado aparece públicamente como en el caso de México donde el Estado aparece como favorable al indígena y muy romántico... pero al indio presente meta bala. Así pasa en el Chaco con todos los grupos aborígenes... vemos que se practica el paternalismo... hoy se lo decía al Ministro de Educación y el me decía por que la Comisión de Juristas no elaboraba un proyecto adecuado a la enseñazas regionales para que salgan con sus propias pautas y no sea una educación masificante y alienante y que impida la comunicación y contribuya al aislamiento y a la discriminación.

El Estado esta en contra de las personerías jurídicas, en la practica salvo 1 o 2 comunidades tienen el reconocimiento que han regimentado en el INAI; todas las otras son asociaciones civiles y lo peor es que el IDACH sea político. Todos se matan por ser parte del mismo. Las autoridades que surgen para administrar a sus hermanos tiene que responder al partido gobernante. En esta caso gano la oposición y todas la autoridades son justicialistas y el gobierno es radical, por eso no le dan el apoyo correspondiente, no le pasan el presupuesto que corresponde.

Los hermanos descuidaron sus organizaciones no gubernamentales, no tienen organización propia, son subordinados del Estado, se han convertido en ladillas son conciencia de nada, entonces están dependiendo no solamente en el orden político sino en el económico... se mueren de hambre en medio de tierra fértil. Hemos estado tratando de que los hermanos siembren, cosechen y no coman la comida a la que están habituados...

El sr. Charole, presidente del IDACH, no puede hacer nada. Esta peleando con el Estado como si fuese una ONG cuando le corresponde la distribución por ley en nombre del Estado. Es funcionario pero como es indígena lo frenan. Eso es discriminación pura. Discriminación política terrible.

Es imposible en la practica de la noche a la mañana hacer que se respete la ley, y el texto constitucional, que las comunidades se registren en el INAI. El Chaco es

renuente a que se firme para unificar la personera jurídica con el INAI porque el Chaco tiene su propia ley.

Cada pueblo indígena tiene su director, cada pueblo pelea para que lleguen a presidir el instituto de comunidades indígenas, cuando llegan se aíslan y que tengo entonces? La asociación civil que me representa pero en realidad no lo hace porque no tienen autorizado su balance porque no tienen plata para que certifiquen la firma contable, ni regularicen la situación ante la AFIP... entonces quedamos aislados y a que recurren? Al paternalismo terrorífico.

.....digresión.....

Esta Asociación de la que Ud. forma parte de juristas indígenas...

La Comisión de Juristas Indígenas de la Republica Argentina es una entidad no gubernamental, sin fines de lucro, destinado a la defensa y desarrollo de las comunidades indígenas del país, en el '99 se formaliza pero comienza a actuar en 1990...

.....digresión.....

El recurso natural fundamental es la conciencia y el segundo es como no destruir, especialmente los andinos que heredamos la civilización de los Incas, de los Humahuacas, los Diaguitas, los Calchaquíes.. donde todavía están todos los sistemas de vasocomunicantes de los riegos por las montañas... donde antes eran hermosos sembrados de maíz, hoy es tierra áridas.. esta como el desierto del Sinai. Queremos imitar a los hermanos judíos que en ese pedacito que reconstruyeron transformaron en fértil todos esos bosques. Ya empezamos en 2001 y 2002 en Finca Santiago recuperamos 125 mil hectáreas de tierras a Patron Costas que fue a la quiebra, pero hemos tenido que hacer una administración con técnicos indígenas y hemos cambiado la mulita por una Ford ultimo modelo en fin...

Siembro, cosecho, reservo y el remanente lo vendo. Nuestros mayores nos enseñaron que deber haber una planta donde llueve para que no se lave la tierra. Y

esa planta no se ha revitalizado por 5 siglos. 50 años a esta parte estamos transformando en Argentina, Perú, Bolivia y Ecuador. A partir de 1971 nos empezamos a organizar y tomar conciencia. Hemos trabajado duro para tener una ley que reconozca la personería jurídica de defensa ideal de las comunidades de los pueblos indígenas de Argentina. El segundo punto el reconocimiento de derecho preexistente consistente en la posesión y propiedad comunitaria de las tierras que venimos ocupando desde siempre las comunidades indígenas. Y este es un derecho que ya lo hemos obtenido en 1994 con la CN y en 1985 con la ley 23302 donde por primera vez e la historia en la Argentina recuperamos la personería jurídica que nos habían quitado los españoles con la encomienda.

.....digresión.....

El tema especifico de la propiedad intelectual sobre recursos naturales lo ve como un tema instalado o ajeno a las comunidades nativas? Hay temas mas acuciantes, falta de información?

Primero es falta de información, segundo hay entrevero de información e intereses creados. Hoy tenemos dentro de las propias comunidades, que explotan la madera sin plantar árboles, cuando pueden sacan un camión son madera para beneficio personal cuando eso es parte de un todo. Hay choques entre jóvenes y mayores quienes si luchan para conservar la armonía con la naturaleza, aun sin conocer términos como biodiversidad, es decir conservar frutos de la madre naturaleza, no erosionar la tierra... darle de comer que significa enriquecerla con el guano. Nosotros no queremos meter cosas raras, discutimos con el INTA, queremos usar productos naturales y no químicos porque queman la tierra.

Queremos poner en la legislación el conocimiento previo e informado en relación con el aprovechamiento o toma de territorio del indígena con el cuento de que es territorio fiscal, de que pertenece a alguien que reside en Londres, Salta, Jujuy o Buenos Aires y el ese sr. es propietario de la Puna por ejemplo. Hay que hacer prevalecer el concepto de la posesión tradicional.

Hay dos proyectos en el Congreso, el 0409 de Escudero que regularía el articulo 8j de la CDB y otro de la Diputada Chaya sobre la propiedad aborigen sobre el uso de semillas y plantas de carácter medicinal. Fue consultado? Que opinión le merecen?

Yo los tengo en la gatera, tengo infinidad de proyectos de diputados. En el '97 hicimos una gran reunión en todo el país donde los indígenas nos pusimos de acuerdo que todos los proyectos que traten de recursos naturales de pueblos indígenas debieran tener el consentimiento previo informado de las comunidades. Tengo conocimiento, muy buena relación con la Sra. Escudero...

.....digresión.....

En relación a la biopirateria, están las comunidades mas alertas en cuanto a brindar sus conocimientos a cualquier persona que vaya a visitarlos?

Donde estamos organizados si. A nosotros nos paso en Finca Santiago, Salta y en otras comunidades con estas hierbas que se utilizan para hacer jabones de calidad. Los paisanos estaban contentísimos y uno de ellos me mando por fax el texto del convenio. Tenían que juntar cualquier cantidad de esas hierbas, si era positivo les pagaban, si no, no. Era un convenio terrible. No hay dirección, nombres, nada. Quienes estaban metido en eso? El senador, el disuado, todos los tranzeros! Es biopirateria, esta bien que la comunidad tenga personería jurídica y pueda realizar los acuerdos que crea necesario pero no porque lo indique la política...

Es problema muy grave para nosotros los juristas porque lo que pueda acordar una comunidad con personera no entra dentro del concepto de la propiedad colectiva de recursos naturales. Optamos por lo siguiente: los proyectos deben ser financiados por el Consejo de la comunidad y ahí debemos estar atentos nosotros con la Comisión de Juristas, el INAI, la Secretaria de Derechos Humanos de la Nación, con la Secretaria de Medio Ambiente y Desarrollo de Salta etc. Son cucos para asustar porque desde la práctica los contubernios se hacen desde ahí y es biopirateria porque hacen piratería con elementos biológicos...

.....digresión.....

Mas allá del perjuicio económico también se afecta contra lo espiritual?

Si, pero acá hay menos conciencia. Algunos como los Guaraníes y los Coyas mantienen el maíz y la papa, habas, arvejas puras... la cebada y el trigo también sin ninguna modificación genética...

.....digresión.....

Dentro de las amenazas serian mas graves la de las compañías farmacéuticas en cuanto a biopirateria que las cerealeras?

Si... pero la soja nos joroba porque es depredante y el árbol no puede echar raíz por eso en Tartagal paso lo que paso

.....digresión.....

Interview Orlando Charole (President of the IDACH- Institute of the Aborigine of Chaco)

La propiedad intelectual sobre recursos naturales es un tema sobre el que la comunidad aborigen del Chaco esta preocupada o es un tema desconocido?

El tema de la propiedad intelectual es un lenguaje que no es propio de los indígenas, esta legislado por los Legisladores que no son indígenas por eso es que justamente se llama propiedad intelectual. La propiedad intelectual de los recursos naturales...ni siquiera los indígenas son dueños, esa es una concepción propia de los indígenas porque es algo natural... no se puede calificar de intelectual a la propiedad natural o a la conservación de la naturaleza por ejemplo. La conservación de la naturaleza en su fase integral, no se trata de ser intelectual o ser mas inteligente que el otro, la conservación es muy simple, hay que tratar de conservar las especies para conservar la humanidad.

Desde luego que estamos informados de la legislación que tiene que ver con la propiedad intelectual y con la cuestiones biológicas, el avance de la ciencia en relación a los recursos natrales es realmente una cosa que llama la atención y preocupa altamente los pueblos indígenas.

Que área cree que se ve mas afectada por este tipo de legislación? Estos efectos son meramente económicos o también los afecta en el ámbito espiritual?

El tema es muy complejo, lo que pasa es que la legislación es una especie de acordonamiento, es como que aprisiona a los pueblos indígenas. Se dicta una legislación sin consultar y después terminan sometidos los pueblos indignas a esa legislación y si los indígenas no acatan esa legislación terminan siendo transgresores de las legislaciones de las cuales no han sido participes. Es algo bastante complicado, pienso que esto afecta en su fase integral, afecta la territorialidad, la integridad cultural, la integridad de una visión espiritual.. porque son motorizadas por los legisladores sin tener en cuenta a los pueblos indígenas antes de ser dictadas como leyes.

Ante esta situación como calificaría Ud. el rol jugado por el INAI?

El INAI es un organismo de estado, es parte del estado. Lo que sucede es la falta de la aplicación efectiva de la legislación en todos estos años que han mantenido plenamente vigente la ley 23.302 que crea el INAI, ya que el mismo es un organismo de aplicación de la ley... eso es lo que tendría que ser y no la ha cumplido hasta ahora. Me parece que lo que tiene que caber el estado nacional es buscar otra orientación practica a la ley, porque le legislación esta muy rica en su contenido pero lo que falla es su aplicación efectiva. La ley en algunos casos no es mala como en aquellos que favorece los derechos indígenas así como el precepto constitucional nacional pero su aplicación es lo que falla, es muy pobre el accionar del estado en ese sentido.

Hay en estos momentos en el Congreso Nacional un proyecto de la Senadora Escudero que vendría a implementar el articulo 8j de la CDB. Uds como grupo fueron parte del proceso consultivo?

Las consultas no tienen que ser apresuradas. Ud sabe que el mundo blanco se maneja con la velocidad, la audacia, la inteligencia, con ciertos parámetros codificados... ese no es el mundo indígena. El mundo indígenas debe ser un proceso limpio, sin politización, sin vueltas, sin presiones, sin apuros. Porque una consulta hacia los pueblos indígenas, esta consultando a una persona que Ud. no conoce, que tiene una dimensión cultural propia. Entonces al hacer la consulta hay que tratar de adaptar al tiempo del consultado. No puede ser que por ejemplo yo tenga que ser consultado por Ud. vía telefónica, no podemos hacer una consulta así...es un chispazo nada mas, yo le doy un chispazo y listo, Ud. ya sabe lo que hace...Ud. hace eso porque esta habituado a ese manejo, pero el indígena no.

Quiero decir, me gustaría que la Senadora abra el debate... pero de ultima no deciden los pueblos indígenas, decide la Senadora porque el ámbito para dictar las leyes es el Parlamento. Entonces, nuestra opinión es accesoria, lo cual no quita que

pueda tener valor o que pueda traducirse en una legislación. Por eso es muy importante que los legisladores empiecen también a crear un ámbito de participación en donde nosotros podamos empezar a hacer oír nuestra voz.

El IDACH esta trabajando sobre estos temas o esta mas abocado a reclamos territoriales por ejemplo?

El IDACH debo reconocer, yo indígena Orlando Charole, que a lo largo de su creación, ha caído en manos inexpertas, donde políticos audaces que tratan de empañar los estamentos públicos aprovecharon de la ignorancia de estos indígenas. Esto sirvió para la venta de las tierras fiscales, para no avanzar con la educación bilingüe cultural en todas sus fases y la perdida de valores culturales que en la legislación están absolutamente contemplados pero que no han sido llevados a la practica a raíz de una ignorancia inmersa en nuestros dirigentes anteriores.

Lo que quiero decir, es que estas estructuras estatales con participación indígena, el estado también tiene que empezar a ver de otra manera la participación indígena. No solamente puede ser Charole hoy un dirigente importante de la provincia del Chaco sino creo que tenemos que formar una dirigencia o generación intermedia que defienda los valores e ideas indígenas y que a lo largo de los años podamos revalorizas nuestros valore culturales, tener una expansión territorial donde desarrollarlos y donde podamos expresarnos como pueblos indígenas al margen de todo lo que piensen los políticos porque somos pueblos avasallados, pueblos que han sido sometidos por el estado y en esto tienen una responsabilidad los gobernantes de hoy en cambiar esta realidad. No le debe molestar a ningún político que un indígenas piense una manera mas amplia, mas sensata, mas clara... al contrario tiene que agradecer el mundo político. Fíjese, si yo hablo de este modo estoy seguro que en unos días nada mas tengo mil enemigos al frente mío, cuando en realidad estas personas del mundo no indígena tienen que reflexionar el por que pienso así. Creo que son etapas en las cuales nos tenemos que ir adaptando todos.

Dentro de este avasallamiento al que Ud. hacia mención, esta al tanto de algún episodio de biopirateria?

Hay de todo en este mundo. El único que nos tendría que decir la verdad es el Sr. Jesús o Dios. En este mundo hay de todo, desde la piratería hasta personas malas, o hasta sacerdotes malos. Imaginemos que si la persona que esta en contacto con la divinidad puede tener fallas, imagínate el hombre común siempre va a estar expuesto a cosas que ni siquiera pensamos.

No ha habido ningún reclamo formal por parte de las comunidades indígenas por casos de biopirateria...

Pero también por desconocimiento. El tema del que Ud. me esta hablando, el de piratería biológica no es una cosa tan sencilla para que el indígena lo pueda entender. Un indígena aislado, que esta viviendo en paz con su familia sin tener contacto... que ni siquiera conoce la Capital Federal ni Resistencia la capital de la provincia del Chaco. Imagínese si ese hombre puede estar pensando en piratería biológica...

Por eso le preguntaba si era un tema que formaba parte de la agenda de las comunidades indígenas o era todavía un tema desconocido precisamente por la falta de información y no por culpa de ellos...

Para abordar la propiedad intelectual las cuestiones biológicas, la identidad, las fronteras territoriales (donde hay pueblos indígenas que no pueden por ejemplo cruzar a otro país a pesar de que puedan pertenecer a la misma comunidad) son problemas estatales de fondo. Otros problemas que podemos llegar a abordar: la alta inseguridad jurídica, la inmigración, la degradación de las comunidades indígenas hacia grandes centros urbanos. Se entiende? Entonces son temas que no son fáciles de abordar en corto tiempo. Son decisiones muy importantes que no solo las debe tomar el pueblo indígena sino en coordinación con los poderes del estado...

Y teniendo en cuenta la experiencia de grupos indígenas en otros países...

Exactamente, creo que los indígenas de todo el mundo hoy estamos tratando de coordinar esfuerzos comunes para salvaguardar nuestros pueblos que han sido absolutamente destrozados, contaminados por una sociedad viciosa en algunos casos, explotados mas allá de su persecución permanente. Creo que acá tenemos que empezar un mundo mas equilibrado, un mundo mas humano, que haya menos armamentismo, que haya menor violencia, que las cuestiones de los estados se diriman dentro del ámbito de la diplomacia esto es un escenario que los lideres debemos empezar a pensar. Ya la imposición, el avasallamiento, el imperialismo, han causado demasiado daño a la humanidad; de manera que tenemos que empezar a tomar otra visión distinta de la clase de relaciones humanas que queremos tener los pueblos étnicos, no solamente indígenas, de todo el mundo para tener un mundo mas pacifico.

Titulo del Proyecto

Biopirateria y Propiedad Intelectual sobre Recursos Naturales:

Las consecuencias para los Tobas.

Un trabajo comparativo con la experiencia Neocelandesa

HOJA DE INFORMACION

Los objetivos de esta investigación son: 1) determinar en que medida los Regímenes de Propiedad Intelectual esta afectando a los Tobas y cual sector ha sido el más afectado, 2) ver cuales son los futuros escenarios posibles para proteger sus derechos (mejor legislación, contractos con compañías farmacéuticas o cerealeras, una participación mas activa en foros internacionales etc), 3) y comparar la situación de los Tobas con la experiencia Maori en Nueva Zelandia. Las siguientes preguntas van a guiar el presente trabajo:

1. Los Regímenes de Propiedad Intelectual llevan necesariamente a la violación de los derechos de los pueblos indígenas? y
2. Los aborígenes de Argentina y Nueva Zelandia enfrentan problemas comunes en la implementación de los Regímenes de propiedad Intelectual? Cuan efectivas han sido las medidas tomadas por los Estados en proteger los derechos de los pueblos aborígenes en ambos países?

Derechos de los participantes

Ud. no se encuentra obligado a aceptar participar de está entrevista. Si da su conformidad, Ud. tiene derecho a:

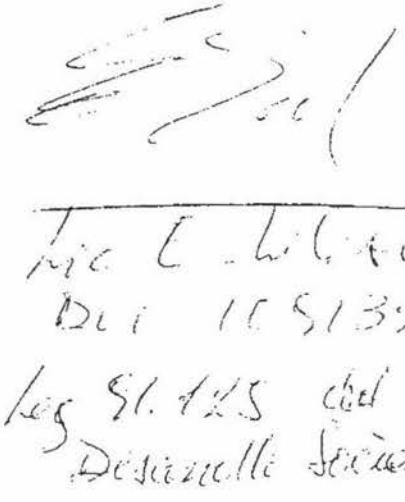
- negarse a responder cualquier pregunta
- Retirarse de la entrevista en cualquier momento si así lo desea
- Preguntar cualquier pregunta que quiera realizar sobre el estudio en cualquier momento

- Brindar información teniendo presente que su nombre no será publicado a menos que de su permiso al investigador
- Tener acceso a los resultados de la investigación cuando finalizada
- Pedir que la grabadora sea apagada en cualquier momento durante la entrevista
- No brindar ninguna información al investigador que no seria dada a cualquier otra persona común u otro investigador, y no revelar información confidencial de ningún tipo

Contactos

Esta investigación esta llevada a cabo para cumplimentar los requisitos de la Maestría en Políticas Publicas de Massey University, Nueva Zelandia. Si Ud. tiene cualquier inquietud, por favor contacto al investigador o a sus supervisores cuyos datos se brindan a continuación:

- Investigador: Fernando Casal, Sarmiento 370, Santa Rosa (La Pampa) TE: 011-1563688482 E-mail: casalfernando@gmail.com
- Supervisores: Michael Belgrave, TE: (00-64-9) 414 0800, Extn 9083 Email: M.P.Belgrave@massey.ac.nz; y/o Grant Duncan, TE: (00-64-9) 414 0800 ext 9086 Email L.G.Duncan@massey.ac.nz



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