Some considerations concerning the debate on IPRs, Biodiversity and Traditional Knowledge related to Indigenous Peoples.

Patricia Borraz
ALMÁCIGA
Grupo de Trabajo Intercultural

We would like first to acknowledge DG Trade for this initiative of opening a dialogue with civil society and we sincerely hope the dialogue to be fruitful. We particularly find it interesting as it is open to the participation of members from other DGs, which will probably allow for a greater coherence among the EU actions relating human rights and environmental issues.

1. Our participation only intends to propose for the consideration of this group and specially for the representatives of the EU, the particular case of Indigenous Peoples in reference to the subjects dealt with in the agenda. As other social groups, Indigenous Peoples have repeatedly state their concern about the negative influence current IPRs could have in the access to the resources within their territories and on the protection of their traditional knowledge (TK).

2. As a support member of its Communications Committee, we are deeply involved in the support of what is called the International Indigenous Forum on Biodiversity (IIFB), an open instance created in 1996 whose role has recently been recognized by the 5th COP of the Convention on Biological Diversity (CBD) (Resolution V/16).

3. Because of the special relevance of Indigenous Peoples for the debate on conservation, sustainable use and equitable sharing of Biodiversity, we would like to propose the DG Trade to consider the possibility of opening a direct dialogue with them so to take into account their views on this subject.

4. The first issue we would like to comment on is that, due to the holistic nature of Indigenous Peoples' cultures, it is nearly impossible to split up the debate concerning access to resources from the consideration of traditional knowledge.

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1 Almáciga (Grupo de Trabajo Intercultural) is a working group created in 1997 and based in Madrid made up of Latin-American and Spanish professionals who have been involved for some years in cooperation and support work with Indigenous Peoples and local communities through some NGOs and institutions. Our two main areas of work are defence of rights and interculturality. Some of Almáciga members have been particularly involved in supporting indigenous participation in International fora, mainly the negotiations of the Convention on Biological Diversity, supporting the International Indigenous Forum on Biodiversity, of whose Communications Committee, a network of indigenous and support organizations, Patricia Borraz makes part. She is also participating in the Working Group set up by the Spanish International Cooperation Agency (AECI), to formulate the new Spanish Strategy of Cooperation with Indigenous Peoples.

2 Statements reflecting this concern by indigenous representatives have been put forward in WIPO Roundtable on intellectual property and Indigenous Peoples (1998) and WIPO Roundtable on traditional knowledge (1999) and on UNCTAD 2000 meeting on Systems and national experiences for protecting traditional knowledge, innovations and practices. More general views and principles are reflected in relevant indigenous declarations, such as the Mataatua Declaration, the Ukupseni declaration, the Kari-Oka declaration and many others. A good selection has been collected in *Cultural and Spiritual values of biodiversity* (1999) edited by UNEP. Most of the papers in this book deal with the subjects present in this dialogue agenda.
Although we know traditional knowledge will be object for another dialogue group meeting, it is very difficult to keep it apart as it is a subject which could be also potentially affected by TRIPs. Access to resources and access to knowledge are intimately linked for Indigenous Peoples, as people are intimately linked to their lands and territories. This link is very important for the fulfilment of the two first objectives of the CBD, and should be taken into account in the development of its third objective, which cannot be achieved independently from the others.

5. Although technically it may be true that TRIPs agreement is not directly related with genetic resources (as it covers inventions and not resources themselves) and with traditional knowledge (for not been innovation), TRIPs does not happen in a vacuum but in an unbalanced economic and political situation so its enforcement is no neutral. Biotechnological processes patented through TRIPs based on natural resources extracted from Indigenous Peoples territories without their prior informed consent (PIC) may be associated to some traditional knowledge (which is no in purity the invention to be patented but has driven to it). Both access and patenting in such a case are felt as an exploit by Indigenous Peoples.

6. In the context we are dealing with and as expressed in the CEAS Report the DG Trade has circulated, we have noticed that controversy between CBD and TRIPs agreement grants CBD positive intentions, considering the CBD a general protective instrument. But the positive reading of the CBD as protective or fair is not fully shared by Indigenous Peoples, who (as stated in position paper presented to WG 1 of COP5 on Article 8j and related provisions), do share the objectives of the CBD but do not see their rights conveniently taken into account.

7. The CBD was one of the outputs of Rio Earth Summit held in 1992. The new concepts it enshrines are the result of a long process of a couple of decades within the UN framework which was taking into account a new environmental approach to nature and development. In spite of the fact that Indigenous Peoples inhabit the majority of high-biodiversity areas of the Planet, they were not called to participate at the Rio negotiations. They held their own conference in the Brazilian village of Kari-Oca, where they issued the Kari-Oca Declaration and the Indigenous Peoples’ Earth Charter. This Declarations were not taken into account in the final documents of the Rio Summit, but most of the resultant official documents do consider somehow “indigenous populations” or “communities”.

8. The CBD does not make any distinction between local and indigenous communities and does not recognize Indigenous Peoples as peoples. This means

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4 We would like to thank the DG Trade for the circulation of this report, which we consider excellent, although we feel very little importance has been attached to Indigenous Peoples’ particular relevance in the context of traditional knowledge and biodiversity. Only an indigenous organisation was consulted, and there is only a short report on its views. Only through proper and extensive consultation with Indigenous Peoples and local communities should initiatives (such as the global bio-diversity society or any other) be supported.

5 We are annexing the electronic version of two publications edited by Almáciga members for the Spanish NGO WATU Acción Indígena and supported by the Spanish Cooperation Agency, which collect the statements of the IIFB during the COP4, WG on 8j and COP5. Statements for the COP3 can be found in the report En nombre de todas las vidas.
that there is no recognition of their rights (even as partially as granted on other UN instruments such as ILO Convention 169) on their lands and territories or even to their traditional knowledge, of which they are consider “holders” and which the governments should protect and promote “subject to their national legislation” and as appropriate. Principle 3 of the Convention states the national sovereignty of resources within national borders. This principle, which was felt as essential by developing countries not to be left out of the benefits arising from the (sustainable?) use of genetic resources, is the main problem the Convention poses to Indigenous Peoples and their rights.

9. The CBD has been widely ratified so its implementation affects the majority of the countries where Indigenous Peoples live.

10. In its implementation process, the Parties under the Convention have made some positive advances concerning Indigenous Peoples, such as recognising the importance of traditional knowledge, the respect to Indigenous Peoples’ participation or the approval of a Programme of Work for the implementation of article 8j and related provisions which reflects some of the priorities Indigenous Peoples put forward during the Seville and Nairobi meetings. But no a step has been moved forward in the recognition of the rights of Indigenous Peoples as peoples, including their rights over their lands, territories and resources within them.

11. Advances have been made possible because of the direct participation of Indigenous Peoples at the CBD meetings, whether the Conferences of the Parties, SBSTTA meetings, Panels of Experts or recently created working groups. A deeper consideration of this participation is not dealt with in the DG report, while been central to the issue considering property of TK and resources.

The main problems posed by the Convention to Indigenous Peoples are not the general objectives of the CBD, as they are connatural to Indigenous Peoples’ way of life. Conservation is simply a part of sustainable use, and an enormous literature has been written concerning sustainable economic and social systems of Indigenous Peoples.

The main problem laying at the bottom of the CBD is that there is not possibility of seriously dealing with benefit sharing unless indigenous rights on their territories and lands are recognized, considering the terms “territories” and “lands” as inclusive of the resources contained in them. As the CBD recognizes the States as the sovereign owners of the resources, any ABS arrangement could perfectly ignore Indigenous Peoples and legislation can be developed at a national level with can legally ratify this situation.

All the IIFB declarations at the different meetings start by stating the need of the Parties to recognize and respect their rights as Peoples. The Convention does not use the expression Indigenous Peoples (although it inconsistently appears in some of the COP5 resolutions).

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5 Article 3: Principle : States have in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their 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.
12. Concerning the issue of access and benefit sharing (both to resources and to TK/transfer of technology) is has repeatedly been stated by Indigenous Peoples and their representatives that protective measures should be developed before benefit-sharing (BS) arrangements. This derives from several facts:

- Indigenous Peoples feel that current IPRs are not appropriate to guarantee either protection of their knowledge and resources or equitable BS arrangements. For their major part, they propose that *sui generis* systems should be considered based on customary law and practices (which means that we are not talking of only ONE *sui generis* system, but a variety of them). TK and use of resources are generally collective and inter generational, although there exist many ways of communicating or holding knowledge and of regulating the use of resources among Indigenous Peoples. Indigenous Peoples do represent an enormous variety of social, economic, cultural and spiritual systems. It would not be fair to reduce all this variety to a single solution or possibility.

- Indigenous Peoples feel that in any BS arrangement in present circumstances, their position would be extremely weak because of lack of protection, lack of information and lack of legal/trade expertise., so the possibility of achieving equitable arrangements is now remote.

- Indigenous Peoples do subsequently ask for support to capacity-building and information sharing among their Peoples and organizations which will allow them to make informed decisions on this matter.

- While these circumstances occur, many Indigenous Peoples and their organizations have called for a moratorium on bioprospecting within Indigenous Peoples' territories or concerning Indigenous Peoples' knowledge.

13. Taking into account the above mentioned facts, Indigenous Peoples have frequently asked the Parties to the Convention no to refer only to other international instruments such as the TRIPs agreements, but have required the CBD, as a UN instrument, to refer to other instruments and the work of bodies related to Indigenous Peoples within the UN system, such as the Working Group on the Draft Declaration on the Rights of the Indigenous Peoples, the Working Group on Indigenous Populations, and the Permanent Forum, now recognized within the ECOSOC, which could be a reference instance from now on to deal with this discussion.

14. While developing appropriate legal mechanisms of protection and until Indigenous Peoples' rights are fully recognized, Prior Informed Consent (PIC) is a key element to consider in any ABS arrangement. Further research on this issue and culturally appropriate information sharing depending on indigenous experts should be supported by Parties.

15. Full and effective participation of Indigenous Peoples' organizations and representatives in the negotiation of the issues of ABS, as in any negotiation which directly affects them, is a necessary starting point. Although this need has been

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7 Ibin.net texts on PIC and PIA are annexed to these comments.
several times recognized by almost every international institution, executive body, treaty and convention, this recognition is usually meaningless because of:

a) Lack of funding within the regular budgets of International Bodies to support participation

b) Splitting up of subjects in so many bodies and meetings that it is impossible for indigenous organizations to follow up discussions

c) The crucial subject of communications among indigenous organizations has never been seriously or realistically considered. No appropriate system to allow communications has been supported, not even communications among Indigenous organizations with a high level of access to electronic technology. Possibilities of taking the discussion of the issues to community level depends only on isolated actions of indigenous organizations dependent on external funding support.

d) Hopefully, the Permanent Forum will be able to harmonise participation, but the agencies should also consider this question. ABS is now under discussion within the WTO, OMPI, UNCTAD, CBD (COP; SBSTTA; Panel of Experts and Working Groups), and no effective participation is being guaranteed.

In spite of the approval of the Programme of Work on article 8j and related provisions which considers information and participation of Indigenous Peoples as priorities, and the recognition of the IIFB as an important advice instance for the implementation process, the IIFB depends on hectic funding made available through different support NGOs, and is never possible to have a long term participation schedule which would allow for appropriate circulation of information.

Within the CBD implementation process, progress in the work of the Working Group on article 8j and related provisions and WG on ABS should be linked. As WG on 8j has prioritised on its programme of work Indigenous Peoples’ participation and information and reports on status and trends, and sui generis protection systems, those should also be high priority tasks for the ABS WG. There is a fear among Indigenous Peoples’ organisations that the work of WG on ABS will ignore the issues that with so many difficulties they have been able to put forward in the WG on 8j. Concern also exists that the creation of thy WG on ABS is the habitual tactics of splitting up issues so making participation and a holistic interpretation more difficult.

16. We feel that discussion on such a sensitive and complex issue as ABS concerning Indigenous Peoples’ knowledge and resources, should just happen involving Indigenous Peoples, and Indigenous Peoples are not properly involved because of the above mentioned problems.

17. All these considerations are also relevant when considering the review and implementation processes of the TRIPs agreement. Indigenous Peoples feel the agreement does not provide for an appropriate framework to deal with access to genetic resources within their territories or protection of the knowledge associated to them. Although DG Trade argues TRIPs are not directly connected with genetic resources and is not applicable for TK, the fact is that genetic resources and TK
associated to them are difficult to separate and TK is not always documented in a way that makes possible to state its precedence over some “inventions”. On the other hand, the possibility of Indigenous Peoples controlling ABS arrangements through the TRIPs agreement are little indeed. Challenging patents processes are also out of reach of most indigenous organizations. TRIPs do not provide for the social and ethical values of traditional property systems.

18. Concerning the possible relationship between TRIPs and CBD, it is possible that there is no legal contradiction in their application. But it should be considered that several authors have underlined the “possibility of a negative link between enhanced intellectual property rights over biological material and the state of the World’s biological diversity”

19. This is even more serious considering that the TRIPs agreement, as posterior to the CBD, should take precedence in case of conflict.

20. From our point of view, and as expressed by Indigenous Peoples representatives of the IIIFB at the COP5, no ABS system can be implemented before.

   a) recognising the rights of Indigenous Peoples
   b) providing for the necessary protective systems for traditional knowledge.
   c) consulting in an appropriate way with Indigenous Peoples.

This is why we ask the EU to consider:

Taking into account the contents of the Working Document of the Commission of May 1998 on support of Indigenous Peoples in the development co-operation of the Community and the Members States, and the Council of the European Union Resolution 13461/98 from 30/11/98 which, among other things, declares

   a) That the Council takes note of the international instruments addressing Indigenous Peoples, in particular the UN Resolution on the International Decade of the World’s Indigenous People, the 1992 Rio Declaration, the CBD, the 1993 Vienna Declaration and the ILO Convention 169 on Indigenous and Tribal Peoples,
   b) That the Council recognises that indigenous cultures constitute a heritage of diverse knowledge and ideas, which is a potential resource to the entire planet,
   c) That the Council reiterates the political will of the EU and its Member states to participate actively in the initiatives in the framework of the CBD for supporting local

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8 See Dutfield introduction to the Chapter “Rights, Resources and responses” of Cultural and Spiritual values of Biodiversity. A Complementary Contribution to the Global Biodiversity Assessment, UNEP (1999): Since WTO Committee on Trade and Environment has not yet been able to confirm that the TRIPs provisions are supportive of and do not in any way run counter to the CBD’s objectives (...) it was very presumptuous of the ministers in Singapore [to issue an statement saying that members should ensure the compatibility of their legislation with WTO obligations] (Paragraph.12). (see page 510). It can be argued that opposite arguments have also been put forward, but even in this case it has been stated that more case studies on such impacts should be necessary. We feel that moving forward the implementation or review of the TRIPs agreement without such studies been carried out could be a risk for the conservation of biological diversity and have very negative impacts on Indigenous Peoples and local communities.
and Indigenous Peoples in their contribution to the conservation and sustainable use of biological diversity,
d) The establishment of partnerships with Indigenous Peoples is essential for the objectives of poverty elimination, sustainable development of natural resources, the observance of human rights and the development of democracy and notes the key role played by Indigenous Peoples in the conservation and sustainable use of natural resources,

Taking also into account other fundamental instruments of the European Union where human rights and sustainable development are presented as central for any of its co-operation policies,

We propose that the following aspects are considered in any discussion concerning access to genetic resources within Indigenous Peoples lands and territories and indigenous traditional knowledge:

1. When dealing with the issues concerning Biodiversity and Access to Genetic Resources related to Indigenous Peoples, UE should take an “integrated rights-based approach”, so respecting the holistic conception of Indigenous Peoples. To allow for a greater coherence among the EU policies, Indigenous Peoples’ rights should be considered as a cross-cutting issue for any action affecting them.

2. No ABS arrangements concerning Indigenous Peoples can be discussed without their active involvement in the discussion. To allow full and effective participation of Indigenous Peoples in such discussions, UE should support the means to achieve it supporting systems to guarantee the circulation of information in culturally appropriate ways to Indigenous Peoples. Inviting Indigenous representatives into this dialogue should be considered, and support for Indigenous participation within negotiations (as WG on ABS) should be prioritised, for instance through a support of the IIFB. Problems of access to trade for Indigenous Peoples cannot be overviewed, as fair deals are not possible in the present situation.

3. Indigenous Peoples support the consideration of sui generis systems for protecting their traditional knowledge and the access to their resources. EU should support this consideration and work in facilitating the development of sui generis systems with the full and effective participation of Indigenous Peoples and with the understanding of the extreme variety of systems Indigenous Peoples have developed concerning these issues. Indigenous experts are best qualified to elaborate on this matters whenever possible.

4. EU should consider opening a dialogue with Indigenous Peoples’ representatives before supporting any arrangement concerning traditional knowledge or access to resources within Indigenous Peoples’ territory.

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9 Craig and Nava, Shelton, “indigenous sustainable development is an integrated cultural concept that is part of everyday customary law and practices. It cannot be separated from another indigenous rights such as human rights, rights to land and resources and their management, intellectual and cultural property rights, and the right to self-government, which are being asserted in international law and policy” (512)
5. EU should support the defence of the rights of the Indigenous Peoples concerning ABS when dealing with State Parties with Indigenous Peoples living within their borders.

6. Because of the considerable weight EU position has in global negotiations concerning international trade, environmental issues and human rights issues, EU should make available and circulate its positions to Indigenous Peoples’ organizations. EU positions are frequently unknown to Indigenous Peoples when attending implementation processes.