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A Treaty between Indigenous Nations on the Protection of Cultural Property and Traditional Resource Rights:

Asserting Indigenous Nation Sovereignty

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Institute
and the Northwest Indian Applied Research Institute.**

Abstract:

Culture is widely understood to be that dynamic and evolving relationship between a people, the land and the cosmos. This dynamic and evolving relationship of a people consists of the intangible and tangible aspects of the whole body of cultural practices including ceremony and ritual. It includes knowledge systems developed, nurtured and refined by a people from the life giving elements of their homelands or territory and passed on by them to succeeding generations. The culture of a people is sometimes also referred to as a heritage, which is passed from one generation to another.

International agreements such as the General Agreement on Tariffs and Trade and the Convention on Biodiversity, developed and ratified by states' governments, define many aspects of a people's culture as the subject of commerce--material or items convertible into commodities and sold or traded. These international legal developments constitute a clear threat to the ability of indigenous nations to protect their cultural heritage. This threat may require the development, negotiation and ratification of a Treaty between indigenous nations to ensure legal, political and economic protections from state authorized, corporate, criminal and or organized religion initiated confiscation or pirating of the cultural property and traditional resources of individual nations. This idea was recently recognized by a gathering of eminent native political leaders, scholars and activists convened by the three organizations preparing this briefing memorandum. This group recognized that the more than 6000 indigenous nations in the world possess the inherent power to institute and enforce laws among their peoples and between peoples. Further, they urgently comprehended the imminent threats to the social, economic, political and cultural existence of indigenous nations and resolved to propose the drafting, negotiation and ratification of an International Treaty on Cultural Property and Traditional Resource Rights by indigenous nations at the earliest possible date.

Introduction:

The cultural properties of indigenous peoples have been under ever increasing danger of theft, appropriation and exploitation. The origins of such dangers are in the agreements and initiatives for economic, social and political globalization developed by states' governments, non-governmental organizations, corporations and religious organizations developed over the last thirty years and ratified as international law in the last twelve years. Agreements between these international players directly and indirectly target indigenous cultures, territories and peoples. There are many forms of artistic expression that are unique to indigenous peoples such as designs, symbols, songs, stories and even languages which are being taken without permission and used for commercial purposes.

Indigenous peoples possess knowledge of the medicinal and nutritional uses of plants, herbs and other natural substances based on their continuing relationship to the natural world. Private businesses with the willing support of states' governments around the world seek to exploit and sell such knowledge, usually after securing national and international recognition of their "ownership" rights to such knowledge through copyrights, patents, trademarks and other legal mechanisms. The problem for indigenous peoples is how to protect their cultural properties and traditional resource rights when new legal mechanisms that have been set up by states' governments for global commerce are unknown or inaccessible. [\(1\)](#)

One problem may be a lack of funds to employ legal representation or the lack of official standing to assert cultural and traditional resource rights in international bodies created by states' government. Another problem, with which we are most directly concerned, has to do with the lack of legal mechanisms created by indigenous nations themselves which they can use to enforce and protect their interests or to advance their interests in international forums.

Conflicts between indigenous peoples and states over ideas of property and ownership:

There is a fundamental difference between indigenous peoples' values and cultural concepts and the values espoused by states' governments, corporations and others within the framework of globalization agreements and policies. Cultural properties in particular are not thought in general by indigenous nations as including items that can be bought and sold, "commodified" or commercialized. In many cases, the cultural property is thought of as belonging exclusively to the group whether the group is a tribe, a community, a nation, a clan or a family. In contrast, states around the world are increasingly reorganizing the entire social, economic and political order based on legal systems designed to protect private property and promote the accumulation and concentration of wealth in the control of corporations and individuals. International laws and the laws of states' governments proclaim the sanctity of individual rights in private property giving them strong legal protection and the highest political standing. In this paradigm constructed by the laws of nation states, if there is collective ownership of property, it is always based on the underlying individual rights of the members of the group. Thus a cooperative is an organization that represents members who have a common interest or stake, a family is a group of individuals related by blood, a corporate entity is comprised of individual shareholders. Even public property that belongs to the state or the government is held in the name of the citizens who comprise the public constituency of the state.

The need for communication regarding the customs and laws of

Indigenous peoples relating to cultural properties and traditional resource rights:

The right to collective ownership is for many indigenous nations an essential element of culture yet it is a right with little significance and standing in international and states' government laws. The customs of indigenous nations generally affirm collective ownership, collective use rights or the inseparable nature and unity of living things in the natural world. However, the concepts of culture, property, traditional resources and rights may vary widely between indigenous nations. Customs, practices and concepts of ownership may vary as widely. That such concepts do exist, there is no doubt, but how and by what legal systems individual and collective indigenous nations regulate access to cultural property and traditional resources are not now documented. While some nations have laws, written or unwritten, how these laws may be used to protect cultural and traditional resources is not certain. Awareness and understanding of the laws of nations as may concern cultural property and traditional resources in relations between nations and between nations and states is very limited.

The problem of "standing" for indigenous peoples' rights and laws about cultural properties:

Even when indigenous peoples attempt to assert their rights to cultural properties, they are often denied standing in different forums or courts set up by the non-indigenous world to protect individual property rights. The US Patent and Trademark Office, (PTO) for example, has been established to register, protect and enforce intellectual property rights. Private individuals or corporations file the necessary paper work that defines something that they claim ownership of and, if the PTO determines that no one else has a proper prior claim, a patent, copyright or trademark may be given and registered in the name of the claimant. Under US federal law this process has become the exclusive means for defining, protecting and enforcing such intellectual property rights. Rights that a US tribe or member of a tribe may claim to cultural property that exist under their own laws are currently not accorded official standing or recognition.⁽²⁾

The system is based on the idea that the only reason an individual would desire to participate in this process is to protect an individual property right *because of the monetary value associated with that right*. If someone has an intangible or non-monetary reason for protecting their property rights, such as the protection of cultural or social values associated with such rights, they are at a disadvantage in participating in this system. The problem is exacerbated when the rights are defined by laws that come from fundamentally different cultural perspectives and these laws are not recognized as valid within such a forum as the US Patent and Trademark Office.

In the view of Indian scholars, political leaders and activists gathering at the Long House of the Evergreen State College on January 29, 2000, indigenous nations would benefit by formulating their own international law in the form of a Treaty on Cultural Property and Traditional Resource Rights:

Rights to the cultural properties of individual nations must be defined first and

foremost by the laws of each of the respective indigenous nation. Cultural properties only exist because there is a unique and culturally distinct and identifiable society. By definition a cultural property belongs to a distinct group who practice their own culture. Each indigenous nation in the world possesses a distinct culture that is the source of their cultural properties. These observations are self-evident and commonsensical. It follows from these observations that the first and foremost definition of who has what rights to cultural properties belonging to a distinct cultural group are the members of the group acting as a collective. Whether we call such groups indigenous nations, tribes, villages, bands or societies, they are the only ones who can rightly determine who owns or has the use of what is in the realm of their own cultural properties. Once such rules of ownership are defined and determined the only proper response on the part of the world outside of such an indigenous nation is to respect, acknowledge and enforce such rules. Any other response leads to chaos. That is, everyone must ask, "If you don't respect my culture and the laws that arise from my culture, why should I respect yours? The absence of mutual respect is anarchy."

International bodies have consistently recognized the right of indigenous peoples to determine for themselves their own social order--their own legal, economic, political and cultural order without external interference. There are no doubt disputes and differences of opinion over their rights of territorial governance and the application of the law of indigenous nations to non-members and their property. However, there is virtually no dispute over recognizing the rights of indigenous nations to self-governance for social and cultural purposes. This is particularly the case in the United States of America and in Canada although in Mexico there are less certain expressions of state recognition. This recognition should extend to the rights of ownership and control over the cultural properties and traditional resources of indigenous nations. The law of each nation pertaining to their own cultural property should be prior and paramount to the law of the state (s) in which they are located and a subject of international law. Thus, international intellectual property laws should possibly apply only to the cultural property of indigenous nations *if and when such cultural properties lawfully enter the stream of commerce in accordance with the law of the indigenous nation*. Once the indigenous nation has said, in whatever manner is customary and appropriate for them, "this cultural property rightfully belongs to such individual and he or she has the power to buy or sell this property," then the intellectual property laws of the rest of the world may come into play. Until then, each indigenous nation should be recognized as having exclusive responsibility and power to define rights of ownership to their own cultural properties and traditional resources.

How these rights may be defined is a matter for each indigenous nation to decide. However, the position of each indigenous nation throughout the world would clearly be strengthened if this right of prior and paramount determination were to be respected by each other indigenous nation. The means by which mutual respect between nations and between nations and states may be achieved is in the development and ratification by indigenous nations of a Treaty on Cultural Property and Traditional Resource Rights.

Notes:

1. The terms "cultural property" and "cultural patrimony" have been officially

recognized in statutes of the US, primarily the so-called "Repatriation" laws, and they refer to cultural items, which belong to the group as a whole rather than to an individual. Thus, they cannot be sold or alienated by the individual or even by a group from within the whole.

2. The United State Patent and Trademark Office, PTO, in response to native rights advocates, has undertaken a study regarding the conditions and terms under which it may accord recognition of US tribal laws pertaining to cultural properties. For example, it has been suggested that if a US Tribal government were to establish or articulate its own law asserting rights to its own cultural properties, these assertions would be recognized by the PTO and would be a bar to any private business or individual acquiring intellectual property rights in such items or using such property without the consent of the tribe.

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