

PROTECTING TRADITIONAL ENVIRONMENTAL KNOWLEDGE AND NEW SOCIAL MOVEMENTS IN THE AMERICAS: INTELLECTUAL PROPERTY, A HUMAN RIGHT, OR CLAIMS TO AN ALTERNATIVE FORM OF SUSTAINABLE DEVELOPMENT?

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The protection of traditional environmental knowledge is a complex area of emerging law that has attracted a great deal of academic attention and controversy over the past five years. I will limit my remarks to the Americas and focus primarily on the empirical reasons that have been established for asserting such rights, the limits of the intellectual property model often proposed to accommodate them, the nature of the social movements in which they are asserted, and the larger difficulty of placing these rights within a human rights framework. Ultimately I will suggest that we understand claims to traditional environmental knowledge (TEK) in the Americas within a context informed by the social movements in which they are most forcefully expressed, where they draw upon human rights vocabularies and rhetorical forms but express much wider social and political aspirations that have emerged in response to conditions of neoliberal globalization.

The reasons for protecting, promoting and preserving TEK are varied and I have canvassed these in more detail elsewhere.¹ Perhaps the most important reason is the fundamental fact that most of the worlds' poorest people depend upon their traditional environmental, agricultural, and medicinal knowledge for their continuing survival, given their marginalization from market economies and the inability of markets to meet their basic needs of social reproduction. The global policy-making community has also recognized that modern agriculture and to a lesser extent, modern medicine requires the ongoing development of biological diversity to sustain itself. For example, new crop germplasm from traditional landraces is continually necessary to revitalize crop breeding programs and serves as a source of risk insurance for peoples living in harsh

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¹ Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275-285 (2001).

and volatile climactic conditions. These landraces or traditional varieties are developed by indigenous peoples in their territories and by farmers in their fields and homegardens.² TEK may also be of value to the new “life industries” (biotech, pharmaceutical, and nutraceutical) in helping to identify genetic materials for potential development.³

Legal recognition of the need to protect TEK is found in many sources. The major impetus for protection was originally provided by global environmental treaties such as the Convention to Combat Desertification⁴ and the Convention on Biological Diversity (CBD)⁵. Since these treaties were ratified, many states have introduced national legislation to implement their provisions.⁶ Even the Paris Convention for the Protection

² David A. Cleveland and Stephen C. Murray, *The World's Crop Genetic Resources and the Rights of Indigenous Farmers* 38 CURRENT ANTHROPOLOGY 477-515 (1997); Stephen Brush, *Bioprospecting the Public Domain* 14 CULTURAL ANTHROPOLOGY 535-555 (1999). For multiple discussions of the importance of recognizing and preserving *in situ* plant genetic resource development see the essays collected in Coonny Almedkinders and Walter De Boef, eds., *Encouraging Diversity: The Conservation and Development of Plant Genetic Resources* (2000). Indigenous peoples may combine hunting, fishing, gathering, and horticulture in agro-forestry systems that combine subsistence and commercial activities. See for example, the discussion of the Guarani peoples in the Mbaracuyu region of Paraguay in Richard Reed, *Forest Dwellers, Forest Protectors: Indigenous Models for International Development* (1997).

³ See Coombe, *supra* note 1; Gerard Bodeker, *Traditional Medical Knowledge, Intellectual Property Rights & Benefit Sharing* 11 CARDOZO J. OF INT'L & COMP. LAW 784-814 (2003); Coombe, *Works in Progress: Indigenous Knowledge, Biological Diversity and Intellectual Property in a Neoliberal Era*, in GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW, AND IDENTITY 273-313 (Richard Warren Perry & Bill Maurer eds., 2003); Bronwyn Perry, *The Fate of the Collections: Social Justice and the Annexation of Plant Genetic Resources* in PEOPLE, PLANTS, AND JUSTICE: THE POLITICS OF NATURE CONSERVATION 374-402 (Charles Zerner, ed., 2003).

⁴ Convention to Combat Desertification, art. 18.2, UN GAOR, 47th Sess., Supp. No. 49, UN Doc. A/47/49, Vol. 1, 137 (1994) states that parties shall: "protect, promote and use ... relevant traditional and local technology, knowledge, know-how and practices, and ... ensure that such technology, knowledge, know-how and practices are adequately protected and that local populations benefit directly, and on an equitable basis and as mutually agreed, from any commercial utilization of them and from any technological development derived therefrom."

⁵ Article 8(j) provides that: "Each Contracting Party shall, as far as possible and as appropriate: (j) 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 utilization of such knowledge, innovations and practices." United Nations Conference on Environment and Development: Convention on Biological Diversity, U.N. Doc. [ST/DPI/1307-Oct. 1992, June 5, 1992 (entered into force Dec. 29, 1993) [hereinafter Convention on Biological Diversity].

⁶ A list of national legislation is maintained at <http://www.grain.org/brl> (last visited Dec. 9, 2004). International, regional, and national legal provisions are collected at http://www.law.unimelb.edu.au/ipria/research/trad_know.html

of Industrial Property (1883) states that “industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise agriculture and extractive industries and to all manufactured or natural products, for examples, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral water, beer, flowers, and flour.”⁷ Clearly the scope of this provision is a matter of ongoing negotiation and controversy but there is no reason to decide that it cannot incorporate TEK *a priori*. Other governments have required that traditional knowledge be considered in environmental impact assessments⁸ and that it be considered in international development initiatives. For example, the United States directs its directors of international financial institutions to promote respect and protection for “territorial rights, traditional economies, cultural integrity, traditional knowledge, and human rights of indigenous peoples.”⁹

There are also many international statements of normative principle with respect to the protection of TEK which might be considered “soft law” but might also be considered part of international customary law to the extent that these principles are routinely

⁷ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 1(3), 21 U.S.T. 1583, 828 U.N.T.S. 305, (1979), last revised Sept. 28, 1979.

8. See for example, Northwest Territories Policy 51.06, Traditional Knowledge:

The Government of the Northwest Territories recognizes that the aboriginal peoples of the Northwest Territories have acquired a vast store of traditional knowledge through their experience of centuries of living in close harmony with the land. The Government recognizes that aboriginal traditional knowledge is a valid and essential source of information about the natural environment and its resources, the use of natural resources, and the relationship of people to the land and to each other, and will incorporate traditional knowledge into Government decisions and actions where appropriate. This Policy applies to all departments, agencies and employees of the Government of the Northwest Territories. Available at <http://www.mtnforum.org/resources/mpl/030797nwt96.htm> .

In Canada the Royal Commission on Aboriginal Peoples has recommended that “the government of Canada recognize the contribution of Aboriginal traditional knowledge to environmental stewardship and support its development.” Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (1993) vol. 4, art. 4.6.8. This is acknowledged in the Canadian Environmental Assessment Act which provides in Article 16.1 that “community knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment.” 2003, c. p, s.8. There are numerous proposals to incorporate TEK into development planning. See for example, Alan Emery, GUIDELINES: INTEGRATING INDIGENOUS KNOWLEDGE IN PROJECT PLANNING AND IMPLEMENTATION (2000). This study was published by the International Labor Organization, the World Bank, The Canadian Development Agency, and Kivu Nature Inc. Generally see Stevenson, M. G. *Indigenous Knowledge in Environmental Assessments*, 49 ARCTIC 278 (1996).

⁹ 22 U.S.C. 262p-4°

reiterated by state and intergovernmental bodies as best practices for state conduct.¹⁰ These include the Draft United Nations Declaration on the Rights of Indigenous Peoples,¹¹ the Council of European Union Resolution on Tropical Forests (1990),¹² the World Bank Operational Directive 4.20 (1991),¹³ the Rio Declaration on Environment and Development (1992), the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests (1992),¹⁴ the Draft American Declaration on the Rights of Indigenous Peoples,¹⁵ the Alliance for Sustainable Development document signed by Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and Belize (1994),¹⁶ and the Programme of Action of the World Summit for Social Development (1995).¹⁷ Since 1995 many other United Nations' intergovernmental institutions (UNCTAD, UNDP, WHO) as well as international aid and development institutions have turned their attention to this issue as have a bevy of international

¹⁰ See James Anaya, *Indigenous Peoples In International Law* (2nd ed., 2004) for a persuasive argument about how the reiteration of principles with respect to aboriginal self-determination has become a part of international law.

¹¹ United Nations Declarations of Rights of Indigenous Peoples, arts. 3 & 29, U.N. ESCOR, Comm. on Hum. Rts., 11th Sess., Annex I, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

¹² Tropical Forests: Development Asoectsm COM (89) 410-final (1990).

¹³ World Bank Operational Directive 4.20, arts. 8 & 15 (1991).

¹⁴ Pghs. 5^a and 12d. Non-Legally Binding Authoritative Statement Of Principles For A Global Consensus On The Management, Conservation And Sustainable Development Of All Types Of Forests [The Forest Principles]. United Nations Conference on Environment and Development (UNCED), Rio de Janeiro, 14 June 1992.

¹⁵ Proposed American Declaration on the Rights of Indigenous Peoples (2000). Authored by Permanent council of the Organization of American States; Committee on Judicial and Political Affairs; Working Group to prepare the Proposed American Declaration on the Rights of Indigenous Peoples. Article XX provides for rights for indigenous peoples to control, develop and Project this knowledge as well as for compensation for their science, technologies and knowledge of plant and animal life. No consensus with respect to this proposed right has been reached amongst state parties whereas support for a right to protect traditional medicinal knowledge appears to be more widespread.

¹⁶ Central American Alliance for Sustainable Development (ALIDES), see J. Rodríguez and A. Salas, *Alianza Centroamericana para el Desarrollo Sostenible, Recursos Naturales, Biodiversidad y Legislación Ambiental*. Primera Reunión Plenaria UICN/PNUD/CCAD (1995). Text of the document signed at the Summit of Sustainable Development in Managua, October 12, 1994, available at <http://www.ccad.ws/antecedentes/alides/alianza.htm> (last visited Dec. 12, 2004).

¹⁷ *Report of the World Summit for Social Development*, ¶ B32, U.N. Doc A/CONF.166/9 (1995), available at <http://www.un.org/esa/socdev/wssd/agreements/index.html> (last visited Dec. 12, 2004).

NGOs.¹⁸ Means of protecting TEK were widely discussed in a number of fora, and the World Intellectual Property Organization (WIPO) Global Issues Division took it upon itself (with the participation of interested stakeholders and a number of global fact-finding missions) to research the prospects and shortcomings of intellectual property models as well as the elements necessary for *sui generis* regimes of protection.¹⁹

The limitations of Western intellectual property regimes for the protection of TEK have been widely discussed and there is no need to canvas all of these again.²⁰ The initial turn to intellectual or industrial property as a model is understandable given the broad enclosures anticipated in the Paris Convention, new forms of intellectual property protections recently created to recognize integrated circuit topography and databases, and the growing scope of patent protections in industrial countries. The neoliberal orientation of the CBD²¹ – which appears to advocate market measures as the favored means of valuing biodiversity – enabled the problem of protecting TEK relevant to the preservation of biological diversity to be defined as a lack of incentive to provide public

¹⁸ For a discussion, albeit now somewhat dated, of the NGOs active in this field, see CEAS (Centre for European Agricultural Studies) Consultants (Wye) Ltd, in association with Geoff Tansey and Queen Mary Intellectual Property Research Institute, STUDY ON THE RELATIONSHIP BETWEEN THE AGREEMENT ON TRIPS AND BIODIVERSITY RELATED ISSUES: FINAL REPORT (September 2000) available at http://europa.eu.int/comm/trade/pdf/ceas_final.pdf

¹⁹ As Graham Dutfield recounts, in early 1998, WIPO established a new unit called the Global Intellectual Property Issues Division to identify and respond to new challenges posed by globalization and rapid technological change and to identify potential new beneficiaries for intellectual property rights including indigenous peoples and so-called traditional communities and to address issues relating to traditional knowledge and folklore. The Division embarked on nine fact-finding missions in its first two years and turned to consider other issues such as the potential for protection of traditional knowledge through customary law. In 2000 the state members of WIPO agreed to establish the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and that body has been meeting regularly since the spring of 2001. See *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW (2001) 266-268. For documents of the Committee's work see <http://www.wipo.int/tk/en/igc/documents/> (last visited Dec. 12, 2004) .

²⁰ See Michael Huft, *Indigenous Peoples and Drug Discovery Research: A Question of Intellectual Property Rights* 89 NW. U. L. REV. 1678 (1995); Elias Peralta, *A Call for Intellectual Property Rights to Recognize Indigenous People's Knowledge of Genetic and Cultural Resources* in WIDENING PERSPECTIVES ON BIODIVERSITY (A. F. Krattiger, et. Al., eds., 1994). An overview of legal frameworks is provided in Subha Ghosh, *Cardozo International Law Journal* 2003. Most recently a strong case is made by Thomas Cottier and Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection* in INTERNATIONAL PUBLIC GOODS AND TECHNOLOGY TRANSFER IN A GLOBALIZED INTELLECTUAL PROPERTY REGIME (J. Reichman and K. Maskus, eds., 2005).

²¹ L. D. Guruswamy, *The Convention on Biological Diversity: A Polemic*, in PROTECTION OF GLOBAL BIODIVERSITY: CONVERGING STRATEGIES 351-359 (L. D. Guruswamy & J. A. Mc Neely eds., 1998).

goods.²² Since this was the rationale used to justify other proprietary interests in intangible goods, the presumed applicability of intellectual property laws to be modified to suit this purpose was easily assumed although the complications involved soon proved formidable.²³

Significantly, many of the proposed new rights' beneficiaries vociferously reject the existing intellectual property system in a series of continuing declarations, manifestos, and statements. The intellectual property system is accused of having an inappropriate individualist bias towards a Eurocentric model of the author, being predominantly market-oriented, and unduly emphasizing or enabling the privatization of knowledge with respect to resources.²⁴ It is also seen to have a propensity to isolate and abstract "knowledge" from ecosystem and social relationships, and from the collective human obligations to future and past generations and to other species that many indigenous peoples consider primary.²⁵ Moreover, many activists see it as disrespectful to claim to value biological resources and indigenous peoples' knowledge about them when

²² See for example, Christopher D. Stone, *What to Do about the Earth's Biological Riches*, in PROTECTION OF GLOBAL BIODIVERSITY: CONVERGING STRATEGIES (L. D. Guruswamy & J. A. Mc Neely eds., 1998); Joseph Henry Vogel, GENES FOR SALE: PRIVATIZATION AS A CONSERVATION POLICY (Oxford University Press, 1994); Anil K. Gupta, *Rewarding Local Communities for Conserving Biodiversity: The Case of the Honey Bee*, in *id.* 180-189.

²³ See Michael Brown, *Who Owns Native Culture?* (Cambridge: Harvard U., 2003); Michael R. Dove, *Center, Periphery, and Biodiversity: A Paradox of Governance and a Developmental Challenge*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 41-67 (Stephen Brush & Doreen Stabinsky eds., 1996); Steven Brush, *Bioprospecting the Public Domain* CULTURAL ANTHROPOLOGY (1999) Geoffrey Heal, *Markets and Biodiversity* in *id.* 118-128; R. David Simpson, Roger A. Sedjo, and John W. Reid, *The Commercialization of Indigenous Genetic Resources as Conservation and Development Policy* in *id.* 129-146; Stefano Varese, *The New Environmentalist Movement of Latin American Indigenous People*, in *id.* 122-142; Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?* in *id.* 305-322. GRAIN, *Community or Commodity: What Future for Traditional Knowledge?* SEEDLING 1-3 (July 2004).

²⁴ See UNDP Consultation on the Protection and Conservation of Indigenous Knowledge, Sabah, East Malaysia, 24-27 February 1995 where indigenous peoples of Asia voice these concerns. Reprinted as Appendix Ten of BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES (D. Posey and G. Dutfield, eds., 1996). See also the manifestos, declarations and resolutions gathered at <http://www.biodiv.org/programmes/socio-eco/traditional/instruments.aspx?grp=STA>. For an articulate statement see Lorenzo Muelas Hurtado, *Access To The Resources Of Biodiversity And Indigenous Peoples* (first published in 1998 in Bogota, Columbia and reprinted in 1999 with the permission of the author as an occasional paper of the Edmonds Institute).

²⁵ Miriam LaTorre, *Protection for Indigenous Knowledge: An International Law Analysis*, 14 ST THOMAS L REV. 287, 289-295 (2001); Siegfried Wiessner, *Defending Indigenous Peoples' Heritage: An Introduction*, 14 ST THOMAS L REV. 271, 273-274 (2001).

indigenous societies themselves are being subject to modern development projects that are displacing them and destroying their livelihoods. Some indigenous peoples also believe that this issue takes valuable public attention away from more fundamental issues of indigenous rights to territory and issues of self-determination.²⁶ Others were insulted by the fact that their own systems of managing what we would call “intangible properties” were being ignored; customary law should also be considered a viable juridical resource for building *sui generis* regimes of protection.²⁷

It would be wrong to suggest that indigenous peoples have found no use for any form of Western intellectual property protections and a misrepresentation to suggest that all forms of Western intellectual property are designed primarily to create private economic monopolies, although this has certainly been the recent tendency as intellectual property protections became encompassed within global trade regimes.²⁸ Intellectual property regimes are also used to assert consumer rights against confusion and traditional methods of production rooted in local territories and culture, to certify particular conditions of origin, to protect reputation, to protect peoples against offence in the marketplace, and to respect relationships of confidentiality and values created through secrecy. Many indigenous peoples understand how to use intellectual property protections for particular purposes that protect their goods in the market, preclude misrepresentations of indigenous origin, and maintain desired forms of secrecy and

²⁶ For example, item number 18 of the “Basic Points of Agreement” of the COICA/UNDP Regional Meeting on Intellectual Property Rights and Biodiversity, (Santa Cruz de la Sierra, Bolivia, 28-30 September 1994) which ends the list with the reminder that “discussions regarding intellectual property should take place without distracting from priorities such as the struggle for the right to territories and self-determination, bearing in mind that the indigenous populations and the land form an indivisible unity.” Reprinted as Appendix 9 in *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* (D. Posey and G. Dutfield, eds., 1996) 215.

²⁷ A. Taubman, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge* in *INTERNATIONAL PUBLIC GOODS AND TECHNOLOGY TRANSFER IN A GLOBALIZED INTELLECTUAL PROPERTY REGIME* (J. Reichman and K. Maskus eds., 2005); Chidi Oguamanam, *Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge*, 11 *IND J OF GLOBAL LEGAL STUD.* 136-137 (2004); *Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain* (July 9, 2003) to Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 5-17, 2003, available at: <http://www.wipo.int/tk/en/igc/ngo/tulaliptribes.pdf>

²⁸ See R. J. Coombe, *Commodifying Culture, Private Censorship, Branded Environments, and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 369-391 (A. Sarat ed., 2003).

confidentiality.²⁹ Moreover, the practices through which misappropriations of TEK have been permitted with respect to granting patents are under heightened scrutiny and proposals for changes to the dominant system to prevent abuse are multiplying.³⁰

Many proponents of *sui generis* regimes of protection now acknowledge that means for recognizing, preserving, and compensating for the use of TEK must be developed to empower local communities, promote cultural revitalization, and further objectives of political autonomy, sustainable development, and territorial rights as fundamental to indigenous survival – although the states in which indigenous peoples are resident may resist many of these claims. Significantly, indigenous representatives at international meetings insist that customary law provides a viable basis for new rights regimes to protect and recognize their TEK for most purposes. WIPO has nominally supports the need to acknowledge and strengthen customary law as a source for the management and protection of TEK.

Much of the debate around TEK is, however, unnecessarily abstract and inattentive to the conditions under which rights are being asserted. It is illustrative to explore some of the social movements that have emerged in the Americas in which TEK figures by examining a body of evidence that includes movement self-representation, and studies based on the field research of anthropologists, geographers, and political scientists. The Zapatista resistance to NAFTA and global neoliberalism is well known but just as important are peoples' ongoing struggles in Chiapas for collective political autonomy and their assertion of rights to communal forms of rural subsistence framed in cultural terms as the right to maintain a distinctive indigenous identity. The ongoing production of biological diversity through the use of TEK is understood here to be central to an indigenous peoples' social reproduction.

²⁹ See Intellectual Property and Aboriginal People: A Working Paper (Research and Analysis Directorate, Department of Indian Affairs and Northern Development and Intellectual Property Policy Directorate, Industry Canada, 1999) for examples.

³⁰ See discussion in B. Amani and R. J. Coombe "The Human Genome Diversity Project: The Politics of Patents at the Intersection of Race, Religion Research Ethics, and Human Rights" 27 *Law and Policy Review* 152-188 (2005) and sources cited therein. Further discussions may be found at <http://www.wipo.int/documents/en/meetings/2004/igc/> and in Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 *CASE W. RES. J. INT'L L.* 233-275 (2001).

Anthropologists June Nash and Lynn Stephen have both drawn attention to the revitalization of indigenous communities as political actors under neoliberal conditions.³¹ In response to economic restructuring new ethnically diverse “nationalisms” are emerging amongst the rural poor that bring together self-declared “autonomous communities” who have organized around the human rights concept of indigenous autonomy (liberalized by affirmation of women’s and children’s rights in the reconstruction of “tradition”). What is most striking about the figuration of these movements as “indigenous” is not simply the remarkable revitalization of Mayan languages and ethnicities³², but the insistence that an indigenous identity represents human dignity in the struggle against exploitation, dependency and impoverishment.³³ This emphasis on human dignity emerged in dialogue between leaders of peasant revolutionary movements and indigenous elders as an essentially moral positioning in which the struggle against the poverty and dispossession wrought by Mexico’s entry into globalized capitalism is a struggle not only for the means of production and social reproduction but a struggle for the possibility of being human in a dignified way.³⁴ In the aftermath of the Zapatista rebellions a civil society movement galvanized around the need for further democratization in which the rights of indigenous collectivities – first politically recognized in the 1996 Accords as *pueblos indios* (usually translated as indigenous communities) became central.

The federal government’s failure to implement the terms of these accords, particularly with respect to the rights of collectivities was rhetorically justified by appeal to the liberal individualism that is dominant in the Western human rights tradition. Appealing to the purported equality of all Mexicans, the government suggested that recognition of

³¹ Lynn Stephen, *Indigenous Autonomy in Mexico*, in AT THE RISK OF BEING HEARD: IDENTITY, INDIGENOUS RIGHTS, AND POSTCOLONIAL STATES 191-216 (Bartholomew Dean & Jerome M. Levi eds., 2003); Lynn Stephen, *Between NAFTA and Zapata: Responses to the Restructuring of the Commons in Chiapas and Oaxaca, Mexico*, in PRIVATIZING NATURE: POLITICAL STRUGGLES FOR THE GLOBAL COMMONS 76-101 (Michael Goldman ed., 1998); June C. Nash, *Mayan Visions: The Quest for Autonomy in an Age of Globalization* (2001); June C. Nash, *Defying Deterritorialization: Autonomy Movements against Globalization*, in SOCIAL MOVEMENTS: AN ANTHROPOLOGICAL READER 177 (J. Nash ed., 2005).

³² Kay B. Warren, *INDIGENOUS MOVEMENTS AND THEIR CRITICS: PAN-MAYA ACTIVISM IN GUATEMALA* (1998).

³³ See Stephen 2003, *supra* note 30, 195, citing a Communique from the Clandestine Revolutionary Indigenous Community, 1994.

³⁴ See Nash 2001 *supra* note 30 at 226.

collectivities would be unfair because it would provide some Mexicans with ‘special’ rights. It is well known, however, that formal equality has only produced substantive inequalities for those who have been historically disadvantaged and these are disproportionately those who claim an indigenous identity. Indeed, communally based models of autonomy are posed as distinctive political alternatives to individualized citizenship. The struggle for the inclusion of collectivities or communities in the Mexican constitution also involves a claim of rights, “to bilingual education, the right to local and regional autonomy and to communal lands as the basis for the cultural reproduction of the group.”³⁵ These rights claims are posed in cultural terms, political scientist Courtney Jung asserts, because international indigenous rights are the only ones now available. Specifically, activists “whose capacity to advance political claims on the basis of a peasant identity that has been eviscerated by neoliberal policies have [instead] adopted an indigenous political identity.”³⁶

Rights with respect to TEK are only one dimension of the struggle for indigenous political autonomy in Mexico and elsewhere, but they are not insignificant. Those peoples who currently claim indigenous identities are often of interest to global capital primarily because of the resources in their territories and the genetic properties of the soil, plants, animals, and even their own bodies “in the biospheres of which they are [or see themselves to be] custodians.”³⁷ As capital has become more information intensive, new technologies and developments in intellectual property law have enabled forms of genetic difference to be expropriated and exploited for product development. At the same time, the environments occupied by these peoples become strategic matters for capital exploration and local knowledge of ecological specificities has assumed a new value. States, given control over these resources through international treaties such as the CBD and promised returns on their investments, are expected to assist in the process

³⁵ Courtney Jung, *The Politics of Indigenous Identity: Neoliberalism, Cultural Rights, and the Mexican Zapatistas*, 70 SOCIAL RESEARCH 433 (2003). The Law on Indigenous Rights and Culture that was ultimately passed by the federal government in 2001, however, restricted the degree of indigenous autonomy to communities in single municipalities, denied constitutional recognition of indigenous peoples as distinct subjects with rights to self-governance and maintained paternalistic relations in which the federal government would provide social services to indigenous communities. See Neil Harvey, *Globalisation and Resistance in Post-Cold War Mexico: Difference, Citizenship and Biodiversity Conflicts in Chiapas*, 22 THIRD WORLD QUARTERLY 1048 (2001). Although this law was rejected by the National Indigenous Congress (CNI) and by states such as Chiapas, Oaxaca and Guerrero in which the largest indigenous populations were resident, it nonetheless came into effect in August 2001.

³⁶ *Id.* at 437.

³⁷ Nash 2001, *supra* note 30 at 1-2.

of opening up these final frontiers for emerging industries and making TEK available for this purpose.

It is precisely because of their marginality to earlier forms of capitalist expansion, Nash suggests, that these peoples reside in biologically rich areas and maintain distinctive worldviews -- “substantive economies” that “provide a positive coexisting alternative to a world predicated on universal self-regulating markets.”³⁸ Struggles over biodiversity and TEK in Chiapas also confirm the new political valences that indigenous identity and community have acquired as local peoples become transnationally interconnected with other peoples whose identity as indigenous is similarly premised upon forms of livelihood and relations to land conceived as ancestral territory rather than property.

Both Nash and political scientist Neil Harvey believe that recently politicized indigenous peoples in Chiapas (like others in pluricultural American democracies) are asserting a new type of citizenship in which forms of collective autonomy are understood as moral rights of community survival that depend upon continued access to subsistence resources and their culturally specific development. The legitimacy and necessity of non-market relationships in peoples’ lives is being affirmed in cultural terms that valorize “tradition” and “the local” but do so using the decidedly *modern* language of rights in the very *global* arenas provided by networked NGOs and United Nations bodies.

The struggle against the industrialization of biological resources (linked to the “No Patenting of Life” movements) which Harvey calls “the Life Industry” is one that insists upon the cultural, economic and political significance of biodiversity resources in people’s lives:

This resistance is opposed not only to the privatization of biodiversity resources and indigenous knowledge, but also to the redefinition of cultural identities and political power which such privatization implies. In contrast to the dominant neoliberal model of ‘market citizenship,’ in which subjects are created by the extension of individual property rights and capitalist rationality, the[se]

³⁸ *Id.* at 2.

struggles...can be seen as diverse attempts to build an emerging non-essentialist ‘pluri-ethnic citizenship’ in Mexico.”³⁹

Significantly, Harvey finds that the movement towards reaffirmation of cultural identities in México has been accelerated by concerns about industrial access to biological resources, limitations upon farmers’ rights to save and exchange seed posed by the patenting of plants, and threats to health and food security perceived to be posed by the importation of genetically-modified organisms (GMOs).⁴⁰ The National Indigenous Congress (CNI) issued its first declaration of support for the Zapatistas with a statement in which it joined other indigenous peoples around the world in opposing “biopiracy” and demanding a moratorium on all prospecting projects concerning biodiversity “until the indigenous peoples have discussed in their own time and on their own conditions the issues pertaining to control of their resources.”⁴¹

As one of the world’s seven richest nations in terms of biodiversity, Mexico is an attractive site for biotechnology corporations interested in genetic materials (this includes those corporations that hold dominant positions in the global markets for pesticides, seeds, plant breeding, pharmaceuticals and veterinary medicines) and the states that are home to the largest indigenous populations are also those possessing the largest concentration of biological diversity. In the absence of clear regulatory policies around access and benefit-sharing and the continuing controversy around the boundaries and political rights of indigenous communities, collection of plant genetic resources and traditional knowledge of their properties was certain to generate conflict.

Indeed, the most influential actors in the management of the Lancandon rainforest – which is also a place of great Zapatista strength – are a major Mexican timber products company and the business-oriented NGO Conservation International. Both are involved in projects designed to introduce foreign tree species for timber resources and have partnerships with corporations and joint ventures engaged in biotechnology development. These projects obviously require alliances with local villages who are encouraged to become engaged in “market citizenship.” These prospects for economic

³⁹ See Harvey, *supra* note 34, at 1046.

⁴⁰ *Id.* at 1050.

⁴¹ *Id.* at

development must be enticing for many of these communities, given limited alternative forms of livelihood, but many still resist bio-prospecting activities in the rainforest. The communities located in and near the biosphere are organized into the Independent and Democratic Rural Collective Interest Association (ARIC) which has heightened consciousness of the dangers of bioprospecting among the indigenous organizations of Chiapas. Indeed, it would appear that the biggest obstacle to CMI and the Pulsar Group's desire to open the rainforest to bio-prospecting is the demands of those communities that are most aligned with the region's indigenous organizations to assume a more meaningful role in the design of rural development plans.⁴²

This organization of communities makes its political claims in terms that fuse their impoverishment, lack of development, and their stance with regard to bioprospecting with their rights as indigenous peoples under international law:

ARIC invited ecologists to work with them in designing sustainable development plans. ARIC called for a moratorium on the patenting of live organisms, the defence of traditional knowledge and biological resources against intellectual property laws that benefit transnational corporations, as well as a ban on the marketing of GMOs by national and transnational corporations. Citing the need for a strong regulatory framework for biodiversity conservation, the declaration called for groups to work together to formulate a law that would reflect the spirit of the Convention on Biological Diversity (Article 8j), the Protocol on Biosecurity and International Labor Organization (ILO) Convention No. 169, ARIC demanded rights as indigenous people to land, health care and education, while committing to conserve national resources of the Lancandan rainforest. ARIC also upheld the right to control the use of indigenous knowledge and to improve it through interactions based on mutual respect.⁴³

The struggle for recognition of collective rights is a struggle against poverty and underdevelopment, for respect and involvement in local development decisions, as well

⁴² *Id.* at 1055.

⁴³ *Id.* at 1056.

as a desire for cultural survival in resistance to a form of citizenship that incorporates them wholly into markets and imperils subsistence livelihoods.

The peoples of Chiapas, Guerrero, and Oaxaca are not alone in this struggle. CONAIE (the Confederation of Indigenous Nationalities of Ecuador) a particularly influential indigenous organization in the region and one that is well-represented in international legal fora⁴⁴ provides one of the most articulate statements. Their website declares their commitment to “alternative forms of development that combine traditional knowledge with Western science to promote balanced ways of living with the environment.”⁴⁵ Asserting the primacy of land rights, community rights to resources, and the promotion of “traditional forms of land use such as cooperatives, organic farming, natural pest control management” as well as “natural medicines and traditional healing practices” they also promote the revitalization of indigenous languages and celebrate their role in establishing national bicultural education for indigenous peoples. Theirs are not atypical of the priorities asserted by many emerging place-based social movements for the defence of natural/social/cultural conditions of existence, not as isolated locations where people seek to keep “timeless” cultures outside of history, but as meaningful forms of ecological and cultural difference to which peoples feel a strong attachment.

⁴⁴ CONAIE has participated in the following international meetings: the United Nations General Assembly World Conference on Human Rights in the Regional Meeting for Latin America and the Caribbean, which took place in Costa Rica, from January 18-22, 1993 (*See* <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4951ffcc8f2e7d4f802569030037ed3f?Opendocument>); the United Nations Economic and Social Council Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-ninth session, Agenda item 7, the Human Rights of Indigenous Peoples (*See* Report of the Working Group on Indigenous Populations on its fifteenth session at <http://www.hri.ca/fortherecord1997/documentation/subcommission/e-cn4-sub2-1997-14.htm>); the United Nations Environmental Programme, Conference of the Parties to the Convention on Biological Diversity Fifth meeting, 15-26 May 2000, Annex III at 185, U.N. Doc.UNEP/CBD/COP/5/23 (2000) *available at* <http://www.biodiv.org/doc/meetings/cop/cop-05/official/cop-05-23-en.doc> (last visited December 22, 2004); the Ad Hoc Open-ended Working Group on the Implementation of Article 8(j) and Related Provisions of the Convention on Biological Diversity, U.N. Doc UNEP/CBD/COP/5/5, *available at* <http://www.biodiv.org/doc/meetings/cop/cop-05/official/cop-05-05-en.pdf> (last visited December 22, 2004); at the United Nations Economic and Social Council Substantive session of 2001 (*See* Social and human rights questions: implementation of the Programme of Action for the Third Decade to Combat Racism and Racial Discrimination and preparatory process for the World Conference *available at* <http://www.un.org/documents/ecosoc/docs/2001/e2001-74.pdf> (last visited December 22, 2004); at the United Nations – Committee on the Elimination of Racial Discrimination International Convention on the Elimination of all Forms of Racial Discrimination, Sixty-second session, 4 March 2003 (*see* Summary Record of the 1556th Meeting, U.N. Doc CERD/C/SR.1556, *available at* [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e0805ecdea5286a4c1256e900036e4b7/\\$FILE/G0340577.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e0805ecdea5286a4c1256e900036e4b7/$FILE/G0340577.pdf) (last visited Dec. 22, 2004).

⁴⁵ *See* <http://conaie.nativeweb.org/brochure.html> (last visited Dec. 9, 2004)

Geographer Thomas Perreault also shows how federations of Ecuadorian peasant organizations have come to adopt an indigenous identity across ethnic lines in the past decade. Their claims have become more culturalized under conditions of neoliberalism because they have had to look beyond the state for political resources to protect themselves from modern development pressures and have found these in linkages to international activist networks. When Quichua speaking groups make claims as environmental caretakers in the name of tradition, Perrault suggests, they are not rejecting modernity, but negotiating their own place within it by “calling for environmentally sustainable forms of development based upon culturally specific values and practices.”⁴⁶ They do so from a modern subject position – interacting with state agencies, NGOs, and transnational networks – and using modern rights claims that nonetheless exceed these categories in their insistence upon rights that respect traditions and non-market relationships.

Neoliberal reforms that have dismantled state structures in Ecuador and destabilized rural livelihoods also afford transnational NGOs a greater role and influence in providing support for local peoples, leading to alternative forms of organizing that “are rooted in local places (communities, territories) and ...simultaneously, global in nature (ie., represented through, and in part, forged by, national and transnational networks).”⁴⁷ Indigenous organizations work with development ideas and discourses as well as the language of human rights as they link cultural identity, territorial rights and control over resources. International environmental regimes such as the CBD shape the priorities of these agencies and the direction of their energies. Communities thus put value on bilingual and intercultural education and their schools give shamanism, plant medicinal knowledge and traditional agricultural practices central positions in the curriculum along with community development skills.⁴⁸ Biodiversity politics provides a new idiom for indigenous organizations to make resource claims and assertions of territorial rights: “Crucially these claims were made largely on the ground of ethnic distinctiveness, and of the discursive linking of identity and place which posits indigenous peoples as

⁴⁶ Thomas Perreault, *Developing Identities: Indigenous Mobilization, Rural Livelihoods, and Resource Access in Ecuadorian Amazonia* 8 ECUMENE 400 (2001).

⁴⁷ *Id.* at 69-70.

⁴⁸ *Id.* at 77-78.

uniquely positioned to protect tropical rainforests.”⁴⁹ Perreault believes that in making such assertions indigenous groups are not rejecting development but “calling for environmentally sustainable forms of development based on culturally specific values and practices.”⁵⁰

Arturo Escobar’s ethnographic work with indigenous and black communities in the Colombian Pacific rainforest paints a similar picture. Approximately 900,000 Afro-Colombians and 50,000 indigenous peoples live in small riverine settlements in rain forest areas that maintain high indices of biodiversity. Many of these communities were mobilized in response to a move by a large pharmaceutical company to explore and extract resources in a nearby national park and came to understand their own practices of subsistence in cultural terms as distinctive ecological and economic practices that maintained autonomy from market-based extractivism. These peoples maintain distinct matrilineal oral traditions even as they interact with dominant modern cultures, and employ diverse productive strategies including farming, fishing, hunting, gathering of mangrove forest products and limited gold and timber extraction which were sustained by culturally specific local understandings of the natural world and its imbrication in a larger cosmos. In Colombia, a social movement of black communities emerged in the 1990s who used the provisions of the Convention on Biological Diversity and its respect for TEK in defense of collective ownership of community lands and the right to culturally distinctive forms of development that might better be characterized as the defence of a life-project rather than claims to resources or to biodiversity.⁵¹ Like social movements in Mexico and Ecuador, these have taken advantage of the state’s self-affirmation as a pluricultural democracy to assert claims as citizens whose cultural survival is necessary to the state and whose TEK is valuable to larger global objectives of preserving means of protecting biodiversity. The leaders of these movements are often women and strong norms of gender equality characterize what Escobar came to understand as an “autonomous vision of development based on black culture and an

⁴⁹ T. Perreault, *A People with our own identity: Toward a Cultural Politics of Development in Ecuadorian Amazonia*, 21 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 583, 598 (2003).

⁵⁰ *Id.*

⁵¹ See generally, Arturo Escobar, *Cultural Politics and Biological Diversity: State, Capital and Social Movements in the Pacific Coast of Columbia* in BETWEEN RESISTANCE AND REVOLUTION: CULTURAL POLITICS AND SOCIAL PROTEST (R. G. Fox and O. Starn, eds., 1997) 40; *Culture Sits in Places: Reflections on Globalism and Subaltern Strategies of Localization*, 20 POLITICAL GEOGRAPHY 139 (2001); *Place, Nature, and Culture in Discourses of Globalization*, in LOCALIZING KNOWLEDGE IN A GLOBALIZING WORLD (A. Mirsepassi, A. Basu, and F. Weaver, eds., 2003) 37.

alternative ecological rationality.”⁵² Like other emergent indigenous movements they were linked to larger transnational advocacy networks including those with anti-trade, indigenist environmental and development agendas, and United Nations bodies became important interlocutors.

This movement of black communities in the rainforests of Colombia, like the Zapatistas and Equadorian indigenous federations, do not make their claims with respect to TEK simply as traditional or indigenous communities asserting ‘cultural’ rights, but in more fundamental terms as citizen’s rights with respect to maintaining distinctive forms of human survival and alternative futures under neoliberal conditions that put ever-greater pressure on them and threaten to fully subsume all human energies solely into commodity markets. Culture, territory, and principles of stewardship are jointly expressed in affirmation of alternative ecological rationalities that respond to and engage with particular forms of modernity (the state, citizenship, science, technology and environmentalism) in distinctive ways that use the vocabulary of human rights to make new claims.

Indeed, it would appear that throughout Latin America small scale cultivators have found spaces within the discourses of sustainable development, biological diversity conservation, and indigenous human rights to construct new political identities and positionings. The Convention on Biological Diversity affords a unique positioning to those asserting local or place-based attachments through provisions that require measures for the maintenance of TEK and to encourage its use with the involvement of indigenous or “local” communities. Negotiations over the implementation of these provisions have become a place of resistance to the neoliberal “green developmentalism” that otherwise characterizes biodiversity politics.⁵³ Southern NGOs, networks of indigenous peoples and regional federations as well as organizations of healers and farmers have adopted the dominant forms of international indigenism to construct political strategies “for the defense of territory, culture, and identity linked to

⁵² Arturo Escobar, *Displacement, Development and Modernity in the Columbian Pacific* 175 INT’L SOC. SCI. J. 157, 167 (2003).

⁵³ See Kathleen McAfee, *Selling Nature to Save it? Biodiversity and Green Developmentalism* 17 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 133 (1997).

particular places.”⁵⁴ We might understand this as an advocacy of biodemocracy that views small cultivators (especially female farmers) as the creators and custodians of biological diversity in order to promote measures that would ensure local control over resources, collective title to lands reconfigured as traditional territories, and the preservation of local languages through bicultural education that would revitalize local cultural differences and preserve the cultural diversity to which biological diversity is now authoritatively linked.

In a recent volume titled *International Law from Below* Balakrishnan Rajagopal suggests that we have become so accustomed to considering human rights as the sole legitimate discourse of resistance in the Third World that peoples are forced to adopt and occupy its categories even when these are alien to them.⁵⁵ Like peoples engaged in social struggles against oppression and domination everywhere, they must “push the envelopes” of rights categories to make them accommodate new forms of injustice. International law, he argues, is fundamentally premised on the superiority of Western modernity and rationality and the history of bringing the values of civilization and progress to others, understood to be mired in superstition – tradition and its presumed “stasis.”⁵⁶ Third world states have generally adopted human rights norms to the extent that these have tended to buttress the primary role of the state in directing development, Rajagopal suggests and even the most ardent proponents of the New International Economic Order were intent on the acceleration of the Western modernization process under state governance.⁵⁷

Social movements, unless they can be characterized as movements of self-determination that aspire to statehood, are ignored as forces in international law and legal theory.⁵⁸ Yet social movements of the poor, the marginalized, and disenfranchised, are multiplying and making new demands in international arenas. Rajagopal is concerned primarily with “Third World” movements, but his description of these easily extends to encompass the

⁵⁴ Arturo Escobar, *Whose Knowledge, Whose Nature? Biodiversity Conservation and the Political Ecology of Social Movements*, 5 JOURNAL OF POLITICAL ECOLOGY: CASE STUDIES IN HISTORY AND SOCIETY 60 (1998). More generally see Arturo Escobar, Diane Rocheleau and Smitu Kothari, *Environmental Social Movements and the Politics of Place*, 45 DEVELOPMENT 28 (2002).

⁵⁵ BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

⁵⁶ NEED PAGE NUMBERS.

⁵⁷ DITTO

⁵⁸ DITTO

struggles of indigenous peoples or “Fourth World” movements (and although it is beyond the scope of this paper to fully make this argument, it should be apparent that Third and Fourth World interests may be converging in new ways). These new “local” or place-based movements are devoted to preserving rights to resources, the maintenance of ecosystems, human subsistence, and cultural survival under the pressures of state-led or supported modern development projects. These movements take advantage of the environmentalist rhetoric of “sustainable development” but resist the modern environmental law framework by proposing alternatives to the postcolonial state’s investments in managing the poor in order to force “development” upon them.

Rajagopal describes Indian movements that cut across class lines, coalitions of women, tribal peoples, consumers and intellectuals who assert community rights⁵⁹ and makes no mention of international indigenous rights or TEK but the movements he describes and their political characteristics share similarities with those in which assertions of rights with respect to TEK are made. They emphasize local democracy, community autonomy, and culturally based local resistances to and negotiations with global capitalism, using human rights discourse strategically and selectively to attract the attention and support of major United Nations actors combined with an assertion of indigenous identity that attracts the energies and sympathies of prominent NGOs. Rajagopal makes the strong claim that such resistances to development, coming from or voiced within the traditions of non-Western others “are not cognizable within the apparatuses and discourse of human rights, although they are an increasingly important source of identity for individuals and communities.”⁶⁰

I would suggest, however, that these resistances are indeed countenanced by the human rights tradition if we enlarge our understanding of it to consider international indigenous rights norms and emergent cultural rights to be part of its purview. Indeed, Rajagopal himself makes special note of the “turn to culture among mass movements in the Third World that emphasizes rights to identity, territory, some form of autonomy”⁶¹ and alternative conceptions of modernity and development. These movements pose the

⁵⁹ DITTO.

⁶⁰ DOUBLECHECK BEGINNING AND END OF QUOTE.

⁶¹ *Id.* at 165.

question of “how to be ‘modern’ while remaining different in ‘traditional’ ways.”⁶² We could view them as part of that process the anthropologist Marshall Sahlins describes as the “indigenization of modernity.”⁶³ Cultural survival, in the early twenty-first century is not dependent upon isolation from modernity but upon the selective use of modern technologies and market mechanisms for the continuation and revitalization of cultural identity as a distinctive way of being in the world – to promote forms of development that in which the reproduction of living traditions serve “as a means and measure of innovation.”⁶⁴

TEK rights are often evoked using a vocabulary and rhetoric of human rights honed during the United Nations Decade of Indigenous Peoples from 1994 to 2004 and negotiations over indigenous rights that are ongoing in the United Nations Permanent Forum. Indigenous peoples rights claims do not neatly fit Western rights categories and, I would suggest, reveal some of the fundamental limitations of human rights norms and thereby pose new challenges to human rights law and theory.

Although TEK claims are clearly congruent with states’ international environmental law commitments, these claims are rarely made by individuals asserting demands for a healthy environment. In other words, TEK rights are seldom merely assertions that one’s surroundings should have certain characteristics, although a right of freedom from certain destructive forms of development may be implied in many circumstances. The rights that TEK proponents assert are more often voiced as collective rights by communities who assert the priority of particular ways of living in localities – the fundamental human significance of distinctive ways of being in place and the relevance of these to contemporary environmental governance. The dominant understanding of environmental rights that informs the human rights tradition, however, has little room to encompass such values.

To the extent that rights with respect to TEK are conjoined with claims of entitlement to livelihood resources, they might be seen as economic rights. In the human rights

⁶² SAME AGAIN.

⁶³ Marshall Sahlins, *What is Anthropological Enlightenment? Some Lessons of the Twentieth Century*, 28 ANNUAL REVIEW OF ANTHROPOLOGY 1 (1999).

⁶⁴ *Ibid.* at ix.

framework, however, economic rights are generally posed as either rights within markets, such as rights of employment, or alternatively rights with respect to well being that are addressed to the state such as social welfare rights. Both presuppose the ubiquity of market societies or planned economies under state surveillance. To the extent that they are combined with rights to subsistence, and pertain to livelihood resources, and indeed that TEK provides the means by which people create sustenance for themselves in particular ecologies, the right is relevant to a people's very physical survival but claims are rarely phrased merely as such. More often these are voiced in terms of the spiritual meaning these practices have to the fulfillment of specific human forms of well being. These have a cosmological or 'religious' dimensions but the human rights tradition understands religious rights primarily in terms of freedoms of belief and practice that privatize and individualize these as matters of choice and conscience. Assertions of TEK are more often made in terms that stress the social understanding of the sacred as a form of belonging, obligation, and reciprocity rooted in systems of human and non-human relationships with others across time.

To the extent that TEK claims assert socially distinctive forms of knowledge and practice, they might be seen as cultural in nature. The dominant understanding of cultural rights in the human rights tradition emerging from the International Covenant on Economic, Social and Cultural Rights posits cultural rights as rights of individuals to have access to an accumulation of works and knowledge in the arts and sciences -- forms of heritage and technology -- as well as rights to the moral and material benefits of creative authorship (the conventional understanding of intellectual property). This includes rights to education, to benefit from scientific progress, and the right to information. After the Second World War, these rights were socialized to include rights of participation in the cultural life of a community and states recognized "an obligation to achieve progressively the full realization of the right of access to cultural life, including an obligation to identify and take specific measures to improve the position of the most vulnerable and disadvantaged groups in society."⁶⁵ The rights of persons in minority communities to participate in the cultural life of their own communities has been extended through UNESCO standard-setting instruments to encompass the

⁶⁵ Janusz Symonides, *International Implementation of Cultural Rights by the International Community*, 60 GAZETTE 7 (1998).

principle of a right to cultural identity, which is still vaguely defined and leaves many critics uneasy but has nonetheless been advanced and elaborated within Europe in particular.

In 1994 the Human Rights Committee adopted a General Comment on article 27 of the International Covenant on Civil and Political Rights that provides that in those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the rights, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” It has been accepted that rights to enjoy a culture may encompass respect for a way of life that is closely associated with particular ways of occupying a territory and using its resources. This article “has already been used to stop the granting of leases for oil and gas exploration and timber development on indigenous land in Canada and to defend Maori fishing rights in New Zealand as well as Sami practicing reindeer husbandry in Finland, which were threatened by logging interests.”⁶⁶ Rights of indigenous peoples with respect to cultural traditions and to cultural and intellectual property in their heritage are even more strongly asserted in the Draft Declaration on the Rights of Indigenous Populations which clearly links these rights to issues of self-determination. Thus recognitions of cultural rights increasingly implicate economic concerns and inscribe material and political claims.

The social movements in the Americas that we have considered make TEK assertions in the context of political demands for new forms of participation and autonomy. These peoples do not appear to mobilize for mere inclusion but for recognition of and respect for the value of social difference and its maintenance and expression as the source of distinctive contributions to the state’s body politic. They are akin to claims of self-determination to the extent that they are often accompanied by proposals for particular forms of political autonomy but they do not seek sovereignty but a negotiated distance from modernity and citizenship based on full participation in market relations.

⁶⁶ Bruce Robbins and Elsa Stamatopoulou, *Reflections on Culture and Cultural Rights*, 103 SOUTH ATLANTIC QUARTERLY 419 (2004).

Perhaps then, we should see claims that pertain to TEK as rights assertions that attempt to expand and push the human in human rights beyond the particular position occupied by the possessive liberal individual and to deprivilege it or to supplement it in substantive ways. As Jung suggests with respect to the Zapatistas in Chiapas, these ‘cultural’ assertions are not merely expressions of a need for recognition, nor attempts to safeguard traditional practices from the threat of modernity, but instead she suggests that “...indigenous identity is the condition of participation in a global political dialogue” that insists upon a political voice for many of those who have been most marginalized and oppressed by modernity and asserts for this group the ‘right to have rights’.”⁶⁷ In any case, TEK claims made by indigenous groups in the Americas challenge us to imagine alternative forms of ‘development’ that reject the hegemony of modernization and new forms of social justice that exceed modernity’s limits.

⁶⁷ Jung, *supra* note 34, at 435-6.