Seedling

Biodiversity, Rights and Livelihood

January 2004

Rights

GRAIN
Genetic Resources Action International

Girona 25, pral., Barcelona E-08010, Spain
Tel: +34 933 011 381
Fax: +34 933 011 627
Email: seedling@grain.org
Web: www.grain.org

Genetic Resources Action International (GRAIN) is an international non-profit organisation which promotes the sustainable management and use of agricultural biodiversity based on people's control over genetic resources and local knowledge. To find out more about GRAIN, visit our website at www.grain.org

Seedling

Seedling is GRAIN's quarterly magazine, published in January, April, July and October. It provides background articles, news, interviews and much more on the issues GRAIN is working on. *Seedling* is available free both in paper format and on GRAIN's *Seedling* website (www.grain.org/seedling). To receive *Seedling* in paper format or to inform us of a change of address, please contact GRAIN at the address or email above.

Seedling is published as a collective effort of GRAIN staff. Janet Bell is the editor. If you would like to contribute an article or other information to *Seedling*, please contact us. Outside contributions are attributed to their respective authors.

Printed on recycled paper
Deposito Legal No. B-25.166.92, Spain
ISSN: 1002-5154

Contents

Front cover picture: © Jeremy Horner/Panos Pictures. Cuzco Department, Peru. Quechuan women marching for equal rights.

Back cover picture: © Alastair McNaughton/Panos Pictures. Australia, Wongi tribe. Boy with spears & woomera

Redefining 'property'

Private Property, the Commons, and the Public Domain

BREWSTER KNEEN

The pervasive culture of turning everything and anything into commodities that can be bought and sold is squeezing the space for common ownership. Exploitation for private gain has systematically diminished the commons and the public domain. This is happening not only in the case of tangible goods such as public services, utilities and public spaces like parks and highways, but also with the more intangible goods of ideas and information, now increasingly referred to as *"intellectual property"*. We are all impoverished as a result. *"In the end,"* as law professor James Boyle puts it, *"the public domain is whatever intellectual property is not."* He goes on to say, *"You have to be a lion- or jackal-lover of truly limited imagination or unlimited commitment to argue that gazelles are to be understood as no more than whatever is left over after their adversaries have finished feeding."*[1]

But it is essential to recognise, particularly at a time when 'government' is systematically reviled and its social justice and social welfare mandate is degraded and deconstructed, that intellectual property is a social construct. This means that it is dependent for its meaning, legality and application on a strong central government and a legal system willing to enforce and extend the domain of private property at the expense of public good.

The relentless advance of private property

For the past three hundred years or so, industrialised societies (or at least the class of tangible property owners within them) have become increasingly preoccupied with property, its privatisation, and its 'protection,' meaning the accumulation of capital and control. The debate about property ownership has been framed as being between enclosure and commons, private property and public property.

[1] James Boyle (2003), "The Second Enclosure Movement and the Construction of the Public Domain", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, www.law.duke.edu/journals/66LCPBoyle

Table 1: Rights and Responsibilities

	Private Property	Commons	Public Domain
Access	Exclusive	Limited access	Open access (on good behaviour)
Responsibility	Individual (includes corporate)	Village/community	Social

The ideology of personal (and now corporate) greed has become the unquestioned driver of the economy, with its assumption that humans are motivated only by the prospect of acquisition, and that progress results solely from increased production and consequent economic growth. Any semblance of a common/public property regime is simply a block, if not an enemy, to wealth and progress.

Over the past two decades many of us have criticised the concept and application of intellectual property rights (IPRs) on moral, spiritual and intellectual grounds. We have objected to the part they play, for example, in the relentless erosion of traditional practices of seed saving and medicine, accompanied by the theft of plant, animal and human genetic material, to say nothing of laying claim to the knowledge of indigenous peoples. All of this has been rationalised as reasonable activity by first conceptually reducing plants, animals and people to 'genetic resources' and then making this socially acceptable by labelling them 'the common heritage of humanity.'

The corporate and governmental pirates engaged in this 'resource' exploitation claim that it is in the public interest that they do so on the grounds of the public benefits of the products – mostly drugs – they promise to produce from these 'resources.' While they demand extensive state intervention to protect what they regard as their 'intellectual property,' they do not appear to consider it unreasonable to demand increasing limitations on any state or community action in the public interest or for the public good.

A failure of our imagination

Granting patents on plants, seeds, genes, gene sequences, ideas, data and information has accelerated dramatically in the past decade. But proponents of the public domain, public good, the commons, and community life seem to have been unable to gain any significant leverage on the institutions of domination and exploitation. We have allowed ourselves to be confined in a straitjacket of limited imagination and narrow concepts, and have failed to get to the root of the issue. Our language and analysis has not been sufficiently historically informed and incisive, and relies too much on slogans and emotional appeal.

We have been thinking only in terms of private property or a vague and perhaps romantic notion of commons, paying even less attention to 'public domain.' We should, however, recognise three quite distinct categories of property and space – private, common and public (see table 1).

Private is easily understood as belonging to a person or a family, but we have to recognise that corporate-owned property and space is considered just as much private as your home. The American shopping mall is perhaps the most obvious example of the both the property and the space within it being privately – that is, corporately – owned. With its pretense of being public space – and deliberately setting out to create the sense of a village square, but with political activity and anything that might interfere with commerce excluded, the healthy concept of public domain is further eroded. In fact, children growing up in the malls are deprived of any sense of the politics of public life. Such is our confusion over public and private property and space that a common fishery, or the fields of a village, are not even given the same recognition or status as the shopping mall.

Commons is wrongly used to describe what is considered as public. This misrepresentation can be attributed to Garret Hardin and his 1968 essay, *The Tragedy of the Commons*, in which he set out to demonise the concept of commons in order to finish off any notion of public interest or public good, and with it any positive connotations for public property and space. As James Boyle sarcastically puts it, *"'Everyone' knows that a commons is by definition tragic, and that the logic of enclosure is as true today as it was in the fifteenth century. Private property saves lives."* [2]

In reality, commons historically referred to property and space that was 'owned' communally – by a group of fisherfolk or a village, for example – and managed for the long-term good of the group, including succeeding generations. Access to the property and space – fields, fishing grounds, forests – was limited to the group 'owning' and managing it. It was not open to exploitation by outsiders, though limited use of the space could be extended to them. Thus a well-defined fishing area might be closed for fishing to all but the 'owners' while still permitting everyone to swim or paddle in it.

[2] James Boyle (2003), "The Second Enclosure Movement and the Construction of the Public Domain", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, www.law.duke.edu/journals/66LCPBoyle

The *public domain*, on the other hand, is open to all, but that does not mean a 'free for all.' Access may be denied to those who refuse to play by the rules governing use of the public space and 'property.' Roads and parks are good examples. Access is open to all, but the rules of the road must be obeyed, and are usually enforced by agents of the 'state' – police of one sort or another. Village greens and market squares have also been socially and politically vital spaces for communities.

Breaking out of the straight jacket

Outside the culture of societies dominated by the vagaries of the market economy, the ideology of privatisation and private property is highly contested. There is also growing resistance to the dictatorship of IPRs in market-defined societies, as indicated by the following letter. It was sent by 59 high profile scientists including John Sulston of the Human Genome Project, to the Director General of the World Intellectual Property Organisation (WIPO), stating:[3]

"In recent years there has been an explosion of open and collaborative projects to create public goods. These projects are extremely important, and they raise profound questions regarding appropriate intellectual property policies. They also provide evidence that one can achieve a high level of innovation in some areas of the modern economy without intellectual property protection, and indeed excessive, unbalanced, or poorly designed intellectual property protections may be counter-productive. We ask that WIPO convene a meeting in calendar year 2004 to examine these new open collaborative development models, and to discuss their relevance for public policy."

WIPO initially welcomed the letter and talked about holding a conference on the subject, but was subsequently caved in when it was inundated with calls from trade groups and government representatives who said WIPO should not be wasting time on this, but should instead be putting its energy into protecting their IPRs.

In 2001, James Boyle (one of the letter's signees) and his colleagues at Duke University School of Law held a conference on 'the public domain,' which he describes as *"the 'outside' of the intellectual property system – the material that is free for all to use and to build upon."* This seemed to be the first conference of its kind, which according to Boyle, *"is surprising when one realises the central role of the public domain in our traditions of speech, innovation and culture."* Boyle compares the current lack of discourse on the public domain with that on the 'environment': *"Once upon a time there was no environmental movement. Before there could be an environmental movement, the concept of 'environment' had to be created, that is, a discourse about the environment had to be created before a social movement to protect it could emerge."* We have to create a discourse about the concept of 'public domain' before a movement to promote it can rise up.[4]

Roots of the second enclosure

To identify the political-ideological context of the diminution of the public domain, Boyle points to the post-Cold War 'Washington Consensus', which claims that history teaches the only to growth and efficiency is through markets, and that property rights are an essential condition for markets. The phrase 'Washington Consensus' was coined originally *"to refer to the lowest common denominator of policy advice being addressed by the Washington-based institutions [World Trade Organisation, International Monetary Fund, etc] to Latin American countries as of 1989."*[5] These policies included:

- Fiscal discipline
- Trade liberalisation
- Liberalisation of inflows of foreign direct investment
- Privatisation
- Deregulation (to abolish barriers to entry/exit)
- Secure property rights

Boyle mockingly dubs the Washington Consensus 'property saves lives,' explaining that: *"The world of the Washington Consensus is divided into two parts. In one, growing smaller by the minute, are those portions of the economy where the government plays a major regulatory role. The job of neo-liberal economic thought is to push us toward the privatisation of the few areas that remain. The second area of the Washington Consensus is an altogether happier place. This is the realm of well-functioning free markets, where the state does not regulate, subsidise, or franchise, but instead defines and protects property rights. While unintended consequences are rife in the world of government regulation, no such dangers should be feared if the*

[3] See the open letter and signatories at: www.cptech.org/ip/wipo/kamil-idris-7july2003.pdf. Also, "Drive for patent-free innovation gathers pace", *Nature* 424, p. 18, 10 July, 2003.

[4] James Boyle (2003), "The Second Enclosure Movement and the Construction of the Public Domain", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, www.law.duke.edu/journals/66LCPBoyle

[5] John Williamson, Center for International Development, Harvard University. www.cid.harvard.edu/cidtrade/issues/washington.html

Words designed to trap us

The following terms and images in current use can all be related to property rights in some form. If allowed to, each of these words could raise questions of access and exclusion. In the current context of individualism, materialism and market ideology, however, they customarily only raise questions about rights and innovation, progress and profit – and the appropriate penalties for violation.

Private property	Public domain	Genes
Resources	Intellectual property	Traditional Knowledge
Parks	Seeds	Common Heritage
Commons		

government is simply handing over a patent on gene sequences or stem cell lines, or creating a property right over compilations of facts. Property is good, and more property is better."

The corporate grab for 'genetic resources' – plant, animal and human – is being called *"the second enclosure"* (see box) by activists around the world, who have been battling for farmers rights, retention of their seeds in their village commons and the recognition of traditional/indigenous knowledge. But this terminology is definitely not the language of the public relations firms responsible for corporate image-making.

The first enclosure of the commons

The 'first enclosure' was the enclosure of village commons by the feudal lords in Britain. The process began around 1700, and 4,000 Private Acts of Enclosure had privatised some 2.8 million hectares of commons before the Great Enclosure Act was passed in 1845, bringing an end to the economy of the commons upon which the welfare of the peasants depended. Deprived of their commons for growing and raising their own food, people were forced to provide the cheap labour for the Industrial Revolution.

The tragedy of the misunderstanding of the commons - as per Garrett Hardin

It wasn't always so black and white

While intellectual property rights as currently practiced and pursued are acts of enclosure for private gain, historically copyright and the public domain were born together as the outcome of a struggle between the vested interests of authors and publishers enjoying a perpetual property right and the interests of the broader public in a more open literary environment.

"The pre-history of copyright was not total freedom, but rather a set of guild publishing privileges that produced a framework of pervasive regulation. Instituting a copyright system with statutory time limits, particularly after the House of Lords rejected the author's claim of a perpetual common right, enabled a much freer and more open literary environment. It is only after the Statute of Anne [1709] . . . that certain classic works became available for any publisher to print in a competitive market."[6]

In addition to the British focus on enclosures and commons, there is, as part of the same cultural history, Roman law, which recognised five different categories of what might be described as 'impersonal' property[7]. These categories are not tidy, as indicated by the word *res*, the Latin word for 'thing,' a fuzzy word if there ever was one. But they do offer more 'property' options than seem to be recognised today.

Res nullius: things that are unowned or have simply not yet been appropriated by anyone.

'Unsettled' land, traditional knowledge, herbal and medicinal plants and agricultural seeds and human DNA have all been treated as *res nullius*, 'the common heritage of humanity' open to appropriation by others – queens, governments and corporations. The establishment of botanical gardens like Kew and Singapore with material gathered from colonies around the world was an integral aspect of British colonialism, just as the St. Louis Botanical Garden is an integral aspect of Monsanto's imperialism.[8] In recent years there have been innumerable examples of the collection and appropriation of human DNA as if it were *res nullius,* from the cell line of a Hagahai indigenous person from Papua New Guinea to John Moore's spleen to the entire population of Iceland.

Res communes: things open to all by their nature, such as oceans and the fish in them or the air.

This is the understanding of the commons promoted and vilified by Garrett Hardin. It is closer to the truth to say that historically the commons has been a limited-access space managed by a distinct community according to its social norms, which excluded individual benefit at the expense of the community, whether referring to grazing rights or catching fish. Boyle comments that one might say that the function of intellectual property is to turn *res communes*, things by their nature incapable of ownership, into *res nullius*, things not yet owned but capable of appropriation.

Res publicae: things that are publicly owned and made open to the public by law.

This includes parks, roads, harbours, bridges and rivers. *Res publicae* are public spaces rather than wilderness. There is open access, but one is expected to behave according to social norms and laws.

Res universitatis: things owned by a public group in its corporate capacity.

The standard 'owner' for the Roman *res universitatis* was a municipality, but both private (churches, universities, hospitals) and public (villages, fishing communities) groups could own property in common, including lands or other income-producing property. Such limited common property regimes may be commons on the inside, but they are property on the outside, that is, vis-a-vis non-members.

Res divini juris; things 'unownable' (of divine jurisdiction) because of their divine or sacred status.

For many people, this would include seeds, plants, traditional knowledge, and even land. Obviously all this depends on your attitude and the cultural context.

All of the categories identified above are forms of 'public' property as opposed to what capitalist market societies regard as private property. There is nothing absolute about these five categories, but the characterisation does make the point that there is a far greater range of property-holding arrangements possible than either those of us who oppose privatisation or those who support it have been considering. There is a huge chasm between recognition of *res nullius* and *res divini juris* on the one hand, and the current push to enclose everything, including life itself, within the for-profit domain of intellectual property rights on the other.

Now is the time for legal and institutional creativity, not defensiveness or retrenchment. Now is the time to give new meaning to the 'commons' and 'public domain' in practice. 'Property Rights,' intellectual or otherwise, need to be pushed back and the public domain regained. Just as self-provisioning communities reduce the power of global agribusiness, so rebuilding the commons may drive out the exploiters. It is not a matter of rights, but of the integrity of persons and communities.

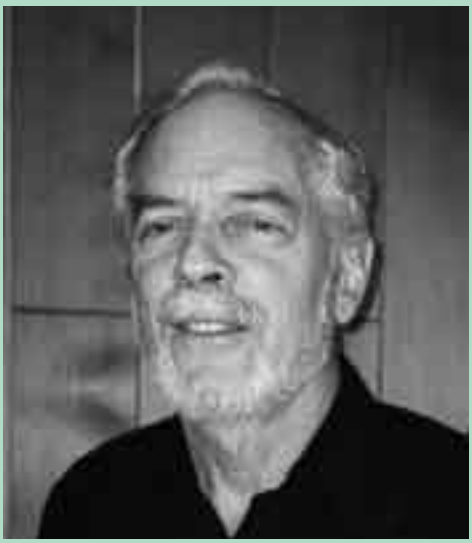
[6] Mark Rose (2003), "Nine Tenths of the Law", *Law and Contemporary Problems*, Vol 66, Nos. 1/2, at www.law.duke.edu/journals/66LCPMarkRose

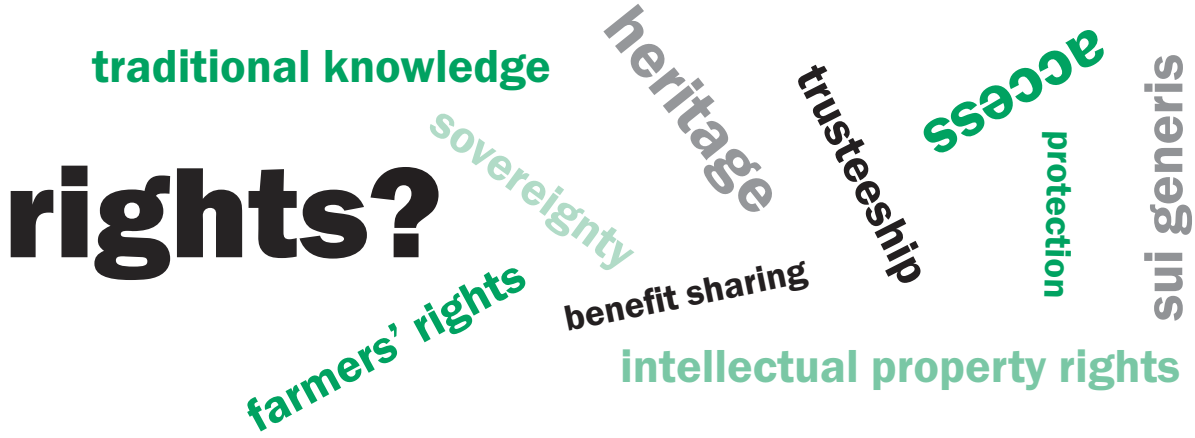
[7] Carol Rose (2003), "Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age", *Law and Contemporary Problems*, Vol 66, Nos. 1/2 at www.law.duke.edu/jounals/66LCPCarolRose

[8] For more on this subject, see Alfred Crosby, *Ecological Imperialism – The Biological Expansion of Europe, 900-1900*, Cambridge, 1986.

After studying economics and theology in the US and the UK, **Brewster Kneen** produced public affairs programs for CBC Radio in Canada, and worked as a consultant to the churches on issues of social and economic justice. In 1971, he and his family moved to Nova Scotia, where they farmed until 1986, starting with a cow-calf operation and moving on to a large commercial sheep farm. It was through his work working with other farmers, raising awareness about how they were being squeezed by the industries controlling food production, and setting up co-operatives to bypass the middle men, that in 1980 Brewster and his wife Cathleen started publishing The Ram's Horn, a monthly newsletter of food systems analysis.

The Ram's Horn (www.ramshorn.bc.ca) dissects the dominant food system, reporting on the activities and analysing the strategies of transnational agribusiness and governments. In 1986, Brewster began devoting himself full time to writing and lecturing on the food system, with increasing attention to biotechnology. He is the author of many books including *Invisible Giant: Cargill and its transnational strategies; Farmageddon: Food and the culture of biotechnology; From Land to Mouth: Understanding the food system;* and *The Rape of Canola.* In his spare time, he plays an active role on GRAIN's board.





Good ideas turned bad?

A glossary of rights-related terminology

GRAIN

Many of us often have to struggle with words and concepts that are used as though they have one single and simple meaning, while in reality they hide strong bias and very specific worldviews. Not surprisingly, they are usually biased towards the worldviews of those in power. There have also been well-intentioned words and concepts when coined but that have been corrupted over time through inappropriate usage, thereby acquiring more complicated connotations and implications. When we use these words, we often unwillingly but unavoidably become trapped in political and philosophical frameworks which block our ability to challenge the power that backs those views.

In the following pages, GRAIN takes a critical look at some such key concepts related to knowledge, biodiversity and intellectual property rights. Many of these words and phrases look innocent enough at a first glance, but on deeper examination, we can see how they have been twisted, manipulated, usurped, devalued and/or denatured. Some are used to constrain us and lock us into a particular way of thinking, and others are used against us. This is not an exercise aimed at drawing final conclusions, but an invitation to deconstruct some definitions and start the search for new terminology and ways of thinking that may help us untangle us from some of the conceptual traps we are stuck in.

As readers will see, one key concept is missing: *rights*. After some discussion, we concluded that this concept is so central to current debates, so loaded with implicit values, and its bias so deeply ingrained in our minds, that much longer and careful consideration is needed before we can attempt a useful discussion on the subject. We expect to include a discussion on 'rights' in a later issue of *Seedling*. Meanwhile, your comments are welcome.

ACCESS

The term *"access"* simply means a right to use or visit. In the context of biodiversity it suggests either admittance to bio-rich areas for bioprospecting, or the permission to use such resources or the traditional knowledge associated with them for research, industrial application and/or commercial exploitation. Initially heralded as a safeguard against biopiracy, the expectation was that access rules and regulations would help to keep control of biological resources and knowledge in the hands of communities. Any decision on access would require prior informed consent from the relevant communities. But access regimes have turned into mere negotiating tools between governments and commercial interests. The potential (market) value of biodiversity and its associated knowledge in the development of new medicines, crops and cosmetics has transformed access into a tug of war between countries. In this way, access has become synonymous with biotrade.

Take the way in which *access* is currently being discussed within the CBD's *Ad Hoc Open-ended Working Group on Access and Benefit Sharing*. Governments must now respond to Rio+10's call to negotiate an international regime on access and benefit sharing, on the basis of the (voluntary) Bonn Guidelines adopted by the parties to the Convention in April 2002. The CBD does not define *"access"*, but envisages several dimensions to it:

- Access to plant genetic resources and traditional knowledge of these resources from the South
- Access to technology transfer from the North
- Access to benefits derived from the use of genetic material.

Sadly but predictably, the preoccupation is only with the first dimension, without any reciprocal and/or balanced attention to the two others. Moreover under the CBD, countries are bound to *"facilitate"* access, not restrict it. Access to plant germplasm is receiving the same treatment in FAO's International Treaty on Plant Genetic Resources.

What is troublesome in all these discussions is the pro-IPR (intellectual property rights) approach. Access negotiations in many cases are obliged to accommodate the international legal regimes on IPRs as prescribed by WTO's TRIPs Agreement and WIPO. This is unacceptable. If we are presented the argument 'no patents, no benefits', we must respond with 'if patents, no access'. No amount of 'benefit sharing' can make up for the loss of access by communities to their local resources and knowledge.

Jargon buster

CBD – the Convention of Biological Diversity was the result of prolonged international pressure to respond to the destruction and piracy of the biodiversity of the Southern hemisphere. After years of debate, the Convention was agreed upon in 1992 and came into force in 1993. Now adhered to by 188 nations, the CBD was hailed as an important watershed in international efforts to promote biodiversity conservation, and was applauded for giving formal recognition to indigenous and local communities for the central role they play in biodiversity conservation. Ten years on, much of the hope has evaporated.

CGIAR – the Consultative Group on International Agricultural Research – a group of donors established the CGIAR in the early 1970s to fund agricultural research around the world. It does this via 16 International Agricultural Research Centres, which now call themselves *"Future Harvest"* Centres comprising more than 8,500 scientists and support staff working in more than 100 countries.

FAO – the United Nations Food and Agriculture Organisation. The only international negotiating forum that has ever seriously attempted to take on the issue of Farmers' Rights – at least it did for a while. Also home of the International Treaty on Plant Genetic Resources, which was drawn up to protect farmers' crops and ensure their conservation, exchange and sustainable use. But its core provisions on access and benefit sharing only apply to a small and specific list of crops and its value to farmers remains unclear.

GATT – the General Agreement on Tariffs and Trade, see WTO below.

TRIPS – Under the WTO's Trade Related Intellectual Property Rights Agreement (Article 27.b), countries are obliged to provide intellectual property protection for plant varieties at the national level either through patents or *"an effective sui generis system"* or both. TRIPS negotiations have been stalled for quite a while, and many developed countries are negotiating special closed deals with governments in the South instead. These TRIPS-plus deals establish much stronger requirements for IPRs than TRIPS itself and are being introduced through a range of bilateral, regional and subregional agreements. They are making so much headway that TRIPS may soon be obsolete.

WIPO – World Intellectual Property Organisation. A rising star in the international negotiating scene as the US and other patent-pushing countries are looking to it as the body to establish a world patent regime (see *Seedling*, October 2003, p 11)

WTO – Established in 1995, the World Trade Organisation is a global agency that transformed the GATT into an imposing body with the power to define the rules of global trade, enforce them and punish renegades. At its heart are a whole series of WTO agreements from agriculture to investment, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The WTO is one of the main forces of corporate globalisation.

BENEFIT SHARING

Benefit sharing was originally seen as a way to bring equity and justice to a world in which industrialised countries and their transnational corporations had long been plundering the biodiversity and traditional knowledge of communities in the South. In the early 1990s, it became one of the three central pillars of the CBD, which calls for *"the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources"*. Later, the parties to the CBD developed guidelines on how to go about it, and similar wording was incorporated in FAO's International Treaty on Plant Genetic Resources. Benefit sharing, it was argued, would put a stop to biopiracy and the custodians of biodiversity – local communities – would get a fairer deal and a bigger say in how to manage those resources.

More than a decade later, it seems that the benefit-sharing discussion is moving in quite the opposite direction. Governments and corporate lawyers negotiate benefit-sharing agreements while local communities sit on the sidelines. Money dominates the agenda and the multiple benefits of biodiversity at the local level are all but forgotten. Despite some talk about capacity building and empowerment, most approaches to benefit-sharing are dominated by the commercial bottom-line: 'no patents, no benefits'. Instead of supporting the collective forms of innovation that sustain the knowledge and practices of local communities and the biodiversity that they generate and maintain, benefit sharing is increasingly becoming a tool for pushing IPRs, promoting 'biotrade' and turning biodiversity in another commodity for sale (see box opposite).

It is time to go back to the basics: this main issue is to strengthen the control of local communities over the biodiversity they nurture (and that nurtures them) in order to improve the benefits they derive from it for their livelihood systems. Any benefit sharing scheme that doesn't take this as a central element is bound to contribute to the problem rather than providing a solution.

FARMERS RIGHTS

What Farmers Rights are depends to a large extent with whom you talk. A farmers' organisation in the Philippines defines it as an issue of farmers' control over their seed, land, knowledge and livelihoods, while an article in the *Hindu Business Line* describes it as the right for farmers to have access to transgenic crops. The International Seed Federation has little respect for the concept, saying that: *"Farmers' Rights were introduced rather emotionally, without careful consideration* (…) *and have led to endless discussions"*. The Farmers Rights Information Service set up by the M.S. Swaminathan Research Foundation explains its existence on the grounds that indigenous groups and farmers also need to gain *economic* rewards from the exploitation of biodiversity along with commercial interests.

The official definition laid down in Article 9 of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture doesn't help us much further. It says that countries should protect and promote Farmers Rights by giving farmers an equitable share in the benefits, and by letting them participate in decision-making. But these 'rights' are limited by the country's *"needs and priorities"* and are *"subject to national legislation"*. Even the age-old right of farmers to save and exchange farm-saved seed is not clearly guaranteed, but made subject to *"national law and as appropriate"*

Farmers' Rights has been a central battle issue for many NGOs and farmers' organisations, including GRAIN, for most of the past decade. The central objective was – and continues to be – to ensure control of and access to agricultural biodiversity by local communities, so that they can continue to develop and improve their farming systems. Rather than a simple financial compensation mechanism, we pushed for Farmers Rights to be socio-economic rights, including the right to food, land, to decent livelihoods, and for the protection of knowledge systems. Not much has been achieved at the international level between governments. But it is a battle that continues for many farming communities at the local level.

HERITAGE

Heritage is a nation's or people's historic legacy that is deemed worthy of preservation. Inheritance is something that is passed on from one generation to the next, suggesting that heritage is outside the purview of buying and selling. This is what the FAO had in mind when the concept of *"common heritage of mankind"* was developed in relation to plant genetic resources. By acknowledging the 'heritage' status of seeds and plants, the idea was to keep them in the public domain, free of restrictive and exclusive property rights. But the concept was then revised to accommodate the *"sovereignty"* principle enshrined in the CBD, which meant giving heritage a price tag. The sanctity of seeds in farming cultures as something inalienable and to be shared has long been violated by ever-increasing privatisation, particularly through the abuse of patents and plant breeders' rights. This is an ironic situation in which the IPR system, which so hankers for this heritage, is sounding its death knell.

Sharing a few crumbs with the San

For thousands of years, San bushmen have eaten the *Hoodia* cactus (left) to stave off hunger and thirst on long hunting trips. But in 2002, the *Hoodia* became the centre of a biopiracy row. A UK company Phytopharm patented P57, the appetite suppressing ingredient in the *Hoodia*, claiming to have 'discovered' a potential cure for obesity. It then sold the rights to license the drug for $21 million to Pfizer, the US pharmaceutical giant, which hopes to have the treatment ready in pill form by 2005. But while the drug companies were busy seducing the media, their shareholders and financiers about the wonders of their new drug, they had forgotten to tell the bushmen, whose knowledge they had used and patented.

Phytopharm's excuse appears to be that it believed the tribes which used the *Hoodia* cactus were extinct. Richard Dixey, the firm's chief executive, said: *"We're doing what we can to pay back, but it's a really fraught problem... especially as the people who discovered the plant have disappeared"*. Having woken up to the fact that the San are alive, well and organising a campaign for compensation, Dixey backtracked fast and a benefit sharing agreement was drawn up between Phytopharm, the South African Council for Scientific and Industrial Research (CSIR), which was responsible for leading Phytopharm to the *Hoodia* plant (and misleading the company about the extinction of the San). Ironically, CSIR's failure to consult with the San early in the commercial development of *Hoodia* considerably strengthened the bargaining arm and political leverage of the San, resulting in a high-profile case followed throughout the world. But even in this 'best case' benefit sharing scenario, the San will receive only a fraction of a percent – less than 0.003% - of net sales. The San's money will come from the CSIR's share, while profits received by Phytopharm and Pfizer will remain unchanged. Not only are Pfizer and Phytopharm exempt from sharing their king-sized portions, but also are protected by the agreement from any further financial demands by the San.

There are also other concerns. Chief amongst them is that the agreement is confined almost exclusively to monetary benefits, which hinge on product sales and successful commercialisation. Yet commercialisation is far from certain, highlighting the need for a more comprehensive and holistic approach to benefit-sharing that is not exclusively financial, is not contingent on successful drug development, and provides immediate and tangible benefits to the San. Additional worries include the fraught questions of administering the funds, of determining beneficiaries and specific benefits across geographical boundaries and within different communities, and of minimising the social and economic impacts and conflicts that could arise with the introduction of large sums of money into impoverished communities. A critical moral dilemma relates to the patenting and privatisation of knowledge. In communities such as the San, the sharing of knowledge is a culture and basic to their way of life.

Sources: Antony Barnett, "In Africa the Hoodia cactus keeps men alive. Now its secret is 'stolen' to make us thin", *The Observer* (London), 17 June 2001; Rachel Wynberg (2002), *Sharing the Crumbs with the San*, www.biowatch.org.za/csir-san.htm

Across the globe people are fighting to keep heritage and what it needs to thrive alive. The international farmers' organisation Via Campesina has launched a campaign to defend seeds as peoples´ heritage for the service of humankind. This global campaign was launched at the World Social Forum in Porto Alegre, Brazil in 2003, where thousands of participants committed themselves to defending seeds as collective heritage, the basis of cultures, and the foundation of farming and food sovereignty.

IPRs

There are many ways to encourage innovation and there are many ways for people to guard against the misuse of their creative works. But, over the course of the last century, these functions have increasingly become the domain of the courts and the various legal systems that they govern, such as copyrights, patents, trademarks, plant breeders' rights, geographical indications and industrial designs. These laws are supposed to maximise the public interest: society gets access to creative works and inventors/authors get a reward for their efforts and investments in the form of temporary monopoly rights. It was agreed that each country needed to be able to limit the scope of the laws and the rights they afford according to their own particular conditions and interests. But recently the courts in some countries have increasingly confused these legal systems with property law, and the scope and monopoly of rights conferred is getting totally out of hand. What's worse, some governments, led by the US and supported by big business, are pushing to make this situation the norm around the world, They are even pushing for a single global patent system based on this distorted model.

The growing use of the term *"intellectual property rights"* (IPRs) is part of the problem. IPRs came on the scene in 1967 when the World Intellectual Property Organisation was set up to bring the various legal systems under a single umbrella. The concept of IPRs is tied to a neo-liberal worldview that says that everything in the world – material goods, creative works, even DNA – can and should be privatised: i.e. parcelled up, owned and governed by a set of legal monopoly rights. If people do not own things and are not able to accumulate more ownership over things, there can be no progress; commons and collective processes create nothing but tragedy and upset the efficient functioning of 'free' markets. But, in practice, we see that property rights only serve the interests of the few. They facilitate the concentration of wealth by expanding the control of property owners and by devaluing and dispossessing people of 'unclaimed' wealth, such as the lands of indigenous peoples, or traditional plant varieties.

IPRs, as they exist today, also favour a very particular form of innovation – that of private individualised authorship that is generally controlled by big industry and suits the needs of commercial mass production. IPRs undermine the more important collective processes of innovation at the heart of agricultural biodiversity, culture, science, and community. For instance, while patents and plant varieties reward the seed industry for making subtle modifications to existing plant varieties, they obstruct the collective forms of plant breeding that generations of farmers have used to produce the earth's tremendous agricultural biodiversity. We are now at the point where the legal systems designed to enhance innovation are doing precisely the opposite: strangling innovation, locking up ideas, and ripping people off.

Fortunately, there is a growing global movement of resistance to this trend. Farmers are fighting the criminalisation of seed saving and the patenting of life. Digital innovators are struggling to preserve and expand the space to freely create and use software. Activists and scientists are fighting against obscene pharmaceutical patents and looking to alternative, 'open' models of research that avoid patents altogether.

PROTECTION

The English dictionary defines *"protect"* as to shield from harm or danger; shelter, defend and guard. But the interpretation of protection can also imply confinement, coercion, constraint, repression, limitation, restriction, monopoly and prohibition. So protection can not be understood without reference to what we want to defend, in whose favour, and at whose expense. Without this, we can easily destroy what we are supposed to be protecting, as is the case with IPRs. These are supposedly used as shields to protect knowledge, but are actually instruments to make profit from so-called *"scientific"* research. The economic horizon is its value measurement: nothing else. Not much is being protected except someone's wallet.

Part of the problem is that protection means very different things in intellectual property law and in ordinary usage. In the intellectual property sense, protection means protecting property over something in a very specific way, but in ordinary usage it has a much broader meaning. This has proved particularly problematic in the discussions on protecting traditional knowledge at WIPO (see p 13). When human knowledge is transformed into property in convenient IPR-sized bites, it exits the commons leaving social rights unprotected. To truly protect human knowledge – scientific, traditional, indigenous or whatever – several conditions must be met. First, we need to assign it greater value and create the conditions for that knowledge to flourish, such as by preserving cultural diversity and expressions, and conserving ecosystems diversity. Second, knowledge must flow free without limitations, monopolies or prohibition. Last but not least, this freedom must be applied to all types of knowledge, which means no IPRs in any form.

SOVEREIGNTY

Sovereignty implies self-governance. International law states that sovereignty means each country has *"supreme control over its internal affairs"*. Back in 1958, the UN General Assembly established a Commission on Permanent Sovereignty over Natural Resources, followed by an eight-point resolution in 1962. But sovereignty did not become an important concept in relation to biodiversity until the drafting of the CBD. During the 1980s, discussions in the FAO on the politics of plant genetic resources had centred around the principle that they were a 'common heritage of mankind.' The dramatic change in the perceived 'ownership' of biodiversity brought in by the CBD was said to be to allow states and their constituent populations to take decisions on how biological resources within their jurisdiction should be used, conserved, exchanged and shared. The conceptual shift towards sovereignty was supposed to recognise peoples' contributions (especially in the South) to the development of biodiversity, and include them in decisions on how to manage and share the benefits from the fruits of their labours.

More than a decade later, how is sovereignty being exercised? In biodiversity-rich countries around the world, it is governments and state agencies that are wielding the power. They seem to have hijacked the concept. State sovereignty is neither an absolute right, nor was it meant to grant any kind of ownership over genetic resources to governmental authority. Breathing new life into sovereignty necessarily mandates the empowerment and enfranchisement of communities. Farming groups are attempting to do this by promoting the concept of *"food sovereignty"*, which implies the right of the people of each country to determine what they eat.

SUI GENERIS

In Latin, *sui generis* means *"of its own kind"*, something unique, something special. It implies, especially in Spanish, something exceptional or strange. The concept of *sui generis* legislation was first introduced in the negotiations on intellectual property within the GATT agreement, as a way to grant intellectual property over plants instead of patents, which had met with widespread and strong rejection worldwide. Although *sui generis* legislation was initially designed exclusively for plant varieties, the concept has been gradually expanded to cover property claims over traditional knowledge and other cultural expressions.

There is a lot of conceptual and historical twisting behind the idea of *sui generis* legislation. The first and most fundamental twist was in its very inception in WTO's TRIPS agreement. By saying that the exclusion from patents was *sui generis* (unique, different), it implies that patents over life are the norm, despite the fact that exactly the opposite is true. A second twist is that the way it is defined in TRIPS means that *sui generis* is really a mirage: the only 'alternatives' allowed are still patent-like IPRs, just modified slightly to adapt them to plants.

Despite these basic flaws, the *sui generis* idea remained unquestioned for a decade, and in the meantime we have witnessed or entangled ourselves in numerous contradictions as part of many often courageous but hopeless searches for a 'better' IPR system. This has been the case for many groups fighting against intellectual property through WIPO, a body that was specifically and exclusively created to defend intellectual property. After so many years of fruitless battles, we should perhaps turn the argument on its head. The fact is that IPRs are an extreme case of *sui generis* legislation. As such, they should be drafted, applied and interpreted under the severe scrutiny of and the strict limitations set by societies and their different fundamental, *non-sui generis* norms. From this standpoint, the overwhelming conclusion would be that intellectual property should not be granted over life or knowledge.

KNOWLEDGE

Have you ever noticed that almost every concept or device that is permanently attached to an adjective becomes degraded and devalued? Like organic agriculture, sustainable development, participatory breeding, alternative technology, protected democracy, market economy. Traditional knowledge is no exception.

Traditional knowledge is knowledge, just like mathematics, biology or sociology. What makes it distinct is that it has been carefully and patiently created, built, nourished, circulated and promoted by common, non-powerful people: small farmers, fisherfolk, hunter-gatherers, traditional healers, midwives, artisans, traditional poets, and many others. Because the majority of these people belong to rural cultures or have close links with rural cultures, such knowledge is intimately linked to the understanding of natural processes. It is a form of knowledge that is continuously evolving, integrating new knowledge into a rich pool that has been tested and enriched over centuries.

We don't go around talking of *"mathematical knowledge"* or *"sociological knowledge"*. The reason we always hear about *"traditional knowledge"* is that this way we can diminish a form of knowledge that

could become subversive, because of its collective nature and its autonomy from the circles of power. The labelling also allows the same circles of power to excuse themselves from understanding a type of knowledge which is way too sophisticated to fit their current models. Most of all, it conveys the message that traditional knowledge is fixed, mummified, and unfit for modern times. Once traditional knowledge has been portrayed as a second-class knowledge, it becomes easier and cheaper to turn it into a commodity.

That is what we are seeing these days. The result of centuries of on-going human creativity is now being sold in pieces, with the active assistance of WIPO and WTO. But just as you cannot sell or buy number five, nor can you sell or buy people's knowledge of plants or nature, or any knowledge for that matter. What is really being done is crushing or violating the right of many peoples of the world to continue freely creating, promoting, protecting, exchanging and enjoying knowledge. Can you imagine a world where no one except a few corporations could use the number five?

TRUSTEESHIP

Trusteeship refers to a legal responsibility to supervise and administer some kind of property or asset – as in a 'trust fund' – on someone else's behalf. It comes from the Anglo-Saxon legal tradition. It was introduced into the political debate over plant genetic resources in the early 1990s as a means to protect the world's stock of *ex situ* germplasm collections from both physical destruction and legal misappropriation. The way it was set up meant that the international agricultural research centres of the CGIAR were granted the responsibility to maintain the seed collections held in their gene banks 'in trust' for the benefit of the international community. This responsibility was granted to them by the members of FAO's Commission on Plant Genetic Resources – that is to say, national governments. The trust agreement, originally signed in 1994, was meant to shake off doubts about who owns the materials in the CGIAR's gene banks. It formally instructs the centres to preserve their germplasm collections in perpetuity and keep them free from IPRs. On the surface, it seems like a noble effort. The world's most important institutional collections of genetic diversity for a number of food crops are supposedly going to be kept safe and sound (in deep freeze), and put to proper use (by scientists), for the public good. The key word here is *"public"*. The seed collections held in trust are considered *"international public goods"* which should not be privatised and should benefit everyone. But the whole system – from the text of the FAO-CGIAR agreement to the way it is implemented – carries a number of hidden weaknesses. Neither the CGIAR centres nor the CGIAR itself have the legal capacity to prevent people from getting patents or other forms of IPRs on the material in trust. The centres distribute seed samples, but they cannot police what happens to them, either in the lab or in the courts. Nor can FAO or the CGIAR stop researchers from getting IPR on the components or derivatives of these materials. Sometimes sensitivities blow up.

In 2000, Thai rice farmers, NGOs and politicians became furious when they learned that samples of Jasmine rice were sent from the International Rice Research Institute (a CGIAR centre) to scientists in the US without the required material transfer agreement stating that IPRs were prohibited. In 2001, Peruvian scientists raised a stink about how the International Potato Centre (another CGIAR institute) mishandled the trust agreement when it ferried yacon samples from Peru to Japan. But most importantly, the very people who provided all these diverse and unique plant materials to the trust pot – local farming communities and indigenous peoples throughout the developing world – were never consulted about whether they wanted the seeds put in this system, whether they trusted the CGIAR centres, who they thought should benefit, whether they considered the seeds to be international public goods and whether they wanted to play a role in the whole thing.

There's no reason to doubt the good intentions behind the system. But the political reality of it is that the authority to take decisions has been abrogated from the farmers who contributed the seeds in the first place. This is what's wrong and it needs to be righted. (Did someone say something about 'farmers' rights'?)

Most *Seedling* readers will find the idea of using IPRs to protect traditional knowledge bizarre, if not offensive. IPRs are now routinely used by commercial interests to appropriate and exploit traditional knowledge. Experience tells us that IPRs rank among the major threats to its protection, not one of its defences. But a WIPO committee in Geneva is proposing just that: to create an entirely new form of IPR especially for traditional knowledge. How should indigenous groups, farmers and other holders of traditional knowledge respond?

The great PROTECTION racket

Imposing IPRs on traditional knowledge

GRAIN

Over the past three years, the World Intellectual Property Organisation (WIPO) has unexpectedly become a major arena for the international discussion about traditional knowledge and its protection. Several years ago, developing country members started to raise questions at WIPO about the increasing use of intellectual property rights (IPRs) to appropriate both genetic resources (biopiracy) and related traditional knowledge – just like they had already done in other international organisations such as the Convention on Biological diversity (CBD), the UN Food and Agriculture Organisation (FAO) and the World Trade Organisation (WTO). These questions became so disturbing to other WIPO negotiations that eventually a separate committee was set up to deal with them, no doubt in the hope of isolating and neutralising these problematic issues in a dark corner of the organisation.

Another unresolved matter, folklore, was thrown into the mix, and the result was baptised the Intergovernmental Committee on Genetic

Use or misuse?

The piracy of traditional knowledge and genetic resources by way of IPRs is often referred to as *misappropriation*, and as a *misuse* of the IPR system. We are concerned that this language *misrepresents* the facts.

In many traditional communities, both traditional knowledge and genetic resources are typically managed as an integral part of a community heritage, not as private property in the Western sense. Using the term *misappropriation* implies a change of property ownership and in an improper manner (by theft, to be exact). In reality, what takes place is that something which never was private property at all is made into private property, ie an *appropriation.* The damage persists also after the term of IPR protection expires, as whatever was appropriated does not revert to community management but passes into a *public domain* status, something which is equally foreign to traditional communities as is private property (in fact, a public domain can hardly be conceived of in a culture where there is not private property). Whether as private property or as public domain, whatever was appropriated is irreversibly lost to the community concerned, as its heritage status can never be restored. Up to now, much of this has happened without explicit, free and prior informed consent of the communities involved – be they indigenous peoples or peasant farmers.

For the same reasons, this process can not be described as a *misuse* of the IPR system. Making property out of non-property is exactly what IPRs were created for; this is its main *use*.

Consequently, we have chosen to avoid these *mis*-nomers in this and future writings on the matter.

Resources, Traditional Knowledge and Folklore, usually referred to as the IGC. Contrary to expectations, the IGC rapidly developed into a very lively forum with the highest participation of any WIPO body, regularly exceeding the capacity of the main plenary hall. The cross-cutting nature of the issues attracted an unprecedented collection of government experts from environment, agriculture, development and culture ministries, in addition to the usual crowd of patent bureaucrats. And the observer benches, usually populated by a narrow selection of industry bodies and patent trade associations, started to fill up with environment and development-oriented NGOs and a colourful contingent of indigenous peoples' organisations.

Traditional knowledge the core issue

Between 2001 and 2003, the IGC has held five meetings. Early on, traditional knowledge (TK) emerged as the core issue. The discovery that TK systems are in fact a complete alternative paradigm for the development and management of knowledge seems to have been both a fascinating and disturbing one for the intellectual property community. In its short existence, the committee has produced an impressive number of documents detailing the characteristics of TK systems and in particular their interface with intellectual property right systems.

Work on the genetic resources and folklore agendas has been largely coloured by the TK perspective. Folklore has been on the WIPO agenda for decades without tangible results, because industrial countries would not agree that folklore should be protection. But the association with TK in a wider sense seems to have created a much better understanding of folklore as an aspect of TK, which is reflected in the change of terminology from folklore to *"traditional cultural expressions"*. The specific work on genetic resources has been limited to some quite technical matters, but genetic resources have figured prominently as an important example of a resource often intimately related to TK. (See box on p 17 for a selective overview of documents.)

Inevitably, the work of the IGC suffers from an IPR bias, because that is WIPO's perspective on the world. But discounting for that bias, the documents produced give a thorough and quite inclusive overview of the issues on the table. The IGC has a very able and hardworking secretariat with cross-disciplinary backgrounds and their output is very high quality compared to corresponding documents from, for example, the CBD. The WIPO documents contribute to a deeper understanding of some difficult matters, such as the risks of putting TK into computerised databases, or the technical and legal aspects of a disclosure of origin requirement for biodiversity or TK in patent law.

So both for governments and for WIPO itself, the IGC has brought greatly increased awareness and understanding of TK. For governments, an additional benefit has been that a number of different ministries have been forced to talk to each other about the matter. In many cases, this has meant the first ever contact between for example environment or agriculture ministries and patent offices.

For WIPO as an institution, the process has also been a long overdue introduction to the political conflicts of the real world. Until very recently, WIPO led the life of a closed gentlemen's club, much like the WTO before Seattle, with only one kind of people at the table and developed countries firmly in control of the agenda. The IGC has introduced very different dynamics, with developing countries taking up the proactive role and indigenous peoples' organisations, rather than industry bodies, increasingly providing the expertise.

From exploration to politics

For its first couple of years, IGC work has been of a mainly exploratory nature with compilation of information and wide-ranging discussions. But at the fifth meeting in July 2003, which was also

the last under its original two-year mandate, the committee clearly crossed the line into political mode and latent conflicts came into full play.

Developing countries took the offensive, arguing that a prolonged mandate for the IGC would only be meaningful if it included a clear commitment to *"norm-setting"*, in particular on new measures for better protection of TK. Developed countries, predictably, wanted no such commitment, only continued analysis and discussion. The outcome was a compromise which left the question open, explicitly stating that *"no outcome of its work is excluded"*. This simply means that the fight will continue at the next meeting in March 2004, which is expected to spend most of its time debating the IGC's work plan for the next couple of years.

While there could be no doubt about the political commitment from developing countries to create stronger protection for TK, they had no common message about how this should be done. There were references to the idea of creating a *sui generis* (special, unique) IPR system for TK, but most countries remained vague. The African Group alone made a specific formal demand, asking for the immediate start of negotiations on *"a legally binding international instrument on genetic resources, traditional knowledge and folklore"*. But when asked to expand on this, the Africans were not able to answer any questions on what such an agreement should contain.

Protection or protection?

A major problem which became evident during the discussion was the confusion about the concept of 'protection', which means very different things in intellectual property law and in ordinary usage. 'Protection' in the intellectual property sense means that the owner of a patent, a copyright, a trademark or some other piece of intellectual property has a legal right to exclude others from using or reproducing it. It is that specific piece of property which is protected, no more, no less.

In ordinary usage, 'protection' of course has a much broader sense. When developing countries speak about the need to protect TK, it is quite obvious that they mean 'protection' in the sense of safeguarding the continued existence and development of TK. As repeatedly pointed out by indigenous peoples' organisations, this necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge, something which simply is not possible to achieve with IPRs.

This conceptual confusion has been explicitly addressed in IGC documents (at least those in English), and the WIPO secretariat now systematically uses 'protection' only in the IPR sense and refers to the broader concept as 'safeguarding' or 'preservation'. But this has not helped much, as almost everybody else continues to use 'protection' interchangeably in both senses. In the discussion about a *sui generis* IPR system for TK, the confusion has led to a complete mix-up between the two. Even though it is clear from WIPO's own documents that creating IPRs over TK always requires that a limited piece of knowledge must be cut out from the community context and made into private property, the discussion in the IGC continues to be conducted as if IPRs could equally well be used to protect TK together with its context.

Patents to protect' the people? Or just another case of the leech and the earthworm? (an indigenous tale about the white man failing to keep his promises)

A similar confusion, with a similar outcome, has arisen over the terms "defensive" versus "positive" mechanisms for the protection of TK. Most people would think that you defend TK from IPRs. But through reams of paper and clever language, WIPO has managed to implant the idea that IPR *is* a form of defensive protection – against the wrong IPR holders!

Analysis overkill

A strongly contributing cause of this confusion is that the volume and complexity of the IGC documentation has grown to the point that it is now hindering the political discussion rather than facilitating it. At the most recent meeting, several countries noted that they had not been able to even read the many hundred pages of documents properly, much less assess them. The representative of UNCTAD concurred and added that under the rules of procedure that they live by, a secretariat would not even be allowed to present such large amounts of documentation without providing shorter summaries of the main issues.

Off the record, there were even suggestions that this analysis overkill could well be intentional from

WIPO's side. By producing these huge documents which somehow include or relate every possible angle on the subject matter, WIPO can insure itself against any criticism for bias. Of course there is a pro-IPR bias. Nothing else should be expected from an institution whose mandate is promoting IPRs. But much of the counter-arguments are also there, but buried or scattered in different locations all over the documents, so it becomes exceedingly difficult for the average reader to see them.

Indigenous perspectives

In order for governments to realise how slanted a picture they are getting, the voice of the TK holders needs to be stronger and clearer. So far, although a number of indigenous peoples' organisations have been following the process in Geneva, they do not have much in the way of teeth in the discussions, partly because WIPO's membership is composed of governments and the organisation has not been willing to provide financing for indigenous peoples' to participate, but partly also because it is a daunting task to decipher and challenge WIPO doublespeak. As for other TK holders such as traditional farmers, healers or fisherfolk, they have barely been represented. Then again, not all TK holders would feel it is worthwhile to get involved in processes in Geneva..

There are now signs that this is changing. At least among indigenous peoples, there is a growing capacity to tackle the WIPO process. A number of the indigenous groups looking at what WIPO is doing are arriving at more clearly articulated views on key points, including:

Indivisible heritage. Traditional knowledge is part of the indigenous heritage which cannot be divided into its component parts. Protection of this heritage cannot be achieved by separating out aspects or elements such as songs or science.

Rights. Heritage in turn is linked to territorial and resource rights, which are essentially human rights, not property rights, in terms of Western legal systems (both concepts are really foreign to indigenous customary law). Both TK and biodiversity are best defended by asserting the right to self-determination, land and culture.

IPRs and TK incompatible. IPRs are private monopoly rights and therefore incompatible with the protection of TK. TK is held as part of a community heritage passed down from generation to generation, and not allowed either to be privatised or to slip into the *"public domain"* (a concept, and current legal reality, that indigenous peoples strongly contest).

Customary law. Any legitimate work on protection of TK should start from an indigenous framework grounded in customary law. If there is a need for *sui generis* legislation, this should be its basis, not IPRs

The overall conclusion is that the IPR system is the problem – and that it is dangerous and wrong to dress the problem as the solution. If WIPO wants to do something useful, it should concentrate on preventing the IPR system from trampling on indigenous peoples' rights in the first place.

What future for the IGC?

The IGC must now extract the obvious conclusions from the huge body of analysis it has produced. Governments should not allow WIPO to continue to bury the issues in overly detailed documents, but demand the key findings up front – even if these are uncomfortable to some member states or to WIPO itself. On the basis of the work done so far, including the strong messages heard from indigenous peoples, at least the following conclusions can be drawn.

Acknowledge the irrelevance of IPRs

It clearly follows from the analysis already done by the IGC that protection of TK as such cannot be achieved through intellectual property systems. This goes for existing IPR systems as well as for any *sui generis* IPRs that could be created. By their very nature, IPRs are only useful for protecting private property, not heritage. To be protected as intellectual property, a piece of TK must first be made into a commodity, something which can be bought and sold, which heritage as such can never be. The fact that IPRs are already used in this way, not only by external actors but also by members of indigenous communities themselves, is not proof that this is a way to protect TK.

Bury the idea of sui generis IPRs for TK

As a consequence, the idea of creating an additional IPR system specifically for TK should be buried for good. No matter how *sui generis,* this would still be an IPR system and for this reason unfit to protect TK as such. Instead, it would most certainly accelerate the commodification, disintegration and destruction of TK.

Focus on damage control

The IGC should instead focus on stopping the damage caused by existing IPR systems. The main reason that the Committee was originally created was to address the increasing use of IPRs for biopiracy and for appropriation of TK, and it should now return to this agenda. In particular, it should review current national IPR systems and international IPR treaties and identify what changes to IPR law and practice are necessary to

eliminate these problems. It should also address the repatriation of already appropriated resources, and consider how IPR systems could be amended to stop interfering with customary law systems and farmers' inherent rights.

Leave the broader agenda to more suitable fora

The broader agenda of protection for indigenous rights over all aspects of their heritage, including traditional knowledge and genetic resources, falls entirely outside WIPO's mandate and competence. But it urgently needs to be addressed. The IGC should explicitly recognise this and issue a call for more suitable fora within the UN system to take over. Some indigenous groups feel that the UN's Permanent Forum on Indigenous Issues should take the lead to convene all relevant UN bodies to produce one coherent set of rules on heritage rights. What is clear is that protection of TK is a cross-cutting issue which cannot be addressed by environment, trade, agriculture or IPR bodies alone.

Fighting in the trenches comes first

As usual, it is a mistake to believe that the real fight takes place in the air conditioned halls of Geneva or other government meeting spots. In order to protect traditional knowledge the first requirement is that communities have the right and the power to make the crucial decisions over their livelihood resources and management systems. This holds true whether we speak of pe asant farmers, other rural communities, or indigenous peoples. Rights to livelihood systems have to be secured and constantly defended in the local context.

But while international agreements will never in and of themselves solve problems for communities, they can be either a help or a hindrance. They can put some limits to greed and economic exploitation, or they can promote them. They can create some public pressure on governments, or they can reduce it. Which way they go depends, again, mostly on what happens on local and national levels. If governments feel that they are being watched, if there are visible popular movements which formulate clear political demands regarding international negotiations so such as those taking place at WIPO, they will find it more difficult to go in the wrong direction. This is why farmers' groups and indigenous peoples must carefully consider whether or not to get involved with processes like the IGC and push for conclusions that recognise their fundamental livelihood and heritage rights. There are risks either way. Good ideas can turn bad in the wrong hands, as has happened with the CBD. But a complete hands-off approach means that bad ideas can go really far. Either way, the most important thing is that farmers' groups and indigenous peoples succeed in asserting their approaches and systems that protect TK and genetic resources where it counts most: at the grassroots level.

Further reading

+ A good general introduction to the issues about protection of TK was written by Carlos Correa for the **Quaker UN Office** in Geneva in 2001. It also gives an overview of the different international organisations which had been involved prior to WIPO's IGC. *Traditional Knowledge and Intellectual Property. Issues and options surrounding the protection of traditional knowledge* at www.geneva.quno.info/pdf/tkmono1.pdf
+ **WIPO's IGC** has produced a wealth of documents, but they suffer from a bias and many are heavy reading. All are accessible on the web from www.wipo.int/tk and most come in all six UN languages.
  - A good starting point is WIPO's own evaluation of the IGC process so far, contained in the *Overview of activities and outcomes of the intergovernmental committee* (WIPO/GRTKF/IC/5/12).
  - The main summary document about TK and IPRs is the *Composite study on the protection of traditional knowledge* (WIPO/GRTKF/IC/5/8).
  - The main document on genetic resources is the *Technical study on disclosure requirements related to genetic resources and traditional knowledge* (WIPO/GRTKF/IC/5/10). This will be one of the main inputs when the CBD starts to negotiate more specific rules on access and benefit-sharing in 2004.
+ **Indigenous peoples' organisations** have published a few statements in English on the WIPO process:
  - Call of the Earth, a new indigenous network dealing specifically with TK and IPRs, has posted a copy of the joint statement of the indigenous participants at the last WIPO IGC in July 2003. See www.earthcall.org
  - A statement on TK and IPRs made by a representative of the Tebtebba Foundation at the UN Working Group on Indigenous Peoples in July 2003 is available at www.tebtebba.org/tebtebba_files/ipr/wgipagenda5.rtf
+ The **UN Conference on Trade and Development,** organised a seminal conference on protection of TK in 2000 and has a webpage with a number of documents from that process. See http://r0.unctad.org/trade_env/traditionalknowledge.htm
+ Geneva's **International Centre on Trade and Sustainable Development** (ICTSD) runs a resource page with regularly updated listings of materials on TK and IPRs at www.iprsonline.org/resources/tk.htm
+ **ICTSD** has produced a document exploring ways of taking the TK discussion away from IPRs to look at its protection in the wider sense: www.ictsd.org/dlogue/2003-07-11/11-07-03-desc.htm
+ The **South Centre** and the **Centre for International Environmental Law** have just produced *A Review of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore at WIPO* at www.south.centre.org

Sprouting Up...

Contamination by GM maize found in nine states in Mexico

SYLVIA RIBEIRO

Studies undertaken by a number of NGOs in Mexico have found widespread genetic contamination of maize fields with genetically modified (GM) material in nine states: Chihuahua, Morelos, Durango, Mexico State, Puebla, Oaxaca, San Luis Potosí, Tlaxcala and Veracruz. The analysis were carried on 2,000 plants (in 411 groups of samples), from 138 farming and indigenous communities. In 33 communities (24% of total samples), the tests found some presence of transgenes in native maize. The results show percentages of contamination that run from 1.5% to 33.3%, in a second round of analysis.

In the nine states that tested positive, genetic contamination was found from the Bt-Cry9c protein, which implicates the Starlink maize variety. This is patented by Aventis (Bayer), but is prohibited for human consumption in the US and was taken off the market there. In these same states, evidence of contamination with Bt maize and herbicide-resistant maize was also found. The analyses were carried out with commercial detection kits. The first round of tests were done by the members of the communities and organisations themselves, with the technical assistance and support of biologists from the National Autonomous University of Mexico (UNAM). The second round of tests was carried out by a company that distributes the kits in Mexico.

"Our analyses confirm the findings of contamination of native maize that were released to the public previously by researchers Chapela and Quist of the University of California at Berkeley, and by the National Institute of Ecology (INE) and the National Council on Biodiversity (CONABIO). Now we see that the contamination has spread at least to the South, Central and Northern regions of the country," said Ana de Ita of the Center for Studies on Rural Change in Mexico (CECCAM).

Pedro, an indigenous community member in Chihuahua, echoed a view expressed by many of the representatives of indigenous and farming communities affected, stating that the contamination of their maize is an attack on their most profound cultural roots and a threat to their basic source of sustenance and autonomy. *"Our seeds, our maize, is the basis of the food sovereignty of our communities. It's much more than a food, it's part of what we consider sacred, of our history, our present and future."* Baldemar Mendoza, an indigenous farmer from Oaxaca, reported at the news conference that deformed plants with GM traits have been found in Oaxaca and other states. *"We have seen many deformities in maize, but never like this. One deformed plant in Oaxaca that we saved tested positive for three different transgenes. The old people of the communities say they have never seen these kinds of deformities."*

"Contamination isn't just one more problem", said Alvaro Salgado of the Center for Indigenous Missions, (CENAMI). *"It's an aggression against Mexico's identity and its original inhabitants. That is why we have decided to take matters into our own hands. We won't let the same technicians and institutions and companies that gave us chemicals and hybrid seeds come along now to tell us not to worry and that the solution is their seeds. We want our seeds and we are going to defend them and rescue them."*

On November 20, an open letter was sent to the Mexican government authorities and intergovernmental bodies signed by 302 organisations from 56 countries, demanding action to maintain the moratorium against the planting of transgenic maize in Mexico, stop importing transgenic or non-segregated maize — which is likely to be the main source of contamination in Mexico— and conduct urgent studies to determine the extent of the contamination. The letter also calls upon the Mexican Congress to reject the biosafety bill now under consideration because it is deeply flawed.

Organisations from five continents around the world are also asking the United Nations Food and Agriculture Organisation, the Convention on Biological Diversity, the International Maize and Wheat Improvement Center, the Consultative Group on International Agricultural Research, and the Cartagena Protocol on Biosafety to adopt these issues on their agendas and take actions to ensure the application of the precautionary principle to prevent further GM contamination of farmers' varieties. They also urge intergovernmental bodies to call for a global moratorium on the release of genetically modified organism in crop centres of origin and diversity, and to insure that the biotechnology industry is prevented from making patent infrigement claims against farmers who are victims of GM contamination.

Take Action!

Readers are invited to join the international protest by demanding action. Go here to send messages directly to the Mexican government and to international bodies: www.etcgroup.org/action3.asp

For more information, contact: Hope Shand, ETC Group, hope@etcgroup.org, +1 919 960 5223, Silvia Ribeiro, ETC Group, silvia@etcgroup.org; Ana de Ita, CECCAM, Centro de Estudios para el Cambio en el Campo Mexicano, ceccam@laneta.apc.org.

Watch this space!

Syvia Ribeiro will be writing a longer piece on the GM contamination issue in Mexico in the next issue of *Seedling*.

German Velez

You spent six years living with communites in the Amazon. How did that affect you?

The experience was interesting because it was a chance to re-educate myself on my concepts of agriculture. You leave the university with all the prejudices and the weight of formal education, thinking only about conventional agriculture, and then you arrive at a place where you have to unlearn what you had studied. You have to relearn how to look at the world, the environment, the means of production and culture as an integrated unit, with all the complexity of this indigenous world. That gave me a new outlook on learning about agriculture and helped me become more sensitive to indigenous and peasant peoples who farm differently from conventional agriculture.

You have done a lot collecting and protecting local seeds, but have also been active in the arena of collective rights. What has your role there been?

We have hosted many activities to sensitise local groups about the problems of privatising life, and on mechanisms to defend and control local resources. With some groups we have worked on designing strategies to control their territories, because to defend their biodiversity, they must first be able to defend their territory. These strategies, which involve both formal legal tools and informal ones, have helped to establish some rules and guidelines for local organisations to use when outside agents approach them. Some groups have advanced more than others in establishing these collective rights, and pass on their experience to others through workshops, seminars and gatherings.

When communities discuss access to biodiversity, do they ever talk about a moratorium on bioprospecting or collecting genetic resources?

A few years ago this was a frequently discussed issue. The person who most actively promoted the moratorium proposal was former Senator Lorenzo Muelas, with whom we worked closely while he was in Congress (1995-1998). Many organisations at the time gave strong support to this position, particularly indigenous organisations that decided to close some doors to bioprospecting – some partially and others entirely. Some organisations have held on to this principle of not allowing outside researchers into their territories until there are clearer conditions about what can be done and how their rights can be protected. These principles included rights to biodiversity, above and beyond simply preventing biopiracy. But this proposal has been on a back burner in recent years, for several reasons. First because very few people are active in this kind of work in Colombia today. At the same time, the war has become a priority over all other discussions. Indigenous groups are more concerned with displacement and survival in the midst of the conflict. Communities have also lowered their expectations of national or international legal mechanisms, since we all know that it is nearly impossible now to change or bring progress in the recognition of commmunity rights in today's political climate.

"Between 1988 and 1994 I lived with Amazon communities researching agroforestry systems on indigenous *chacras* (peasant farming plots). This research on agricultural diversity and the cultural complexities of farming in the Amazon provided my first close contact with indigenous groups and local communities.

When I came back to Bogotá, I joined the *Semillas* (Seeds) group of the Swissaid Foundation, and began working to support and advise indigenous, Afro-Colombian and peasant organisations in several regions of the country on issues related to the recovery, conservation and management of diversity and of traditional knowledge. The work began by providing support for the recovery and management of local seeds. In the mid 1990s, local groups began urging us to go beyond the recovery of local seeds to cover the political dimension of the problems. So now we help organisations to develop strategies and public policies for the local defence and control over their resources."

Germán Velez can be contacted at: semil@attglobal.net

A lot of work has been done in Colombia on developing sui generis rights and access legislation, but you and others seem to be moving away from this work. Why is that?

The Colombian context has been very incisive. The country is in the midst of conflict and also in the midst of the agricultural crisis. What has happened to Colombian agriculture has been dramatic. In ten years we have moved from self-sufficiency in food to being net food importers. Today we import 8 million tons of food per year, of which 2 million tons are maize, accounting for 75% of national consumption. We also import 85% of the soybeans we consume. These two crops are particularly significant because most of these would be transgenic, but we also import potatoes, rice, manioc and other food staples that Colombia used to produce and even export.

Local communities are very strong in their capacity to resist attacks – even under such extreme conditions – and all kinds of local initiatives to manage biodiversity from an agro-ecologicalapproach are springing up in order to overcome the attacks. Communities realise more clearly how the model that has been promoted and imposed upon them has utterly failed. The only alternative they see is to pursue organic agriculture, rather than sit back and wait for initiatives from the government.

Colombia's indigenous peoples' - like the Uwa whose leader Roberto Perez is depicted here fighting Occidental Oil - face many difficult challenges, from war to exploitation by transnational corporations.

Despite the conflict tearing apart organisations working at all levels, people are holding more and more meetings, workshops and gatherings. The gatherings on biodiversity are not simply for talking about the beauty of the seeds and exchanging them, but also to take stock of problems related to biodiversity in public policies, like the Free Trade Agreement of the Americas and transgenic crops. Every day people are creating new local and regional networks and consolidating national dynamics while looking at how to fit into international dynamics. For example, at that most recent meeting we were working out how to join Via Campesina's Seed Campaign and join in the globalisation of struggles for the political defence of biodiversity. People are starting to take food sovereignty into their own hands as the only possible solution.

The same is happening all over Latin America, but Colombia is in a special situation. What role does the war play, and what impact does it have on communities?

One of the first impacts of the war is that it breaks down all the social fabric, particularly in the countryside, which is where it is happening and where the most suffering happens. This means that indigenous groups, peasant groups and black communities have been the most affected by forced displacements that oblige them to leave their territories. In the past ten years, nearly three million people have been displaced from local territories, and the most hard-hit have been the peasant and indigenous communities. This has a major impact too on food security, with the loss of biodiversity.

When a community or a family is displaced, the first thing they lose is their local resources, particularly their seeds and their animals. This is the way that many local varieties and breeds disappear. To make matters worse, these resources have often already been under siege from the Green Revolution and other global and national farm policies. Many people cannot return to their territories, and the loss of their varieties has a strong impact on production systems, traditional knowledge and all the biodiversity.

Have you worked with displaced communities?

We have worked with a few who have been able to return to their lands. We have had some very interesting experiences with indigenous groups who were totally displaced and who recovered their local seeds after nearly a year away from their territories. But only in a few cases has this been possible.

There are many cases around the country where displaced populations simply end up living in extreme poverty in the cities, unable to return to their territories. Many are refugees from areas where there are armed groups and mega-projects underway. The populations displaced by the conflict are growing in number in regions where there are economic interests mobilised around mining projects, hydroelectric dams and highway

construction, as well as bioprospecting projects in strategic ecosystems with high levels of biodiversity.

All of this revolves around the war context, which also involves drug trafficking and local fights for territorial control by different armed groups who sandwich the residents between them, stifling any chance for organising or consolidating local processes around their own production systems. Some groups return and work hard to recover their production systems which were damaged as a result of the conflict, only to lose all their work and be displaced once again because the conflict continues. Long-term stability is desperately needed, but even so many communities have developed their own strategies to move forward and save these alternatives from being lost. We have very valuable experiences with local groups who for ten to fifteen years now have been consolidating their work in the agro-ecological management of biodiversity.

Tell us about "Seeds of identity"

"Semillas de identidad" is an initiative of about ten indigenous and peasant organisations in the Caribbean region of Colombia, which created the Caribbean Agroecology Network. They are working on issues related to the defence and recovery of their maize-based culture, which is very strong in the Caribbean region, as well as relating to the political context through their proposals for agro-ecology. This work is all the more important given the new threat of introduction of genetically modified (GM) maize into Colombia. There is a lot of concern in the country because the government's response to the crisis in agriculture is simply to jump off the deep end into GM crops, a policy that fits into all these bilateral agreements and the government's expectations both to join the FTAA and to sign a free-trade agreement with the US.

One of the priorities in these agreements is the large-scale introduction of GM crops. The government has already moved for the massive release of transgenic cotton. Planting has now been authorised throughout most of the country, after an initial release restricted to the Caribbean region.

Now the government is planning GM maize trials. This is critical, because here we're talking about food sovereignty and food security, in addition to the fact that Colombia is one of the countries with the highest diversity of native maize, after Mexico. Colombia's high level of diversity is because it is a point of convergence in the evolution and domestication of maize, with maize from both Meso-America and from South America flowing into a huge maize-biodiversity basin concentrated particularly in the Caribbean region. Indigenous and peasant communities in Colombia's Caribbean region are very worried, because raising maize is central to their culture and they fear we may face a catastrophe similar to what has happened with the contamination of maize in Mexico, its area of origin. These organisations have begun organising into networks involving not only integrated agro-ecology projects, but also to develop defensive strategies around maize in the Caribbean region and to coordinate with other groups in the country.

What strategies have you and other organisations in Colombia used to resist GM crops over the past few years?

Work by civil society organisations has been important because the general population has been left out of the debate and is not aware of these issues. For some years now we have been trying to influence public opinion, particularly raising awareness amongst local groups of farmers. We have worked in *Semillas* to reach various sectors of society such as consumers and academia, to generate more discussion on GM crops.

The mass media is very limited in its coverage of this problem, but events around the release of GM cotton in Colombia have generated significant public debate in the past two years. The issue is breaking out of the small circle, and more people are taking a critical look at how GM cotton's release was authorised, given the absence of biosafety tests and irregularities committed by authorities during the authorisation process through the National Technical Council (CTN). But it is an uphill battle. There is no room for broad, open debate on technical or scientific grounds, to discuss the issues seriously with public participation. Decisions are made unilaterally and top-down by government officials, riding roughshod over all rule-making bodies where public opinion should be able to hold them accountable.

We have the dubious honour of being the first country in the world in which the vice-president of the official biosafety council works for Monsanto. This means that the company that applied for approval of its own products was in a position to grant it. Monsanto was even able to orchestrate the process of legitimising the release of its GM cotton. A few small trials (designed, run and funded by Monsanto) were set up for one growing season. No biosafety studies were done on the impact the GM cotton on acquired resistance by pests, on soil microorganisms or on the social and economic impacts for cotton growers. Nor was its impact on local biodiversity explored, despite Colombia being

a center of origin for some wild species of cotton. We have a germplasm collection with some 400 accessions (genetically distinct samples) collected in the country. Yet the Ministry of Agriculture denies the existence of native cotton varieties, even though the seed bank belongs to the same Ministry.

Another revealing aspect of how the government has no interest in helping cotton growers is that the Bt cotton to be grown in Colombia does not control the pests we have. The main pest here is the *picudo* (*Anthonomus grandis*, the boll weevil), whose control accounts for 70% of the insecticides used on cotton. Bt cotton targets the tobacco budworm, cotton bollworm and pink bollworm, but is ineffective against the *picudo*. So we are introducing a very costly technology that is irrelevant to the problem. The Bt maize that the government wants to introduce is equally inappropriate, because it targets the European corn borer (*Ostrinia nubilalis*), which is practically non-existent in the tropics. What are we to do with this new maize that is ineffective agains one of our country's most important pests?

Where does the approval process stand now?

Small-scale field trials have been approved in several maize-planting regions of the country: the Caribbean, the Andean region and the eastern plains (*llanos*). The trials are very limited, as was the case with cotton, and again based on the claim Colombia is not a centre of origin for maize. In Colombia we have hundreds of native varieties that could be threatened. But of even greater concern is that we have already been eating (and probably planting) transgenic maize for many years on a large scale, since we import more than two million tons of maize every year.

I suspect that a lot of illegal transgenic maize has been planted by unsuspecting local communities, and native varieties polluted, just as has been happening in Mexico. We have no biosafety regulations to do anything about it. Colombia has nothing but an isolated rule governing the import of transgenic seeds as such; all other transgenic products are simply out of control in the country.

Two years ago we tested soybeans being handed out in food-aid programs all over the Andean Region. We coordinated that activity with several organisations from other countries like Acción Ecológica (Ecuador) and through the Network for a GM-free Latin America. The most dramatic and critical levels of contamination were found right here in Colombia, based on three random simples taken from three warehouses at the Family Welfare Institute, the agency that distributes food to poor children. Some 90% of the soybeans were found to be transgenic – Monsanto's Roundup-Ready soybeans. Despite the public outcry, almost nothing was done about it and Colombia continues to import soybeans with no control, and continues to hand them out, especially to the poorest of the country's children.

The same pattern is being repeated throughout Latin America. Going back to Bt cotton, have you taken any legal action?

Several civil-society organisations filed a class action suit against the Ministry of Agriculture and the Colombian Agricultural Institute (ICA) over the release of GM cotton in Colombia. This suit is still underway, but is unlikely to end up in our favour, because the judge is not interested in the subject and is too close to the government to offer any kind of indpendent judgement.
Another class action suit was filed against the Ministry of the Environment and Monsanto, for the lack of an environmental license granted by the national environmental authority. The decision (in October 2003) went against the government and Monsanto. The Ministry was required to process an environmental license and also to include a process of citizens' participation in the approval of Bt cotton in Colombia. That ruling was appealed and will now go to a higher level to be studied by the Council of State. This is a very complex and difficult body, because it is very closely aligned to government politics. But this is still a very important achievement, because it sets the precedent that legal proceedings can be a useful tool in the fight over GM crops.

This first successful class action suit over GM crops means that the courts are getting involved in decision-making on these issues. This has helped public opinion to begin participating more actively in debates and opens up new pathways for the struggle, as there may now be more convergence with other organisations. We need many broad strategies to overcome GM – civil resistance, capacity building, mobilisation, technical training on issues and political and technical discussions, and also actions like this in the legal sphere. Brazil is a good example here. Legal suits have at least held back industry's offensive there and established limits to slow them – and government – down.

What directions to you see for resistance and for the defence of communities' biodiversity in Latin America?

We are realising more and more that we have to strengthen the initiatives that move from the

[1] www.grain.org/gd

local into the global dimensions. Over the past 15 years there has been a flourishing of activities in biodiversity management, in agro-ecological farming systems, clean agriculture, etc. that show how the model imposed over the past half century has been a miserable failure, especially for small farmers worldwide. Even large-scale farming has failed under this model. The only thing that keeps it going is the huge economic subsidies doled out to northern farmers.

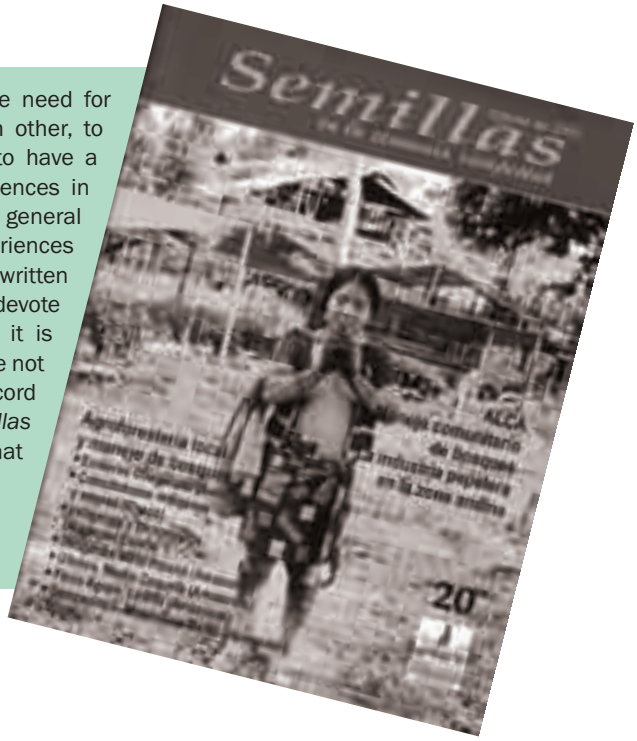
Local alternatives are beginning to come together not only around food sovereignty proposals, but also in political struggles to defend biodiversity, as we have all seen in the Growing Diversity[1] project. That project allowed us to see how indigenous, black and peasant organisations around the world are working towards the same objective, with similar approaches and outlooks and also with their own peculiarities, all of them aimed at consolidating local experience, and united against all aspects of this overwhelming globalisation. This is the light at the end of the tunnel, and these alternatives are gaining strength as they bring together other social movements to work for the autonomy of countries and of the poor, as well as for food sovereignty in cities and the countryside. Urban and rural social movements are coming closer together, focused on these common issues.

So you're still an optimist?

Despite the catastrophe we're suffering in Latin America, all these initiatives – even through they are still very isolated and barely visible – reveal that another world is possible. Consensus has also been growing within the World Social Forum and other initiatives that the only way we can get there is by globalising social struggles. And officials at the WTO are worried, because they'll have to hold their next meeting on the moon to keep the anti-globalisation movement from following them. Although the balance of forces is still very unequal – through this struggle we may be able to bring together all these different initiatives.

Semillas magazine (www.semillas.org.co) grew out of the need for local communities to communicate first of all with each other, to understand the political dimension of the issues, and to have a space where they could express and share their experiences in managing biodiversity. The magazine has two parts, one on general issues of context and politics, and the other on local experiences with biodiversity. In the latter part, the priority is for articles written by the local organisations. It is unusual for magazines to devote as much space as that to local experiences. Although it is sometimes difficult to get the local people to write – they are not used to organising their ideas in this way – it helps them record and systematise their knowledge and experiences. *Semillas* gives strength and a framework for local organisations that normally find no room to publicise their work.

Grupo Semillas, Calle 25 C Nº 3-81a, Oficina 301, Bogotá, Colombia : Tel: + 571 341 3153, Fax: +571 380 0030



Information Feudalism: Who Owns the Knowledge Economy?

by Peter Drahos with John Braithwaite

Earthscan, UK, 2002; New Press, New York, 2003, 253 pp.

We need more books like *Information Feudalism*. This important review of the history of intellectual property rights (IPRs) puts into perspective the pressure that we are all being subjected to by the push for stronger and stronger property rights over intangible assets. By *"information feudalism"* the authors refer to a project of visionaries that is currently being contested. This is a project to control the *"knowledge economy"*[1], which is organised into vast fiefs and held up by an unjust property system. While all of us are cast as serfs in this growing net of domination, the book's message is that we can and must fight back.

The main thesis of the book is that IPRs facilitate cartelism[2] and cartelism is bad for society. Examples of what this cartelism amounts to – monopolies, higher prices, rigged trade rules – are plucked mainly from the chemical, pharmaceutical, seed, software and entertainment industries, with an emphasis on the first two. We read unsavoury accounts of how the industrial economy was built around guilds and power-sharing deals between major corporate players. We read stories of price-jacking schemes and product pipelines through tax havens to squeeze enormous profits from drugs. We are reminded of the sheer monopolies companies have been able to exercise on antibiotics, synthetic hormones, quinine – monopolies which the authors blame for countless deaths – and, today, genetically modified seeds. The authors describe an ugly history of maximising profits at the expense of the public interest, and methodically twisting people's minds in the process.

As Drahos and Braithewaite make clear, the hidden (or not so hidden) agenda of the IPR system is controlling markets and restraining competition. Experience bears this out: offer money to those who rely on the IPR system for their return on investment – for example, by subsidising inventors 100% or limiting IPRs to a mere financial payback – and they say no. It is not enough. IPRs are about more than money.

The pro-regulation and anti-competition agenda of the IPR system has now reached such heights that it is threatening basic freedoms (or civil liberties as they are called in some places), such as the right to enjoy, produce and reproduce creative works. This situation is particularly extreme in the information technology sector, with the expansion of the copyright regime through both law and technology: from internal locks (encryption) to prevent the viewing of DVDs from one country to another, to lawsuits against students for participating in peer-to-peer networks over the internet. At the rate we are going, it will soon be a crime to walk down the road singing John Lennon's *"Imagine"* without a license from Capitol Records.

Money is only a surface issue. Deep down, the IPR-clad economy is about controlling people, controlling society. We are all competitors and criminals now. The competition lockout through IPRs used to be more restricted. The targets used to be farmers, for example, who were prime time competitors for the seed industry because thanks to Mother Nature they could replant patented seeds. Other targets were the entrepreneurial companies that could produce generic copies of branded drugs thanks to governments which were careful about using patent laws to public advantage. Now we are all *de facto* blacklisted, because we can read and write and think – and sing. And governments are more and more privy to the lockout process, to the extent that they are doing all they can to facilitate the enforcement of IPRs. IPRs are now even part of George W Bush's *"war on terror"*. He's got US Congress to agree that the lack of strong patent regimes in foreign countries is a subterfuge for criminal syndicates to launder ill-gotten funds (read: misappropriated royalties) to support 'terrorist' groups.[1]

The TRIPS tale

While the cartel picture is well depicted, it is not at all new. What is more interesting in the book is the insider glimpse, based on interviews conducted by the authors in the mid-1990s. Here the authors show how the major players of the knowledge economy – the

Pfizers and IBMs, DuPonts and Intels – manipulated governments to impose their perverse property system on a planetary scale. For this story alone, the book is worth the read.

Drahos and Braithwaite give a detailed account of how essentially American corporations, led by Pfizer, chose to link IPRs to investment and trade policy as a means of securing their market lead in a globalising economy. They convinced the US government through one simple word: piracy. Overnight, somewhere in the early 1980s, piracy – a clever word to describe the lack of protection for US trademarks, copyrights and patents in foreign countries, especially the developing world – was made responsible for the loss of jobs, decline in competitiveness and the growing economic insecurity the US was facing. (This, as mentioned above, was later linked to national security at large.) With huge resources under their wings, they mobilised an intense campaign to convert the world into a captive market for their intellectual property claims. As the authors put it, *"Old protectionism was about keeping your rival's goods out of your domestic market. New protectionism in the knowledge economy was about securing a monopoly privilege in an intangible asset and keeping your rival out of world markets. But that meant persuading your rival to play by rules recognising your 'right' to the asset."* The persuasion game meant making strong IPR regimes a top objective of US foreign policy and trade negotiations. And it worked. Through a series of quick-handed moves, the US corporate giants got the US government, together with Europe and Japan, to slide the Trade Related Intellectual Property Rights Agreement (TRIPS) into the Uruguay Round of the General Agreement on Tariffs and Trade negotiations. They also got the US and Europe to implement a complex strategy of multilateral forum shifting, bilateral carrot-and-stick treaty making, and unilateral trade retaliation to the same end.

The corporations' single goal was worldwide subservience to their property regime governing the main assets of the new economy: intangible information. The long term objective, according to the book, is a set of multilateral rules casting this in stone. The bilateral game, which Drahos and Braithwaite rightly draw attention to, is one tool to reach that goal. In the wake of the collapse of the recent World Trade Organisation (WTO) Ministerial in Cancun, bilaterals are on everyone's minds. The US is proferring new deals left and right, and working to conclude old ones, with the message, 'You protect US corporate interests through IPRs or there is no welcome mat to peddle your wares to the American public.' Enforcement of US IPRs has become central to bilateral trade and investment talks. It was the reason the US recently called off its talks with Taiwan and Pakistan, and it was the condition for launching negotiations with Thailand. These countries depend, to varying degrees, on selling to the US market. Favourable terms of access to that market through bilateral treaties mean a lot to them. But it is all contingent on paying up monopoly rents to the lords of the knowledge market: the mega-corporations financing the US electoral system.

Elephant and rabbit stew

While bilateralism is the name of the game for the moment, as governments try to figure what to do with WTO (including its stalled TRIPS Agreement), it is only part a multi-tiered strategy. Drahos and Braithwaite are smart to point out that over-reliance on bilateral deal-making can be dangerous. It is just not credible for a US president to decline a cosy trade partnership with a specific country because it won't honour Mickey Mouse. *"Bilateralism is like* cooking an *elephant and rabbit stew,"* the authors write. *"However you mix the ingredients, it ends up tasting like elephant."* Some people will tire of eating elephant and rebel.

What is most striking in this account are the contradictions and manipulations through which this game has been won. These contradictions underscore the fragility of this campaign. For example, according to the book, the US double crossed developing countries by convincing Korea, Singapore and Hong Kong to independently jack-up their IPR regimes on the grounds that India and Brazil are not interested in creating an investment climate. But then the US worked India hard, saying it had all to gain from a strong IPR system because of its powerful domestic software, drug and film industries. The point was to divide the South by playing individual

countries against each other. The same goes for patent offices, which the authors interviewed. These guys run the day-to-day IPR business in a setting that hinges on contradictions. To paraphrase Drahos and Braithewaite, when NGOs complain about the patent system commodifying nature, the patent offices retort that patents are not rights to commercialise anything, only to exclude people from doing something. But when others complain about the expansion of the IPR system, the patent offices say that patents are crucial for the commercialisation of new and useful technologies. Or when patent offices need to classify patented genes, the fact that they are 'engineered' and not natural (to enhance the perception that they are inventions, not discoveries) is the key issue. But whether it comes to disclosing (describing) gene inventions, as any patent must do, all of a sudden their 'living' nature becomes the key issue and full disclosure can be shortcut by depositing a sample. And then there are the contradictions that industry has had to rely on. Here, one quote about the corporate campaign to get IPRs into the multilateral trade system will suffice: *"It was important to define TRIPS as a matter of simple justice* [stopping the pirates] *because the fact is it is a matter of complex injustice* [extracting profits from the poor to further enrich the rich]."

This is elephant stew, with a lot of rabbits involved. The IPR system only works the way it does today because of the scale of the massive ideological war that has been waged against us for the past two decades.

Tearing down the castle walls

The authors give two recommendations to NGOs and people's movements. First they suggest we engage with government and industry to rewrite the rules of the IPR system. The reason they suggest this is sensible: because those rules were not democratically written. But whether social groups will want to engage is not at all clear right now. Great disgust is expressed toward the tight web of control that has been set up so far: on farmers, on all of us who use computers, on indigenous peoples' rights, and so on. This atmosphere is not conducive to positive reform.

The authors also suggest that, come what may, there remains a real need to take the upper hand to manage the economy of what they call *"global public goods"*. This is an interesting idea, although the notion of global public goods is by no means clear or consensual. The argument is that despite the current set-up, there are whole sectors left out of the purview, or the complete control, of the feudal barons. Poor people's diseases, small farmers' seeds, traditional knowledge: these can be dealt with by volunteer efforts to do something about them. And those volunteer efforts could be more viable and have greater impact if they involved consortia of community organisations, donors, NGOs, scientists, etc. What they are saying is that the poor need reliable and quality food systems, research and support to meet health needs, and alternative media and communication systems – outside the walls of IPR monopoly controls – nd that there is space for people to contribute to this as part of the fight against this feudal empire.

This is not a bad idea. But we still need to break down the walls of the information fiefdom, not just live part of our lives outside them.

Endnotes

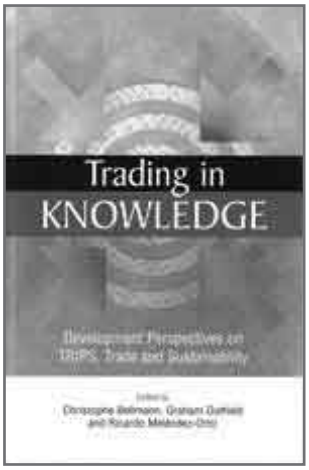
[1] The knowledge economy might be better referred to as an *"information economy"* given our lack of knowledge in many of its corners like genetic engineering.

[2] Cartelism is a centralised system of collective bargaining by a group of large corporations that effectively control marketing, prices and so on.

Price: £35 (hardback), £10.80 (paperback). See next column for ordering details.

Trading in Knowledge: Development Perpsectives on TRIPS, Trade and Sustainability

Edited by Christophe Bellmann, Graham Dutfield and Ricardo Meléndez-Ortiz, Earthscan 2003, 358 pages.



This book, edited by International Centre for Trade and Sustainable Development (ICTSD), pulls together the papers commissioned by ICTSD for a series of dialogues it sponsored in 2001-2002. The dialogues brought TRIPS negotiators from Geneva, Asia, Africa and Latin America to discuss key issues in the intellectual property debate with different *"stakeholders"* in the regions. The issues largely revolve around biodiversity, traditional knowledge, public health, international instruments outside the WTO and general directions of the patent system. The papers contained in the book are also available on the internet: www.ictsd.org/dlogue/index.htm

Price: £70 (hardback), £26.96 (paperback)

Both books are available from Earthscan Publications:
Web: www.earthscan.co.uk
Email: earthinfo@earthscan.co.uk
Fax: +44 20 7278 1142
Tel: +44 20 7278 0433
Mail: Earthscan Publications Ltd, 120 Pentonville Road, London N1 9JN, UK.

The Leech and the Earthworm

A film by Max Pugh and Mac Silver

Produced by Debra Harry

Run Time: 68 mins

IPCB/Yeast Directions, 2003

In the mid-1980s, scientists from a Canadian university took blood samples from more than 800 people of the Nuu-chah-nulth nation of Vancouver Island, Canada. The scientists said the blood samples would help find a cure for arthritis and the Nuu-chah-nulth people were willing to help. But the scientists never returned with their results and a few years later the Nuu-chah-nulth people discovered the blood was in England being used for other experiments, without their knowledge or authorisation.

This unfortunate but not uncommon case of biopiracy is the opening scene in *The Leech and the Earthworm*, a documentary film produced by Debra Harry, Executive Director of the Indigenous Peoples Council on Biocolonialism (IPCB) and one of the world's foremost critical voices on biotechnology. From the Nuu-chah-nulth biopiracy case, the film plunges into complex questions of intellectual property rights and biotechnology, bringing indigenous leaders from the Philippines, North America, Aotearoa (New Zealand) and Lolvatmagemu (Vanuatu) to unpack these difficult concepts and explain what they mean according to the world views of indigenous peoples.

The underlying message is that biotechnology is nothing but an extension of colonialism – a new fundamentalism promising another round of salvation, as it unleashes more domination and destruction. Blunt words are said about *"benefit sharing"* and the perils for indigenous peoples of joining the intellectual property game. Through the experiences of Maoris

struggling to stop research into genetic engineering in Aotearoa, the film sends a powerful message about the need for indigenous peoples to shift the focus of resistance away from reacting to the arguments of the biotech promoters. Instead, they should be reclaiming their own arguments and finding their own ways to restore the health of their communities.

With so much written material available on biotechnology, it is great to have a film that deals with the subject, especially one based on the perspectives of indigenous peoples. The film is an excellent education tool for workshops, classrooms and other activities. But is too bad that the film uses mostly old, post-World War II archive footage to portray those promoting biopatents and genetic engineering; while this helps to underline the continuity with colonialism, it doesn't give the viewer an accurate picture of the sophisticated forces that indigenous people are up against today. And, even though the collage, musical scoring, archive footage and graphics used in the film are well done, it would have been good to devote more time to the stories of the Nuu-chah-nulth people and the resistance to genetic engineering in Aotearoa to give viewers a deeper understanding of how biotechnology and the accompanying legal regimes impact on the lives of indigenous peoples.

Individuals may purchase *The Leech and the Earthworm* (for home use only) on VHS tape for $24.95, plus shipping. The film can be rented for $95 for community educational screenings where no admission is charged. Institutions can purchase the film on VHS tape for $249.00. Note: Please indicate format desired - either NTSC (North and South America) or PAL (Europe and the rest of the world)

For copies of the video, send cheques or money orders to
IPCB, PO Box 72, Nixon, NV 89424, USA.
Tel: + 1 775 574 0248
Fax: +1 775 835 6934

Sprouting Up...

European farmers plan new campaign for farmers' seeds

GRAIN

A new, exciting and long-overdue initiative to help farmers save, use and share their seeds is taking off in Europe. In Paris, France, on 13 November, the Réseau Semences Paysannes of France and Red de Semillas of Spain organised a workshop entitled *"Farmer Seeds: rebuilding autonomy in Europe".* The workshop was part of the seminar *"GMOs, patents and seed monopolies: resistance and proposed alternatives in Europe"* which was part of the European Social Forum.

The main message of the workshop was clear: in the context of growing corporate control over the seed system, relentless pressure on the EU to accept GMOs, and the ongoing disappearance of peasant agriculture, European farmers have to return to farmer seeds. This is the only way that farmers can secure their autonomy and the only way to protect the food system, the environment and rural life from the brutalities of industrial agriculture and corporate agribusiness.

There wasn't time to fully discuss the different ideas for building farmer seed systems that were put on the table but it was important to see that the participants, mostly farmers from France, Italy and Spain, shared a fundamental vision for farmer seeds. All agreed that farmer seeds cannot be commodified and subjected to the criteria and demands of industrial agriculture. They are based on diversity and variability and must be free to evolve according to their local environments and the efforts of farmers. In this vision, there is no room for seed catalogues and monopoly rights that promote uniformity and 'stability'. Indeed, the European seed catalogue was singled out for its central role in the destruction of farmer seeds. So too were GMOs and intellectual property rights, particularly patents. Participants unanimously rejected patents on living organisms and called for the European moratorium on GMOs to be left in place; both of these positions were subsequently taken up by the larger seminar.

In supporting the moratorium and calling for zero tolerance for GMO contamination in seeds, the workshop took a strong position against those seeking to replace the moratorium with rules for co-existence. Accepting co-existence means opening the floodgates to GMOs and spells the end for organic agriculture.

Another important outcome of the workshop was its expression of solidarity with farmers in Eastern Europe and the South. The need for solidarity was driven home by Avram Fitiu of the Romanian organisation Agroecologica, who reminded the room that 7 million small-scale farmers in Poland and Romania would soon be driven off their lands with their country's looming accession to the EU and that their farms were already deeply contaminated by GMOs.

Participants agreed that they must not pursue strategies that undermine the struggles of peasants in Eastern Europe and the South. Without farmers there can be no farmer seeds!

AssociationKopokelli

GRAIN's board helps find direction

In November 2003, GRAIN held its annual board meeting in Barcelona. In addition to the usual responsibilities a board assumes, GRAIN's board has always played an important role in helping us to find our direction and keep our work relevant. Our current board comprises Bob Brac of Association BEDE (France), Brewster Kneen of the *Rams Horn* newsletter (Canada), Antonio Onorati of CROCEVIA (Italy), Silvia Ribeiro of ETC Group (Mexico), Silvia Rodríguez of the National University of Costa Rica, PV Satheesh of the Deccan Development Society (India), Lovemore Simwanda of the Zambian National Farmers' Union (Zimbabwe), and Supa Yaimuang of Alternative Agriculture Network (Thailand).

Board chair: Sylvia Rodriguez

We discussed the ever-changing backdrop of GRAIN's work. The collapse of the World Trade Organisation's (WTO) Ministerial meeting in Cancun dealt another blow to the organisation and was important in terms of southern governments standing up for themselves and rejecting domination by a few, influential northern governments. The post-Cancun playing field opens up some spaces and opportunities, but the US and the rest of its cartel will be quick to change its strategy to meet its goals of control and domination in other ways, so our job will not likely be any easier. Corporations have new, powerful tools like genetic contamination to help achieve the domination they seek.

Southeast Asia representatives Supa and Witoon

We talked about the need to look hard at our successes and failures over the last ten years, and consider carefully how effective we can be at the international level. Some of these fora has been at best ineffectual and in some cases actively counter-productive. For example, the Biodiversity Convention was hailed as a victory by the South and NGOs at the Earth Summit in Rio in 1992, yet in its articulation it has actually facilitated the privatisation of biodiversity.

What does all this mean for GRAIN's rights work in 2004 and beyond? We will continue to monitor the international negotiations, including the World Intellectual Property Organisation, developments at the WTO-TRIPS negotiations, and the various Free Trade Agreements at the international, regional and national levels. Our role here will be to analyse and spell out the implications of these negotiations, with the objective of informing and supporting work on new approaches that better serve people and communities. Specific areas of interest will be access regimes and new moves towards privatising things that have so far been elusive to privatisation (such as the environment and biodiversity) through approaches like 'environmental services'.

Satheesh and Brewster

"Convergence" will be a new, important theme, and GRAIN will be exploring the connections and common ground between groups fighting intellectual property rights in different sectors, such as information technology, seeds and health.We will also be looking to work more closely with social movements, and working on the positive agenda: on-the-ground initiatives and coaltions to strengthen the control of local communities over their livelihoods. All this will require a lot of linking – both conceptually to bring the issues together and with other organisations. We hope, through initiatives like the glossary article in this issue of *Seedling*, to invite *Seedling* readers and others to challenge current thinking and develop new approaches.

GRAIN's board (L to R): Supa, Sylvia Rodriguez, Lovemore, Satheesh, Sylvia Ribeiro, Bob, Brewster, Witoon and Antonio.