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**Sub-Commission on the Promotion and Protection of Human Rights  
Working Group on Indigenous Populations**

**Agenda item 4(b)**

**Mr Chairman,**

Since I nominated you, rather than congratulating you on your election, perhaps I should congratulate myself on my perspicacity in nominating you.

The use of traditional knowledge is clearly a matter of negotiation but on what basis? Is it the case that national authorities can insist on the right of exploitation? If so, all that remains for negotiation is the terms. I would suggest that there is an analogy with land rights.

Generally speaking, under human rights law, a State is free to take land for certain purposes, on condition that it provides compensation. That is not, however, the position in relation to indigenous land. Why is the position different in the case of indigenous rights? It is because, first, a different norm applies in the case of indigenous land and, second, because indigenous rights are supra-constitutional.

If the rights in traditional knowledge are to be treated analogously to land rights, then it is not a question of the State having the right to exploit the knowledge. It is for indigenous populations to determine both *whether* the rights are to be shared and also *how* they are to be shared.

There is, in that regard, a striking contrast in the documents before us. The paper prepared by the Secretariat of the Convention on Biological Diversity and Traditional Knowledge states, in para. 7, that the benefits of traditional knowledge "should be shared equitably with the indigenous communities concerned". That implies that sharing is non-negotiable; the only subject for negotiation is determining what constitutes an equitable benefit for the indigenous community. Article 8j of the Convention, on which the Secretariat relies is, if anything, even worse. It provides for the application of traditional knowledge "with the approval and involvement" of the holders of the knowledge. It is not clear whether that gives them a right of veto. Even more problematic, the entire paragraph is subject to the law of the State in question. There is a word for taking the property of another without consent. It is called theft.

It is little wonder that the statement from the Indigenous World Association and the Indigenous Media Network calls for the right of the indigenous to be the first beneficiaries of their own knowledge and that the paper from the Secretariat of the Permanent Forum states that indigenous people feel that the current approaches do not adequately address the collective rights in indigenous knowledge. The Convention on Biological Diversity and Traditional Knowledge is not consistent with Article Article 29 of the Draft Declaration on the Rights of Indigenous Peoples which provides, "Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property."

There is a need to establish, as a starting point, that indigenous knowledge *belongs* to indigenous people. It is not a matter of their being asked to approve of the plans of others. Any arrangements for the exploitation of indigenous knowledge can only be made with the free, prior and informed consent of the indigenous population in question. They have a right of veto. Without their consent, there can be no exploitation of the knowledge. It is for them, in negotiation, to determine the terms on which it is exploited, with a right of veto. Experience suggests that, when they are treated respectfully, indigenous populations are more than generous. It is only when consent is assumed and their backs are against the wall that indigenous populations may appear bloody-minded.

There is a real risk that indigenous populations may agree to terms that are not in their best interests. Their consent may be free and prior but it will not be informed. The paper from the Indigenous World Association says that legal services should be made available to assist in this regard. There is a precedent that indigenous groups may wish to consider. Disputes in the context of the WTO may pitch a small developing State against a very well resourced developed State. In order to level up the playing field a bit, an NGO has been created that is based here in Geneva. It has first rate lawyers on the books. Their job is to represent those States that cannot afford to pay for top notch legal representation. Perhaps there is a need to create something similar for the vindication of the intellectual property rights of indigenous populations.

Thank you.