

Briefing Memorandum for Participants at "Protecting Traditional Knowledge" Conference,  
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# A Treaty among Indigenous Nations on the Protection of Native Peoples' Cultural Property Rights: An Exercise of Indigenous National Sovereignty and International Relations

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Prepared jointly by: The Center for World Indigenous Studies, Morning Star Institute and the  
Northwest Indian Applied Research Institute.

## ***Abstract***

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

International agreements, such as the General Agreement on Tariffs and Trade and the Convention of biodiversity, developed and ratified by states' governments, define many aspects of a people's culture as the subject of commerce-material or items convertible into commodities and sold or traded. These international legal developments constitute a clear threat to the ability of indigenous nations to protect their cultural heritage. This threat may require the development, negotiation and ratification of a Treaty among themselves to ensure legal, political and economic protections from state authorized, corporate criminal and/or organized religion initiated confiscation or pirating of the cultural property and traditional resources of individual nations.

This idea was recently recognized by a gathering of eminent Native political leaders, scholars and activists convened by the three organizations offering this briefing memorandum. This group recognized that the more than 6000 indigenous nations in the world possess the inherent power to institute and enforce laws among their peoples and between peoples. Further, they urgently comprehended the imminent threats to the social, economic, political and cultural existence of indigenous nations and resolved to propose that Indigenous Nations

develop at the earliest possible time a Treaty on Native Peoples' Cultural Property and Rights.

### ***Introduction***

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The cultural properties of Native Peoples have been under ever increasing danger of theft, appropriation and exploitation. Many of these threats are continued in the agreements and initiatives for economic, social and political globalization developed by states' governments, non-governmental organizations, corporations and religious organizations developed over the last thirty years and ratified as international law in the last twelve years. Agreements among these international players directly and indirectly target indigenous cultures, territories and peoples. Many unique names, designs, symbols, songs, histories and stories are Native Peoples' knowledge of the medicinal and nutritional uses of plants, herbs and other natural substances based on their continuing relationship to the natural world. Private businesses, supported by states' governments around the world, are exploiting and selling such knowledge, usually after securing national and international recognition of their "ownership" rights through copyrights, patents, trademarks and other legal mechanisms.

The problem for Native Peoples is how to protect their cultural properties and traditional resource rights when new legal mechanisms that have been set up by states' governments for global commerce are unknown or inaccessible. One problem may be a lack of funds to employ legal representation in domestic forums or the lack of official standing to assert cultural and traditional resource rights in international bodies created by states' government. Another problem, with which we are most directly concerned, has to do with the lack of legal mechanisms created by Native Peoples themselves to enforce and protect their interests or to advance their interests in international forums.

### ***The need for declarations of Native Peoples' Cultural Property Rights***

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Among Native Peoples, the idea of cultural property includes both items that can be bought, sold and otherwise commercialized and those that cannot be commodified. Native Peoples' cultural property belongs exclusively to the group whether the group is a nation, tribe, clan, society, community or family. Non-Natives have appropriated these items, without the consent of the applicable group, and have commodified them, irrespective of their Native ownership or prohibitions against commodification. International laws and the laws of states' governments have developed in such a way as to recognize the ownership and standing of the appropriators and to ignore the rights of those Native owners of the cultural property. Often, these recognition's turn on the alienation of such rights by Native individuals and the failure to recognize that individuals cannot alienate property that is owned by the group or extinguish the rights of the group as a whole. The terms "cultural property" and "cultural patrimony" have been officially recognized in statutes of the US, primarily in the "Repatriation" laws and

policies, and they refer to cultural items which belong to the group as a whole rather than to an individual and, thus, cannot be alienated by an individual or a part of the group.

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

***In the view of Indian scholars, political leaders and activists who gathered at the Longhouse of the Evergreen State College on January 29, 2000. Indigenous Nations would benefit by formulating their own international law in the form of a Treaty on Native Peoples' Cultural Property Rights.***

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Rights to the cultural properties of Native Peoples must be declared first and foremost within the context of the sovereignty and laws of the respective Indigenous Nation. Cultural properties exist because of their origin and development within unique, distinctive societies. By definition, a cultural property belongs to a distinct group who continues their own culture. It follows that the first and foremost definition of who has what rights to cultural properties belonging to a distinct cultural group are the members of the group acting as a collective. Whether such groups are nations, tribes, villages, bands, societies, clans, communities or families, they are the only ones who can rightly determine who owns or has the use of their own cultural properties. Once such rights of ownership are declared by the appropriate Native Peoples, the only proper response on the part of the rest of the world is to respect and recognize such rights, using their own mechanisms and forums to enforce against any abuse of such rights. Any other response leads to chaos.

International bodies have recognized the right of Native Peoples of this hemisphere to determine for themselves their own social, legal, economic, political and cultural order without external interference. There are no doubt disputes and differences of opinion over their rights of territorial governance and the application of the law of Indigenous Nations to non-citizens and their property. However, there is virtually no dispute over recognizing the rights of Indigenous Nations to self-governance for social and cultural purposes. This is particularly the case in the United States, Canada and Mexico, while elsewhere there are less certain expressions of state recognition. This recognition should

extend to the rights of ownership and control over the cultural properties and traditional resources of indigenous nations.

The law of each Native Nation pertaining to its own cultural property is prior and paramount to the law of the state (s) in which it is located. Thus, international intellectual property laws should possibly apply only to the cultural property of Native Peoples if and when such cultural properties lawfully enter the stream of commerce in accordance with the indigenous national law. Until then, each indigenous nation should be recognized as having exclusive responsibility and power to define rights of ownership to their own cultural properties and traditional resources.

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

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