

THEMATIC REPORT ON BENEFIT SHARING

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Summary information on the process by which this report has been prepared, including information on the types of stakeholders who have been actively involved in its preparation and on material which was used as a basis for the report.

In April to June, 2009 a rapid assessment was conducted to examine the preservation and maintenance of biodiversity-related knowledge, innovations and practices of indigenous and local communities employing traditional lifestyles in Guyana. This report has been prepared by The Consultancy Group who were recruited by the Environmental Protection Agency for the purpose of developing this report. The members were:-

1. Esther M. McIntosh (Team Leader)
2. Rene Edwards (Project Manager)
3. Alana Lancaster (Legal Specialist and lead for the thematic report)
4. Chris Chin (Environmental Expert)

The team undertook consultation with a wide range of stakeholders including government ministries, private sectors, civil societies, non-governmental organizations (NGOs) and Community-based organizations (CBOs) (and academic institutions. Before submission of the report to the Environmental Protection Agency, a national stakeholders' workshop was held to discuss it and all comments from the workshop were incorporated in the report. The type of the stakeholders consulted include;

- academic and research institutions
- government ministries and institutions
- non government organisations (NGOs)
- private sectors
- youth organisations
- village councils
- relevant indigenous group
- Civil societies organizations

The type of materials used in the preparation of the report include:-

- the convention, CBD,
- Guyana's 1st national CBD report
- national policies, legislations, strategies and plans, programme and projects
- laws and legislation
- existing documentation on biodiversity and traditional knowledge

Intellectual property and traditional knowledge related to genetic resources

(a) How to define relevant terms including subject matter of traditional knowledge and scope of existing rights;

Nationally, there is no agreed consensus on the definition of these terms and hence there has been a reliance of standard international/CBD definitions which has proved sufficient. These terms include traditional, indigenous, and customary use. In addition to this the Amerindian Act (2006) has provided some guidance on the national understanding of some key terms.

(b) Whether existing intellectual property rights regimes can be used to protect traditional knowledge;

An analysis of the legal and policy framework yields that there was a dearth of laws apart from outdated copyright legislation dealing with ownership of subject matter, including resources. With respect to indigenous peoples, the main consideration is in the *Amerindian Act, 2006* and references in other acts - primarily the *Forest Bill (2008)*, *Mining Act (1989)* and the *Mining Regulations (2005)* that deal with restricting their access to State resources.

However, with the passage of the *Amerindian Act, 2006* and the publishing of the *National Policy on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2007)*, *Guyana Protected Areas Legislation : Legal, Institutional and Management Issues - Analysis and Recommendations (2007)* and the *Report on Consultations for the drafting of the Proposed Protected Areas Legislation (2008)* it can be said that Guyana is moving toward protected area legislation (there is a draft Protected Area bill currently before the National Cabinet), bio-prospecting, and securing greater rights for the Amerindian peoples in Guyana.

(c) Options for the development of sui generis protection of traditional knowledge rights.

Concurrent to the legal regime to protect TK, consideration should be given to *sui generis* systems effectively situated within broader policy and the legal environment. However the *sui generis* system established should not have to meet too many objectives for it can be too unwieldy and while these systems may appear to be comprehensive and holistic; one issue is compatibility between TRIPS and the provisions of the CBD.

(d) The relationship between customary laws governing custodianship, use and transmission of traditional knowledge, on the one hand, and the formal intellectual property system, on the other;

In Guyana today, the law acknowledges the existence of Amerindian communities and provides titles for their habitat on reservations. The Amerindian Act 2006 provides for local self rule and local decision making; such as legal powers to manage and conserve their lands, create conservation areas without the State as well as the power of enforcement. For example Article 3 of the

Amerindian Act, 2006 makes provision for the establishment of Amerindian districts or villages, and section 5 restricts the entry of non Amerindians into these areas. Both custom and convention are potential sources of law, and although they are legally distinct concepts, they both arise out of the social *mores* and practices of a people. They both depend on an **additional** process before they can be appropriately viewed as legal sources.

The missing link is the judicial process, since the courts must declare customs and convention as law and not mere social practice. As such, custom and convention cannot be considered as entirely independent sources of law. Where common law exists, then custom is in abeyance, since the common law is the law that applies in Guyana. However, custom is potentially of particular importance in the areas of land law and property law. Custom has two (2) fundamental characteristics: (1) it must be an exception to the common law, and (2) it must be confined to a particular locality, such as a town, district or county. Given these two characteristics, local custom is not relied upon often. Additionally, unlike the rules of common law, customary rules of law are not judicially noticed until settled by judicial decision, usually by satisfying certain tests - (1) antiquity, (2) continuance, (3) peaceable enjoyment (4) mandatory, (5) certainty and clarity, (6) consistency, and (7) reasonableness. With these demanding requirements, claims to local custom are quite rare. In colonies, the date of antiquity is considered to be the date of conquest, cession or colonization. Belle-Antoine (1999) acknowledges that the basis for elevating custom and traditional practice is important to Amerindians to substantiate claims. However, because of historical prejudice against Amerindians, and the lack of adequate historical verification, and the possibility of incompatibility with English common law make the recognition of custom an exceedingly difficult exercise. Early case law recorded conflict between Amerindian custom and the common law: *The Fiscal v Billy William*,¹ a judgment from the Court of Criminal Justice of Demerara and Essequibo, where the court rejected the view that Amerindians were a free nation existing beyond the jurisdiction of English courts, and *R v William*, where it was noted: "although dwelling among us ... the [the Amerindians] are still essentially a distinct people governed by their own customs and petty chiefs".² While these cases represent of judicial recognition of Amerindian custom, such recognition was short lived, since after emancipation, as a matter of policy, the laws of the State were applied equally to all persons and any special acknowledgement of Amerindian custom was forgotten.

Today, it is perhaps more accurate to say that, rather than the law attempting to assimilate Amerindians fully, or, on the other hand acknowledge their customs, it adopts a detached stance. Although there is a *de jure* jurisdiction over Amerindians, accounts of oral history demonstrate that the law will not often intervene. Shahabudeen writes for example: "[s]o the existence of the jurisdiction did not itself settle the difficult and sometimes delicate question of its exercise."³ The result is that Amerindians in Guyana have a certain amount of leeway under the law, maybe simply because of geographic circumstance, since they are found in the hinterland of the country.

In concluding, it is worthy of note that in May 1998, the Amerindian peoples of the Caribbean region, particularly Dominica and Guyana, signed an important

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Mohammed Shahabudeen. *The Legal System of Guyana* (Georgetown : Guyana Printers, 1973), 226

treaty in Barbados - the *Ichirouganaim (Barbados) Treaty, 1998*. The treaty's main objective was for self-governance by the year 2005, but to date there has been little progress in this regard. In the circumstances, the most effective route toward acknowledging customary rights may be to ascertain them, and incorporate them as best a way as possible using legislative and policy devices.

(e) **Means by which holders of traditional knowledge, including indigenous peoples, may test means of protection of traditional knowledge based on existing intellectual property rights, *sui generis* possibilities, and customary laws;**

Appropriate mechanisms shall be set in place/ devised under national laws/ intellectual property laws to cater for their registration, documentation, certification marks, trade marks that can provide certainty as to their authenticity and as such ensure their protection and sustainable use of biodiversity resources.

(f) **How to ensure that granting intellectual property rights does not preclude continued customary use of genetic resources and related knowledge;**

Traditional knowledge by its very nature is often in the public domain, and as such, there could be many claimants to the ownership of a particular TK. Further, as these TK have generally evolved out of different uses of the biological resources, the same may be held by communities of different countries in the same eco-region. For example Latin American countries falling in the same eco-region share a lot of biodiversity, and consequently a lot of traditional knowledge as well. Once the money starts flowing sometimes substantial out of the benefit sharing arrangement, such problems will crop up and would need immediate solutions For example, curare⁴ which used historically as a paralyzing poison by South American indigenous people, was also in common usage in Guyana as a anaesthetic and as an arrow poison. The word curare is derived from *woorari*, a native South American word meaning poison,⁵ and while in 1596 Sir Walter Raleigh mentioned the arrow poison in his book *Discovery of the Large, Rich, and Beautiful Empire of Guiana*⁶ some authors have posited that it is possible that the poison he described was not curare at all.⁷ Subsequent accounts of its use in 1780 Abbe Felix Fontana,⁸ and in 1800, when the first western account of how the toxin was prepared from plants by Orinoco River natives surfaced⁹, have served to prove that the poison was used generally on the continent and not in one geographic location. Thus the substance is often thought as originating from South America, and attributing specific traditional ownership to it could be a challenging issue. Additionally, it must be remembered that some of the tribes

4 There are three (3) main types of curare : (1) **tubocurare** (also known as tube or bamboo curare, because of its packing into hollow bamboo tubes; main toxin is D-tubocurarine). It is a mono-quaternary **alkaloid**, an **isoquinoline** derivative, (2) **calebas curare** (also called "gourd curare" by older British classifications, being packed into hollow gourds; main toxins are **alloferine** and **toxiferine**), and (3) **pot curare** (packed in **terra cotta** pots; main toxins are **protocurarine**, **protocurine**, and **protocuridine**). Of these three types, some formulas belonging to the calebas curare are the most toxic, relative to their **LD₅₀** values.

⁵ Foldes, F.F. "Anesthesia Before and After Curare", 1993, 18(5) *Anaesthesiol Reanim*, 128-31

⁶ now Guyana

⁷ J. A. Carman (1968) 23 *Anaesthesia*, 706.

⁸ K. Lee Lerner and Brenda Wilmoth Lerner (eds.) *The Gale Encyclopedia of Science*, 3rd Edition. (: Gale Cengage, 2003)

⁹ Humboldt, Alexander von. *Personal Narrative of Travels to the Equinoctial Regions of America, During the Year 1799-1804 — Volume 2* (: BiblioBazaar, 2006)

in Guyana are part of larger populations of their parent or sister tribes in other South American countries

While most of the discourse on property rights is focused on copyright and patent law in particular (primarily because of the role patent law plays in the relationship between indigenous peoples and bio-prospecting), the role of trademarks has not featured as prominently. While trademark law has been used to both protect and undermine indigenous people's claims to protection for their traditional knowledge and cultural property, in some circumstances existing trademark regimes may be a way to protect their cultural icons, signs and symbols¹⁰ Given the movement of many Amerindian villages into commercial ventures, where they use traditional emblems to distinguish their products, this should be an area of consideration under the TK regime.

Intellectual property rights and access and benefit-sharing agreements

(g) Ways to regulate the use of resources in order to take into account ethical concerns;

Because the gains of benefit sharing would also be impaired or unjustly distributed if there are huge differences in the access fee or benefit sharing formulae in the legislation of countries possessing a particular plant or species. In formulating their ABS arrangements under legislation, Guyana should seek to liaise with both the Caribbean as well as countries in the Amazonian eco-region. This would be in an effort to harmonise the ABS regime with countries in similar eco-regions, and the mechanism for achieving this would be thru the Revised Treaty of Chaguaramas and the Amazon Cooperation Treaty (ATC) respectively.

(h) Ways to ensure the continued customary use of genetic resources and related knowledge;

Given the onerous requirements and unlikely recognition of customary rights at common law, in drafting a TK legislation and framework policy, policymakers should as far as applicable incorporate customary practices into legislation so they can be duly recognised and protected.

(i) How to make provision for the exploitation and use of intellectual property rights to include joint research, obligation to work any right on inventions obtained or provide licenses;

¹⁰ The TRIPS agreement, art 15, uses "sign" as the term that catches all potential trademark subject matter including words

By inclusion of provisions in national legislation that allow for joint research and sharing of benefits and the widening of the mandate of the National Biodiversity Committee (NBC) under the national legislation as an advisory body to oversee the implementation of the legislation.

The widened mandate of the National Biodiversity Committee as the advisory body will have the responsibility to advise on the modalities, terms and conditions for joint exploitation and use of IPRs. There shall also be established for the purpose of the "sui generis" an Arbitration Tribunal.

In addition, there is a Policy on Access to Genetic Resources and Benefit Sharing (ABS) which has been approved by the National Cabinet and ABS regulations that are currently being drafted to be passed by the national legislative body. Recognising that the ABS Sub-committee of the NBC is the national body for making recommendations on ABS to the EPA. The NBC will play a key role in matters relating to ABS.

(j) How to take into account the possibility of joint ownership of intellectual property rights.

In the same line as proposed for (i), a national authority shall be established under the national legislation which shall devise and impose terms and conditions to secure joint ownership of IPR and sharing of benefits. These may include

- Granting of full ownership or joint ownership of intellectual property rights to the established national authority or where benefit claimers are identified;
- Mechanism to ensure access to the genetic resources;
- Terms and conditions for technology transfer;
- Securing involvement of research institutions (both parties), local people, benefit claimer (if any), in the exploitation and utilisation of genetic resources;
- Modalities concerning payment of monetary benefits and also sharing of non-monetary benefits either to the national authority or other benefit claimers.

**Article 8(j) - Traditional knowledge and related provisions
GURTS (Genetic Use Restriction Technologies)**

k. Has your country created and developed capacity-building programmes to involve and enable smallholder farmers, indigenous and local communities, and other relevant stakeholders to effectively

| participate in decision-making processes related to genetic use restriction technologies? | |
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| a) No | X |
| b) No, but some programmes are under development | |
| c) Yes, some programmes are in place (please provide details below) | |
| d) Yes, comprehensive programmes are in place (please provide details below) | |
| Further comments on capacity-building programmes to involve and enable smallholder farmers, indigenous and local communities and other relevant stakeholders to effectively participate in decision-making processes related to GURTs. | |
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Status and Trends

| I. Has your country supported indigenous and local communities in undertaking field studies to determine the status, trends and threats related to the knowledge, innovations and practices of indigenous and local communities? (decision VII/16) | |
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| a) No | X |
| b) No, but support to relevant studies is being considered | |
| c) Yes (please provide information on the studies undertaken) | |
| Further information on the studies undertaken to determine the status, trends and threats related to the knowledge, innovations and practices of indigenous and local communities, and priority actions identified. | |
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Akwé:Kon Guidelines

| m. Has your country initiated a legal and institutional review of matters related to cultural, environmental and social impact assessment, with a view to incorporating the Akwé:Kon Guidelines into national legislation, policies, and procedures? | |
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| a) No | X |
| b) No, but review is under way | |
| c) Yes, a review undertaken (please provide details on the review) | |
| Further information on the review. | |
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| n. Has your country used the Akwé:Kon Guidelines in any project proposed to take place on sacred sites and/or land and waters traditionally occupied by indigenous and local communities? (decision VII/16) | |
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| a) No | X |
| b) No, but a review of the Akwé: Kon guidelines is under way | |
| c) Yes, to some extent (please provide details below) | |

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| d) Yes, to a significant extent (please provide details below) | |
| Further information on the projects where the Akwé:Kon Guidelines are applied. | |
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Capacity Building and Participation of Indigenous and Local Communities

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| o. Has your country undertaken any measures to enhance and strengthen the capacity of indigenous and local communities to be effectively involved in decision-making related to the use of their traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biodiversity? (decision V/16) | |
| a) No | X |
| b) No, but some programmes being developed | |
| c) Yes, some measures taken (please provide details below) | |
| d) Yes, comprehensive measures taken (please provide details below) | |
| Further information on the measures to enhance and strengthen the capacity of indigenous and local communities. | |
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| p. Has your country developed appropriate mechanisms, guidelines, legislation or other initiatives to foster and promote the effective participation of indigenous and local communities in decision making, policy planning and development and implementation of the conservation and sustainable use of biodiversity at international, regional, sub regional, national and local levels? (decision V/16) | |
| a) No | X |
| b) No, but relevant mechanisms, guidelines and legislation are under development | |
| c) Yes, some mechanisms, guidelines and legislation are in place (please provide details below) | |
| Further information on the mechanisms, guidelines and legislation developed. | |
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| q. Has your country developed mechanisms for promoting the full and effective participation of indigenous and local communities with specific provisions for the full, active and effective participation of women in all elements of the programme of work? (decision V/16, annex) | |
| a) No | X |
| b) No, but relevant mechanisms are being developed | |
| c) Yes, mechanisms are in place (please provide details below) | |
| Further comments on the mechanisms for promoting the full and effective participation of women of indigenous and local communities in all elements of the programme of work. | |
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Support to implementation

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| r. Has your country established national, sub regional and/or regional indigenous and local community biodiversity advisory committees? | |
| a) No | X |
| b) No, but relevant work is under way | |
| c) Yes | |

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| s. Has your country assisted indigenous and local community organizations to hold regional meetings to discuss the outcomes of the decisions of the Conference of the Parties and to prepare for meetings under the Convention? | |
| a) No | X |
| b) Yes (please provide details about the outcome of meetings) | |
| Further information on the outcome of regional meetings. | |
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| t. Has your country supported, financially and otherwise, indigenous and local communities in formulating their own community development and biodiversity conservation plans that will enable such communities to adopt a culturally appropriate strategic, integrated and phased approach to their development needs in line with community goals and objectives? | |
| a) No | X |
| b) Yes, to some extent (please provide details below) | |
| c) Yes, to a significant extent (please provide details below) | |
| Further information on the support provided. | |
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Box I.

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| <p>Please elaborate below on the implementation of this article and associated decisions specifically focusing on:</p> <ul style="list-style-type: none">a) outcomes and impacts of actions taken;b) contribution to the achievement of the goals of the Strategic Plan of the Convention;c) contribution to progress towards the 2010 target;d) progress in implementing national biodiversity strategies and action plans;e) contribution to the achievement of the Millennium Development Goals;f) constraints encountered in implementation. |
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CASE STUDIES

Region 2

Mainstay Women Development Group Eco-Tourism Heritage Park: Using Traditional Botanical and Medicinal Knowledge to Preserve the Forest and Improve Livelihoods¹¹

Ten women from the Amerindian community of Mainstay/Wayaka in Region 2 (Pomeroon/Supenaam) have started a project to establish a Heritage Park on 20 acres of community forested land. The aim is to have identifiable varieties and other exotic types of plant species used in traditional and modern medicine at a central location for preservation purposes. The project promotes the understanding of traditional medicine in addition to offering remedies for local populations, and also seeks to improve the environment and biodiversity, livelihood and health of communities through the conservation and sustainable use of natural resources, including medicinal plants and agro-diversity. This project is important to biodiversity management because it uses traditional knowledge about the usefulness of local plants to develop a livelihood activity (eco-tourism). Importantly, the planting and maintenance of traditional medicinal plants promotes in-situ conservation. Moreover, the Heritage Park provides the opportunity for the group to raise awareness about the importance of TK in biodiversity management among the local community and with visitors.

According to Toshao of Mainstay, Ms. Yvonne Pearson, who heads the enterprise, the hope is that, in generating income through hosting eco-tourists, it will benefit the health and well being of both the ecosystems and the livelihood of the local people who depend on them. The Heritage Park consists of a herbal garden, a nature trail, a 580 feet bridge built across a swampy area with wood from the forest and an area with traditional thatch-roofed huts for lunch and relaxation.

Ms. Pearson, in an interview stated that the motivation for establishing the business was out of fear that older generations of Amerindians will die with all known tribal secrets of the cultures and beliefs, leaving no legacy to pass on to the younger generation. She said that the knowledge of community elders has been used to identify some of the plants and insects and the ways that have been used traditionally.

To date, the women have been able to identify numerous varieties of plants which have been tested to ascertain their values. In addition the group is developing a butterfly garden and has conducted research on the various species of butterfly with the help of the University of Guyana. The herbal garden has medicinal plants for treating hypertension, snake bites, for cleaning sores, de-worming, dandruff, and a variety of aphrodisiacs.

The project has been funded by the European Commission and has received technical support from Organisation of American States (OAS) in collaboration with the Inter American Institute for Cooperation on Agriculture (IICA).



¹¹ Information gathered from: www.stabroeknews.com at Mainstay Women Development Group community members

Toshao Pearson explaining a medicinal plant

Region 9

The Bina Hill Institute: Training in Traditional Knowledge Systems, Natural Resource Management and Skills for Employment and Economic Development¹²

The Bina Hill Institute (BHI) located at Annai Central in Region 9 (Upper Takatu/Upper Essequibo), was established in 2001 and works with several partners under the umbrella of the North Rupununi Development Board (NRDDB), to develop training, research and other resources in the North Rupununi, e.g. fisheries surveys for arapaima and aquarium fish used the institute as a base.

There are currently 26 students enrolled at the institute which provides an opportunity for youth from the North and South Rupununi who did not complete secondary school, to further their training and education. The skills taught are meant to build the capacity of the students in areas that can increase their employment marketability and preserve traditional knowledge systems and language.

The BHI offers courses such as Wildlife Management, Forestry, Computer Science, Agriculture and other skills and leadership programmes.

The BHI is in the process of expanding its training in the areas of:

- natural resource management;
- traditional knowledge systems and
- capacity building for occupational and economic development.

The institute has also started a radio station in 2004 called Radio Paiwomak (FM 97.1) which is the first hinterland radio station. The station is located with the Bina Hill Institute and operates under the umbrella of the NRDDB. The station affirms the culture and tradition of the Macushi people by producing and broadcasting programmes highlighting local culture and issues about the environment and biodiversity. Some of these programmes are in the local language (Makushi) and the station serves 9 communities in the area.



Bina Hill Institute – Annai Region 9

¹² Information gathered from: <http://www.iwokrama.org/people/binahill.htm>; a site visit and interviews with members of the NRDDB and community members

South Central & South District Toshias Council & Communities **Article 10 C** of the CBD Project: Documenting Customary Use of Biological Resources within their Traditional Territory in South Rupununi - Guyana¹³

In April 2006 members of the South Central and South District Toshias Council published a study, ***Wa Wiizi Wa Kaduzu: Out Territory Our Custom*** as part of a project on Customary Use of Biological Resources and Related Traditional Practices within the Wapichan Territory in Guyana. This work summaries customary use practices of Wapichan people in South Rupununi in Guyana and explores the opportunities and challenges relating to the effective implementation of article 10(c) of the Convention on Biological Diversity (CBD).

The study was done by a team of eight Wapichan researchers in 16 main villages and other smaller settlements in the South Rupununi District. It highlights the strong attachment that the Wapichan people feel to the area, which makes up their ancestral territory (***Wiizi*** in Wapichan) large seasonally flooded grassland-shrub ecosystem in the western and central parts of the territory and an extensive tropical forest ecosystem in the south and east. The area supports a large variety of fish and other aquatic life, including the endangered giant river otter and the arapaima fish, among others.

The study is divided into the following seven sections:

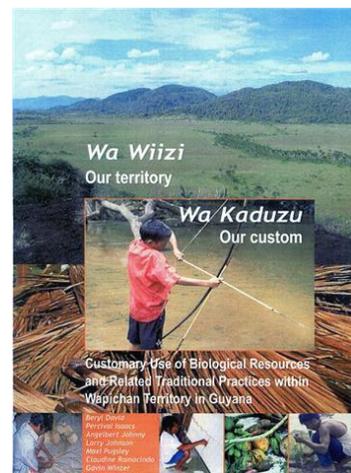
1. The CBD and article 10 (c): context for the study
2. Indigenous people in the South Rupununi
3. Customary use of biological resources
4. Traditional practices
5. Management of territory and sustainable use
6. Legal framework and national policies
7. Conclusion and recommendations

The study documents how the Wapichan communities customarily use the land for farming and use a wide variety of uncultivated plants and animals for food, craft, construction, medicines and cultural activities. Customary use areas span the range of ecosystems and habitats that are found in the South Rupununi: savannah, forest, mountains, swamps, lakes, rivers etc. The work also examines and documents the Wapichan ***Kaduzu*** custom which includes settlement patterns, norms and beliefs, customary law that sanctions overharvesting and wasteful activities. It also looks at traditional practices that promote selective and rotational resource use to enable regrowth and regeneration.

The study concludes that the sustainability of traditional resource use in the South Rupununi stems from the maintenance of the customary land tenure regime, which enables access to extensive areas of lands and diverse resource use, continuity in a dispersed settlement pattern, the extensive system of shifting cultivation and the Wapichan ***kaduzu*** custom of sensible use of land and natural resources.



Part of the Wapichan ***wiizi***



Front cover of the publication

¹³ Information gathered from: the publication, ***Wa Wiizi Wa Kaduzu: Out Territory Our Custom***, a visit to the district and interviews with authors of the document and community members

