

**CONFERENCE OF THE PARTIES TO THE
CONVENTION ON BIOLOGICAL DIVERSITY**

Third meeting,
Buenos Aires, Argentina
4 to 15 November 1996

**INDIGENOUS PEOPLES, INDIGENOUS KNOWLEDGE & INNOVATIONS
AND THE CONVENTION ON BIOLOGICAL DIVERSITY**

1. INTRODUCTION

1.1 This paper has been prepared by The Indigenous Peoples Biodiversity Network for the Third Conference of the Parties. Members of the IPBN have been involved in the CBD process since its inception and have followed the negotiations, ratification, Inter-governmental meetings, and previous COP and SBSTTA meetings. The purpose of this paper is to articulate to the COP III, the views of the Network's members regarding the implications of the Convention of Biological Diversity on the lives and livelihoods of the world's indigenous peoples.¹

¹ The IPBN is an association of indigenous peoples organisations from all regions of the world who work with towards the common goal of nurturing biological diversity at the ecosystem, species and genetic level for the benefit of indigenous communities and humankind as a whole. The IPBN is an active clearing-house mechanism for indigenous peoples seeking to protect their indigenous knowledge and to ensure that indigenous peoples benefit from their bio-cultural innovations. The IPBN is engaged in indigenous knowledge and intellectual property rights work and facilitates members involvement in the design and promotion of relevant international policy measures. The Network's main activities are; advocacy, research, education and networking.

The IPBN Regional Co-ordinators gratefully acknowledge the contribution of the Aotearoa New Zealand delegation, particularly the Ministry of Maori Development, towards the publication and distribution costs of this paper. IPBN Regional Co-ordinators (East Africa, West Africa, South Asia, Southeast Asia, North America, Central America, South America and the Pacific) also acknowledge the assistance of the Mataatua Declaration Assoc., Maori Congress and Maori educationalists at the University of Auckland in compiling this paper.

1.2. The Indigenous Peoples Biodiversity Network (IPBN) commends the Secretariat on its paper (UNEP/CBD/COP/3/19, 18 September 1996). The paper provides a useful summary of previous undertakings and documents considered by the COP and CBD-related agencies and offers a comprehensive account of the range of related activities being carried out in other UN agencies as well as by indigenous peoples themselves.

1.3. We welcome in particular sections 3.4.6 and 3.5 of the Secretariat's paper which outlines the role of UNDP in assisting the IPBN to implement its' Indigenous Knowledge Programme ... (include a footnote with information on the programme)... in cooperation with the International Development Research Centre (IDRC) of Canada. The IPBN gratefully acknowledges the Swiss Development Corporation, the Royal Danish Ministry of Foreign Affairs and the Norwegian Ministry of Foreign Affairs for their generous support to the Indigenous Knowledge Programme. The IPBN considers the Indigenous Knowledge Programme to be one of the most positive and constructive initiatives to address the complexity of issues surrounding indigenous knowledge. The IPBN urges members of the COP to support the Indigenous Knowledge Programme and to provide future financial contributions to ensure its ongoing success.

1.4. Mindful of the discussions on Indigenous Peoples and Traditional Knowledge, Article 8(j), at the recent Second meeting of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) at which many countries expressed their wish to gain a greater understanding of some of the key terms in Article 8(j), this paper will set out the views of the IPBN's members on key terms in the Convention, discuss a framework for interpretation, and offer practical suggestions for States to consider in their national implementation of the Convention.

2. THE CONVENTION'S PROVISIONS ON INDIGENOUS AND LOCAL COMMUNITIES EMBODYING TRADITIONAL LIFESTYLES

2.1 In the Preamble and in Article 8(j), explicit mention is made of indigenous and local communities and traditional knowledge in the coverage of the Convention. The Secretariat's paper to the COP3 recommended in paragraph 103, that other provisions of the Convention should be considered conjointly with Article 8(j). In particular, Articles 10(c), [Sustainable Use] 17.2 [Information Exchange] and 18.4 [Technical & Scientific Cooperaton].

2.2 In the Preamble to the Convention, the Parties recognise:

'The close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.'

2.3. Article 8(j) obliges States to give legal expression to the Convention's objectives as set out in the Preamble:

"Each Contracting Party shall, as far as possible, and as appropriate...."

"(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices."

2.4 The IPBN agrees with the Secretariat's recommendation that States should consider Article 8(j) alongside other relevant provisions of the Convention. The IPBN however suggests that there are a greater number of Articles which should be considered conjointly than those referred to in the Secretariat's paper, including *inter alia*, Articles 3, 4, 9, 12, 15, and 22.

2.5 Indigenous peoples also have a direct interest and expertise in the CBD's deliberations on specific areas of biological diversity, marine and coastal, agricultural, terrestrial as well as on overarching issues such as intellectual property rights, taxonomy, and public education.

2.6 Article 3 (Principle) and Article 4 (Jurisdictional Scope) - In many of the countries where IPBN members live, indigenous peoples are contesting the interpretation by States that they do in fact have exclusive rights to exploit the resources within their national territories. Many indigenous peoples are also seeking legal clarification of the scope of jurisdiction accorded to States under the Treaties that they originally signed with Indigenous peoples.

2.7 The Convention on Biological Diversity recognises the sovereignty of States to exploit their own resources (Article 3), and although the usage of the term 'exploit' within this specific Convention implies 'a resource usage' rather than wilful damage, nevertheless it is a matter of great concern to indigenous peoples that the Convention accords such a *carte blanche* sanction to States to continue to engage in environmentally destructive practices within their national territories. A consistent multigenerational concern expressed by indigenous peoples ever since first contact with colonists, has been the blatant disregard for the well-being of the environment displayed by colonists and their descendants. Mining, clear-cutting of indigenous forests, dumping of toxic and hazardous wastes, introduction of new species which destroy indigenous flora and fauna, industrial effluent discharges, dumping of raw sewerage into waterways, civil and global wars, and nuclear testing are but a few of the issues which have caused massive environmental destruction, as well as the mass extermination of millions of indigenous peoples and the alienation of millions of other indigenous peoples from their original homelands. "WAKE UP WORLD! When the headlines show Indigenous peoples resisting governments' so-called "development", destructions of our Mother Earth, our forests, our oceans, our rivers, this is not some tug-of-war over a real estate deal. It is a matter of life and death, for we are part of the environment. It's all happening far from your eyes, but it's in our backyards, and we are dead serious. For we know that Mother Earth does not belong to us: but we belong to Mother Earth."²

² Daughters of the Pacific, Ed. Zohl de Ishtar, Spinifex Press, 1994)

2.8 The IPBN notes that many of the concerns indigenous peoples have articulated over generations are slowly and gradually being recognised in national and international instruments such as the: Nuclear Non-Proliferation Treaty, UN Convention on the Law of the Sea and Convention on Climate Change. The IPBN points out however that while Article 3 of the Convention reminds Parties of their obligation to "not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction", the same obligation to not cause damage to the national environment is a fundamental premise of many of the Treaties and other Constructive arrangements entered into by States with indigenous peoples. That so many of these Treaties have not been honoured by States resulted in the Economic and Social Council resolution 1989/77 of 24 May 1989 which approved a Study to be conducted on 'Treaties, agreements and other constructive arrangements between States and Indigenous Populations.' Mention of this is made in 3.2.3 of the Secretariat's paper UNEP/CBD/COP/3/19. The IPBN respectfully reminds Parties that while the CBD obliges them to not cause damage to the environment of other States, there is also an obligation on States, through the Treaties and other Constructive arrangements that many States have signed with Indigenous peoples, to not cause damage to the environment at the local and national level.

2.9 The Convention's mission to protect biodiversity and respect, protect and promote knowledge and practices of indigenous and local communities can not be accomplished without the active participation of the holders and original guardians of such knowledge. For indigenous peoples to participate fully and equitably in meeting the goals of the Convention, we must be granted a special status which assures us full access to the decision making apparatus of the CBD.³

3. ARTICLE 8(J): INTERPRETATION AND APPLICATION

3.1 Indigenous and Local Communities Embodying Traditional Lifestyles Inherent in the wording of Article 8(j) and the Preambular statement, is the assumption that there is common understanding of who is meant to be included, and therefore who is meant to be excluded, from the grouping referred to as "*indigenous and local communities embodying traditional lifestyles*". The wording is ambiguous in that it could be read at least two ways dependant on the punctuation in the statement: (i) indigenous peoples and local communities embodying traditional lifestyles or (ii) indigenous communities that embody traditional lifestyles and local communities that embody traditional lifestyles. Some distinguish *indigenous and local communities* as being a different grouping from *indigenous peoples*. In making such a distinction, the implication is that *local communities who embody traditional lifestyles* should enjoy equal status to indigenous peoples. Local communities could in this context refer to any collective of peoples, a suburb in the city, a prison population, or a cult for

³ Indigenous Peoples' Biodiversity Network presentation to the Members of the Bureau of the Subsidiary Body of Scientific and Technical and Technological Advice (SBSSTA), Montreal, May2-3

instance, could each be classified as local communities. *Traditional lifestyle* therefore becomes defined according to who the local community is at any given time. Local communities as a grouping currently do not have any status in international law. Indigenous peoples do.

3.2 The Indigenous Peoples Biodiversity Network is strongly of the view that Article 8(j) and therefore any other associated provisions of the Convention should be interpreted to mean *Indigenous Peoples*. The IPBN's interpretation of the complete phrase therefore is that it refers to: indigenous peoples who live within their traditional territories, as well as those who have been forcibly relocated to other territories (physically or due to socio-economic factors) but who still hold claim to their original territories. The IPBN interprets *indigenous and local communities* to encompass the various tiers of indigenous societies, families, clans, bands, tribes, nations. The IPBN also interprets the term to refer to those whose traditional tribal nations might span State boundaries (e.g. US/Canada) or provincial/local government boundaries, and whose *local communities* would therefore comprise communities on either side of the border. The IPBN also wishes to remind Parties and UN agencies that indigenous peoples live in both developed and developing countries and can be both minority and majority populations.

3.3 The Spirit of Article 8(j): Interpretation of Key Terms

Members of the IPBN recall the original negotiations of Article 8(j) before the Convention was finalised, as being conducted in a relative spirit of goodwill of States towards Indigenous peoples. We would hope that the original spirit behind Article 8(j) is maintained. The IPBN reminds Parties that the wording was deliberately kept loose and that it was understood therefore that future interpretation would rely on the cooperation and goodwill of States and their local bodies to give constructive and progressive meaning to Article 8(j). In that light, the IPBN would like to suggest how Parties might consider the key terms in Article 8(j) to be interpreted.

3.4 The terms "*as far as possible*" and "*as appropriate*" should not be used by States as an 'opt-out' because of financial or other constraints. Rather it should be seen as requiring States to ensure Indigenous peoples have solid and active input into determining what is deemed as "*appropriate*" throughout the implementation process.

3.5 "*Subject to national legislation*" should also be interpreted to include Treaties that States have entered into with indigenous peoples.

3.6 IPBN members hope that States would agree that "*promote and encourage*" as general principles, require a higher and more active commitment than merely bringing to the attention of, or publicising of the issues. Our reading of this Article is that proactive affirmative action programmes and legislation are required to validate, legitimate and protect Indigenous knowledge.

3.7 "Respect, preserve and maintain" in this Article are used in relation to knowledge. The IPBN would not want to see this term interpreted to mean *'in vitro preservation'* and to therefore encourage western science to appropriate indigenous knowledge, assert ownership over it and prevent indigenous peoples' continued useage. Our concerns are well founded as this has been a consistent facet of previous interactions between western science and indigenous peoples.

3.8 "Promoting their wider application" is a clause within Article 8(j) which causes grave concern to members of the Indigenous Peoples Biodiversity Network. To begin with, the Network takes the view that there is a sequential process that needs to be adopted in order for Article 8(j) to have constructive value to indigenous peoples. That sequence requires:

- * acceptance of the right to self-determination of indigenous peoples;
- * observance by States of indigenous peoples' human rights and fundamental freedoms;
- * capacity-building of indigenous and local communities;
- * validation of indigenous knowledge;
- * acknowledgement that indigenous knowledge is an intellectual property in the broadest sense but is not adequately accommodated for within the existing intellectual property rights regime;
- * development of national legislation to protect indigenous knowledge including the establishment of *sui generis* systems;

3.9 Once these have been enacted, indigenous and local communities will be better placed to reach informed and mandated decisions concerning the terms and conditions they require for information exchange and for promoting a wider application than their customary application. .
*"We are willing to share our knowledge and resources with humanity provided we are the ones to determine when, where, how, by whom and for whose benefit."*⁴

3.10 Traditional Knowledge, Innovations and Practices

It is important for Parties, UN agencies and NGOs to reach common understandings about the value of indigenous traditional knowledge to indigenous peoples, to States and to the world as a whole. Traditional knowledge, however, is not an isolated, transportable commodity that can be studied or applied outside of its cultural framework. As is the case with western academic disciplines, there is a theoretical and analytical paradigm that traditional knowledge, innovations and practices within which must be contextualised.

⁴ Indigenous Peoples Biodiversity Network Statement to the Second Conference of the Parties (Jakarta) on Agenda Item 7: Access and Intellectual Property Rights.

3.11 The IPBN considers that there are nine basic premises that Parties should adopt in order to implement Article 8(j) and other provisions of the Convention in the spirit in which it was intended.

- 1) Indigenous knowledge is site specific in the first instance to a local community and secondly to a collective of communities (clans, bands, tribes, nations);
- 2) Indigenous knowledge is dependant on the continued wellbeing of the indigenous communities and environments within which it originates;
- 3) Indigenous knowledge covers a much broader knowledge base than environmental and biological diversity but for the purposes of the CBD it is being discussed within this limited coverage;
- 4) Indigenous women have often been the customary guardians and practitioners of Indigenous knowledge;
- 5) Indigenous knowledge is not a transportable commodity which can be exercised to the same degree of precision outside of its original cultural framework;
- 6) Indigenous knowledge and therefore indigenous innovation is dynamic and evolving;
- 7) Indigenous peoples and their knowledge are important to the world;
- 8) Indigenous knowledge is important to indigenous communities;
- 9) Indigenous peoples have their own views on how their knowledge should be maintained, promoted and protected.

3.12 **Traditional Knowledge, Innovations and Intellectual Property Rights**

The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples (1992) provides a valuable framework for progressing policy on Indigenous knowledge and intellectual property rights. The Indigenous Peoples Biodiversity Network is a signatory to the Declaration and is systematically working towards the full implementation of its objectives. Included in the recommendations of the Mataatua Declaration are specific goals for States, national, and international agencies to consider in the development of any policies and practices. These include the suggestion that bodies should;

- 2.1 *Recognize that Indigenous people are the guardians of their customary knowledge and have the right to protect and control dissemination of that knowledge.*
- 2.2 *Recognize that Indigenous peoples also have the right to create new knowledge based on cultural traditions.*
- 2.3 *Note that existing mechanisms are insufficient for the protection of Indigenous peoples' cultural and intellectual property rights.*
- 2.5 *Develop in full co-operation with Indigenous peoples an additional cultural and intellectual property rights regime incorporating the following:*
 - collective as well as individual ownership and origin;*
 - retroactive coverage of historical as well as contemporary works;*
 - protection against debasement;*
 - co-operative rather competitive framework;*
 - first beneficiaries to be the direct descendants of the traditional guardians;*

multi-generational span;

- 2.11 *Ensure current scientific environmental research is strengthened by increasing the involvement of indigenous communities and of customary environmental knowledge.*

The Mataatua Declaration also recommends to Indigenous peoples that they should:

- 1.3 *Develop a code of ethics which external users, researchers should observe;*
- 1.4 *Prioritize the establishment of indigenous education, research and training centres to promote their traditional knowledge;*
- 1.5 *Re-acquire traditional lands for the purpose of promoting customary agricultural and marine production (1.5 & 2.10);*
- 1.9 *Establish international indigenous information centres and networks;*

These recommendations remain as vital today as they were when the Declaration was finalised in 1993. The IPBN is aware that many States do not agree that traditional knowledge is either unique, scientific, of value or is an intellectual property in the broadest sense of the term.

3.13 At the July meeting of the World Trade Organisation's Trade and Environment Committee, States considered the importance of linking the Trade Related Intellectual Property Rights (TRIPs) agreement to the Convention on Biological Diversity. In a discussion on the issue of traditional and indigenous knowledge, it was reported that Canada and the US advanced the view that *"From a legal standpoint, traditional and indigenous knowledge was not an intellectual property and cannot be treated as such"*. Both favoured an approach where *"traditional and indigenous knowledge could be recognised and rewarded through benefit sharing approaches which entail voluntary contractual arrangement on mutually agreed terms. Such private contractual arrangements did not require multilateral disciplines, nor would an international sui generis system be established to protect or grant some right of compensation for this type of subject matter."*⁵

3.14 The problem with this interpretation is that it would encourage multinational companies, for example Ciba-Geigy (with its 83,980 employees and a 1994 revenue of US\$16,381 million) to negotiate a voluntary contract with, say, a village of 200 people in the Amazon, company to community, without national or international guidelines to observe basic social justice principles such as informed consent. This scenario fails to acknowledge the significant resource disparities in such negotiations.

⁵ World Trade Organisation Trade and Environment Committee Report, PRESS/TE010, 8 July 1996

3.15 The IPBN realizes that the difference between the Mataatua Declaration's objectives and the World Trade Organisation is considerable. It makes it difficult to imagine any consensus outcome. However, there are some milestones which could be reached as an initial step towards longterm progress.

3.16 The IPBN recommends to the Third Conference of the Parties therefore that on substantive issues concerning indigenous peoples and Article.8(j) of the Convention, States should:

3.16.1 recognise that indigenous knowledge systems are unique, scientific, of value and require protection;

3.16.2 develop national legislation to protect indigenous knowledge;

3.16.3 acknowledge that existing intellectual property rights mechanisms are insufficient for the purpose of protecting indigenous knowledge;

3.16.4 provide for Indigenous peoples to be central stakeholders in biodiversity conservation and their participation ensured at all levels, particularly within National Biodiversity Action Plans;

Respect, preservation and maintenance of indigenous knowledge, innovations and practices of indigenous peoples must be entrenched into national legislation taking into account existing indigenous customary laws

Recommendations

The Indigenous Peoples Biodiversity Network therefore recommends to the Third Conference of the Parties that:

due consideration be given to the recommendations and viewpoints articulated throughout this paper

Parties support and make financial contributions to:

the Indigenous Knowledge Programme and to provide future financial contributions to ensure its ongoing success.

with the proper psychological persuasion.