Introduction

The new area of science and technology poses new challenges to the collective protection and management of resources. The commercialization of genes through the application of intellectual property rights law, conflicts with indigenous knowledge systems of stewardship and protection. Indigenous peoples are heavily impacted in this area because they control and occupy lands that are rich in biodiversity, and also maintain traditional knowledge about the uses of plants in their regions. International conventions such as the Convention on Biological Diversity are geared toward defining processes for access to genetic resources and benefit sharing. However, these initiatives fall short of recognizing the rights of indigenous peoples to protect and manage their biological resources on their own terms. This debate will be on-going in UN forums and it is imperative that Indigenous peoples be present to advocate for the protection of their collective rights, resources, and knowledge.

Convention on Biological Diversity

A. Background on the CBD relating to access to genetic resources and traditional knowledge

The Convention on Biological Diversity (CBD) entered into force on 29 December 1993 and currently has 188 state parties. Article 1 lays out the Convention’s three objectives as “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising from the use of genetic resources, including by appropriate access to genetic resources . . . , taking into account all rights over those resources . . . .” A framework for the implementation of the third objective (access to genetic resources) is provided in Article 15 of the Convention.

The right of Indigenous peoples to permanent sovereignty over natural resources is particularly threatened by Article 15.1, which states:

\[\text{Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.}\]

Article 15.5 requires that “access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.” Thus, according to the CBD, sovereign rights to control access to genetic resources are only recognized for the contracting parties, i.e, the states.

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1 The CBD’s website contains links to the provisions of the Convention, COP decisions, and all other relevant information (www.biodiv.org)
In addition, Article 8(j) contains a provision to encourage the equitable sharing of the benefits arising from the utilization of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity.² Article 8(j), however, is subject to national legislation. Although 8(j) requires that wider application of traditional knowledge, innovations and practices of indigenous and local communities should be “with the approval and involvement of the holders of such knowledge, innovations and practices,” it does not couch it in terms of prior informed consent, as it does for states regarding genetic resources.

By the terms of Article 17 Parties are also under a duty to “facilitate the exchange of information, from all publicly available sources, relevant to the conservation and sustainable use of biological diversity, taking into account the special needs of developing countries.” (17.1) Article 17.2 explains that “such exchange of information shall include “indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, paragraph 1.” Although there is provision for “repatriation of information,” “where feasible” (17.2), there have been no significant mechanisms or measures to facilitate repatriation of so-called “publicaly available” Indigenous knowledge. Indigenous peoples continue to assert that ex-situ Indigenous knowledge is not in the “public domain” as understood under Western intellectual property rights law.

B. Development of an International Regime on Access and Benefit Sharing

A major step towards the development of an international regime on access and benefit sharing was taken at the sixth COP held in The Hague in April 2002, when 180 Parties adopted the voluntary Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization. “The Guidelines are expected to assist Parties, Governments and other stakeholders in developing overall access and benefit-sharing strategies, and in identifying the steps involved in the process of obtaining access to genetic resources and benefit-sharing. More specifically, the guidelines are intended to help them when establishing legislative, administrative or policy measures on access and benefit-sharing.”³ It is important to note that the vast majority of Indigenous peoples, viewing their participation in the development

² The full text of Article 8(j) states:

“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 the benefits arising from the utilization of such knowledge, innovations and practices;”

³ http://www.biodiv.org/programmes/socio-eco/benefit/bonn
of the Guidelines as facilitating biopiracy of their resources and knowledge, made a conscious
decision not to actively participate in the discussions on the Guidelines, and therefore have
rejected its application.

Consistent with the Article 15 relating to national sovereignty over natural resources, the Bonn
Guidelines suggest that access to genetic resources be controlled by competent national
authorities (see Section IV of the Guidelines). Paragraph 26 states:

_The basic principles of a prior informed consent system should include:_

...  
(d) _Consent of the relevant competent national authority(ies) in the provider country._

_The consent of relevant stakeholders, such as indigenous and local communities, as
appropriate to the circumstances and subject to domestic law, should also be
obtained._

Paragraph 31 further elaborates on this issue by stating:

_Regarding established legal rights of indigenous and local communities associated with
the genetic resources being accessed or where traditional knowledge associated with
these genetic resources is being accessed, the prior informed consent of indigenous and
local communities and the approval and involvement of the holders of traditional
knowledge, innovations and practices should be obtained, in accordance with their
traditional practices, national access policies and subject to domestic laws._

This language is evidence that the Bonn Guidelines continue to further national sovereignty over
natural resources and subject Indigenous peoples’ rights to domestic policies and laws. Although
the Guidelines are not binding the Parties do consider them “a useful first step of an evolutionary
process” and may well serve as some basis to a future regime.

Paragraph 44(o) of the Plan of Implementation of the World Summit on Sustainable
Development (WSSD) called for action to “negotiate, within the framework of the [CBD],
bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair
and equitable sharing of benefits arising out of the utilization of genetic resources.” Further, UN
General Assembly resolution 57/260 adopted at is fifty-seventh session, invited the COP to take
appropriate steps with regard to the commitment made at the WSSD. At the CBD’s Inter-
essional meeting on the Multi-Year Programme of Work of the Conference of the Parties up to
2010, held in March 2003, a recommendation was made that the Ad Hoc Open-ended Working
Group on access and benefit-sharing (ABS Working Group) consider the process, nature, scope,
elements and modalities of such an international regime on access and benefit-sharing at its
second meeting in December 2003. Therefore, the ABS Working Group prepared
recommendations on the terms of reference for the negotiation of an international regime, which
were submitted to the Conference of the Parties at its seventh meeting (COPVII) in February
2004, in Kuala Lumpur, Malaysia (UNEP/CBD/COP/7/6).
At COPVII, the Parties engaged in extensive discussions to set the mandate of the ABS Working Group according to the terms of reference and decided that the Working Group will “elaborate and negotiate an international regime on access to genetic resources and benefit sharing with the aim of adopting an instrument/instruments to effectively implement the provisions of Article 15 and Article 8(j).” The Working Group will meet twice before the next COP in 2006 and is mandated to work “with the collaboration of the Ad-Hoc Open-ended Working Group on Article 8(j) and related provisions.”

The preambular language to the COPVII decision relating to the international regime “[r]eaffirming the sovereign rights of States over their natural resources and that the authority to determine access to genetic resources with the national Governments and is subject to national legislation, in accordance with Article 3 and Article 15, paragraph 1” sets a dangerous stage for future negotiation of the regime in the eyes of Indigenous peoples. The International Indigenous Forum on Biodiversity (IIFB), which is the full caucus of the Indigenous peoples present at the COP, made an intervention in opposition to this language stating that international human rights law recognizes that states do not have absolute sovereignty over natural resources. The parties, however, of course, refused to agree.

Although Indigenous peoples are only considered observers at the COP, we lobbied vehemently that our rights must be recognized throughout the elaboration of the international regime. In the end, Canada and Australia blocked language that had the agreement of the other states proposed by the EU that the international regime “shall recognize the rights of Indigenous peoples”. In the end, the preambular language adopted states that “the international regime should recognize and shall respect the rights of indigenous and local communities.”

Indigenous peoples successfully lobbied for the inclusion of international human rights law contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights to be considered in a long list of other instruments and processes as possible elements to be included in the international regime. Although this gives some foothold for lobbying in the future meetings, there is no guarantee that the regime will be consistent with international human rights law. At CBD meetings, Indigenous peoples advocate that Article 22.1\(^4\) of the Convention relating to relationship with other international conventions requires that the decisions of the COP must be consistent with international human rights law. Unfortunately, some parties and other observer governments not party to the Convention (i.e, the United States) do not agree and have requested an opinion from the CBD legal counsel to support their position.

Conclusion

\(^4\) Article 22.1 states: “The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreements, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity.”
Increasingly, states are asserting that their obligations in intellectual property rights treaties and trade agreements and new agreements for the access to genetic resources and traditional knowledge may supercede their international duties to uphold the human rights of Indigenous peoples. Efforts to globalize intellectual property rights and harmonize national legislation accordingly must not diminish the fundamental right of all peoples of self-determination, nor justify claims by states to deny our right to permanent sovereignty over our natural resources. If sovereignty over our natural resources is to mean anything at all, it must mean that Indigenous peoples are the only competent authorities to control access to and use of the genetic resources within our territories and associated Indigenous knowledge.

While the CBD will continue to assert national sovereignty over natural resources, Indigenous peoples must continue to re-assert our rights to self-determination within the CBD process. In the ABS proposed international regime, language is now in the framework of an international regime that mandates consideration of other international human rights instruments. It would strongly be recommended that in the future, Indigenous peoples work to develop strategies that will counter the CBD process. Additional support in the human rights bodies of the UN can possibly serve as a check and balance to assure the rights of Indigenous peoples are protected as the CBD process moves to develop the mechanism(s) to facilitate an international regime on access and benefit sharing. Indigenous peoples will have to be very careful not to become active participants in the future development and negotiations of an international regime, as this active participation can be construed as an acceptance of, or complicity with, the international regime.

The IIFB should be commended for providing the time and space for an in-depth workshop on an issue as complex as the international regime at the COP 7. The IIFB should be encouraged to continue to inform and educate forum members as the international regime is further elaborated.
The IIFB Working Group on ABS formulated it’s strategy based on the following key positions regarding a proposed international regime on ABS:

1. preamble para 2 & 3 – delete. We disagree with the basic contention that states have sovereign rights over natural resources.
2. Disappointed about all bracketed text relating to IPs
3. Decision #1, object to being listed with other stakeholders
4. Remove brackets regarding the work of article 8j in #2
5. Do not support a legally binding regime
6. Modalities: we want article 8j to complete its work in relation to access and benefit sharing discussions.
7. Scope: we oppose any attempt to separate genetic resources from Indigenous knowledge.
8. The doc should refer to international human rights standards.
   a. The particular part should state that the international regime must be applied in accordance with international human right standards.
   b. Operative para “elements” should include a reference to the universal declaration on human rights, the International Convenant on Civil and Political Rights, and the 1st covenant on Economic, Social and Cultural Rights.
Indigenous Forum on Biodiversity Press Conference
Feb. 11, 2004

Statement by Debra Harry regarding a proposed international regime on access and benefit sharing.

With regard to the proposed discussions on an international regime on access and benefit sharing we must state that Indigenous Peoples are not participating in these discussions in order to facilitate access to the genetic resources and Indigenous Peoples’ knowledge in our territories.

We are participating to guarantee that the discussions on a proposed international regime recognize and uphold our rights. We will advocate for the integration, strengthening, and elaboration of protections for our collective rights. Until our rights are protected and respected in the CBD process it is premature to enter into discussions on Access and Benefit Sharing.

We reiterate our position we oppose patents on biological resources, and call for a moratorium on bioprospecting activities that impact our lands and Indigenous knowledge.

No aspect of a proposed international regime should presume to extend over Indigenous peoples’ biological resources and knowledge. No aspect of the international regime should presume that national authorities would have the right to collect or grant access to our knowledge and biological diversity, which of course, would be a fundamental violation of our rights to self-determination.

The rights of Indigenous peoples, as the owners of their territories, exist and stand independent of the discussions on the international regime. Indigenous peoples stand firmly upon our rights to self-determination. Our rights to self-determination are fundamental to the freedom to carry out our responsibilities in accordance with our cultural values and customary laws.

All decisions in the CBD process must recognize and protect the fundamental premise that Indigenous peoples are rights holders with proprietary, inherent, and inalienable rights to our traditional knowledge and biological resources. Furthermore, it will be incumbent upon the parties to ensure the international regime is consistent with and upholds international instruments, and standards, that affirm the rights to self-determination of Indigenous peoples.
CBD’s International Regime: Indigenous Activist Organizations Call for No Access Zones to Genetic Resources and Indigenous Knowledge

(Kuala Lumpur, Malaysia) Representatives from Indigenous organization, expressing urgent concern, are calling upon Indigenous peoples around the world to declare their territories “Access-Free Zones for Genetic Resources”. This call to action is a response to the preliminary mandate to develop international instruments that facilitate access to, and the commercialization of, genetic resources. The mandate for the international regime is nearly finalized by the governments attending the Convention on Biological Diversity in Kuala Lumpur at the Seventh Conference of the Parties.

Indigenous peoples believe the discussions on an international regime for access and benefit sharing are a thin disguise for the exploitation of genetic resources and traditional knowledge in the name of fair and equitable sharing of benefits. Debra Harry, No. Paiute and Director of the Indigenous Peoples Council on Biocolonialism states that “It’s outrageous that the CBD has become the vehicle for the wholesale exploitation of life forms. No aspect of life will be safe from the genetic gold rush.”

Indigenous peoples successfully demanded that specific language is included in the final mandate of the proposed international regime that ensures the protection of Indigenous peoples rights. This was necessary to counter the state’s assumption of absolute state sovereignty over natural resources. Arthur Manuel, from the Secwepmc Nation (Canada), stated “We cannot accept the notion that governments have national sovereignty over our resources and traditional knowledge. This contradicts international human rights laws and is a violation of our rights to self-determination.”

The Parties discussions focus on the right of states to access genetic resources without acknowledging that much of the world’s biodiversity exists in Indigenous peoples’ territories and sidelining the voices of Indigenous peoples in these discussions. “Developing countries claim they hold the keys to unlock Indigenous territories, the treasure chests of the world’s biodiversity, to allow for corporate biopirates from the developed world to plunder for profit,” says Le`a Kanehe representing Na Koa Ikaika o Ka Lahui Hawai`i, a Native Hawaiian non-governmental organization in the United States.

One of the key objectives of the Convention is to ensure the fair and equitable sharing of benefits arising out of the utilization of genetic resources. However, the benefits are in reference only to states and not to Indigenous peoples. Because Indigenous peoples are not contracting parties in access agreements, they would receive little or no benefits from such arrangements. Alejandro Argumedo, Quechua from Peru, of the Indigenous Peoples Biodiversity Network, likened the regime to “burglers who break into our house calling themselves stakeholders, and say ‘lets share the benefits’; they offer to let us keep a couple of our spoons, but steal everything else that is
valuable.” In the absence of the recognition of Indigenous peoples rights, this is the scenario that plays itself out.

Indigenous peoples have consistently asserted the position that traditional knowledge is inseparable from our genetic resources. Deliberations in the COP have made this separation in the scope of the regime. “They don’t want any legal obligation to compensate for the use of Indigenous knowledge that led them to the resources they want to exploit. The regime legalizes the appropriation of Indigenous knowledge for profit.” says Lourdes Amos, Igarot of the Phillipines, a member of the Asia Indigenous Knowledge and Biodiversity Committee.

Indigenous peoples have demanded that the decisions of the Conference of the Parties must respect and protect the rights of Indigenous peoples to control their territories and protect their knowledge and resources from exploitation. Cecilio Solis, of the Nahuat People in Mexico stated “The States have refused to fully recognize and protect the rights of Indigenous peoples. Our voices and presence are completely disregarded.”

For the Indigenous peoples anxiously following the discussions in Kuala Lumpur, the agenda of the parties is clear. The parties are developing a regime that will facilitate a biopiracy free-for-all. Harry says, “Sadly, all we can do is call upon Indigenous peoples to prepare themselves. The biopiracy regime is coming. They must do whatever is necessary to protect their resources and knowledge at the local level. Their most basic rights to self-determination are not going to be recognized at this level.”

[end]

Endorsing Organizations:

Asamblea Nacional Indigena Plural por la Autonomia (Mexico)
Asia Indigenous Knowledge and Biodiversity Committee (regional)
Asociacion Napguana (Panama)
Centro de Estudios Multidisciplinarios Aymara CEM-Aymara (Bolivia)
Human Rights and Democracy Movement (Tonga)
Indigenous Network on Economies and Trade (Canada)
Indigenous Peoples Biodiversity Network (Peru)
Indigenous Peoples Council on Biocolonialism (US)
International Indian Treaty Council
Instituto de Desarrollo Integral de Kuna Yala (Panama)
Na Koa Ikaika o Ka Lahui Hawai`i (Hawaii)
Nga Wahine Tia ki o Te Ao (Aotearoa)
Red Nacional de Mujeres Indigenas Sobre Biodiversida de Panama
Tebtebba Foundation (Phillipines)