NGA TIKANGA, NGA TAONGA

CULTURAL AND INTELLECTUAL PROPERTY: THE RIGHTS OF INDIGENOUS PEOPLES

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EDITORS COMMENTARY

This monograph is one of several written by Maori scholars which IRI considers to be important work and ought to read widely.

The intention is to make the research undertaken by Maori students, available to other Maori students and to Maori people generally, especially those who may have been directly associated with the research. This is a 'ngawari' kaupapa, developed in response to the cultural obligation implicit within notions of reciprocity (utu, koha) - the responsibility to return gifts and favours. In this sense this represents an effort to return the research, knowledge and understandings to those who have contributed or indeed who may be affected in some way by the research.

This series of published monographs has been completed by Masters and PhD students. This is a non-profit exercise, the overall concern being to make available valuable knowledge and understandings that are contained within these works but would not otherwise be accessible.

No reira, e hoa ma, aroha mai, awhi mai ki tou ratou mahi. Ma maatou, ma koutou, ma tatou katoa ka ora ai te iwi.

IRI - The International Research Institute for Maori & Indigenous Education was established at The University of Auckland in 1996. The institute's aim is to develop research, which improves Maori and Indigenous educational and schooling outcomes. In particular it's concern is to develop practical 'intervention measures' to alleviate the educational crises faced by many Maori, and thereby contribute to the general betterment of Maori and New Zealand society as a whole.

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Paper presented by: Aroha Te Pareake Mead, Taonga Pacific Litd.
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BUSINESS AND THE ECONOMY
Auckland, Centra Hotel, August 4 & 5 1994

The objective of this Paper is to consider the issue of indigenous rights to land and biological resources by exploring three broad areas:

* The Global Moral and Legal Framewok
* Indigenous Knowledge of Biological Diversity
* Indigenous Rights to Biological Diversity

The overall direction that I will be discussing is the critical need to involve indigenous peopless in all aspects of policy development; local, national and regional planning; and in policy implementation which affetcs (directly or indirectly) indigenous communities (i.e. peoples as well as their lands and resources).

I will also be asserting the view that New Zealand, far from being a leader in this field, is lagging behind many other States, and in fact is having difficulty in meeting its current international commitments. As a nation we have much to be poud of, there are innovative and exciting prograammes being developed or already underway regarding indigenous knowledge of biodiversity, but such programmes are the exception. The pace of change and development in this area is intensifying. We have a long way to go before New Zealand can claim the honour of meeting its global moral and legal responsibilities, and an even further distance to traverse with regard to its national Treaty of Waitangi responsibilities.

1. THE GLOBAL MORAL AND LEGAL FRMEWORK

Although the United Nations Commission on Human Rights has mandated a Working Group to draft a Universal Declaration on the Rights of Indigenous Peoples for the past twelve years, the Draft Declaration is still a Draft and yet to be considered or approved by States. The Draft Declaration once passed by the General Assembly will provide minimum **moral** standards for States to observe.

The most recent indication of the global community's understanding and sense of responsibility ttowards indigenous peoples occurred in 1992 when States met to develop guidelines for the sustainable development of the earth's resources. The United Nations Conference on Environment and Development (UNCED) provided the global community with a comprehensive plan of action, and included in the Plan was a Chapter devoted to the Role of Indigenous Peoples and Local Communities. *Chapter 26: Recognising and Strengthening the Role of Indigenous People and their Communities.*

While there are some who consider the content of Chapter 26 weak and ineffective, nevertheless it provides numerous policy directives relating specifically to indigenous peoples which all UN Member States, including New Zealand, have formally agreed to.

To begin with it placed the issue of indigenous peoples and sustainable development firmly on the international agenda. The first time ever that UN Member States have acknowledged indigenous peoples as distinct, unique and a valuable sector of society.

A few other achievements included:

* Acknowledgement that *indigenous people have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.*"

It was through the successful lobbying by Maori Congress that acknowledgement of the scientific nature of indigenous knowledge was first instroduced into this Chapter and subsequently accepted by States. The previous wording spoke of a *special relationship with their lands, natural resources and environment* and we never could figure out exactly what 'special' was supposed to mean.

Within New Zealand we are still having to establish whether Maori knowledge is in fact scientific. A debate which is both time consuming, energy draining and tends to leave all participants dis-spirited. It cannot be easily resolved because the debate is hinged on cultural identity.

* A directive to States to *establish arrangements to strengthen the active participation of indigenous peoples and their communities in the national formulation of policies, laws and programmes relating to resource management and other developmental processes* as well as *conservation strategies.*"

In Chapter 15: Conservation of Biological Diversity, States agreed to:

> * *recognise and foster the traditional methods and the knowledge of indigenous people and their communities...and ensure the opportunity for the participation of those groups in the economic and commercial benefits derived from the use of such traditional methods and knowledge....*

The UNCED Agenda 21 provides the global **moral** framework for States as it is of course non-legally binding. The Convention on Biological Diversity takes the moral guidelines further and provides a **legally** binding framework for signatory States to observe. The Convention pushes the global debate on the value of indigenous knowledge of biodiversity far beyond the comfort zone for both indigenous peoples as well as States. Far from merely affirming the existence and that there is a value in indigenous knowledge, the Convention requires States to:

> *" 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 tthe benefits arising from the utilisation of such knowledge, innovations and practices."*

Clearly in order to achieve this, government policy makers (at local and central levels), scientists, academics and corporate professionals will have to embark on a steep learning curve, and most of the learning will involve de-programming their past attitudes towards indigenous knowledge and indigenous environmental systems and towards working together with indigenous peoples and their communities in a very direct and active way.

If New Zealand professionals are still enaged in a debate on the scientific validity or otherwise of Maori environmental and biodiversity knowledge, then obviously New Zealand is not progressing the objectives of Article 8(j) of the CBD with the speed, priority, and cooperative spirit that the CBD legally requires of it.

2. INDIGENOUS KNOWLEDGE OF BIODIVERSITY

Indigenous peoples, including Maori, have always been aware that their environmental knowledge is sound, valid and of value. One of the many devastating consequences of colonisation is that over time, those who retained detailed biodiversity knowledge have lessened in number with each generation, because the majority society actively convinced Maori that such knowledge was heathen, primitive, a waste of time, filled with superstitition and even worse, unsafe and could cause the death of family members (e.g. Ante-Natal Care and Customary childbirth practices).

Within the indigenous community the issues raised in the Biodiversity Convention are bittersweet - from an era of being ignored and considered primitive we are being catapulted into commodifying our biodiversity and our knowledge of biodiversity at local, national and international levels all at once.

The middle zone, which is the partnerships between Research Institutes/Companies, agencies with local indigenous communities; the precedent building; the refinement through experience, just hasn't had time to develop. There simply isn't the experience for anyone, other than multinational corporations, to confidently state that they really know what they are doing.

There are two mainstream environmental paradigms operating in this country - development and conservation. The 'power' has prviously firmly rested with the development 'paradigm'. One couldn't say that it has shifted to the other, but what has happened is that there is a greater 'conservation' componeent in the new system of *sustainable development* and there are a lot more grey areas in between the two than previously existed. In other words, there are more people, unsure of their direction or more precisely unsure of their footing. Maori however, are setting their sights on the development end of the spectrum, as the right to development on one's own territories is a right which has previously been denied.

The New Zealand government has made a commitment to settle all treaty grievances by the year 2000. That means that many Iwi will be receiving compensation in the form of money and lands. But how do they decide what to do with it?

> For those who wish to develop sites with high biodiversity, they will be seen as the *badies*, irresponsible members of society;
>
> For those who wish to develop commodities from indigenous flora and fauna for commercial benefits, they will be seen as the *baddies* - greedy.
>
> For those who just want to leave their lands alone, they too will be seen as the *baddies*, lazy, unproductive, wasting lands which could be cleared and used for agriculture, horticulture, dairy and sheep farming.

Iwi who in the past have advocated **the conservation ethic** might now be pushing for **development.** Just as the global debate has highlighted the difference between developing and industrialised countries, the same applies here in New Zealand. Maori are a developing people living in an otherwise industrialised nation.

Government (central and local) will have to seriously consider **offering incentives to Iwi**, and I do mean incentives as opposed to laws or

regulations, to resist economic pressures and conserve high biodiversity sites. This would need to be done outside of the very poorly conceived Fiscal Envelope Treaty Settlement policy.

I referred earlier to the link between cultural identity and the reluctance of many western trained scientists to acknowledge and accept the scientific nature of indigenous knowledge.

Culture is a term more frequently used to describe the values and social systems of indigenous and ethnic communities. But New Zealand Pakeha ethnic values are very central to the discussion on the implementation of Article 8(j) of the Biodiversity Convention.

There are philosophies and practices inherent in Pakeha (western) culture which I consider need to change before real progress can be achieved. Some include:

* **one solution for many diverse situations**
  the all or nothing syndrome -
  antithesis of developing policy on an Iwi by Iwi basis

* **wanting to see results in one's own lifetime**
  short-term goal setting
  Inter-generational responsibility

* **Having to experience something first hand in order to understand it and/or want to protect it**
  I have to understand you before I can help you
  The current situation of the Rwandan refugees teaches us that one doesn't need to 'understand' what happened in order to help save lives. It is a simple case of handing over resources, getting rid of the barriers preventing the safe return and existence of the Refugees in their homelands, and allowing them to get on with their lives. The same applies to all indigenous peoples.

  Mauri, Ihi, Wehi, Mana are intangibles which Maori protect without necessarily 'experiencing them firsthand.'

* **Innovating and modifying nature**
  protecting and caring for what is already there

* **Compartmentalizing, Listing, Sub-Dividing**
  reaffirming the wholistic interdependency of social, cultural, political, environmental and ecomomic influences.

* **Commodifying Nature and Knowledge Itself**
  too bizzare to even comment on

* **Focussing on the Rights of Indviduals**
  Collective rights are the legitimisng norms and standards for indigenous peoples and many others worldwide

One of the many side-effects of colonisation is that some Maori have also adopted these values and you might notice the occasional newspaper clipping or news item where such maori are being challenged by their communities.

Scientists, academics and government policy makers will have to recognise that any refusal to accept the validity of indigenous environmental knowledge as scientific is racist. It isn't a philosophical question - it is downright racist based on the assumption that one knowledge system is the 'norm' by which all other knowledge systems are evaluated.

The notion of innovating traditional knowledge and protecting only the innovation for instance, is racist, as it does not recognise the value already present in the original form of traditional knowledge. If you ask me how do I distinguish racism from mono-culturalism. Mono-culturalism is simply a perspective - racism is when one forces that perspective on others against their will (through policy, legislation, occupation, invasion and other mechanisms.)

ONE INDIGENOUS RESPONSE: THE MATAATUA DECLARATION

In June 1993, a year after the UNCED Earth Summit, Ngati Awa and the other 8 Iwi of Mataatua, convened the First International Conference on Cultural and Intellectual property Rights of Indigenous Peoples. Maori, together with indigenous delegates from 14 countries, as well as non-indigenous advisors and professionals with an interest in this field, met and considered a wide range of relevant issues, including biodiversity.

The resultant document **The Mataatua Declaration on the Cultural and Intellectual property Rights of Indigenous Peoples** was subsequently tabled at the United Nations (11th Session of the UN Working Group on Indigenous Peoples) and signed by over 150 indigenous representatives and nations from 60 UN Member States. The Mataatua Declaration has been signed by Maori Congress as well as the indiviidual Iwi members of Congress. The Mataatua Declaration is now widely quoted and discussed. It is not as well known here in New Zealand and so far government has not formally acknowledged its existence. I think they call this the *Tall Poppy Syndrome.*

The Mataatua Declaration raises a number of significant issues. In particular;

* recognition that indigenous peoples are the exclusive guardians of their knowledge, and as such must be the ones to define it;

* must be the first beneficiaries of it,

* must be respected for their right to create new knowledge or discover new aspects of traditional knowledge; and

* must be the ones to decide whether to protect, promote or develop their knowedge.

Due to the local nature of such guardianship responsibilities, the Mataatua Declaration would take the view that **capacity building** of indigenous communities is essential and that any policies and structures should reflect this.

Indigenous knowledge can be local to a whanau (family unit), a Hapu, an Iwi, a Waka Grouping or collectively to all Maori. The ability to distinguish these groupings and their areas and items of guardianship should be fully canvassed with Maori before any national policies and legislation are developed. From a purely commercial view, this is even more important.

It is impossible to discuss indigenous knowledge of biodiversity in the context of the CBD without exploring the issue of intelletual property rights, but this requires a Conference and focus all to itself. I will simply reaffirm Article 2.5 of the Mataatua Declaration which requires States, national and international agencies to develop in full cooperation with indigenous peoples a cultural and intellectual property rights regime which incorporates:

collective (as well as individual) ownership and origin
retroactive coverage of historical as well as contemporary works
protection against debasement of culturally significant items
cooperative rather than competitive framework
multi-generational coverage span
first beneficiaries to be the direct descendants

3. INDIGENOUS RIGHTS TO BIOLOGICAL RESOURCES

My previous comments are of course all culminating in this third area of **indigenous rights.**

The 1840 Treaty of Waitangi, Article 2, details very clearly the responsibilities of the Crown towards protecting the assets of Maori. It states:

> *"The Queen of England agrees and consents (to give) tto the Chiefs Hapu and all the people of New Zealand the full chieftanship (rangatiratanaga) of their lands, their villages and all their possessions (TAONGA -everything which is held precious)."*
> *English translatio of the Maori Text (Professor Hugh Kawharu)*

Biodiversity is often described in the Maori language as *nga mokopuna o Papatuanuku raua ko Ranginui* - the descendants of the Earth Mother and Sky Father. These are in every way **taonga** or precious possessions as stated in Article 2 of the Treaty of Waitangi.

When the British Crown devolved its Treaty responsibilities to the newly formed government of New Zealand, it took approximately 140 years for the government to accept that it actually had *Treaty responsibilities.* The Crown applied the next 30 years to 'coming to terms' with the Treaty. This phase included: redefining the Treaty, denying the international legal status of the Treaty; questioning which language version was operative (Maori or English); questioning whether it was signed by two sovereign nations - who else signs international Treaties? and many other delay tactics. The Crown has spent the past 24 years trying to get rid of the Treaty.

Now, the New Zealand government has systematically *devolved* its Treaty responsibilities to Local Bodies in the first instance (in the primary service areas of health, education and environmental/resource management) and to the global community, through the General Agreement on Tarrifs and Trade (GATT) Uruguay Round Agreement in the second instance.

The Resource Management Act (1991) while requiring consideration of Treaty principles in resource management issues, assumes ownership by the State of all of the country's natural resources.

The Plant Varieties Act (1987) assumes it is the responsibility of the State to regulate plant genetic resources based on innovation, with no acknowledgement or value being accorded to the guardianship relationship successive generations of Maori have held with the original species of plants.

At an international level, the UN Convention on Biological Diversity (1992) (CBD) assumes responsibility by signatory States to define and regulate biological genetic resources, including but not confined to, innovations. The CBD was developed on the basis that UN Member States accepted that misappropriation of indigenous knowledge of biological resources was widespread and serious enough to warrant designing specific protection mechanisms to reduce the problem.

The General Agreement on Tarrifs and Trade (GATT) Trade-Related Intellectual Property Rights Agreement (TRIPs) (1994) assumes it is within

the responsibility of the State *to allow commodification* of biological resources, including **both plant and human genetic resources**, and to allow for *the free trade* in these 'commodities'. (Note: While it has been left up to individual States to develop their own national intellectual property rights legislation, particularly relating to indigenous flora and fauna and human genetic resources, there is a clear direction as to what is considered 'GATT Friendly' and what is 'GATT-Unfriendly'.)

If you are having difficulty in recognising the rights of indigenous peoples in these examples of national and international instruments, believe you me so are indigenous peoples! Each one of these instruments serves to diminish the ability of indigenous peoples to exercise control over their lives, livelihoods and heritage. It is my assertion that individually and therefore collectively, each instrument directly contravenes Article 2 of the Treaty of Waitangi. It could be easily argued that the New Zealand government has well overstepped its mark and will soon be facing the consequences.

INALIENABLE RIGHTS

Maori and other indigenous peoles often use the term **inalienable rights**. These are rights which have existed since time immemorial. The current UN Draft Declaration on the Rights of Indigenous Peoples (referred to earlier) uses this term in relation to Self-Determination.

The inalienable right for Iwi comes from *Papatuanuku and Ranginui and beyond*, which takes us from time immemorial to 1835 and 1840 when the Declaration of Independence and Treaty of Waitangi were signed. Since then, successive legal instruments have been developed, implemented, amended and rescinded. State laws are alienable rights because they are temporary, changeable and often only applied to certain sectors of society.

Inherent in the concept of *inalienable rights* is a guardianship responsibility to future generations which indigenous peoples take very seriously. A 'guardianship responsibility' in State legislation only exists if it is expressly stated. Even when this does occur, such as in the Resource Management Act (1991) which uses the term *kaitiakitanga* or guardianship, the major players cannot agree on the definitions and therefore perimeters of a guardianship responsibility. The shift in ethnic values which I referred to earlier is especially important for non-indigenous peoples to better understand the inalienable rights and responsibilities of indigenous peoples.

The commodification and trade in biodiversity, and the research and trade in genetic resources has profound Treaty of Waitangi implications which so far the Crown has chosen to ignore. The Waitangi Tribunal Claim 262 relating to indigenous flora and fauna, will force the discussion, but it is my hope that government agencies will begin discussion with Iwi well before the Claim. To date that has not occured. When one considers the obvious lack of enthusiasm

the Crown has demonstrated over informing Iwi of the full implications of the GATT Trade Agreement, and the review of national intellectual property rights legislation, it gives the impression that a constructive discussion will not ever take place. The *'cooperative partnership'* required to implement Article 8(j) of the Biodiversity Convention therefore, is not currently operative here in New Zealand.

UNEP (UN Environmental Programme) published a 'Background Document' for consideration by States at the Intergovernmental Committee on the Convention on Biological Resources (ICCBD) on the *Rights of Indigenous Peoples*. The Document states:

> *"Historically, nations freely exchanged plant genetic resources which were considered the* ***common heritage*** *of humankind. The growth of technologies which use and raise the commercial value of genetic resources, combined with the loss of biological diversity worldwide, has led to narrowing of the* ***free exchange principle.*** *Thus far, the contraction of the free exchange principle has been largely one-sided. The contributions of public and private sector institutions in industrialised countries tend to be considered patentable innovations while the role of indigenous and local communities in developing and conserving land or tradtional healers knowledge of medicinal plants, are given no value."*
>
> (Reference: UNEP/CBD/IC/2/14/14 August 1994)

The *free-exchange principle* is being replaced with the *free-trade principle* thus changing the underlying values and influences in access to biological resources. I would say that the CBD and indigenous peoples sit squarely in the middle at this point in time. It remains to be seen as to how long this continues.

The possibility of continued and increased misappropriation and alienation of indigenous biological resources is great. An intensive **capacity building programme is required throughout indigenous communities** in order for them to reach informed decisions on these issues. One really cannot consider the current situation to be a 'level playing field'.

The more I participate in international, and particularly United Nations activities, and observe the contribution of New Zealand, I find myself asking the question *What is driving New Zealand environmental and social policy?* Does the Treaty of Waitangi have any influence whatsoever? Are there other 'national considerations'? or are we driven by global pressures, particularly those coming from developed countries. Are we simply trying to keep up with the Joneses even before we figure out if we actually really want what the Joneses have?

WHERE TO FROM HERE?

In my opinion, the best and safest option for anyone involved in indigenous knowledge of biodiversity, and in designing options for the equitable sharing of benefits of indigenous knowledge of biodiversity, is to ensure:

* the active participation of indigenous peoples throughout all stages of any policy/programme design and implementation;

* an established and agreed *Code of Ethics* covering all stages of the policy/programme, particularly detailing the likely activity after the completion of the programme;

* a transparent mechanism to gain the *informed consent* of the indigenous peoples concerned, which includes agreement to the *Code of Ethics* but is a distinct and separate procedure;

* incorporating into the methodology and outcomes, defined benefits (capacity building, technology transfer, financial compensation, commercial opportunities, etc.) for the indigenous peoples concerned;

* an understanding that the above procedure will need to be developed on a *case by case basis*. No single procedure could ever adequately encompass the varying needs and aspirations of indigenous peoples and their communities.

Observation of these minimum key principles will at least ensure that one is not contributing further to the exploitation of indigenous peoples.

CONCLUSION

In conclusion, the Convention on Biological Diversity (CBD) certainly forces the consideration by States of the value, in both environmental and commercial terms, of indigenous knowledge of biodiversity. It also requires indigenous communities to consider these issues and reach decisions. As with many things, it comes down to resources both human and financial, as to who reaches their conclusions first, who has the power to enact their decisions and to what degree the decisions reflect the combined collaborative views and interests of both Treaty partners.

New Zealand has a Treaty of Waitangi responsibility to get this issue right. New Zealand also has an international obligation through the CBD to get this issue right. Real progress will occur when the driving motivating force

behind New Zealand's biological resource management policies will be the inclusive vision of the Treaty of Waitangi rather than the exclusive and purely economic force of the GATT Trade Agreement. Only then will the necessary shift in cultural values occur to give meaningful effect to the intentions of the CBD, particularly Article 8(j).

What is apparent, is that there is no longer any excuse (moral or legal) to continue any further **without the full participation of indigenous peoples.**

Aroha Te Pareake Mead
Auckland, August 1994