NEGOTIATING INDIGENOUS ACCESS AND BENEFIT SHARING AGREEMENTS IN GENETIC RESOURCES AND SCIENTIFIC RESEARCH

by Virginia Marshall

INTRODUCTION

In Australia, the concept of Indigenous sovereignty is recognised and exercised by Indigenous peoples through a claim of ownership within a range of Indigenous rights and interests, which includes land, the waters, gas, minerals and genetic resources. This article focuses on the significant issues facing Indigenous communities in Australia in negotiating their rights and interests to genetic resources. Indigenous peoples from various global communities continue to raise their serious concerns to international organisations such as the World Intellectual Property Organization ('WIPO') and before various United Nations committees on the lack of 'the fair and equitable sharing of benefits arising from the use of genetic resources'[1] in relation to the minimum benefits going to Indigenous communities; either as in-kind benefits or monetary payment by potential partners or contracting parties under the 'Access and Benefit-Sharing' ('ABS') principles of the Convention on Biological Diversity ('CBD').[2] The framework of the ABS will be discussed in relation to an Indigenous perspective in Australia.

Australia is a rich, mega-diverse region for biodiversity. Therefore the implications for bioprospecting (either in the discovery or commercial stages) in relation to sourcing and developing genetic material into new medicines, especially those which have been used as traditional medicines, is a target for foreign and national entities who seek to develop therapeutic and pharmaceutical research and new commercial products from Indigenous genetic resources (including those resources in the sea as well as on land). Although international standards exist to seek to protect the access and use of Indigenous knowledge and traditional resource rights such as the 1992 CBD, The Nagoya Protocol and the Trade-Related Intellectual Property Rights ('TRIPS') Agreement of the World Trade Organization ('WTO'), the threat of 'biopiracy'[3] is always present when significant commercial gains are to be realised.[4] Because these international documents recognise the supreme sovereignty of nation states, it is ultimately left to the nation states (Australia and other nations) to determine the extent of recognition they choose to apply in regulating any protection of Indigenous genetic and biological resources.[5] In the case of Australia, the federal government's position on the CBD and the Nagoya Protocol is generally weak on protecting Indigenous rights and interests; which will be discussed later.

The widely held belief that Western intellectual property rights law alone could provide protection for Traditional Knowledge ('TK') of Indigenous peoples in highly sophisticated commercial environments is not realistic. In Australia there is a lack of investment provided to Indigenous communities in developing their own commercial opportunities to use their genetic and biological resources (such as harvesting, collecting and producing a range of consumer products). On the other hand the Australian Government appears to encourage and support private entities and research institutions to access and use Indigenous genetic resources and the 'traditional biodiversity-related resources'[6] *in situ* on the land or in the waters, which is alarming. Particularly in view of the Australian Government's stated policy focus on 'Closing the Gap', and ways to improve Indigenous economic development. Because the majority of Indigenous communities in Australia lack government investment and venture capital in developing the necessary technology and scientific capacity to initiate bioprospecting, in order to self-determine the research and commercial stages of the pharmaceutical or biochemical products, it is more common that Indigenous communities partner with research institutions and/or commercial partners.

THE RISE AND RISE OF BIOPROSPECTING

In recent times the unique biodiversity of Indigenous areas (either traditionally owned or held under Western property rights regimes) has often been unlawfully 'collected' through 'bioprospecting',[7] which generally results in no economic benefits or 'in-kind'[8] benefits for the Indigenous community from the exploitation of Indigenous biological resources and TK. The unregulated practice of bioprospecting directly impacts Indigenous communities in a variety of ways, and represents a loss

or theft of unique 'bioresources'[9] (Indigenous biological resources specific held by communities), the absence of commercial and non-commercial contractual benefits (such as ABS), limited opportunities for community development, and the general disregard for international standards on protecting the rights of Indigenous peoples over their genetic material and resources. Although Article 8J of the CBD espouses that 'as far as possible, each contracting party should respect, preserve and maintain TK as it relates to the sustainable use of biological diversity' the maintenance of such diversity is subject to a countries national legislation and regulations.[10]

As with Indigenous genetic resources sourced from the land, there is also significant commercial interest in the taking of marine genetic resources (including microbial resources) from the oceans and seabed in Australia. The collection of sea sponges in Australian waters (both continental shelf and the high seas) is highly prized for microbial research. The legal status of marine scientific research is not fully fleshed out in the 1982 United Nations Convention on the Law of the Sea ('UNCLOS'), which raises important questions for Indigenous communities in the recognition and protection of traditional harvesting methods in marine resources such as sea sponges.[11] Recently, Canada, Russia, the United States, Denmark and Norway have been seeking to prove and claim offshore territory beyond the 200-nautical-mile limit, claiming that under UNCLOS the seabed is an extension of their land and the continental shelf.[12]

The two global positions under UNCLOS are not mindful of the rights and interests of Indigenous peoples to marine genetic resources; 'one position is that these resources are held as a "common heritage of mankind", and the other position is that any country is free to take and use these resources beyond the national jurisdiction'.[13] For Indigenous peoples in Australia, both positions are untenable because it dismisses the relationship and authority of Indigenous peoples to land and sea 'country', and fails to engage the spirit of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP').

Research bodies in Australia are aiming to pursue transnational partners through bilateral partnerships such as with the United States, so as to increase their commercialisation opportunities in the wild harvest of sea sponges and to realise plans to create a sustainable harvest under world-wide licence.[14] The Australian development of marine biotechnology and the proposed wealth generation from such research collaborations must engage Indigenous communities and identify all opportunities to translate biodiversity resources into mutually beneficial outcomes under contractual and collaborative agreements. Graham Dutfield, researcher from the University of Oxford points out that 'it may be difficult to negotiate and access favourable terms':

> The concentration of technology ownership is becoming more skewed as large corporations in the life science/ biotechnology sectors increasingly access rival companies' Intellectual Property Rights-protected technologies through cross-licensing, or by purchasing or merging with these companies.[15]

Where Indigenous peoples seek to maximise the potential for economic and non-economic purposes in controlling the national and transnational access and use of their genetic and biological resources it is fundamental that the relevant nation state (such as Australia) incorporate in domestic legislative instruments in expressed terms, that Indigenous communities must be consulted, engaged and share the benefits from research and commercial development and products sourced from such resources. It is estimated that there are 2.2 million marine species that are yet to be researched and 230 187 marine species have already been described (which include sponges, abalone, whelks and green mussels).[16] These figures alone identify the significant opportunities for Indigenous peoples to participate in future research and share the benefits of genetic and biochemical resources.

STEERING COMMUNITY CAPACITY IN ACCESS AND BENEFIT SHARING AGREEMENTS

The discovery and commercialisation of new therapeutic products and pharmaceutical drugs is driven by an aggressive focus on the use of patents and licenses to protect their innovations.[17] It is equally important for Indigenous peoples to robustly participate in regulating the access and use of their genetic resources and to advocate for the incorporation of clearly expressed policies, strategies and legislative frameworks for the flow of benefits to Indigenous communities. The Australian Government ratified the CBD in June 1993; however, the Nagoya Protocol, although signed, are yet to be ratified. The Protocol (on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation), when ratified, will provide the Australian Government with the opportunity to fully engage and consult with Indigenous communities prior to the Protocol's domestic implementation (in part or whole) to ensure clarity on the range of benefits.[18] This will also clarify Australia's regulations to create legal certainty under ABS Agreements for Indigenous peoples

contracting with other parties in relation to the use and access of genetic resources.[19]

Because of the potential gain through commercial exploitation of genetic resources, it is imperative that prospective business partners such as research organisations, universities, corporate entities, or private individuals discuss the aims, strategies and management of the project with the Indigenous community (or communities). To seek conditional access and use of Indigenous held or sourced bioresources, entities and institutions should, prior to the bioprospecting stage, identify and clearly align the requirements of the Indigenous protocols and Governance with the proposed project; including the expectations of the parties involved and the regularity of communication.

If there is a desire by an Indigenous community and the proposed contracting parties (or parties) to create a commercial or non-commercial partnership, then a mutually-agreed formal agreement such as a user-friendly contract or collaborative agreement should be drafted, and subsequently revised where necessary, in order to ensure the protection of sensitive TK or practices (or to exclude this completely). It is very important to identify the risks and the benefits of the intellectual property rights and interests expressed by Indigenous communities within the agreement or contract; including clearly expressed definitions and project milestones in the schedules.[20]

The terms and conditions under an ABS or similar legal contract or agreement (including confidentiality provisions) may include references to international protocols, the recognition of Indigenous laws and community protocols, as well as the inclusion of statutory or common law rights held by Indigenous peoples over land and waters (for example in sea and freshwater rights under native title)[21] or Indigenous interests. The significance of Indigenous Protocols and the recognition of Indigenous laws should leave no room for misunderstanding and under the legal agreement should clearly set out the traditional boundaries that are to be observed during all stages of the contractual relationship. The ABS is more than just about exercising Free Prior and Informed Consent ('FPIC') of Indigenous peoples or the recognition of Mutually Agreed Terms ('MAT'). It should be underpinned by principles which address the distinct disadvantages that Indigenous communities have experienced *and* continue to experience, both in Australia and globally, through the effects of colonisation. The focus of the Australian Government should be on strengthening the economic and non-economic foundations of Indigenous communities and not to create unworkable aspirational mantra of rights and interests.

Formalising any benefit-sharing arrangements in writing between the parties becomes particularly important when non-disclosure agreements are required before commercial in-confidence or sensitive TK is shared between the contracting parties. A clearly drafted and succinct agreement is preferred to any lengthy, ambiguous and legalistic agreement that would conflate its meaning.

The commercialisation of Indigenous TK in relation to the use of genetic resources and medicinal plants or marine resources attracts a range of research institutions and commercial entities which have competing interests and are generally risk averse in their approach to biodiscovery projects. Indigenous communities embarking on partnerships with researchers under contractual arrangements should focus on maximising their potential for economic development where it coincides with community values, long term planning and practical opportunities for self-determination through establishing Indigenous-controlled business.

THE LIMITATION OF INTERNATIONAL INSTRUMENTS: AN AUSTRALIAN PERSPECTIVE

The CBD set out three objectives, firstly, the conservation of biological diversity, secondly, the sustainable use of its components, and thirdly, the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources—which includes the appropriate access, transfer, funding and account of all rights over those resources and technologies.[22] As discussed earlier, the CBD recognises the sovereign rights of the nation state (Australia) over genetic resources in scientific research and in terms of non-commercial and commercial uses of genetic resources.[23] Australia has regarded intellectual property (most notably patents) with a higher consideration than the environment and protecting its unique, rich biodiversity that is recognised globally as a 'hot spot'.[24]

Were Australia to ratify the Nagoya Protocol, and give consideration to the extent to which it implements and regulates the control and management of genetic resources, then significant concerns should be raised by Indigenous communities on the exercise of their traditional authority and sovereign rights and interests over genetic resources. A necessary consideration in terms of the proposed implementation of Australia's position on the Nagoya Protocol is that Indigenous peoples and the Australian Government read the Protocol in conjunction with UNDRIP. Proposed consultations with Indigenous

communities should seek to enshrine environmental principles of access to justice, and the ABS strategies, as expressed rights and interests of Indigenous communities. Indigenous peoples have a right to an equitable and fair share of commercial and non-commercial benefits which flow from the research and development of genetic resources sourced from the land and the waters.

CONCLUSION

During the recent meeting of the United Nations Permanent Forum on Indigenous Issues in New York a presentation was made on behalf of the National Congress of Australia's First Peoples,[25] which emphasised that nation tates must ratify the Nagoya Protocol into the legal framework and that the CBD should be made mandatory for all nation states.[26] The words chosen to underpin this recommendation were 'Free, Prior and Informed Consent, integrity and attribution' of traditional Indigenous knowledge.[27] However important the promotion of these recommendations are in the context of protecting TK under the CBD, the Nagoya Protocol or other international instruments, human rights must remain the focus for restoring the control and management of Indigenous peoples over their inherent resources on land or in waters.

The skeletal principles of Australia's sovereignty will not be broken or impaired where the legal position is created for a shared joint sovereignty with Indigenous communities.[28] The future national discussions on the CBD and the proposed implementation of the Nagoya Protocol into Australia's legal system is a unique opportunity to move beyond purely aspirational statements and minimalistic legal approaches to Indigenous rights and interests, and instead embrace the ABS as a practical tool for Indigenous economic development.

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1 Carlos M Correa, 'International Treaty on Plant Genetic Resources for Food and Agriculture: Options to Promote the Wider Application of Article 6.11 of the Standard Material Transfer Agreement and to Enhance Benefit-Sharing' (Berne Declaration and Development Fund, July 2013) 4.

2 ABS Capacity Development Initiative, 'From Global to Local: ABS Capacity Development Initiative, A Multi-Donor Initiative Spanning Nature Conservation, Poverty Alleviation and Governance' (ABS Capacity Development Initiative ,September 2012).

3 Biopiracy is when corporations, researchers, or research organisations misappropriate biological resources or Traditional Knowledge through the patent system or the unauthorised collection of Indigenous biological resources or Traditional Knowledge for commercial purposes.

4 Department of Environmental Affairs, 'South Africa's Bioprospecting, Access and Benefit-Sharing Regulatory Framework: Guidelines for Providers, Users and Regulators' (Department of Environmental Affairs, Republic of South Africa, 2012) 1–3.

5 Mary Riley (ed), *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative solutions* (AltaMira, 2004) xi.

6 Graham Dutfield, *Intellectual Property Rights, Trade and Biodiversity: Seeds and Plant Varieties* (Earthscan,, 2000) 69.

7 Bioprospecting is where individuals or companies explore the potential of the bioresource (raw genetic material) for commercial gain. This type of exploration occurs frequently by illegally taking the resource without the permission and knowledge of Indigenous communities and without a legal agreement that identifies the commercial arrangements for ABS between the parties.

8 In-kind means the non-economic benefits that may be agreed as part or whole of the ABS arrangements, such as university scholarships for community, infrastructure or community training programs.

9 Bioresources is the raw material of the genetic and biochemical resource such as a plant or sea sponge.

10 Maui Solomon, 'Intellectual Property Rights and Indigenous People's Rights and Responsibilities' in Mary Riley (ed), *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (AltaMira, 2004) 243.

11 Charles Lawson, *Regulating Genetic Resources: Access and Benefit Sharing in International Law* (Edward Elgar, 2012) 105.

12 Nunatsiaq Online, *Innuit Must Consent to the UN Law of the Sea: ICC* (3 June 2013) <http://www.nunatsiaqonline.ca/stories/article/65674inuit_must_consent_to_un_law_of_the_sea_treaty_icc/>.

13 Lawson, above n 11, 124.

14 Libby Evans-Illidge, 'Marine genetic resources and community governance' (Speech delivered at the Oceania Biodiscovery Forum, Eskitis Institute, Brisbane, 19-23 November 2012).

15 Dutfield, above n 6, 59.

16 John Hooper, 'Draft European Union Access and Benefit Sharing document' (Speech delivered at the Oceania Biodiscovery Forum, Eskitis Institute, Brisbane, 19-23 November 2012).

17 Wesley M Cohen and Stephen A Merrill (eds), *Patents in the Knowledge-Based Economy* (The National Academy Press, 2003) 13.

18 Australian Government Department of Sustainability, Environment, Water, Population and Communities (Cth) *The Nagoya Protocol in Australia* (3 January 2013) <http://www.environment.gov.au/biodiversity/publications/access/pubs/nagoya-factsheet.pdf> .

19 ABS Capacity Development Initiative, *Strategic Communication for ABS: A Conceptual Guide and Toolkit for Practitioners* (ABS Capacity Development Initiative, September 2012) 20.

20 Mark Allen and Virginia Marshall, 'Commercialising Indigenous Knowledge' (Paper presented at the Indigenous Knowledge Forum, University of Technology Sydney, 1-3 August 2012). Allen and Marshall were commissioned to draft and produce a Commonwealth Research Agreement that recognises and enhances Traditional Knowledge opportunities for Indigenous peoples in Australia.